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ACTING IN CONCERT AND BANKS' OWNERSHIP STRUCTURE REGULATION: THE BANCA CARIGE CASE

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Introduction

The regulation of concert action in the Italian legal system is characterized by a strong regulatory "stratification", which has also contributed to making the interpretation and application of the institution in our country particularly difficult. In particular, as far as the national legal system is concerned, it is first of all necessary to point out that Law 149 of 1992 in regulating, for the first time, the subject of "public offers to sell, subscribe, purchase and exchange securities", did not contain an express regulation of the institution at hand. The need to regulate, in a more comprehensive manner, concerted action was also increasingly felt by Consob, which, in 1995, had clearly highlighted the desirability of amending the regulations on takeover bids meaning to state that exceeding a certain shareholding threshold would entail the obligation to make a public takeover bid even in the presence of concerted action. The purpose of this dissertation is to introduce the case in both the EU and national contexts in order to understand its effects as far as credit institutions are concerned. The dissertation is divided into three chapters. The first deals with the acting in concert regulation in the Italian legal system with the aim of outlining its general profiles and regulatory evolution. A definition and rationale of the institution of concert action will be provided. Next, concert action will be analyzed from the European

perspective: from Directive 2004/25/EC (so-called Takeover Directive) to ESMA's clarifications. Next, the evolution of the discipline of concert action in the Italian system and the various types of concert will be presented; the articulated architecture of presumptions of concert and the absolute presumption of concert based on the shareholders' agreement: a case with blurred boundaries. The second chapter deals with the regulation of capital holdings and concert action in the ownership structures of banks. So, the evolution of the legislation on bank ownership structure will be introduced: from the 1936 law to the regulations of the TUB (*Testo unico delle leggi in materia bancaria e creditizia*). In addition, the purchase of qualified shareholdings, indirect shareholdings, and purchases in concert in the TUB will be discussed: the former Article 22 TUB and the new provisions on the ownership structure of banks and other intermediaries in light of Legislative Decree 182 of 2021. In addition, we will focus on the amendment of Article 22 TUB and the new "multiplier criterion" and shareholders' agreements and ownership structures of banks. The third chapter is of a practical nature concerning the Case Study: the Carige affaire, after a brief introduction on the history of the Bank, the shareholders' agreement having to do with the exercise of voting in the appointment of corporate bodies will be analyzed: the case of Banca Carige; the Bank of Italy's

Communication of September 13, 2018; and the Genoa Court order of September 19, 2018.

- Chapter I -

The "Acting in concert" concept in the Italian legal system: general profiles and normative evolution.

1.1 Acting in concert: definition and rationale

The discussion on the subject of concert action and ownership structures in banks requires a preliminary in-depth examination of the notion of Acting in concert in the Italian legal system, starting from the identification of the definition and rationale of the institution and then proceeding to a historical-evolutionary reconstruction of the institution. In the context of the regulation of takeover bids, the notion of concert action has taken on fundamental importance, starting from its full explication - in the Italian context - by means of Legislative Decree No. 58 of February 24, 1998, better known as the T.U.F. (or "Testo Unico della Finanza")[1]. In it, in fact, the essential elements of concert are evinced, which has been defined as «*dynamic behavior*»,

[1] For a full consultation of the Law Decree of February 24th, 1998, n. 58, visit this portal: https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:1998-02-24;58

prearranged, capable of generating repercussions «*on the power structures or concentration of ownership of an issuer*»[2].

Proceeding in the reading of Article 101-*bis*, paragraph 4, T.U.F, the so-called "concert parties," i.e., persons acting in concert, are specifically delineated: «*persons who cooperate with each other on the basis of an agreement, whether expressed or tacit, verbal or written, even if invalid or ineffective, aimed at acquiring, maintaining or strengthening control of the issuing company or to counter the achievement of the objectives of a takeover or exchange offer*».

From this effective definition, it is possible to discern both the scope of concert action and the rationale behind the aforementioned regulation, which finds its primary foundation in a clear anti-elusive intent. It is well known, in fact, how the institution in question is part of a regulatory context aimed at providing clarity on significant shareholdings in listed companies and in those that, although not listed, operate in sectors of particular economic and social importance - such as banking - in which the need for transparency emerges, even more poignantly: in this perspective, the T.U.F. now provides that anyone wishing to acquire a controlling interest must observe specific rules of conduct[3].

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[2] C. MOSCA, *Azioni di concerto e OPA obbligatoria,* Milano, Egea, 2013, p. XII.

[3] G.F. CAMPOBASSO, *Diritto Commerciale 2, Diritto delle società*, IX edition, Torino, Utet Giuridica, 2021, p. 253.

In particular, since Law No. 149 of 1992, it has been expressly established that the transfer of ownership of controlling stakes in listed companies must take place in such a way as to ensure maximum transparency and in such a way as to allow all shareholders to participate in the majority premium that the transaction may entail, that is, through the takeover bid, which has become - when certain conditions are met - mandatory.

Regarding the legal framework of the mandatory takeover bid, in fact, the Italian lawmaker (even in the most recent interventions on the matter) has favored a relatively simplified approach, reiterating that exceeding a certain shareholding threshold, by virtue of a purchase, *«entails the obligation to bid, if one of the exemptions provided for»* by Art. 106, paragraph 5 of the T.U.F.[4] *«is not met»* : a provision that, compared to the previous regulatory framework (Law 149/1992), associates the offer obligation not *«with the acquisition of control, but with the simple exceeding of the shareholding threshold fixed by law»* , going in fact to elide the ambiguities and uncertainties that characterized the previous statute.[5]

[4] Cfr. A. TUCCI, *"Acquisto di concerto" e "azione di concerto"*, in Studi in Onore Di Umberto Belviso, Vol. III, 2010, p. 1755 and ff.

[5] Così A. TRISCORNIA, *OPA obbligatoria: la presunzione di concerto per patto parasociale è ancora assoluta?* in *Giurisprudenza Commerciale*, Vol. 46, Fasc. 3, pp. 483-484.

In this regard, it has been rightly pointed out that, even within a rather precise regulatory framework, there is no lack of the possibility of circumventing the rule, through «*the contrivance of splitting the relevant purchase among a plurality of parties, formally distinct, but, in reality, belonging to a coalition*».

And it is precisely in this context, and for these reasons, that the institution of concerted purchase (and concerted action) becomes a central element in the regulation of takeover bids. As is well known, the Italian Lawmaker has in fact gone on to regulate a sector whose problems-especially in the U.S. sphere-have emerged since the 1980s, with the phenomenon of so-called "hostile takeovers," i.e., those practices aimed at gaining control of listed companies without agreement with the top management of those companies (and often in complete anonymity)[6]. And while such practices have generated an undeniable increase in the volume of business associated with the transfer of corporate control, they have also fostered a framework of instability and uncertainty that doesn't quite match up with market efficiency.

In the wake of these trends, therefore, we have witnessed those phenomena of "strengthening" of the discipline that, in the Italian context, coincided with the two regulatory interventions of the 1990s

[6] M. GALEOTTI, *La finanza nel governo dell'azienda,* Milano, Apogeo Editore, 2008, p. 8.

that we have mentioned above. In particular, as will be better seen below, the issue of control takes on a particular relevance and indeed, precisely the «*subset of the takeover regulation that answers to the name of concert action*» still remains, on the level of interpretation and application, «*perhaps the most problematic part of the regulation of the mandatory bid*»[7]. Returning, therefore, to tracing, at an introductory level, the most interesting profiles of the institution of concert action, the punctual distinction between purchases that can be counted as «*exclusively individually attributable*» and those that, on the contrary, must be aggregated with others, and therefore counted in the perspective of an acquisition that, exceeding the threshold provided by law, is ascribed to a plurality of parties (acting in concert), turns out to be central (and sometimes complex)[8].

In other words, there emerges an interpretative difficulty, related to the stipulations of Article 101-*bis* of the T.U.F., as to whether such a list should be considered as "absolute" presumptive declinations or rather as concert assumptions of a "peremptory" nature.

[7] TRISCORNIA, *OPA obbligatoria: la presunzione di concerto per patto parasociale è ancora assoluta?*, cit., p. 485.

[8] See TRISCORNIA, *OPA obbligatoria: la presunzione di concerto per patto parasociale è ancora assoluta?*, cit., p. 485.

More specifically, the following are in any case identified as persons acting in concert: *«(a) parties participating in a pact, including a null one, provided for in Art. 122, paragraph 1 and paragraph 5 letters (a), (b), (c) and (d); (b) a party, its parent company, and companies controlled by it; (c) companies subject to common control; (d) a company and its directors, members of the management board, supervisory board, or general managers; 4-ter. Without prejudice to paragraph 4-bis, Consob shall identify by regulation: a) the cases for which the persons involved are presumed to be persons acting in concert pursuant to paragraph 4 unless they prove that the conditions set forth in the same paragraph are not met; b) the cases in which cooperation between several persons does not constitute acting in concert pursuant to paragraph 4».* Substantially, the discriminating element for concert action to subsist, based on the provisions of the T.U.F., seems to be *«the common purpose of control»* pursued by the concerting parties[9].

[9] See A. TRISCORNIA, *OPA obbligatoria: la presunzione di concerto per patto parasociale è ancora assoluta?*, cit., p. 486.

1.2 Acting in concert in the European perspective: from Directive 2004/25/EC (so-called Opa Directive) to ESMA clarifications

The attention of the EU institutions has been focused on the regulation of takeover bids since as far back as 1985, when the *White Paper* for the completion of the internal market, for the first time, went to express the European will to harmonize the complex area of corporate takeovers[10]. After two decades of debates and interlocutions, culminating in legislative drafts that were never finally approved, the European Commission drafted a new proposal that the European Parliament approved on April 21, 2004: Directive 2004/25/EC, known as the Takeover Bids Directive (OPA Directive)[11]. The text, incorporating the guidelines repeatedly expressed in previous comparisons, appears to be focused solely on takeover bids having as their object *«transferable securities carrying voting rights»*[12]; the pursuit of three general objectives, capable of combining the - sometimes

[10] In these terms A. ATRIPALDI, *L'equo indennizzo nella regola di neutralizzazione prevista dalla Direttiva Opa*, Roma, Edizioni Polìmata, 2010, pp. 24-25.
[11] A full reference of the directive 2004/25/CE can be found at: https://eur-lex.europa.eu/legal-content/IT/TXT/PDF/?uri=CELEX:32004L0025&from=EN
[12] *See* G. FAUCEGLIA (*edited by*), *Commentario all'offerta pubblica di acquisto*, Torino, Giappichelli Editore, 2010, p. 5.

conflicting - demands of the various member states, also appears to be central: *«the integration of European markets in accordance with the Financial Services' Action Plan; the harmonization of the various national regulations tending to facilitate corporate restructuring; and the strengthening of the legal certainty of cross-border takeover bid transactions and the protection of minority shareholders in the course of such transactions»*[13]. Article 3 of the Directive goes on to clarify, therefore, what are the fundamental principles that serve as a pillar and at the same time as a framework for the action of national Lawmakers: above all, the principle of equal treatment of shareholders *(«all holders of securities of an issuing company of the same class must benefit from equivalent treatment; moreover, if one person acquires control of a company, the other holders of securities must be protected»).*

Nonetheless, the Directive reiterates the need for the board of the issuing company to always act in the interest of the company *«as a whole»,* and for an issuer, before announcing a takeover bid, to verify that it is in a position to meet *«any commitment to pay the cash consideration if this has been offered».* Proceeding in the reading of the Directive, Article 4 establishes the centrality of the Supervisory Authority that each member state is required to establish, clarifying, on the one hand, its nature as a public administration, or as a private

[13] On this matter, G.S. RUSSO, *La nuova Direttiva n. 2004/25/CE in materia di offerte pubbliche di acquisto,* in *AmbienteDiritto.it*, 2005.

body recognized by national law, and on the other hand its effective jurisdiction over companies present on more than one trading market. Consequently, we arrive at Article 5 of the Takeover Directive, which assumes considerable relevance in the perspective of this paper, since it enucleates the issue of the protection of minority shareholders.

And it is precisely the constant reference to acting in concert, mentioned several times within Art. 5, that reaffirms its absolute centrality and full recognition from the perspective of the EU lawmaker (as, for example, in the passage relating to the determination of the concept of a fair price: *«if, after the bid has been made public and before it is closed for acceptance, the bidder or any person acting in concert with him acquires securities at a price higher than that of the bid, the bidder must increase his bid to not less than the maximum price paid for the securities so acquired».*

Nonetheless, as is natural in the context of such "generic" provisions as those of a directive, no indication is given to delineate more acutely the cases that fall within the scope of concert action.

In other words, there seems to somehow emerge, once again, that interpretive difficulty discussed above in relation to the timely recognition of interactions classifiable as acting in concert.

In addition, the concrete implementation of the Directive declined in a multiplicity of distinct legal systems, has produced further ambiguity, pointedly noted by the European Commission: *«the*

Commission observes that member states have transposed the "acting in concert" definition in different ways. Some member states use the definition of the Directive, while other member states changed it and included parts of the "acting in concert" definition used in the Transparency Directive.

Some national regulators issued interpretative guidelines to clarify the concept, but these guidelines are not the same in each jurisdiction»[14].

For these very reasons, the European Securities and Markets Authority, better known as ESMA (the Financial Markets Supervisory Authority), intervened in 2013 at the request of the European Commission: the result is the Public Statement containing information on shareholder cooperation and acting in concert under the Takeover Bids Directive (ESMA/2013/1642), a document designed to clarify those interpretative doubts related to the concept of concert[15].

The formula chosen by the Authority follows the model of a so-called *White List*, that is, a list aimed at illustrating the dynamics in which shareholders can cooperate without risking to fall under the presumption of acting in concert.

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[14] On this matter, P. BÖCKLI, P.L. DAVIES, E. FERRAN, G. FERRARINI, J.M. GARRIDO GARCIA, K.J. HOPT. A. PIETRANCOSTA, K. PISTOR, R. SKOG, S. SOLTYSINSKI. J.W. WINTER & E. WYMEERSCH, *Response to the European Commission's Report on the Application of the Takeover Bids Directive*, University of Cambridge, Faculty of Law, Legal Studies Research Paper no. 5/2014 (2013), p. 3.

[15] For a full consultation of the ESMA clarification (2013/1642), please refer to: https://www.esma.europa.eu/sites/default/files/library/2015/11/2013-1645_esma_clarifies_shareholder_cooperation_in_takeover_situations.pdf

Specifically, there is not a concert action presumption if the shareholders act: *1) entering into discussions with each other about possible matters to be raised with the company's board*; *2) making representations to the company's board about company policies, practices or particular actions that the company might consider taking; 3) other than in relation to the appointment of board members, exercising shareholders' statutory rights;*
4) other than in relation to a resolution for the appointment of board members and insofar as such a resolution is provided for under national company law, agreeing to vote the same way on a particular resolution put to a general meeting. Furthermore, with regard to nominations of company boards of directors, the *White List* - while still leaving a wide margin of discretion to national legal systems - specifies a few areas in which shareholders may cooperate: by entering into agreements and arrangements (formal and informal) to exercise a joint vote in order to support the nomination of one or more board members; by submitting a resolution to remove one or more board members and replace them with new nominees; by submitting [lastly] a resolution to add one or more additional members to the board.

In this regard, as has been rightly pointed out, the provisions of the regulatory framework require national legislators to introduce the

obligation to promote a takeover bid in all cases where a natural or legal person, «*individually or in concert*», takes control of a company[16]. The decision by the European Union to opt for the principle of maximum harmonization of procedural rules is a result of the increasing integration of financial markets and the frequent use of group structures spanning multiple member states, which can lead to scrutiny of the qualifying holding or individual acquisition in financial institutions. Recently, in December 2016, the EBA, EIOPA and ESMA made amendments and updates to the "2008 Joint Guidelines" on the prudential assessment of acquisitions and increases in qualifying holdings in financial sectors with the aim of shedding light on some complex issues of acting in practice[17]. In addition, the guidelines provide two non-exhaustive lists of the factors that generally trigger the Black-list or White-list of acting in concert as required by the Directive. On the one hand, the Black-list includes within it certain factors that are usually an expression of the parties' common intention to exercise significant influence over the governance of the company. On the other hand, to the extent that shareholders act only to exercise their minority corporate rights, their cooperation is considered evidence of the presumption of acting in

[16] In these terms, G.S. RUSSO, *La nuova Direttiva n. 2004/25/CE in materia di offerte pubbliche di acquisto,* in *AmbienteDiritto.it*, 2005.

[17] SACCO GINEVRI A., Sustainable governance and regulation of banks and public companies: a study of the concept "acting in concert", Corporate Governance and Sustainability Review/ Volume 1, Issue 1, 2017.

concert, unless such action is an element of a broader agreement[18]. The notion of "persons acting in concert" should remain flexible and adaptable to the different objectives pursued in different regulations.

1.3 The evolution of the Acting in concert discipline in the Italian system

After having analyzed concerted action in the European perspective, it is now necessary to briefly dwell on the complex and articulated evolution of the discipline in the Italian system. In this regard, it is worth noting first of all that the national lawmaker's attention to this institution is rather recent, having found precise regulation only in Article 109 of the Consolidated Law on Finance (T.U.F.) [19].

As will be seen, however, the regulation of concerted action in the Italian legal system is characterized by a strong regulatory "stratification", which has also made the interpretation and application of the institution in our country particularly difficult[20].

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[18] *Ibidem*

[19] Paragraph 1 of this provision provided that «1. *The following shall be jointly and severally liable to the obligations provided for in Articles 106 and 108, when they hold, as a result of purchases for valuable consideration made even by only one of them, a total holding greater than the percentages indicated in said articles:*
a) the parties to an agreement, even if null and void, envisaged in Article 122;
b) a person and the companies controlled by that person;
c) companies subject to joint control;
d) a company and its directors or managing directors».

[20] A. TRISCORNIA, *OPA obbligatoria: la presunzione di concerto per patto parasociale è ancora assoluta?*, cit., p. 495

It is well known, in fact, that, historically, the concert was first regulated in the English legal system[21], with the *City Code on Takeovers and Mergers*, and then first in other European legal systems and, finally, also in Italy, where its regulation was fundamental to ensuring the proper functioning of the takeover bid system and, more generally, the stock market. In particular, as far as the Italian legal system is concerned, it should first be noted that Law No. 149 of 1992, in regulating, for the first time, the subject of "public offers for the sale, subscription, purchase, and exchange of securities", did not contain an express regulation of the institution under examination[22].

On closer scrutiny, it was only Art. 10 of said law, in paragraph 436, that provided that «*any concerted purchase agreement must be communicated, on penalty of ineffectiveness, to CONSOB, within five days of the date of stipulation, and made public, in extracts, by means of an advertisement in three national daily newspapers, two of which must be economic newspapers*».

[21] The definition of persons acting in concert in the English Takeover Code is broader than in the Italian one: «*Persons acting in concert comprise persons who, pursuant to an agreement or understanding (whether formal or informal), co-operate to obtain or consolidate control (as defined below) of a company or to frustrate the successful outcome of an offer for a company. A person and each of its affiliated persons will be deemed to be acting in concert all with each other.*

[22] *See* L.A. BIANCHI, Sub *art. 109*, in P. MARCHETTI, L.A. BIANCHI (a cura di*), La disciplina delle società quotate nel Testo Unico della Finanza D. lgs 24 febbraio 1998 n. 58,* Milano, Giuffrè, 1999, 1, pp. 430 ff.

In this logic, the Acting in concert - unlike the English model - was already closely linked to the subject of shareholders' agreements: this trend has also been consolidated over the course of the regulatory evolution that, according to part of the doctrine, has led to a substantial equalization between Acting in concert and shareholders' agreements[23], «*giving rise to a symbiotic relationship*» between the two institutions, especially on the practical and applicative level[24].

Part of the doctrine, however, had emphasized how, in the case under consideration - although contemplating conduct substantially referable to the Acting in concert - the position of the individual

[23] It is worth noting that the expression "*shareholders' agreement*" ("patto parasociale" in Italian) refers to that agreement between shareholders - or, according to some, between shareholders and third parties - which is entered into outside the articles of incorporation and bylaws and which has the effect of "obliging" the stipulating parties to behave in a certain way within or towards the company. This is an institution that - as will be seen below - has found its way into our legal system essentially through the work of the doctrine, which - drawing inspiration from the German *Nebenverträge* - since 1942, has used the expression "*contratto parasociale*" to indicate, in the absence of a precise codified regulation, the phenomenon - increasingly widespread in corporate practice - consisting in the stipulation of negotiations and agreements aimed at introducing a pactual regime capable of supplementing - or, in some cases, "exceeding" - the legal and statutory regulations. In particular, see OPPO G., *Contratti parasociali*, Milan, Vallardi, 1942, p. 1 ff, according to which shareholders' agreements configure «*a peculiar phenomenon of corporate practice consisting in supplementing and at times going beyond the legal and statutory regulation of corporate relations with obligations individually assumed by the shareholders among themselves, or even towards the company, or even towards third corporate bodies, which do not rely as their source on the law or the articles of association but derive from agreements distinctly concluded and therefore extraneous to the corporate regulation of the company's internal relations*».

[24] A. TRISCORNIA, *OPA obbligatoria: la presunzione di concerto per patto parasociale è ancora assoluta?*, cit., p. 486.

shareholder, and not that of all the participants in the shareholders' agreement, nevertheless continued to assume particular relevance[25].

According to the prevailing orientation of the doctrine[26], the first real regulation of the institution in question - properly intended - occurred with Art. 8 of the now abrogated Law No. 474 of 1994 on the subject of privatizations, which provided that «*the contribution, within two years of the placement by public offer, to a voting syndicate or consultation agreement, in any form whatsoever concluded, which can also be inferred from concerted conduct, of shares in companies referred to in this decree (...) determines the obligation to proceed with a public offer (...)*». Thus, this provision envisaged that, in the presence of a voting or consultation agreement, the participants in the agreement were obliged to launch a takeover bid if there had been a contribution of shares such as to allow the acquisition of control or, in any case, the possibility of exercising a dominant influence in the decision-making body of the company.

In this logic, moreover, the existence of an action in concert in the management of the company was directly derived from the finding of the existence of a shareholders' agreement[27].

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[25] For further discussion, P. MONTALENTI, *Commento all'art. 10,* in AA.VV., *Disciplina delle offerte pubbliche d'acquisto,* in *Nuove Leggi Civ. Comm.,* 1997, 2, pp. 254 ff., as well as A. TUCCI*, Condizioni dell'OPA obbligatoria e acquisizione del controllo mediante patto di sindacato*, in *Le Società*, 1999, 3, p. 316.

[26] P. GIUDICI, *L'acquisto di concerto*, in *Riv. Soc.*, 2001, p. 493.

[27] On this point, R. COSTI, *Privatizzazione e diritto delle società per azioni*, in *Giur. Comm.*, 1995, 1, pp. 77 ff.

The need to regulate, in a more comprehensive manner, concert action was also increasingly felt by CONSOB, which, in 1995, had clearly pointed out the opportunity to amend the regulations on takeover bids in the sense of stating that exceeding a certain number of shareholdings would entail the obligation to make a public takeover bid even in the presence of parties acting in concert[28].

In particular, the Commission's proposal provided that «*are acting in concert, and are jointly and severally liable to the obligations set forth in this Article, all those natural persons or legal entities that have entered into an agreement or pact between them in any form whatsoever for the purpose of purchasing or selling shares carrying voting rights in the ordinary shareholders' meeting or with the intention of exercising such rights in order to ensure the unity of corporate management. The following shall in any case be deemed to be acting in concert: a) a company with its directors, auditors and general managers; b) a natural person with his spouse, relatives in a direct and collateral line as well as relatives by blood, up to the third degree*»[29].

Thus, in CONSOB's notion as well, particular relevance was accorded to shareholders' agreements, which, from this perspective, become a true constituent element of concerted conduct: indeed, such

[28] Cfr. CONSOB, *Proposta di modifica alla legge OPA*, in *Banca Borsa Tit. Cred.*, 1995, 2, pp. 545 ff.

[29] CONSOB, *Proposta di modifica alla legge OPA*, cit., pp. 545 ff.

agreements constituted the main instrument for implementing concerted conduct.

As already noted, however, it was only with the enactment of the T.U.F. that a comprehensive regulation of concerted action was introduced, also in our legal system. In particular, unlike the law of 1992, Legislative Decree No. 50 of 1998 clearly created a functional link between concerted purchases and the mandatory tender offer. Specifically, the first text that the Government submitted to Parliament provided that the offer obligations were to be «*jointly and severally borne by those who, acting in concert, came to hold, as a result of purchases made also by any of them in the preceding twelve months, a shareholding higher*» than the takeover bid threshold[30].

Furthermore, it was established that concert was presumed - albeit only "*iuris tantum*" - between a subject and the companies it controls, between jointly controlled companies, and between a company and its directors or general managers[31]. This formulation - which was clearly inspired by the English *Acting in Concert* - was, however, strongly contested by representatives of the business and financial world: it was stated, in fact, that «*the introduction of the notion of acting in concert (which occurs in the case of multiple purchases made by several parties, even*

[30] To this effect, A. TRISCORNIA, *OPA obbligatoria: la presunzione di concerto per patto parasociale è ancora assoluta?*, cit., p. 495.

[31] Reference is made to Article 129 of the outline submitted by the executive to Parliament, in Riv. Soc., 1998, p. 105.

individually, but in a concerted manner, over a certain period of time, in order to acquire joint control of a company) brings with it elements of uncertainty»[32].

The main criticism that was found in the reported notion of concerted action was based on the excessive discretion that it could lead to, especially in view of the fact that, in practice, control situations are rarely formalized in written agreements and are therefore not always identifiable.

More generally, the lamented aspect was the risk of excessive indefiniteness of the rule, a trigger of not a few interpretative and applicative uncertainties that would be difficult for the interpreter to overcome. Hence, the "recommendation" by the Senate's Finance and Treasury Commission to «define the notion of concert», adding, in particular, the explicit reference to shareholders' agreements[33]. The delegated Lawmaker, therefore, accepted this invitation, arriving at the original version of Article 109 T.U.F., where it was established that *«the following are jointly and severally bound to the obligations provided for in Articles 106 and 108, when they hold, following purchases for valuable consideration made even by only one of them, a total shareholding greater*

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[32] To this effect, *l'Indagine conoscitiva sull'evoluzione del mercato mobiliare italiano della Commissione Finanze della Camera, Audizione del Direttore Generale della Confindustria del 27 gennaio 1998,* in *Riv. soc.*, 1998, pp. 243 ss.

[33] See. *Parere delle Commissioni riunite II (Giustizia) e VI (Finanze e Tesoro) al Ministero del tesoro, del bilancio e della programmazione economica* February 11 1998, n. 8.

than the percentages indicated in the aforesaid articles: a) the parties to an agreement, even if null and void, provided for in Article 122; b) a party and the companies controlled by it; c) companies subject to joint control; d) a company and its directors or general managers».

Article 108 paragraphs 1 and 3 of the T.U.F. deal with the mandatory residual takeover bid that is triggered when the bidder holds an equity stake equal to 95 percent, beyond this percentage he is obliged to purchase the remaining securities from those who request it, paying an amount equal to the previous takeover bid, in order to ensure the non-subscription of minority shareholders[34].

Paragraph 2 specifies that "whoever comes to hold a stake greater than 90 percent must purchase the remaining securities from those who request it unless he or she restores an adequate free float for regular trading within ninety days"[35].

The doctrine has pointed out how, in the first formulation of Art. 109 of the T.U.F, the Lawmaker seemed to have substantially abandoned a definition of concert, limiting itself only to providing for *«a list of specific cases linked to, so to say, formal connecting factors»*[36]. Here too, the link between acting in concert and shareholders' agreements was quite

[34] Abu Awwad, *Collusione e rettifica del prezzo nell'opa obbligatoria: fattispecie e sanzioni* (Note to Cons. State, Nov. 9, 2018, no. 6330), in *Rivista della Regolazione dei mercati*, 2019, p.167

[35] Cit. Art. 108 TUF, to which we refer for detailed examination of the provision.

[36] *See*, P. SERSALE, *Commento* sub *art. 109 t.u.f.*, in G. FAUCEGLIA (a cura di), *Commentario all'offerta pubblica di acquisto*, Torino, 2010, p. 186.

clear: this "symbiosis", in fact, which over time has become a characteristic element of the regulation of mandatory takeover bids, originated precisely from the need to delimit the hypotheses of concert as much as possible, reducing the interpreter's margin of discretion to a minimum. However, the mere reference to the generic formulas contained in Art. 122 of the T.U.F.[37] appeared, from the outset, to be inadequate and inconsistent with the purpose pursued by the Lawmaker itself: in fact, far from being limited and absolute through the reference to Art. 122, the list of hypotheses of concert tended to be open-ended. The national discipline of concert action underwent a profound and significant change following the adoption of Legislative Decree No. 146 of 2009 - containing supplementary and corrective provisions to Legislative Decree No. 229/2007[38].

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[37] Art. 122 T.U.F. (entitled indeed "Shareholders' agreements" - meaning *«agreements, in whatever form entered into, whose object is the exercise of voting rights in companies with listed shares and in the companies controlling them»* and, therefore, essentially the so-called "voting syndicates") imposed under penalty of nullity, an obligation of disclosure, articulated and punctuated - as will be seen below - in three precise fulfilments, while the subsequent article provided for a duration limit to such pacts, in order to hinder the indefinite continuation of "concentrations of power". Ultimately, what emerges - from the overall regulatory framework - 'is above all the desire to reconcile the protection of the transparency of companies' ownership structures with the freedom of shareholders to implement the agreements that best suit their intentions' (L. GIANNINI, M. VITALI, *I patti parasociali*, Maggioli Editore, II edition, 2011, pp. 65 ff.). For further analysis, *See* E. PICCIAU, *Art. 122,* in *La disciplina delle società quotate nel testo unico della finanza d.gs. 24 febbraio 1998, n. 58. Commentario*, a cura di P. MARCHETTI E L.A. BIANCHI, Milano, 1999, p. 880 ff., as well as F. CHIAPPETTA, *I patti parasociali nel Testo Unico delle disposizioni in materia di intermediazione finanziaria*, in *Rivista delle Società*, 1998, p. 1000 ff.

[38] On closer inspection, in fact, the transposition of the Takeover Directive by the Italian Lawmaker first took place through the adoption of the 2007 Legislative Decree, which, however, was not entirely consistent with the principles of the EU

This intervention operates a total rewriting of Article 101-*bis* T.U.F., establishing a new and articulated regulation of concert, essentially built on three different levels of regulation: i) the first level is that which provides for a general definition of concert; ii) the second level is that based on the absolute presumptions provided for by the T.U.F.; iii) the third level, finally, is that entrusted to CONSOB, which is assigned the task of identifying relative presumptions of concert and non-concert.

More specifically, with the Corrective Decree, the Italian lawmaker not only introduced a general definition of persons acting in concert - in line with what is also provided for at a European level - but also removed the criticized presumption set forth in Article 101-*bis* T.U.F. (introduced by the 2007 decree), including it in the general notion introduced in the new paragraph 4 of the same article, with the

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Lawmaker, introducing an open notion of concert. In particular, such decree had substantially confirmed the approach of the previous regulation, which did not contemplate a general definition of acting in concert, reproducing the four cases of absolute presumptions already contained in the former Article 109 TUF in Article 101-*bis* TUF, except for the addition of a new case of presumptions *iuris et de iure* [contained in subparagraph (e) of the former Article 101-*bis* TUF] which qualified persons acting in concert as "persons who cooperate in order to obtain control of the issuing company". It was this last provision that was strongly criticized, as it was deemed insufficiently defined and in contrast with the nature of absolute presumptions typical of concert hypotheses. Moreover, the same Illustrative Report on Corrective Decree 146/2009 (in leg16.camera.it), amending Article 109 T.U.F., pointed out that *«The resulting regulation was criticized by the market: the case in Article 101-bis, paragraph 4, letter e) was considered insufficiently defined, in contrast with the nature of absolute presumptions typical of concert hypotheses. It was also considered that Art. 109(par.3) leads to an excessive broadening of the assumptions of concert»*.

clarification that cooperation takes place on the basis of an agreement, even if not written.

With regard to the general notion of "persons acting in concert" - introduced in paragraph 4 of Article 101-*bis* T.U.F. - the doctrine has pointed out how the Italian Lawmaker, although inspired by the European legislation, has not however perfectly and completely replicated it: while Article 2, paragraph 1, lett. d) of the directive emphasizes cooperation, always on the basis of an agreement, between «*natural or legal persons (...) with the offeror or the issuing company*», paragraph 4 of Article 101-*bis* T.U.F. refers to «*persons who cooperate with each other on the basis of an agreement*»[39].

Finally, Law Decree No. 91/2014 - converted into Law No. 116/2014 - added an additional clause to the general rule set forth in paragraph 1 of Art. 109, providing that the takeover bid obligation in case of persons acting concert may also result from an increase (even in favor of only one of the concerting parties) of the voting rights, in the event that they dispose of such rights to an extent exceeding the thresholds set forth in Art. 106.

[39] C. MOSCA, *Attivismo degli azionisti, voto di lista e «azione di concerto»*, in *Rivista delle società*, 2013, pp. 118 ff.

1.4 Various types of Acting in concert

Moving on to the examination of the different types of acting in concert, it should be noted that, in light of the current legal framework, it is possible to find three different macro-categories, which are also found in other legal systems[40]. Each of these categories, moreover, is characterized by a differentiated and peculiar *evidentiary regime* (i.e. *"regime probatorio").*

The *first category* is that known as "intra-corporate concert", that is, based on several persons belonging to a group. In our legal system art. 101-*bis* paragraph 4-*bis,* T.U.F., points b) and c) provide that the following are, in any event, persons acting in concert: a subject, its

[40] *See.* A. TRISCORNIA, *"OPA obbligatoria: la presunzione di concerto per patto parasociale è ancora assoluta?"*, cit., pp. 489 ss.

controller, and the companies controlled by it; companies subject to common control.

The *second category* is represented, on the other hand, by the so-called 'relational concert', whose central and characterizing element is the existence of family or role relationships. This case, as far as national law is concerned, is subject to an absolute presumption of concert, given that Article 101-*bis*, para. 4-*bis*, letter d) of the T.U.F. has established that are, in any event, persons acting in concert: «*a company and its directors, members of the management board, or supervisory board, or general managers*». In relation to this hypothesis too, therefore, the lawmaker has provided for an absolute presumption of concert.

The *third category* of concert is, finally, that of the so-called pactual concert (i.e., concerto pattizio), governed by Article 101-*bis*, para. 1 (a), according to which are "acting in concert", in any event, «*the parties to an agreement, even if null and void, envisaged in Article 122, paragraphs 1 and 5 (a), (b), (c) and (d)*». As may be deduced from reading this provision, in our legal system, the category of pactual concert is essentially constructed on the paradigm of the shareholders' agreement. In particular, by this expression, reference is made above all to so-called 'voting syndicates'[41], understood as agreements shareholders undertake to mutually regulate the exercise of their

[41] For an analysis of the evolution of voting syndicates in corporate governance and management, see G. RESCIO, *I sindacati di voto*, in *Trattato delle società per azioni*, directed by COLOMBO and PORTALE, Turin, 1994, p. 485 ff.

voting rights[42], which represent the most frequent hypothesis of shareholders' agreements[43].

1.5 The articulated architecture of concert presumptions

The Italian system has provided for a differentiated evidentiary regime that is based on presumptions and differs according to the individual concert situation: in some cases, the concert is presumed *iuris et de iure (*legal presumption that does not admit contrary proof*)*; in other cases - inferable from the combined provisions of Art. 101-*bis*, par. 4-*ter*, and Art. 44-*quarter*, par.1 of the Issuers' Regulation[44] - there is a presumption *iuris tantum* (i.e. it is presumed unless proven otherwise); whereas in other cases (which may be derived from the

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[42] On this subject, see RESCIO G., *I patti parasociali nel quadro dei rapporti contrattuali dei soci*, cit. p. 445 ff.

[43] The doctrine has pointed out how, on closer inspection, Article 122 T.U.F. has a broader scope, including - in addition to those indicated - two other categories of shareholders' agreements, represented by agreements *«establishing obligations of previous consultation for the exercise of voting rights»* and those " *that envisage the purchase of shares or financial instruments* (*granting rights to purchase or subscribe to them*)" (See. L. GIANNINI, M. VITALI*, I patti parasociali*, cit., pp. 57 ff.).

[44] This rule provides that «1. *The following shall be deemed to be persons acting in concert, unless they prove that the conditions laid down in Article 101-bis par.4 of the Consolidated Law have not been met*
(a) a person and his spouse, cohabiting partner, relatives in the direct and collateral lines within the second degree, and the children of his spouse and cohabiting partner;
b) a person and his financial advisers for transactions relating to the issuer, where such advisers or companies belonging to their group, after the appointment or in the preceding month, have purchased the issuer's securities outside the own account trading activity carried out in the ordinary course of business and under market conditions».

combined provisions of Art. 101-*bis* par. 4-*ter* and Art. 44-*quarter* par.2 of the Issuers' Regulation)[45], the concert cannot

be presumed, despite the cooperation between several persons[46]. This complex structure - in which the general notion and the presumptions of concert run alongside each other - has remained unchanged even following the implementation of the Takeover Directive[47]. The general notion of concert aims to simplify the proof of a legally relevant[48]

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[45] Paragraph 2 of Article 44-*quater* of the Issuers' Regulation provides that «2. *The following cases of cooperation between several persons do not in themselves constitute concerted action within the meaning of Article 101-bis, paragraph 4, T.U.F.:*
(a) Articles 2367, 2377, 2388, 2393-bis, 2395, 2396, 2408, 2409, and 2497 of the Civil Code, or Articles 126-bis, 127-ter and 157 of the T.U.F.; the coordination between shareholders for the purpose of exercising the shares and rights granted to them
b) agreements for the submission of lists for the election of corporate bodies pursuant to Articles 147-ter and 148 of the Consolidated Law, provided that such lists nominate a number of persons less than half of the members to be elected or are programmatically aimed at electing minority representatives
c) cooperation between shareholders to oppose the approval of a resolution of an extraordinary shareholders' meeting or a resolution of an ordinary shareholders' meeting concerning:
1) the remuneration of members of corporate bodies, remuneration policies or compensation plans based on financial instruments;
2) transactions with related parties;
3) authorizations pursuant to Art. 2390 of the Civil Code or Art. 104 of the Consolidated Law(T.U.F);
d) cooperation between shareholders to:
1) facilitate the approval of a shareholders' meeting resolution concerning the liability of members of corporate bodies or a proposal on the agenda pursuant to Art.2367 of the Civil Code or Art. 126-bis of the Consolidated Law
2) casting votes on a list that nominates a number of persons less than half of the members to be elected or is programmatically aimed at electing representatives of the minority, also by soliciting proxies to vote for such list».

[46] *See*. A. TRISCORNIA, *OPA obbligatoria: la presunzione di concerto per patto parasociale è ancora assoluta?*, cit., pp. 489 ff.

[47] G. FAUCEGLIA, *Commentario all'offerta pubblica di acquisto*, Giappichelli, Torino, 2010, pp. 271 ff.

[48] A. TRISCORNIA, *OPA obbligatoria: la presunzione di concerto per patto parasociale è ancora assoluta?*, cit., pp. 489 ff.

"action in concert", whereas the absolute presumption is reserved - pursuant to Article 101-*bis*, para. 4-*bis*, T.U.F. - for four different hypotheses: the first two hypotheses are the expression of an intra-company concert action; the third hypothesis - particularly problematic - is associated with the existence of a shareholders' agreement; the fourth hypothesis, on the other hand, is configured as a typical figure of a "relational concert".

As correctly highlighted in doctrine, these cases of presumptions iuris et de iure *«determine a significant (and very insidious) extension of the takeover obligation»*[49].

This is why the lawmaker - in order to overcome the risk of excessive rigidity in application - has provided for a series of relative presumptions, in which the persons involved are presumed to be persons acting in concert on the basis of the general definition contained in Section 4.

As regards, instead, the so-called relative presumptions (i.e., iuris tantum), the new paragraph 4-*ter* of Art. 101-*bis* of the Consolidated Law on Financial Intermediation (T.U.F.) assigns to CONSOB the task of identifying, by means of its own rules, *«the cases for which it is presumed that the persons involved are persons acting in concert pursuant to paragraph 4, unless they prove that the conditions set forth in the same paragraph are not met»:* it is therefore up to the independent authority

[49] G.F. CAMPOBASSO, *Diritto Commerciale*, cit., pp. 253 ff.

to provide, by means of regulations, those cases of concert that fall within the general definition of acting in concert and which, unlike absolute cases, admit contrary proof[50].

1.5.1. The absolute presumption of concert based on the shareholders' agreement: a case with blurred boundaries.

As mentioned previously, one of the aspects characterizing the national regulation of takeover bids lies in the fact that it provides for an absolute presumption associated with shareholders' agreements. Generally speaking, for the purposes of what is most relevant here, it should be noted that the regulation of shareholders' agreements is contained in Art. 122 and 123 T.U.F., in which the lawmaker - after recognizing the existence and therefore the validity of shareholders' agreements in our legal system - has provided for a regulation aimed at ensuring the transparency of the content of such agreements, in order to favor both the free choice of investors and - at the macroeconomic level - the development of the market[51].

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[50] For more on this point, CONSOB, *Documento di Consultazione sul Recepimento della Direttiva OPA* of 6 October 2010, Annex No. 6.

[51] In fact, it was stated that «*The judgement on shareholders' agreements cannot be unique since, on the one hand, there is the risk that they implement an effective regulation of the company that differs from what is known from legal disclosure and differs from the same*

It is well known that the birth and evolution of shareholders' agreements within the national corporate system has been difficult and troubled, especially because of the difficulty - manifested by both doctrine and the most recent case law - of considering as admissible agreements that have a purely internal relevance, since they are not subject to disclosure requirements.

In particular, Article 122 T.U.F. - which, if compared to the provisions of the Italian Civil Code[52], seems to contemplate a broader range of shareholders' agreements - imposes specific disclosure requirements[53], specifically divided into three obligations: notification to CONSOB,

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rules and principles that inspire them; on the other hand, they make up for the inadequacies of the latter and often respond to real needs of corporate practice or benefit the use of the institution for purposes not better protected by positive law, or in any event protect legitimate interests of the parties within the company» (*See*. G. OPPO, *Contratti parasociali*, cit, p. 3 ff.).

[52] Originally, the Italian Civil Code did not regulate shareholders' agreements, in part because of the variety - teleological but also in terms of content - of the hypotheses that could be concretely ascribed to the phenomenon: such agreements, therefore, fell under the umbrella of unnamed contracts, the lawfulness of which was expressly left to the discretion of the judges, who were required to assess their admissibility on a case-by-case basis.

With the 2003 reform, on the other hand, the Italian lawmaker introduced Articles 2341-*bis* and 2341-*ter* into the Civil Code, in order to *«provide for the regulation of shareholders' agreements concerning joint-stock companies or the companies that control them, limiting their maximum duration to five years and, for the companies referred to in paragraph 2, letter a), ensuring the necessary degree of transparency through adequate forms of publicity»*

(*See*. art. 4, par. 7, of Law no. 366 of 3 October 2001 (delegated law to the Government), with comment by G. RESCIO, *La disciplina dei patti parasociali dopo la legge delega per la riforma del diritto societario*, in Riv. soc, 4, 2002, pp. 840 ff.).

[53] On this subject, for a more in-depth analysis, *See* A. BLANDINI, *Sul requisito della forma nei patti parasociali*, in *Riv. dir. impr*., 2005, p. 51 ff., according to which such fulfilment "*falls within the mechanism of the formation of the agreement*"; as well as E. MACRÌ, *Patti parasociali e attività sociale*, Giappichelli, Turin, 2007, p. 170 ff., according to whom the multiple mechanism of the three publicity fulfilments would even be essential for the valid completion of the agreement.

publication of an abstract in the daily press, and filing with the company register.

Moreover, these obligations are provided for under penalty of nullity of the agreements themselves[54], which is also followed by the suspension of voting rights, as well as the administrative sanction pursuant to Art. 193 of the T.U.F.

Art. 123 of the same decree deals instead with the duration of the agreements, providing - again in observance of the principle of transparency - a time limit in order to hinder the indefinite continuation of 'concentrations of power'.

In fact, the aforementioned article provides that shareholders' agreements, if stipulated "for a fixed term", may not, in any event, have a duration of more than three years, even where the parties stipulate a longer term, notwithstanding the possibility of renewal.

That being said, with regard to the absolute presumption of concert based on the shareholders' agreement, it should first be pointed out that Art. 109 T.U.F establishes that the mandatory takeover bid, in case of concert, follows from exceeding the threshold as a result of

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[54] In this sense, see, among others, P. SCHLESINGER, *The Draghi reform*: *le novità per le società quotate*, in *Il corriere giuridico*, 1998, p. 451 ff.

It is stated in doctrine how the provision of the sanction of nullity finds its justificatory rationale in the *"recognition of the general interest in the knowledge of the content of such agreements",* which can only prevail over the confidentiality needs of individuals (see, among others, F. GAZZONI, Manuale di diritto privato, Naples, 1993, p. 97 ff.).

purchases made even by only one of the parties acting in concert, but, while in the case of concert arising from a shareholders' agreement both simultaneous purchases and purchases made in the previous twelve months are relevant, for other cases of concert, on the other hand, the takeover obligation is triggered only when the threshold is exceeded as a result of purchases made in the context of people acting in concert[55]. In this regard, the doctrine - enhancing such a difference- has pointed out how, in the Italian legal system, the element of greater rigidity of the regulations on concert actions, compared to the more flexible ones in other countries, lies not so much in the *«(absolute) presumption of concert agreement in and of itself considered»*, as in the *«recourse, in order to establish the applicative boundaries of the presumption, to a definition of a shareholders' agreement - that contained in the first paragraph and the fifth paragraph of Art. 122 - which was dictated for another purpose»*[56]. In this perspective, we shall point out, in fact, that there could well be agreements which, while fully falling within the notion of shareholders' agreement provided by Article 122 T.U.F., nonetheless turn out, in concrete terms, to be incapable of impacting

[55] A. TRISCORNIA, *OPA obbligatoria: la presunzione di concerto per patto parasociale è ancora assoluta?*, cit., p. 499

[56] . TRISCORNIA, *OPA obbligatoria: la presunzione di concerto per patto parasociale è ancora assoluta?*, cit., p. 503, where it is stated that "*exporting such a broad and open definition in the context of the regulation of takeover bids and, above all, building on it an absolute presumption of concert is an operation that has obvious limitations and generates equally obvious dysfunctions".*

on the asset protected by the discipline of concert, in its twofold declination of control over the governance or ownership structure of the issuer: for instance, consider the so-called "single-use agreements", (*patti monouso*) for which the need to comply with the disclosure obligation remains - in line with the primary function fulfilled by art. 122 T.U.F. - but which, however, might not lead, *«always and necessarily»*, to the ascertainment of an action in concert.[57]

With particular regard to shareholder cooperation in credit institutions, a case that will be explored in greater detail in the second chapter, it is important to dwell on the difference between "acting in concert" and "shareholder engagement," examining the relationship between shareholders, the effects resulting from such cooperation, and the relevant beneficiaries. Where this difference is not precisely drawn, the excessive regulation of "acting in concert" might hinder management monitoring, reducing the value of the enterprise. Indeed, both acting in concert to evade legal obligations and exercising

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[57] Still . TRISCORNIA, *OPA obbligatoria: la presunzione di concerto per patto parasociale è ancora assoluta?*, cit., p. 503 In the same sense, CONSOB would also appear to have expressed its opinion, stating clearly in its *"Documento di Consultazione sul Recepimento della Direttiva OPA"* of October 6, 2010, Annex No. 6, that *«it is believed that coordination and consultation activities between minority shareholders aimed at facilitating the exercise of their rights, promoting better governance practices or soliciting, through dialogue with the company's top management, managerial or strategic changes are not to be considered included in the notion of concerted action.*
*In other words, it is believed that the implementation of occasional initiatives and understandings between minority shareholders aimed at coordinating behavior in conjunction with specific corporate events, do not constitute acting in concert, as they are aimed at exhausting their effects "*uno actu*" and not at permanently influencing the management of the company.»*

shareholder rights to monitor management depend on shareholder cooperation. Alongside a broad legal notion of "acting in concert," the Italian banking system should clearly indicate what are the factors that lead to the conclusion that relevant shareholders are "acting in concert".

In this way, the Italian competent authority would be able to speed up its supervision and develop a more consistent supervisory practice, thus ensuring a legal and administrative framework that allows for predictable decisions[58].

[58] G. CARLETTI, *La disciplina del "concerto" negli assetti proprietari delle banche. Riflessioni sui profili sostanziali e sull'onere della prova*, Banca Impresa Società, 2020, pp. 549-594.

- Chapter II-

Acting in concert and banks' equity participations regulation

2.1 The evolution of banks' ownership structure regulations: from the 1936 law to the TUB's regulations

Having described, in general terms, the notion and general characteristics of acting in concert - giving particular consideration to its origin and the complex regulatory evolution that has interested the institution - it is now necessary to dwell, in more depth, on the regulation of acting in concert in bank's ownership structures.

To this end, it seems appropriate to premise some historical-evolutionary considerations on the regulation of bank ownership structures - which assumes, to this day, a strategic centrality in the context of the regulation of banking activity - starting from the law of 1936 up to the regulation introduced with the Consolidated Law on Banking Intermediation (T.U.B.) and the very recent changes made with Legislative Decree No. 128 of 2021. As will be seen, in fact,

ownership structures have always represented fundamental aspects in the legislative policies of the main "market economy" countries[1]: hence, the importance of reconstructing the main evolutionary profiles of the discipline, also in order to highlight «*the changes in the related regulatory model and its critical elements, especially with regard to the transition from the principle of industry-bank separateness to a system centered on a comprehensive view of ownership structures that has allowed for the marginalization of the application of subjective discrimination criteria of bank shareholders*»[2]. Generally speaking, it should be noted that the main purpose of the regulations on ownership structure is to prevent that the acquisition or holding of significant shareholdings may result in prejudice to the sound and prudent management of supervised entities[3]. For a long time, the regulation of bank ownership - especially, but not only, in the Italian legal system - was almost entirely based on a regime of separation between banks and non-financial firms[4], «*the origins of which can be attributed to the deep distrust of such corporate*

[1] On this point, see C.A. CIAMPI, *L'evoluzione del sistema e dell'ordinamento bancario e finanziario*, in *Riv. soc., 1986*, p. 920,

[2] To this effect, G. ROTONDO, *Profili evolutivi e disciplina degli assetti proprietari delle banche nel quadro regolamentare del Meccanismo Unico di Vigilanza,* in *Innovazione e Diritto*, n. 3, 2019, p. 10;

[3] For an in-depth study, M.S. GIANNINI, *Osservazioni sulla disciplina della funzione creditizia,* in AA.VV., *Scritti giuridici in onore di Santi Romano,* II, Padua, 1940, pp. 707 ff.

[4] In this regard, see F. BELLI, *Preface*, in A. BENOCCI, *Fenomenologia e regolamentazione del rapporto banca-industria. Dalla separazione dei soggetti alla separazione dei ruoli*, Pisa, 2007, p. 11; M. PELLEGRINI, *La separazione banca-industria*, in F. CAPRIGLIONE (ed.), *L'ordinamento finanziario italiano*, Padua, 2005, pp. 436 ff.

entanglements - caused by the crises of the 1920s and, above all, that of 1929 - in the belief that such interests were capable of generating criticalities in the proper management of financing relationships to the economy and of undermining the stability of the banking sector»[5].

As is well known, at the end of the 1920s, the banking business was not regulated by any special legislation[6]: this regulatory gap - which also concerned the regulation of the ownership structure of banks - allowed the purchase of bank shareholdings even by non-financial companies; and indeed, it was precisely the strong «*corporate integration*»[167] between banks and industries that was one of the main causes that led to the great financial and economic crisis of the time.[8]

In particular, it was not until the Banking Law of 1936[9] -which constituted a truly organic design ensemble of the credit system - that

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[5] *See* G. ROTONDO, *Profili evolutivi e disciplina degli assetti proprietari delle banche nel quadro regolamentare del Meccanismo Unico di Vigilanza,* cit., p. 3.

[6] On this point, see what is stated by F. CAPRIGLIONE, *Prime riflessioni sulla nuova disciplina degli assetti proprietari delle banche*, in *Rivista Trimestrale Di Diritto Dell'economia*, no. 4, 2022, p. 369, where it is noted that *« for decades in the last century - when the industry law of 1936 was in force and with it the referability to the mechanisms of 'structural supervision' - no particular importance was ascribed to the issue of the acquisition and holding of shareholdings in banks since the credit system was prevalently formed by subjects having a public nature or referable to the public hand».*

[7] *See* G. ROTONDO, *Profili evolutivi e disciplina degli assetti proprietari delle banche nel quadro regolamentare del Meccanismo Unico di Vigilanza,* cit., p. 3.

[8] *See*, P. SRAFFA, *La crisi bancaria in Italia (1922),* in Saggi, Bologna, 1986, pp. 219 ff.

[9] Reference is made, in particular, to Royal Decree No. 375 of March 12, 1936, converted by Law No. 141 of March 7, 1938-reciting *"Provisions for the defense of savings and the exercise of the credit function"*. For further discussion, see, among others, S. CASSESE, *La preparazione della riforma bancaria del 1936 in Italia*, in *Storia contemp*., 1974, pp.3 ff. The law under review entrusted the Bank of Italy (Ispettorato) with a role of governance, control and supervision of the banking system; see M. RISPOLI FARINA, *Dalla tutela del risparmio al dirigismo economico*, in M. PORZIO, *La*

there was a significant overall re-organization of the credit system in Italy. The Banking Law of 1936 represented, for a long time, the heart of the banking system's regulation, governing all the main stages in the life of credit companies; nevertheless, even this law failed to provide a specific regulation of the bank's ownership structure, having limited itself, on this matter, to establishing compulsory nominativeness for shareholdings in banking companies, in Articles 26[10] and 39, partly because of the predominantly publicistic nature recognized, at the time, to credit institutions[11].

As effectively pointed out in the literature, the Banking Act of 1936 had limited its scope to merely identifying and regulating instruments of control over the acquisition of bank holdings, with the aim of ensuring *«adequate capitalization»*[12]; in contrast, the legislation of the 1930s did not yet include any provision expressly devoted to the participation of industrial enterprises in the capital of banks[13].

And indeed, until the late 1980s, the regulatory approach to the subject was strongly conditioned by the public ownership of almost all Italian

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legge bancaria. Note e documenti sulla sua storia segreta, il Mulino, Bologna, 1981, pp. 83 ff.

[10] In particular, Article 26 of the Banking Law stipulated - as a condition for the retention of shareholdings - explicit waiver of the right to vote at the shareholders' meeting.

[11] For a more detailed discussion on the point, F. CARBONETTI, *I cinquant'anni della legge bancaria*, in *Riv. soc.*, 1986, pp. 849 ff.

[12] See G. ROTONDO, *Profili evolutivi e disciplina degli assetti proprietari delle banche nel quadro regolamentare del Meccanismo Unico di Vigilanza,* cit., p. 4.

[13] In this regard, among others, A. GUACCERO, *La partecipazione del socio industriale nella società per azioni bancaria*, Milano, 1997, pp. 5 ff.

banks. Doctrine, in fact, made it clear that the lack of specific regulation of bank ownership structures also depended on *«the low liquidity, reduced self-financing capacity and accentuated dependence of the industrial sector on bank credit*[14]*»*.

From the perspective of the banking law, therefore, the need for knowability of the ownership structure was ensured by the requirement of shareholders' names for banking companies[15], aimed at making the ownership of banks known to supervisory bodies[16].

Law No. 28137 of June 4, 1985, significantly affected the regime of shareholdings in listed companies provided for in Law No. 21638 of June 7, 1974, through the inclusion of specific rules aimed precisely at enabling the identification of bank shareholders[17], thus ensuring

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[14] In these terms, G. ROTONDO, *Profili evolutivi e disciplina degli assetti proprietari delle banche nel quadro regolamentare del Meccanismo Unico di Vigilanza,* cit., p. 15, where it also specifies how *«the credit system was (still) characterized by aims and objectives of a 'general nature' rather than the pursuit of profit, which made it unattractive for non-financial firms to enter the banking market in view of the reduced profitability margin for private operators»*.

For more on this point, see also R. PEPE, *Riflessioni e confronti in tema di separatezza tra banca e industria*, in Temi di discussione del Servizio Studi della Banca d'Italia, Rome, 1986, pp. 7 ff.; A. ANTONUCCI, *I rapporti banca-industria fra legge bancaria e legge* antitrust, in A. FRIGNANI, L. PARDOLESI, A. PATRONI GRIFFI, C.L. UBERTAZZI (edited by), *Diritto* antitrust *italiano*, II, Bologna, 1993, pp. 1186 ff.; G. TIRACORRENDO, *Dalla banca nell'industria all'industria nella banca*, in *Bancaria*, 1987, pp. 17 ff.

[15] See M. RISPOLI FARINA, *Il dibattito sulla nominatività obbligatoria dei titoli azionari nella società italiana tra il 1912 e il 1918*, in M. RISPOLI FARINA (edited by*), Le origini della nominatività obbligatoria*, Milano, 1975, pp. 25 ff.

[16] See, G. ROTONDO, *Profili evolutivi e disciplina degli assetti proprietari delle banche nel quadro regolamentare del Meccanismo Unico di Vigilanza,* cit., p. 15.

[17] Reference is made to Law No. 28137 of June 4, 1985, containing *«Provisions on the organization of CONSOB; rules for the identification of shareholders of listed companies and joint stock companies exercising credit; rules for the implementation of EEC Directives 79/279, 80/390 and 82/121 on the securities market and provisions for the protection of*

greater knowledge and transparency of share ownership, averting, as much as possible, the risk of banking activities being unduly influenced by extraneous interests, industrial or commercial[18].

Also in the late 1980s, the Second Banking Coordination Directive[19] was adopted, with which a series of provisions were dictated on the transparency of the ownership structure of credit institutions, relating to both the genetic and functional phases. The doctrine has highlighted how the Directive under consideration was essentially «*neutral with respect to industry-bank integration, not attributing peculiar legal significance to the presence, in the corporate structure, of subjects of a non-financial nature*»[20]. In particular, it was envisaged that authorization should be subject to verification of the «*functionalization of the participant's ownership structure to the objective of the sound and prudent management of the credit institution, without any mention of the existence of industrial entrepreneurial interests on the part of the future shareholders*»[21] : Article 11 of the Directive - in dealing precisely with

savings». For further discussion, D'ALESSANDRO, *La "trasparenza" della proprietà azionaria e la legge di riforma della Consob*, in *Giur. comm*., 1986, I, pp. 333 ff.

[18] For further discussion, see R. COSTI, *L'identificazione dei soci delle società bancarie*, in *Banca impr. soc*., 1986, pp. 221 ff.; M. TOFANELLI, *Trasparenza e obbligo di comunicazione delle partecipazioni sociali nelle ipotesi del 2° comma dell'art. 5 della legge n. 216/74*, in *Giur. comm*., 1988, I, pp. 382 ff.

[19] Reference is made to Directive 89/646/EEC of December 15, 1989, on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions (in G.U.C.E., Dec. 30, 1989, L386).

[20] See, G. ROTONDO, *Profili evolutivi e disciplina degli assetti proprietari delle banche nel quadro regolamentare del Meccanismo Unico di Vigilanza,* cit., p. 18.

[21] *Ibidem*

the ownership structures of banks - did not, in fact, make any specific reference to the criteria for the subjective classification of participants, with the consequence that it was up to individual national authorities to identify the *«degree of regulatory significance of industrial holdings in credit institutions»*[22].

This situation of strong ambiguity - accentuated, moreover, by the flawed Italian implementing legislation - had led part of the doctrine[23] to assert that the European framework also allowed and legitimized the use of forms of industry-bank separateness and, consequently, the provision of "subjective discrimination" of participants in bank share ownership, to the detriment, above all, of the industrial sector.

Starting in the 1990s - under the impetus of European law - the process of privatization of the banking sector began with Law No. 218/1990[24], *«creating again (from the first thirty years of the 1900s) a market for bank shareholdings»*[25]. Following this development - and at the outcome of a long and troubled *legislative process* - the issue of the separation and intertwining of bank and industry was once again taken up by Law

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[22] *Ibidem*

[23] In these terms, for example, C.L. UBERTAZZI, *Concentrazioni bancarie e mercato unico europeo*, in *Dir. banc.*, 1989, I, pp. 164 ff.

[24] On this point, M. PORZIO, *Appunti sulla «legge Amato»*, in *Riv. soc.*, 1991, pp. 804 ff.; F. MERUSI, *Dalla banca pubblica alla società per azioni, in Banca, borsa, tit. cred.*, 1990, I, pp. 1 ff.; F. CAPRIGLIONE, *Le fondazioni bancarie e la nuova legge sulle privatizzazioni*, in *La nuova giurisprudenza civile commentata*, 1995, II, p. 80.

[25] See, G. ROTONDO, *Profili evolutivi e disciplina degli assetti proprietari delle banche nel quadro regolamentare del Meccanismo Unico di Vigilanza,* cit., p. 15.

287 of 1990[26] - the so-called antitrust law - which, in Articles 27-29 - provided for a complex and articulated system of controls on bank equity holdings, characterized by the imposition, on bank shareholders - of obligations of a different nature, including the obligation to notify the Bank of Italy, upon the acquisition of holdings exceeding 1 percent of the bank's capital, which was in addition to, among other things, the disclosure obligations already provided for by Law no. 281 of 1985[27].

For shareholdings (whether direct or indirect) in excess of 5 percent of the capital - or in any case such that they gave control of the credit institution - Article 27 of the Antitrust Law also established the need for authorization by the Bank of Italy, which was required also for subsequent variations, upward or downward, in excess of 2%.

More generally, as correctly pointed out by the doctrine, Law No. 287 of 1990 *«explicitly considered the credit sector from a twofold perspective»*: on the one hand, in fact, it aimed at replacing traditional banking regulation with a more innovative discipline, inspired by the principles of free competition, by subjecting the sector to antitrust rules; on the other hand, however, it continued to affirm the need for

[26] Reference is made to Law No. 287 of October 10, 1990, on *«Rules for the Protection of Competition and the Market»*.

[27] For further analysis, F. VELLA, *Definite le procedure per la disciplina dei rapporti banca-industria, in Corr. giur.*, 1991, p. 1065; G. MINERVINI, *Il controllo del mercato finanziario. L'alluvione delle leggi*, in *Giur. comm.*, 1992, I, pp. 15 ff.;

greater protection of the banking sector, through a *«strict regulation of shareholdings, from possible managerial intrusion by industrial companies»*[28].

In any case, the law under review continued to base the entire regulatory framework in the light of the principle of separateness between bank and industry, expressly establishing that parties other than a credit institution or financial company could not be allowed to hold more than 15 percent of the capital of the investee bank or to take control of it, taking into account the shares or quotas already held[29].

The complexity and ambiguity of these regulations prompted the legislator once again to intervene in the area of bank ownership structures, also in order to implement the Second Banking Directive[30]: with Legislative Decree No. 481 of 1992, therefore, Title V of Law No. 287/1990 was reformulated. In particular, while maintaining firm the provisions of the antitrust law concerning the relevance of shareholdings for authorization purposes and those aimed at guaranteeing the separation of industry and bank - considered compatible with European law and principles - Legislative Decree No.

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[28] To this effect, G. ROTONDO, *Profili evolutivi e disciplina degli assetti proprietari delle banche nel quadro regolamentare del Meccanismo Unico di Vigilanza*, cit., p. 24.

[29] To this effect, M.S. POLIDORO, *La disciplina* antitrust *in Italia*, in *Riv. Soc.*, 1990, p. 1304.

[30] Reference is made to Second Council Directive 89/646/EEC of December 15, 1989, on the coordination of legislative, regulatory and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC.

481 of 1992 outlined a «*different applicative depth of the hypothesis of the participation of the industrial shareholder in agreements capable of giving them the power to appoint or revoke the majority of directors*»[31].

However, even such a regulatory framework was, in practice, not entirely adequate, in that - especially with regard to the regulation of bank ownership structures - it «*compelled forced readings in order not to entangle the system through a literal application of the provisions on industry-bank relations*»[32].

As is well known, the critical issues and loopholes highlighted thus far were largely overcome with the advent of the Consolidated Law on Banking Intermediation (T.U.B.)[33], which - significantly affecting the previous regulatory framework and concluding a process of reform of the banking system that had already begun in the 1970s[34] - permanently removed the regulation of bank equity investments from the *antitrust* law[35].

And indeed, the regulation of bank ownership structures found an autonomous and accomplished arrangement precisely in Legislative Decree 385/1993, specifically in Artt. 19 ff., which included provisions

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[31] G. ROTONDO, *Profili evolutivi e disciplina degli assetti proprietari delle banche nel quadro regolamentare del Meccanismo Unico di Vigilanza*, cit., p. 25.

[32] *Ibidem*

[33] Reference is made to Legislative Decree No. 385 of September 1, 1993, *Testo unico delle leggi in materia bancaria e creditizia.*

[34] In this sense, G.F. CAMPOBASSO, *Le partecipazioni delle banche e dei gruppi bancari,* in *Banca, borsa e tit. cred*., 1995, III, pp. 283 ff.

[35] On the point, A. PATRONI GRIFFI, La partecipazione al capitale, cit., p. 7.

that were «*characterized by a commendable effort of further stylistic simplification and the adoption of technical solutions that allowed for a better articulation and further downsizing of the legislative text*»36.

Generally speaking, the Consolidated Law enshrines the criteria of "sound and prudent management" as the «*key provision*» of the entire banking discipline[37], while as far as the regulation of ownership structures was concerned, the choice of prior authorization was again confirmed: and indeed, the legislative decree of 1993 attributed greater importance to the control of ownership structures even at the stage of authorization for the exercise of banking activity, establishing that the Bank of Italy, when issuing the authorization (to participate), had to ascertain whether the acquisition above the thresholds provided for in Article 19 of the T.U.B. was compatible with the criteria of «*sound and prudent management*»[38].

And indeed, from this perspective, it has been argued that the main purpose of the entire regulation of ownership structure is to prevent that the acquisition or holding of significant shareholdings may result in prejudice to the sound and prudent management of supervised entities. In particular, resuming the classification proposed by

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[36] In these terms, G.F. CAMPOBASSO, *Le partecipazioni delle banche e dei gruppi bancari,* cit., pp. 283 ff.

[37] See G. NAPOLETANO, M. SEPE, *La sana e prudente gestione*, in AA.VV. *Le finalità della vigilanza nel nuovo ordinamento del credito: profili economici e giuridici*, Rome, Bank of Italy, 1994.

[38] See, G. ROTONDO, *Profili evolutivi e disciplina degli assetti proprietari delle banche nel quadro regolamentare del Meccanismo Unico di Vigilanza*, cit., p. 27.

authoritative doctrine[39], the regulation of shareholdings in banks contained in the T.U.B. - at least in its original version - can be divided into four different main moments: i) the authorizing moment, described in Article 19; ii) the definitory moment, whose regulation is concentrated in Articles 22 and 23; iii) the informative moment, essentially described by Articles 20 and 21; iv) the sanctionary moment, identified by Articles 20, co. 4, and 2440.

Article 19, paragraph 1, of the Banking Act (TUB), in particular, in its original formulation, established the rule that any type of ownership interest that could result in the control of a bank (or a parent company of a banking group) must be authorized when it reaches a certain quantitative threshold. Initially, this threshold corresponded to the so-called "significant ownership interest," which was defined based on a parameter of 5% of the capital with "voting rights".

As pointed out by the doctrine, the most innovative profiles of the new discipline concerned disclosure obligations: in fact, under Article 20, they also concerned any shareholders' agreement, in whatever form it

[39] In these terms, A. PATRONI GRIFFI, *Commento* sub *art. 19,* in CONTENTO, PATRONI GRIFFI, PORZIO, SANTORO (edited by), *Testo unico delle leggi in materia bancaria e creditizia*, Bologna, 2003, I, pp. 288 ff.

[40] See. G. ROTONDO, *Profili evolutivi e disciplina degli assetti proprietari delle banche nel quadro regolamentare del Meccanismo Unico di Vigilanza*, cit., p. 27.

was concluded, aimed at regulating or otherwise determining the concerted exercise of voting rights[41].

Following the adoption of Directive 2007/44/EC[42] , moreover, the idea began to spread more and more - even at the national level - that the choice to keep the industry separate from the bank was not imposed by European rules; that is why, with Legislative Decree no. January 27, 2010, no. 21 - bearing, precisely, *"Implementation of Directive 2007/44/EC, amending Directives 92/49/EEC, 2002/83/EC, 2004/39/EC, 2005/68/EC and 2006/48/EC"* - the national legislator once again affected the regulation of the ownership structures of banks, securities firms (s.i.m.) and insurance companies, «*by bringing national rules into line with the principles and provisions of Directive 2007/44 through the amendment of the three single reference texts (t.u.b, t.u.f. and Insurance Code), but also through a series of other "collateral" amendments*»[43].

As will be further explained, the regulation of the ownership structures of banks has undergone multiple and significant legislative reforms.

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[41] See. A. PATRONI GRIFFI, *La partecipazione al capitale e il controllo degli enti creditizi*, in U. MORERA, A. NUZZO (edited by), *La nuova disciplina* dell'impresa bancaria, Giuffrè, Milan, 1996, pp. 98 ff.

[42] Reference is made to the Directive of September 5, 2007, amending Council Directive 92/49/EEC and Directives 2002/83/EC, 2004/39/EC, 2005/68/EC and 2006/48/EC with regard to procedural rules and criteria for the prudential assessment of acquisitions and increases in holdings in the financial sector.

[43] G. ROTONDO, *Le partecipazioni nelle banche. Prime note sul decreto legislativo 27 gennaio 2010, n. 21*, in *Diritto Banca e mercati finanziari*, fasc. 2, 2010, pp. 100.

Firstly, Decree-Law No. 133 of November 30, 2013, subsequently converted with modifications by Law No. 5 of January 29, 2014, has had an impact on various aspects of the regulation concerning the ownership of ownership stakes in the capital of the Bank of Italy. Consequently, it has affected the institution's statute, particularly by redefining the administrative and financial rights of the holders of these stakes.

Lastly, it is noteworthy to highlight that Decree-Law of January 24, 2015, No. 3, subsequently converted with modifications by Law No. 33 of March 24, 2015, containing urgent measures for the banking system and investments, has profoundly influenced the legislation concerning cooperative banks. It mandated, among other things, the transformation of larger cooperative banks – those with assets exceeding 8 billion Euros – into joint-stock companies.

In the event of non-compliance with this transformation, the new regulation stipulates the following consequences: i) a prohibition on undertaking new operations as per Article 78 of the Banking Act (TUB); ii) the adoption of measures outlined in Title IV, Chapter I, Section I of the TUB; iii) the proposal to the European Central Bank to revoke the authorization for banking activities, or the proposal to the Minister of Economy and Finance for the compulsory administrative liquidation of the non-compliant bank.

2.2. The purchase of qualified shareholdings, indirect shareholdings, and concert purchases in the TUB: the precedent Article 22 TUB

That being said, for the purposes that are most relevant here, it is, first and foremost, necessary to point out that, again with the aim of ensuring a greater degree of transparency in bank ownership, the Consolidated Law on Banking Intermediation (T.U.B) already provided, in its original version, for a series of instruments aimed at regulating and disciplining «*any situation likely to produce a significant influence on the management structure of the investee bank (*banca partecipata*)*» [44].

Among these instruments, Article 22 TUB - which represents one of the most suitable instruments for ensuring «*the greatest possible degree of disclosure of bank ownership*»[45] - takes on a key role, regulating the so-called "indirect shareholdings", meaning indirect or concerted purchases of qualifying shareholdings.

[44] Verbatim, G. ROTONDO, *Le partecipazioni nelle banche. Prime note sul decreto legislativo 27 gennaio 2010, n. 21*, cit. pp. 110.

[45] In this regard, G. ROTONDO, *Profili evolutivi e disciplina degli assetti proprietari delle banche nel quadro regolamentare del Meccanismo Unico di Vigilanza*, cit., p. 61. V.F. CHIAPPETTA, *Commento* sub *art. 22*, in F. CAPRIGLIONE, *Commentario al Testo Unico delle leggi in materia bancaria e creditizia,* Cedam, Padua, 1994, p. 181.

This is a provision that - by supplementing the preceptive scope of other statutes concerning banks' capital structures - pursues a clear "anti-elusive" purpose [46].

This rule, in particular, by providing for the equalization of direct and indirect shareholding - and thus, between formal ownership and mere availability of voting rights - makes it possible to extend the disclosure obligation even where there is only a circulation of voting rights, without any change in ownership, in line with what is also provided, at the European level, by Art. 4 para. 1, item 36 of EU Regulation No. 575/2013, according to which, for the purposes of the notion of qualifying holdings in the capital of credit institutions, both direct and indirect holdings are relevant[47]. The rule identifies, in a specific way, the relevant cases of ownership structure, circumscribing as much as possible the risk that «*inadequately identified behaviors on the taxonomic level are sanctioned*»[48]. In this perspective, Art. 22 also fulfills a fundamental function of closure of the system, being aimed at regulating all possible cases not directly regulated by the other provisions, in order to extend the information and authorization requirements to all events involving the acquisition of shares in the

[46] See F. CAPRIGLIONE, *Prime riflessioni sulla nuova disciplina degli assetti proprietari delle banche*, cit., p. 376.

[47] On this point, see, in particular, A. SACCO GINEVRI, *Comment sub art. 22*, in F. CAPRIGLIONE, *Commentario al Testo Unico delle leggi in materia bancaria e creditizia*, Padua, 2018, p. 242.

[48] See. G. ROTONDO, *Profili evolutivi e disciplina degli assetti proprietari delle banche nel quadro regolamentare del Meccanismo Unico di Vigilanza*, cit., p. 61

capital of a bank[49]. Moreover, already in the Report to the T.U.B. it is stated that Article 22 responds to the need to simplify the normative provisions.

In particular, Art. 22 T.U.B. states that significant holdings are those acquired or otherwise held by means of subsidiaries, fiduciary companies or through a third person (Art. 22, par.1) [50]. Generally speaking, these are three cases deemed suitable to include *«all situations in which it is possible to exert, indirectly, a significant influence on a bank through the interposition of a person only formally distinct from the beneficial owner»*, in that they *«contribute to the achievement of the thresholds provided for the authorization of participation and disclosure requirements, without, however, covering all cases of purchase and indirect ownership of interests»*[51]. Regarding the notion of a subsidiary company, according to the prevailing approach[52], for the purposes of the application of the rule in question, it is necessary to refer exclusively

[49] See V.F. CHIAPPETTA, *Commento* sub *art. 22*, cit., p. 136.

[50] On this matter, G. ROTONDO, *Profili evolutivi e disciplina degli assetti proprietari delle banche nel quadro regolamentare del Meccanismo Unico di Vigilanza*, cit., p. 62, who specifies that the category of the interposed person must be «*identified in general terms in order to avoid circumvention of the regulatory provision. The case, therefore, must be inclusive of any hypothesis of a split between the person formally owning the shareholding and the person who has the substantial one, with the consequent managerial influence. The discriminating element is the presence of an interpositor phenomenon, regardless of its legal qualification*».

[51] *Ibidem*. The author also points out that «*the structure of the rule is consistent with the supervisory objective of verifying the existence of conditions to ensure the sound and prudent management of the bank, assessing the qualities of the potential acquirer and the financial soundness of the acquisition project*».

[52] To this effect, A. FERRARI, *La nozione di controllo nel diritto delle società*, in *Impresa,* 1993, pp. 1889 ff.

to the notion of control outlined by the sector legislation - and in particular by Article 23 T.U.B.[55] - as it is not possible to refer to the corresponding common law discipline, contained in Article 2359 of the Civil Code[56]. It is worth pointing out, however, how the notion of

[55] Article 23 T.U.B. provides *verbatim* that:
«1. For the purposes of this chapter, there is a presumption of control, also with reference to entities other than companies, in the cases provided for in Article 2359, first and second paragraphs, of the Civil Code and in the presence of contracts or clauses in the bylaws that have as their object or effect the power to exercise management and coordination activities.
2. Control is deemed to exist in the form of dominant influence, unless proven otherwise, when one of the following situations exists:
1) existence of a person who, on the basis of agreements, has the right to appoint or revoke the majority of directors or supervisory board members or has alone the majority of votes for the purposes of resolutions on matters referred to in Articles 2364 and 2364 bis of the Civil Code;
2) ownership of shareholdings suitable for the appointment or removal of the majority of the members of the board of directors or supervisory board;
3) existence of relationships, also among shareholders, of a financial and organizational nature suitable for achieving one of the following effects:
(a) the sharing of profits or losses;
(b) coordination of the enterprise's management with that of other enterprises for the pursuit of a common purpose;
(c) the granting of powers greater than those derived from the shareholdings held;
(d) the assignment, to persons other than those entitled on the basis of ownership of the shareholdings, of powers in the selection of directors or members of the supervisory board or executive directors of the enterprises;
4) subjection to common management, based on the composition of administrative bodies or other concordant elements».

[56] This rule provides, in particular, that *«The following are considered subsidiary companies:*
1) companies in which another company has a majority of the voting shares exercisable in the ordinary shareholders' meeting;
2) companies in which another company has sufficient votes to exercise a dominant influence in the ordinary shareholders' meeting;
3) companies that are under the dominant influence of another company by virtue of special contractual relations with it.
For the purpose of the application of numbers 1) and 2) of the first paragraph, votes held by subsidiaries, fiduciary companies and third parties are also counted: votes held on behalf of third parties are not counted.
Companies over which another company exercises significant influence are considered affiliates. Influence is presumed when at least one-fifth of the voting shares or one-tenth if the company has shares listed on regulated markets, can be exercised in the ordinary meeting».

control contained in the aforementioned Article 23 - relevant in the field of banking structures and shareholdings - is substantially equivalent to that in the code, especially due to the fact that, following the regulatory intervention that took place with Legislative Decree No. 37 of 2004[57], control is inferred, even in this field, «*in the presence of contracts or statutory clauses that have as their object the power to exercise management and coordination activities*». On the other hand, the other cases specified by the rule concern the acquisition or possession of shareholdings through fiduciary companies or third parties, including both the hypotheses of static and dynamic administration, as well as those of real or fictitious interposition: in other words, for the purposes of the rule, «*all aspects of interposition*»[58] take on importance, notwithstanding the diversity of legal schemes used, in order not to prejudice the transparency purposes inherent to the regulation of ownership structures[60].

As is well known, Legislative Decree No. 21/2010 intervened on the provision in question by amending its heading (adding a reference to "concerted purchases") and adding par. *1-bis*, concerning agreements through which the relevant rights can be exercised acting in concert

[57] Reference is made to Legislative Decree No. *37* of December 28, 2004.

[58] For an in-depth discussion on the point, M. SEPE, *Le società fiduciarie nel diritto dell'economia*, in *Riv. trim. di diritto dell'economia*, 2016, pp. 338 ff.

[60] On this point, also B. MANZONE, *Partecipazione al capitale delle banche*, P. FERRO LUZZI, L. CASTALDI (eds.), *La nuova legge bancaria. Commentario*, Milan, 1996, I, pp. 370 ff.

[Art. 1, par. 1(f)(2)]. Moreover, the doctrine has pointed out how this regulatory intervention has «*contributed to significantly broadening the systematic value of Article 22*»[61].

Following the 2010 amendment, in fact, the rule in question provided that - for the purposes of the application of Chapters III and IV of the T.U.B., and therefore not only on the subject of ownership structures - reference should also be made to purchases of shareholdings by several parties «*who, on the basis of agreements in any form concluded, intend to exercise the relevant rights in a concerted manner, when such shareholdings, cumulatively considered, reach or exceed the thresholds set forth in Article 19*». It is clear that, in this way, there has been a significant expansion of the rules of transparency of ownership structures, including all those negotiation cases of the exercise of influence of a managerial or operational type[62].

In this perspective, it seems interesting to highlight how the common and qualifying element «*of the different definitions of acting in concert*» present in our legal system is represented precisely by the need «*to include in the field of application of the discipline all the subjects held to the same legal obligation, because of the various interconnections between them*»[63].

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[61] In these terms, G. ROTONDO, *Le partecipazioni nelle banche. Prime note sul decreto legislativo 27 gennaio 2010, n. 21*, cit. pp. 111.

[62] *Ibidem*

[63] In this regard, G. ROTONDO, *Profili evolutivi e disciplina degli assetti proprietari delle banche nel quadro regolamentare del Meccanismo Unico di Vigilanza*, cit., p. 63, where it

2.3 New provisions on the ownership structure of banks and other intermediaries in light of Legislative Decree 182 of 2021

As has been pointed out, the acquisition of a qualified shareholding in the capital of credit institutions (or at any rate supervised institutions) has always been the subject of investigation and attention by national and supranational legislators: the latter, in particular, has intervened on the subject several times in order to harmonize, as much as possible, the regulations of national systems.

Moreover, even administrative case law - especially in a well-known ruling by the Lazio Regional Administrative Tribunal, also referred to by the Governor of the Bank of Italy in his report to the CICR - has pointed out that the scope of the regulation of the purchase of qualified shareholdings can be *«fully perceived only when one bears in mind the significant changes, induced by EU-based sources, that have affected banking intermediaries (the nature of which is now completely freed from outdated public schemes)»*[64].

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is also clarified that *«the multiplication of types of corporate interconnections between financial intermediaries meant that the usual categories of interference were no longer exhaustive in regulating the varied articulations of power centers. In other words, the general categories for classifying economic actors, connected by participatory ties, is not considered adequate to regulate the connections potentially present among qualified investors acting in financial markets. This has led to an emphasis on acting in concert among multiple actors in numerous disciplinary areas, including that relating to the ownership structures of banks, insurance companies and other supervised intermediaries»*.

[64] Reference is made to T.A.R. Lazio, Rome, July 13, 2005, no. 3861, which - ruling on the legitimacy of the authorization issued by the Bank of Italy to Banca popolare di Lodi for the purchase of a shareholding of more than 20 percent in Banca

And it is within this context that the recent regulatory intervention set forth in Legislative Decree 182 of 2021[65], aimed, among other things, at dictating new rules on capital requirements in the banking sector, fits in: with it, in fact, an attempt was made to implement, in our legal system, Directive (EU) 2019/878[66] , and to adapt national regulations to the provisions set forth in Regulation (EU) 2019/876[67], on Capital Requirements Directive (CRD) and Capital Requirements Regulation

Antonveneta and on the limits of the court's review on this matter - also clarified that the scope of art. 5 TUB *«is expressed, in connection with the transition from an administered oligopoly to a regulated market, also in relation to the paradigm of supervision of stability, which in the past took place through mostly administrative-accounting controls (credit "institutes" and "companies" were subjects entrusted with the performance of a public service, constrained within strict operational limits), but which today, with the emphasis placed on "management" , cannot disregard the characteristics of "entrepreneurship" of banking companies, as its center of gravity has shifted to a new conception of prudential supervision (in this regard, it is emphasized how the provision under consideration highlights two distinct planes of protection, placing itself in a micro-economic perspective when it comes to protecting the stability of individual subjects, and macroeconomic where it targets the stability, efficiency, and competitiveness of the financial sector)».*

[65] Reference is made to Legislative Decree 08/11/2021, No. 182, labeled "Implementation of Directive (EU) 2019/878, amending Directive 2013/36/EU with regard to exempt entities, financial holding companies, mixed financial holding companies, remuneration, supervisory measures and powers, and capital conservation measures, as well as for adaptation to Regulation (EU) 2019/876, amending Regulation (EU) No. 575/2013 on prudential requirements for credit institutions, as well as amendments to Legislative Decree No. 385 of September 1, 1993, and Legislative Decree No. 58 of February 24, 1998".

[66] Reference is made to Directive (EU) 2019/878 of the European Parliament and of the Council of May 20, 2019, amending Directive 2013/36/EU as regards exempt entities, financial holding companies, mixed financial holding companies, remuneration, supervisory measures and powers, and capital conservation measures.

[67] Reference is made to Regulation (EU) 2019/876 of the European Parliament and of the Council of May 20, 2019, amending Regulation (EU) No. 575/2013 with regard to leverage ratio, net stable funding ratio, own funds and eligible liabilities requirements, counterparty risk, market risk, exposures to central counterparties, exposures to collective investment schemes, large exposures, and reporting and disclosure requirements, and Regulation (EU) No. 648/2012

(CRR), respectively. The main objective of this regulatory intervention was to define, at a national level, the minimum requirements regarding capital and other instruments that a bank must hold in order to be able to operate safely and independently cope with operational losses[68].

More generally, Legislative Decree 182 of 2021 affected, in a significant way, the regulation of the ownership structure of banks provided for by the TUB and the TUF, innovating, at the same time, on several other areas that are nevertheless involved in the field of qualified shareholdings in credit institutions[69].

For instance, the new regulation has updated the definitions contained in Article 1 TUB in order to align them with the European regulatory framework, stipulating, for example, that in order to issue authorization for banking activities, it is necessary to specify the parent company, financial holding companies and mixed financial holding companies belonging to the group, as well as a description of the arrangements, processes and mechanisms relating to corporate governance, administrative and accounting structure, internal audit and incentive and remuneration systems.

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[68] On this point, M.P. FERRARI, *Le nuove regole sui requisiti patrimoniali nel settore bancario*: in *G.U. il D.Lgs. 182/2021*, in *Altalex.com*, December 1, 2021.

[69] In this sense, F. CAPRIGLIONE, *Prime riflessioni sulla nuova disciplina degli assetti proprietari delle banche*, in *Rivista Trimestrale Di Diritto Dell'economia*, no. 4, 2022, p. 367.

This regulatory intervention further affected the regulation of banking groups under Title III, Chapter II, of the TUB by introducing new regulation of Financial Holding Companies (*FHCs*), Mixed Financial Holding Companies (*MFHCs*) and Intermediate EU parent undertakings (*IPUs*)[70].

Moreover, the new legislation, in addition to having introduced specific supervisory powers and precise measures to preserve the capital of banks, has also provided for a new regulation of the "banking group", which clearly shows the legislator's intent to overcome the criteria of the traditional connection between the

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[70] For a more in-depth discussion, see A. PEZZUTO, *Il Decreto di recepimento della CRD V e del CRR II*, in *Rivista di Diritto Bancario*, July 8, 2022, highlighting that *«The CRD V Directive and the CRR II Regulation are part of a broader project to reform European banking discipline, known as the "2019 Banking Package". The CRD V and CRR II package amends the regulations on bank capital contained in EU Directive/36/2013 (so-called CRD IV), EU Regulation/575/2013 (so-called CRR), which has transposed the Basel III provisions into European law since 2014, and the secondary level regulations issued by the Bank of Italy. Objectives of the reform are: to reduce leverage; address the risk of long-term funding; address market risks by increasing the risk sensitivity of existing requirements and strengthening the proportionality of the prudential framework; contain compliance costs for smaller banks while safeguarding their stability; improve banks' ability to provide credit to support economic growth; and increase the loss absorption and recapitalization capacity of global systemically important banks. The main innovations introduced by the CRD V and CRR II package are:*

i) introducing the leverage requirement, to curb the possible overexposure of assets in relation to the capital held;

ii) transposing into European law the requirement, agreed at the Financial Stability Board in 2015 (so-called Total Loss Absorbing Capital, TLAC), which requires global systemically important banks to hold a certain percentage of loss-absorbing instruments;

iii) amending the rules for calculating counterparty credit risks and the requirement applicable to large exposures;

iv) introduce a long-term liquidity requirement (Net Stable Funding Ratio, NSFR);

v) introducing rules requiring cross-border groups operating in the EU through subsidiaries or branches to create a European sub-group, to be subject to supervision by European authorities; and vi) reviewing the rules governing the remuneration of senior management members».

registered office and the nationality of the group's top management[71]. However, the most relevant aspect - at least for the purposes of this discussion - of the new regulatory intervention relates to the identification of the notion of *«relevant participation»* in the capital of banks[72].

Notably, the new legislation has also affected art. 20 TUB, imposing on those authorized to purchase shareholdings, a peculiar disclosure obligation vis-à-vis the Bank of Italy concerning acts and facts that could cause the conditions and prerequisites on the basis of which the authorization was issued, to lapse or change; but above all - as will be better seen in the next paragraph – Legislative Decree no. 182 of 2021 replaced the regulations on indirect shareholdings and concerted purchases set forth in art. 22 TUB: the so-called "multiplier criterion" is now provided for the identification of parties who intend to indirectly acquire a qualified shareholding through a shareholding chain, to be used together with the "control criterion" already provided

[71] Cfr. F. CAPRIGLIONE, *Prime riflessioni sulla nuova disciplina degli assetti proprietari delle banche*, cit., p. 367, secondo cui «*It can be deduced that the legislator's intention was to take into account - in the revision of a broad section of the regulation of the credit sector - the possible forms of interaction that can be found among the various subjects that give content to the banking discipline. This leads to the hypothesis that, in the future, the adjustment of national regulations to the complex EU provisions will continue to be carried out on the basis of such a criterion from which the configurability of new, significant disciplinary changes of wide scope, destined to innovate "ab imis" the current financial system of our country*».

[72] *Ibidem*

for by the TUB[73]. Lastly, it is pertinent to point out that the Bank of Italy has launched a public consultation - specifically regarding the "Provisions on the Ownership Structure of Banks and Other Intermediaries" - concerning the regulatory profiles of transactions involving the purchase and variation of qualified shareholdings in banks, financial intermediaries, trust companies, IMELs, IPs, SIMs, SGRs, SICAVs and SICAFs. The objective of this consultation - which ended on May 6, 2022 - was essentially to gather comments and observations on the proposed new Provisions, as well as to implement the rules on the ownership structure of intermediaries contained in the T.U.B and T.U.F. as amended by the aforementioned Legislative Decree No. 182 of November 8, 2021.

2.3.1. The amendment of Article 22 TUB and the new "multiplier criterion"

As already pointed out, the most significant innovation in the regulations introduced with Legislative Decree No. 182 of 2021 concerns the matter of indirect and concert shareholdings; these are cases «*united by the purpose of subjecting to 'authorization' even subjects who, in terms of concreteness, have a significant shareholding in a banking*

[73] On this matter, M.P. FERRARI, *Le nuove regole sui requisiti patrimoniali nel settore bancario: in G.U. il D.Lgs. 182/2021*, cit.

institution, although they do not hold it on a formal level»[74]. In particular, the need to overcome the persistent regulatory discrepancies between our legal system and the regulations of other EU member states has led the national legislator to revise the notion of concert in banking, seeking to identify a figure that is sufficiently elastic and therefore suitable for covering and counteracting various elusive phenomena[75].

In particular, Art. 3 of Legislative Decree No. 182 of 2021 introduced the "multiplier" criterion in Art. 22 of the Consolidated Law on Banking Intermediation to identify cases of indirect qualified participation through a participatory chain, consequently broadening the range of cases subject to prior authorization requirements[76].

This article, indeed - read together with Art. 19, para. 1, T.U.B., as reformulated by the same decree - has broadened the obligation of prior authorization to include shareholdings held in other companies, including non-controlled companies, which in turn hold voting rights or capital shares in the bank, thus allowing their participant to express in substance a position of power in the bank, not directly, but through them, «*taking into account*», *in particular,* «*the de-multiplication produced by the chain of shareholding*»[77].

As pointed out early on in the doctrine, the new multiplication criterion was introduced in order to bring domestic regulations in line

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[74] In these terms, F. CAPRIGLIONE, *Prime riflessioni sulla nuova disciplina degli assetti proprietari delle banche*, cit., p. 378.

[75] *Ibidem*

[76] In this sense, F. GUARRACINO, *Il regime transitorio sugli assetti partecipativi,* in *Rivista Trimestrale Di Diritto Dell'economia*, n. 4, 2022, p. 454.

[77] *Ibidem*

with the guidelines of the European Supervisory Authorities, overcoming the difficulties encountered, previously, by the Bank of Italy[78]. In its new formulation, in fact, Article 22 of the T.U.B. - headed, precisely, «*indirect shareholdings*» - stipulates that «*For the purposes of the application of Chapters III and IV of this Title, the following shall also be considered: a) shareholdings acquired or in any case held through subsidiaries, trust companies or intermediaries; b) cases, identified by the Bank of Italy, that lead to one of the situations indicated in Article 19, paragraph 1, as a result of voting rights or capital shares held through companies, including non-subsidiaries, which in turn have voting rights or capital shares in the bank, taking into account the demultiplication produced by the chain of shareholdings*».

The new provision, therefore, devolves to the Bank of Italy the task of concretely identifying the cases in which, taking into account the de-multiplication, the chain of shareholding gives rise to indirect qualified participation and the consequent authorization obligation. By virtue of the legislature's explicit stance on the point, the disclosure requirements set forth in subparagraph *b)* of the same provision apply only to cases occurring "after" the entry into force of the new provision, while they cannot be applied to existing chains of

[78] See, on this point, the wording of the Compliance Notification sent by the Bank of Italy to the EBA, reproduced in the EBA's 2017 Annual Report: «*for what relates to the calculation of the indirect acquisitions of qualifying holdings under section 6 of the Joint Guidelines, the Italian Consolidated Banking Law (Italian legislative decree no 385/1993 and subsequent amendments) at present provides only for the 'control criterion'; therefore, the possible amendment to the Consolidated Banking Law does not depend on the Bank of Italy and is subject to the ordinary legislative process*».

shareholdings[79]. The doctrine, however, has pointed out the need for intervention by the legislature to provide a transitory provision regarding qualified indirect shareholdings through participatory chains, which Article 22 T.U.B. deals with for the first time[80].

2.4 Shareholders' agreements and ownership structures of banks

As is well known, the old Article 22, para. 1-*bis*, T.U.B. provided for the application of the entire Chapter III also in the case of «*the acquisition of shareholdings by more than one person who, on the basis of agreements in whatever form concluded, intend to exercise in a concerted manner the relative rights, when these shareholdings, cumulatively considered, reach or exceed the thresholds indicated in Article 19*».

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[79] In this sense, F. GUARRACINO, *Il regime transitorio sugli assetti partecipativi*, cit., p. 454, who, however, criticizes such a legislative choice, pointing out that *«on the dogmatic level, even if the matter is contestable, it doesn't seem that the application from January 1, 2023 to existing participatory situations of the legal rule that explicitly requires to take into account the de-multiplication produced by the participatory chain could constitute a retroactive application of the same regulation. In fact, if the primary objective of the authorization procedure for acquisitions of qualifying shareholdings in credit institutions is, as recognized by European case law itself, to ensure the sound and prudent management of the institution to which the proposed acquisition relates, it is clear that control through authorization does not ultimately concern the acquisition of the shareholding itself, but rather the effect it has on the participatory structure (the power structure) of the bank, with all that this entails. And while it is true that the acquisition already made through a participatory chain is a past fact which, by the general principle of tempus regit actum, remains governed by the law that was in force at the time of the fact, it is equally true, however, that the resulting participatory legal situation could not be said to have been exhausted when the new rules came into force, which, therefore, could well regulate its subsequent features with "ex nunc" effect »*.

[80] *Ibidem*

The rule, in particular, extended the disclosure duties under the Consolidated Law on indirect shareholdings to all those "agreements" between shareholders that result, even potentially, in effects coinciding with those arising from the ownership of a shareholding. This rule has been substantially replaced by the new Art. 22-*bis*, which provides verbatim that «f*or the purposes of the application of Chapters III and IV of this Title, the acquisition or holding of shareholdings by more than one person who, on the basis of agreements in any form concluded, even if invalid or ineffective, intend to exercise in a concerted manner the relevant rights, when such shareholdings, cumulatively considered, reach or exceed the thresholds indicated in Article 19 or entail the possibility of exercising control or significant influence, is also subject to prior authorization pursuant to Article 19*»

The main reference is to the aforementioned shareholders' agreements[81], i.e., those agreements that are stipulated outside the articles of incorporation and bylaws[82] and that have the effect of "obliging" the stipulating parties to behave in a certain way within or towards the company.

Subsection 2 of the current Article 22-bis also stipulates that "for the purposes outlined in subsection 1, the Bank of Italy identifies cases in

[81] For a discussion of the nature and scope of shareholders' agreements in banking, See, among others, A. TUCCI, *Il ruolo dei soci e dei patti parasociali*, in *Analisi giur. dell'econ*., 2007, 2, pp. 445 ff.; F. VENTURINI, *I patti parasociali e la Consob: il caso Unipol-BNL*, in *Le Società*, 2010, pp. 595 ff.

[82] Such agreements, in fact, are defined as "parasocial" (*In Italian*: *patti parasociali*) precisely because they are not enshrined in the company's(*In Italian: Società)* deed of incorporation but, on the contrary, remain formally distinct from it as much as from the bylaws. In this sense, see, among others, G.F. CAMPOBASSO, *Diritto Commerciale*, Vol. 2, *Diritto delle società*, Utet, 2020, pp. 51 ff.

which it is presumed that two or more persons are acting in concert, cases in which cooperation among multiple individuals does not constitute concerted action, and cases in which changes to agreements among individuals acting in concert, including those related to membership composition, are subject to authorization or notification obligations as per this Chapter."

Moreover, it is worth noting that on July 26, 2022, the Bank of Italy issued new "Provisions on Ownership Structures of Banks and Other Financial Intermediaries," also in order to align with the relevant EU regulations (and with the Guidelines issued by European Supervisory Authorities concerning the authorization of the acquisition or increase of qualified holdings in supervised entities).

The primary objective, as emphasized in these Provisions, is to prevent the acquisition or holding of qualified holdings from undermining the sound and prudent management of supervised entities. For prospective acquirers, this entails obligations of prior authorization for the acquisition of qualified holdings and communication obligations regarding events related to such holdings[83].

And indeed, as already pointed out in the previous chapter, among the main objectives pursued through the stipulation of such agreements is undoubtedly that of «*stabilizing corporate governance, through agreements aimed at conditioning administrative activity and the formation of the will of the shareholders' meeting (so-called voting*

[83] For further discussion on the point, L. ARDIZZONE, D. QUATTROCCHI, V. PERINI, *Assetti proprietari: acquisizioni o incrementi involontari nelle disposizioni Banca d'Italia*, in *Diritto bancario*, March 7 2023.

syndicates)" or that of "stabilizing the ownership structure of the company, through constraints on the free alienation of shares (so-called blocking syndicates)»[83].

Hence, the need felt by the legislator - especially in the financial and credit sector - to ensure maximum transparency of power structures, also through the enforcement of disclosure and transparency obligations with respect to all possible situations of control, including - for the reasons already stated - shareholders' agreements[84].

Indeed, for all the reasons stated so far, it appears evident how the aforementioned need is manifested, even more so, in the banking sector, prompting the legislator to regulate shareholders' agreements also within the T.U.B, providing, in paragraph 2 of Article 20, that «*any agreement, in whatever form it is concluded, including those in the form of an association, which regulates or from which in any case may derive the concerted exercise of voting in a bank, including a cooperative bank, or in a company that controls it must be communicated to the Bank of Italy by the participants or by the legal representatives of the bank or company to which the agreement refers. When the agreement results in concerted voting such*

[83] On this point, L. GIANNINI, M. VITALI, *I patti parasociali*, Maggioli Editore, 2nd edition, 2011, pp. 10 ff., who observe that «*in the Italian economic and entrepreneurial reality, shareholder syndicates have often represented the privileged technical tool for organizing coalitions between shareholders aimed at ensuring control over the company*».

[84] See G. ROTONDO, *Profili evolutivi e disciplina degli assetti proprietari delle banche nel quadro regolamentare del Meccanismo Unico di Vigilanza*, cit. p. 53, according to which «*the moment of disclosure assumes particular importance with reference to shareholders' agreements, for which deadlines must be set so as to ensure that the supervisory authority's verifications can be carried out in a timely manner, with respect to the conclusion of the agreement, as well as in time for the subsequent shareholders' meeting*».

that the sound and prudent management of the bank is jeopardized, the Bank of Italy may suspend the voting rights of the participants in the agreement».

In any case, for what is most relevant here, it is worth highlighting how under the old rules - i.e., art. 22, co. 1-*bis*, T.U.B. - Decree No. *675* of 2011 of the CICR, had provided, in art. 5, a particularly relevant and significant rule on ownership structures, aimed - in light of what was expressly noted in the Bank of Italy's Illustrative Report - at avoiding circumvention of the regulations on concerted purchases, considering such, and therefore requiring prior authorization, even voting agreements entered into in the year following the purchase.

In particular, as will be seen more thoroughly below in relation to the case involving Carige bank, the aforementioned Illustrative Report of the Bank of Italy clearly specified how Directive 2007/44/EC required prior authorization of acquisitions by more than one party wishing to exercise "in concert" the relevant rights, but left to member states the choice of whether or not to subject voting syndicates to authorization as well, in the absence of new shareholding purchases or regardless of such purchases[85].

[85] See. G. FUMAROLA, *I patti parasociali e le partecipazioni rilevanti nelle banche*, in *Diritto Banca e Mercati finanziari*, fasc. 1, 2019.

- Chapter III-

Case Study: The Carige *affaire*

3.1. The history of Banca Carige

Banca Carige, also known as Cassa di Risparmio di Genova e Imperia, was founded in 1846 by Royal Decree of King Carlo Alberto, but began its banking activities separate from the social activities of Cassa di Risparmio in 1991, following the institution's privatization through the separation of its banking activities into the newly formed Banca Carige S.p.A. In 1992, together with Columbus Leasing, Factoring and Domestic, it formed the Multifunctional Carige Group, becoming a universal bank in 1994, operating in the short, medium, and long term. In 1995 the group was listed on the stock exchange and grew further: in 2000 it acquired Cassa di Risparmio di Savona S.p.a and Banca del Monte di Lucca S.p.a, between 2000 and 2002 it acquired 124 branches from other banks, and in 2004 it acquired Cassa di Risparmio di Carrara S.p.A. and Banca Cesare Ponti[1].

In 2000 first, and then in 2003, Giovanni Berneschi, who had been working at Carige since 1957, became first Chief Executive Officer and

[1] Il Gruppo - Gruppo Banca Carige (*gruppocarige.it*)

then President[2], thus initiating a fresh new era for the bank: under his management, Carige acquired a large number of new branches and, most importantly, began to operate in the insurance sector. It will be the latter that will negatively affect Carige's overall management, both from an economic and legal standpoint, and these effects propagate their consequences still on the current management. In 2015, the detrimental effects of the management of the insurance sector and the credit portfolio[3] became evident, forcing the Carige Foundation to dilute its 40 percent shareholding: the Malacalza family entered the capital of Banca Carige with Malacalza Investments, a company owned by the Bobbio native industrials. The Malacalza family entered into a preliminary contract with Fondazione Carige, acquiring from the latter a 10.5 percent stake in the bank's capital for €66.19 million, at a price of €0.062 per share[4]. And so began the management of the Malacalza family, whose face was Vittorio Malacalza, a central figure in the bank's recent events.

[2] L. FORNOVO, La caduta di Giovanni Berneschi, La Stampa, 23 maggio 2014. Disponibile su: https://www.lastampa.it/economia/2014/05/23/news/la-caduta-di-giovanni-berneschi-1.35757338

[3] The critical issues that emerged as a result of BankIt investigations: https://www.wallstreetitalia.com/stress-test-equita-bocciate-non-solo-mps-e-banca-carige/

[4] https://www.adnkronos.com/soldi/finanza/2015/03/02/malacalza-entra-banca-carige-rileva-dallafondazione_UdJOsdGr8Jw4h4479HC39J.html

The shareholding increases further, from 14.9 % to 17.6 %, and is enhanced over time in several capital increases[5]. Regarding the stability situation of the Ligurian intermediary, the investor family is optimistic and confident, for example stating at the time of the capital increase resolution in March 2016, "*the concrete implementation of the restructuring measures and actions identified by the subsidiary's management in the update of the strategic plan 2016-2020, dated February 28, 2017 could allow in the foreseeable future the removal of the factors that led to the loss of value, leading to its reabsorption"*[6]. Meanwhile, as far as choices in the insurance sector are concerned, the lack of trust in the previous directors also led to a change of direction at the top with the appointment of Tesauro as president and Bastianini (and after him, Fiorentino) as CEO.

[5] We are referring to a 560 million euro increase that took place in March 2016. This stems from a series of investments by Malacalza in the bank up to an amount of 260 million in March 2016: https://it.businessinsider.com/quanto-ha-guadagnato-e-perso-la-famiglia-malacalza-tra-lacciaio-pirelli-ebanca-carige/

[6] Capital increase resolution March 2016

3.1.1. The shareholders' agreement having as its object the exercise of voting rights in the appointment of corporate bodies: the Banca Carige case

The syndicate pact concerning the exercise of voting rights in the appointment of corporate bodies is limited to the Ordinary Shareholders' Meeting of September 20, 2018 at which the new Board of Directors is appointed. It is a pact signed by the following companies: Pop12, Lonestar, and Spininvest, binding 15,198% of Banca Carige's capital.

The purpose of the meeting was to determine the appointment of the new board of directors. The members of the pact pledge support for the list submitted by Time&Life and Pop12 companies by also establishing a number of members equal to fifteen[7]. The duration of the pact is scheduled until the resolution of the items on the agenda. The membership shares in the agreement are distributed as follows: the company Pop12 with 4.428%, the Company Lonestar with 9.087%, and Spininvest with 0.683%[8]. The three shareholders thereby go on to bind all the shares of the bank held by them to a shareholders'

[7] ECONOMIA A&F, Carige, il patto Spinelli-Volpi-Mincione sul 15% del capitale, La Repubblica, 30 agosto 2018. Available at: Carige, il patto Spinelli-Volpi-Mincione sul 15% del capitale - la Repubblica

[8] BJ LIGURIA, Carige: patto di voto Mincione-Volpi-Spinelli al 15,2%, Business Journal, 30 agosto 2018. Available at: Carige: patto di voto Mincione-Volpi-Spinelli al 15,2% | Liguria Business Journal (bizjournal.it)

agreement, no later than 12 months after the last increase in shareholding, for a total capital share of 15 %. The disclosure requirements enshrined in Articles 122 T.U.F. [9] and 20, paragraph 2, T.U.B.[10] are fulfilled and an abstract is published on the bank's website[11]. A few days before the Shareholders' Meeting was convened, the bank's largest shareholder filed an appeal with the Court of Genoa for the failure of the three agreeing parties to obtain prior authorization imposed by Article 19 of the T.U.B. and supplemented by Articles 22 of the T.U.B. and 5 of the Decree of the President of the Interministerial Committee for Credit and Savings No. 675 of 2011,

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[9] Art. 122. Shareholders' Agreements "1. *Agreements, in whatever form entered into, having as their object the exercise of voting rights in companies with listed shares and their controlling companies shall be: a) communicated to CONSOB within five days of stipulation; b) published in an abstract in the daily press within ten days of stipulation; c) filed with the business register of the place where the company has its registered office within fifteen days of stipulation. 2. CONSOB shall establish by regulation the manner and contents of the notice, abstract and publication. 3. In case of non-compliance with the obligations provided for in paragraph 1, the agreements shall be null and void. 4. The voting right inherent in listed shares for which the obligations provided for in paragraph 1 have not been fulfilled cannot be exercised. In case of non-compliance, Article 14, Paragraph 5 shall apply. The appeal may also be brought by CONSOB within the period specified in Article 14. paragraph 6. 5. This article also applies to pacts, in whatever form stipulated: a) that establish prior consultation obligations for the exercise of voting rights in companies with listed shares and their controlling companies; b) that place limits on the transfer of the relevant shares or financial instruments that grant rights to purchase or subscribe to them; c) that provide for the purchase of the shares or financial instruments provided for in subparagraph b); d) having as their object or effect the exercise, even jointly, of a dominant influence over such companies*".

[10] "*The second paragraph implements Article 20(2) of the TUB, which stipulates the obligation to notify the Bank of Italy of agreements from which the concerted exercise of voting results. Again, the wording is similar to that already provided for in the CICR resolution of July 2005*".
Relazione-illustrativa.pdf (bancaditalia.it)

[11] Available in the "*governance – azionariato – patti parasociali*" section of Banca Carige's website or directly at https://goo.gl/LxYARH.

implementing the delegation of authority provided by Article 19(9) of the T.U.B. Minority shareholders do not have voting control of the company and, in the absence of a shareholders' agreement, these shareholders will exercise minimal influence in the management of the company. Key management decisions can be made by the few controlling shareholders who own more than 50 percent of the company and can avoid taking into account the input of minority shareholders. Although the bylaws protect minority shareholders, the provisions can often be changed through special resolutions approved by the majority shareholders. The shareholders' agreement can fill these gaps by requiring that key decisions of the company be approved by all shareholders, regardless of their voting power. Such rules limit the ability of majority shareholders to override minority shareholders when making particular decisions, such as issuing new shares, appointing and removing directors, etc.

Therefore, the three parties allegedly acquired without authorization *"shareholdings that involve control or the possibility of exercising significant influence or that grant a share of the voting rights or capital of at least 10 percent"*[12], *"on the basis of agreements that allow for the concerted exercise of the relevant rights"*[13], and, therefore, *"the acquisition is also considered to be in concert even when the agreements are entered into within the year*

[12] Article 19, paragraph 1.
[13] Article 22, paragraph 1-*bis*

following the acquisition or change of the shareholding"[14]. For the plaintiff, the absence of authorization led to an "in concert" excess of the 10 percent threshold and also to a joint exercise of significant influence over the bank since the purpose is to achieve a majority of board seats in the presence of a statutory election rule based on proportionality[15].

Following these clarifications, the plaintiff requests the application of the civil law sanction governed by Article 24, paragraph 1 T.U.B., i.e., the prohibition of exercising *"voting rights and other rights that allow influence over the company"* inherent in *"shareholdings for which authorizations have not been obtained or have been suspended or revoked"* [16]. The hypothesis is that of illegitimacy due to the failure of the valid exercise of rights relating to the shareholding representing the capital ratio required by the bank's bylaws for the presentation of lists[17].

In Italian contractual practice, shareholders' agreements usually regulate a wide range of corporate matters, mainly relating to

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[14] Article 5, paragraph 2

[15] A circumstance later reiterated by the plaintiff member's proxy during the meeting, to the minutes of which please refer: minutes of the ordinary shareholders' meeting held on September 20, 2018, available in the section «Corporate governance – 2018 – assemblea ordinaria 20 settembre 2018 – verbale della seduta» of Banca Carige's website or, directly, at https://goo.gl/1u3z3v, 32-33. As for the election rule in Article 18, para. 9, of the Articles of Association (available in the «governance – documenti societari» section of the same website or, directly, at https://goo. gl/ nRWXDY), it is a pure application of the d'Hondt method or of quotients or successive divisions (on which, for general notations on the theory of electoral systems, refer, for all, to Schepis' taxonomy, *I sistemi elettorali: teoria, tecnica, legislazioni positive,* Caparrini, Empoli, 1955, p. 99).

[16] G. M. FUMAROLA, *Diritto della banca e del mercato finanziario*, in *Pacini Giuridica*, 1/2019

[17] *Ibid.*

company control and exit conditions. The most common provisions relate to (1) the appointment of the board of directors; (2) voting agreements, special majorities or veto rights for decisions at shareholder meetings; (3) restrictions on the transferability of shares and special rules on purchase rights; (4) pre-emption rights, drag along and tag along clauses, and call/put options; (5) financing of the company; (6) dividend distribution policies; and (7) special rights granted to founders or particular shareholders.

According to unanimous case law, shareholders' agreements only bind their parties: they have no legal effect against the company, other shareholders, and any third parties. Consequently, they cannot be enforced against them. In case of breach, the only remedy granted to the parties is a claim for damages against the breaching shareholder. No specific performance remedies are allowed against breach of shareholders' agreements[18]. This is the main difference from statutory provisions, which legally bind the company and each shareholder (current/future) and, in addition, are also enforceable against them by way of specific performance. This different regime can be appreciated in case of breach: while a vote against the bylaws may lead to the invalidity of the shareholders' meeting resolution, a vote against a provision included in the shareholders' agreement - but not in the bylaws - will have no impact on the legitimacy of the shareholders'

[18] *Ibid.*

meeting resolution, being only subject to possible claims for damages caused. An economic analysis of the law has already found that, with regard to shareholders' agreements, specific performance is a better remedy that leads to a more efficient allocation of resources: the damaged shareholder wishes to compel the breaching shareholder to duly perform the acts and obligations agreed upon between the parties.

Moreover, considering the nature of the breach of a shareholders' agreement, there are many reasons why damages compensation is a suboptimal remedy compared to specific performance. The actual damage resulting from the breach of the shareholders' agreement is usually difficult to measure and, more importantly, to prove; It is very complex for a judge to assign (ex post) an appropriate monetary value to the damage suffered. Whenever the lost asset has no market substitute or no objectively - and easily - determinable price, any judicial estimate runs a high risk of error. Although specific performance is probably the best remedy to protect shareholders' interests, as mentioned, Italian case law maintains a clear distinction between corporate plans and shareholders' agreements, considering the violation of the latter relevant only among subscribing shareholders, who have the right to protect their interests only by suing for damages[19].

[19] *Ibid.*

3.2. Bank of Italy's Communication of September 13, 2018

The Bank of Italy acknowledging the shareholders' agreement stipulates that *«in the absence of authorization - for which, in any case, it requests that an instance be filed -, voting rights and other rights allowing influence over the company may not be exercised for the shareholding that in the aggregate equals or exceeds the aforementioned threshold of 10% of Banca Carige's capital»*.

This is a rather general communication that does not unravel the issue or intervene on matters of critical importance. In fact, the Bank of Italy does not ascertain the existence or non-existence of significant influence, stopping at ascertaining that the threshold has been exceeded in the absence of authorization. In addition, the doctrine[20] highlights how the wording of the notice traces the first paragraph of Article 24 of the T.U.B., namely, *«Voting and other rights that allow influence over the company inherent in shareholdings for which the authorizations provided for in Art. 19 have not been obtained or have been suspended or revoked cannot be exercised*[21]*»*.

The reference to the aforementioned article, however, has not helped in clarifying the issue, leaving it up to the interpreter to determine what are the *"other rights that allow influence over the company"*. The Authority sterilizes the covenant's share exceeding the 10% threshold of Carige's capital in the absence of the signed covenant's authorization of joint participation. There has also been debate over

[20] *Ibid.*

[21] Article 24, par. 1.

the concept of "influence" intended as an "elliptical form" of the expression "significant influence," suggesting a kind of parity between the case of the exercise (in concrete terms) of significant influence and the case of a shareholding greater than 10%, circumstances that instead remain separate from the plaintiff [22]. Thus, it is as if the participation greater than 10% provides the possibility of considerable influence over the bank, leading to a "sterilization" of the excess part, in this way the Bank of Italy would refute the plaintiff's argument that in the presence of considerable influence, the sterilization should concern the entire unauthorized participation. If, on the other hand, we refer to a wider concept of influence as the generic power to concur in the company's governance decisions, "*it would be the case that the Bank of Italy would refrain from taking a position on the exercise of significant influence by the concert parties, limiting itself to considering only one of the three cases covered by Article 19 T.U.B., namely exceeding the 10 % threshold"*[23]. In this case, the plaintiff's request would be left rejected; in fact, it is stated that the "*Bank of Italy has not commented on the matter for the trivial reason that no one has asked it about it*"[24]. As mentioned earlier, the wording of the communication clearly recalls the first paragraph of Article 24 T.U.B., suggesting the intention of the Bank of Italy official to *"rely on the (deemed) safe wording of the T.U.B"*.[25] Similarly, there was a change in the conclusion of the paragraph that did not provide clarity as a whole, leaving doubt about the " blending

[22] G. M. FUMAROLA, *Diritto della banca e del mercato finanziario*, in Pacini Giuridica, 1/2019
[23] *Ibid*.
[24] Assembly minutes, p. 34.
[25] G. M. FUMAROLA, *Diritto della banca e del mercato finanziario*, in Pacini Giuridica, 1/2019

" between the two cases. *"Other rights that allow influence over the company"* are regulated by Art. 24 as a result of the coordination of the organic reform provisions of corporate law of 2003[26] with the consolidated laws on banking and finance[27], in order to consider the innovations resulting from the entrance into the system of participatory financial instrument[28] that can still provide the possibility of attributions of other rights of an administrative-

[26] Law Decree 5 and 6 of 2003.

[27] Law Decree 37/2004

[28] The only authors whose interest on the scope and meaning of the coordination provisions is known would be Albano and Sciumbata, in works devoted to commenting solely on the provisions of Decree 37 of 2004 [respectively: Comment sub art. 24 t.u.b., in Il coordinamento della riforma del diritto societario con i testi unici della banca e della finanza, edited by Maimeri, Milan, 2006, and Comment sub art. 2 (art. 9.10), in Società, banche ed intermediazione finanziaria, norme di coordinamento (D.Lgs. 6 febbraio 2004, n. 37), edited by Id., Milan, 2004]. The former was able to observe that "in the new drafting, the suspensive effect no longer concerns only the right to vote-which in any case is also attributed to the holders of financial instruments, thereby determining the elimination of any reference to capital, replaced by the new definition of shareholding-but also the so-called 'other rights' capable of influencing the company, i.e., the administrative rights attributed to the holders of financial instruments (Art. 2346, paragraph 6, and 2351, paragraph 5)" (p. 120), cui adde Mazzini, Comment sub art. 25 t.u.b., in Consolidated Banking Law. Commentary, edited by Porzio, Belli, Losappio, Rispoli Farina and Santoro, Milan, 2010, p. 253, and Santoni, Comment sub art. 24 t.u.b., in Commentario al Testo Unico delle leggi in materia bancaria e creditizia, edited by Capriglione, I, Padua, 2012, p. 300 ("the adaptation of the T.U.B. to the reform of corporations has also entailed the inclusion "of the other rights that allow to influence the company. These are the so-called administrative rights pertaining to holders of participatory financial instruments other than shares"). Observation recalled by the same A. also in commenting on the similar provision in the t.u.f.: Albano, Comment sub art. 14 t.u.f., in Il coordinamento, cit, p. 345 («for the identification of the rights attributed to participatory financial instruments that are relevant for the purposes of supervision, reference is made to 'other rights that allow to influence the company'»), to which Corvese, Comment sub art. 14 t.u.f., in Commentario t.u.f. Decreto legislativo 24 febbraio 1998, n. 58 and subsequent amendments, edited by Vella, I, Turin, 2012, p. 187. The second A., in the same vein, believes that the addition of the phrase regarding "other rights that allow influence over the company" "is borrowed from the definition of relevant shareholdings, introduced in subparagraph h-quinquies of paragraph 2 of Article 1 of the t.u.b." (p. 58); he then adds in point of commentary sub art. 16 of the t.u.b. [Commentary sub art. 3 (art. 953), p. 184] that "these are, more or less, the provisions that art. 24 of the t.u.b.

participatory nature and thus provide the possibility of "influencing" management[29]. It was precisely in order to include, in the notion of shareholdings, these new financial instruments that Legislative Decree 37 redrafted the provision by removing the specification "to the capital"[30] and inserting the following clause "*other rights that allow*

dictates in the banking field". In the same vein, albeit briefly, Mucciarelli, L'autorizzazione all'acquisto di partecipazioni al capitale delle banche, in Banche e mercati finanziari, edited by Vella, Turin, 2009, pp. 94-95 (where, in footnote 36, further doctrine is cited on the more general issue of coordination between the t.u.b. and company law reform: Sepe, Nuovo diritto societario e partecipazione al capitale delle banche, in Nuovo diritto societario e intermediazione bancaria, edited by Capriglione, Padua, 2003, 81 ff.; Santoro, Il coordinamento del testo unico bancario con la riforma delle società. Two problematic profiles: ownership structures and the independence of corporate officers, in Dir. banc., 2005, pp. 3 ff.

[29] Albano (Commentary, cit, 120) states that «it is not well understood what these rights are and what "various acts" the legislator refers to in providing for the sanction of "challengeability" in the event of non-compliance with the prohibition of their exercise; however ... it seems congruous to consider that the only administrative right attributable to financial instruments, in addition to the right to vote, capable of determining an influence on the company and concreting itself in an act with respect to which the question of challengeability can be raised, is the power of appointment, pursuant to Art. 2351, paragraph 6, of the independent members of the board of directors.» In the same vein, cited therein, Sciumbata, Commentary, cit., p. 58 («It turns out, indeed, to be difficult for the interpreter to recognize what are, in concrete terms, these rights that enable influence over the company. ... The outcome can only be a sense of unease and disorientation for the interpreter, who has to ascertain the existence of a phenomenon, which, however, he cannot concretely identify»).

[30] A definition that therefore now-coincidentally between Articles 1, co. 2, lett. h-quater, t.u.b. and 1, para. 6-bis, t.u.f.-also takes into account «the other financial instruments that grant administrative rights or in any case the rights provided for in Article 2351, last paragraph, of the Civil Code». However, from the notion of shareholding dictated by the t.u.f. are excluded investment companies with variable and fixed capital for which Article 14, para. 2 - pre 2015 - and third post, appropriately clarifies that «reference is made only to registered shares»; indeed, on this point it has been stated that the «reform of company law ... at least as far as the notion of participation is concerned, did not concern variable capital companies: this, after all, seems understandable, since there is a biunivocal relationship between contributions to capital and registered shares, which cannot be broken, precisely because of the peculiarity of the discipline of capital and the corporate purpose, with the issue of financial instruments, whose contributions, are not charged to capital» (*in these terms* Albano, Comment sub art. 14 t.u.f., 344, note 3, to which Corvese, Commentary, cit., p. 187).

to influence the company". Banking executives live in a more complex environment than their industry peers because of banking regulations. In addition to shareholder demands, regulators have strong incentives to influence managerial action, and this can conflict with shareholder demands. The literature on banking corporate governance can be summarized as follows: takeover markets, considered as a cornerstone of a corporate governance market system, are probably overrated as a governance mechanism.

Rather, banks' natural access to funds favors a free cash flow interpretation of many mergers. In particular, it has already been mentioned that the regulatory interest in mergers aiming at achieving the necessary consolidation of the banking sector should be examined more closely. The findings on executive share ownership have been shown to parallel those on the governance of industrial enterprises: ownership can have both positive and negative effects. So, shareholders' agreements take on specific relevance in two other fundamental provisions of Legislative Decree No. 385/1993: the one referring to "purchases in concert" under Article 22, paragraph 1-bis, T.U.B., and the one relating to the notion of "control" in Article 23 T.U.B. The first provision of Directive 2007/44/EC[31] (which is no longer in effect but was chosen to be cited because of its innovative nature) states that for the application of Title II, Chapters III, and IV T.U.B. *"it shall also be included the acquisition of shareholdings by more than one person who, on the basis of agreements in whatever form concluded, intend*

[31] The provisions of Directive 2007/44/EC (no longer in effect) were subsequently transfused, without substantial changes, into Directive 2013/36/EU (so-called CRD IV), Directive 2014/65/EU (so-called MiFID II) and Directive 2009/138/EC (so-called Solvency II).

to exercise the relevant rights in a concerted manner, when such shareholdings, taken cumulatively, reach or exceed" the thresholds indicated in Article 19 T.U.B.

In addition, by virtue of Article 23(2), dominant influence is presumed to exist, unless proven otherwise, in the hands of the *"person who, on the basis of agreements, has the right to appoint or dismiss the majority of the directors or supervisory board or has alone the majority of votes for the purposes of resolutions relating to the matters referred to in Articles 2364*[32] *and 2364-bis*[33] *of the Italian Civil Code"*.

[32] Art. 2364. (Ordinary meeting in companies without a supervisory board). *"In companies that do not have a supervisory board, the ordinary shareholders' meeting: 1) approves the financial statements; 2) appoints and dismisses the directors; appoints the auditors and the chairman of the board of auditors and, when provided for, the entity ((entrusted with the legal audit of the financial statements)); 3) determines the remuneration of the directors and auditors, if it is not established in the bylaws; 4) decides on the liability of the directors and auditors; 5) decides on other matters attributed by law to the competence of the shareholders' meeting, as well as' on the authorizations that may be required by the bylaws for the performance of acts of the directors, without prejudice, in any case, to the responsibility of the directors for the acts performed; 6) approves any regulations for the proceedings of the shareholders' meeting. The ordinary shareholders' meeting must be convened at least once a year, within the term established by the bylaws and in any case not more than one hundred and twenty days after the close of the fiscal year. The bylaws may provide for a longer term, in any case not exceeding one hundred and eighty days, in the case of companies required to prepare consolidated financial statements or when special needs relating to the structure and purpose of the company require it; in these cases, the directors shall indicate in the report provided for in Article 2428 the reasons for the delay.*

[33] Article 2364-bis (Ordinary meeting in companies with a supervisory board). *"In companies where a supervisory board is provided for, the ordinary shareholders' meeting: 1) appoints and removes the supervisory directors; 2) determines the remuneration due to them, if it is not established in the articles of association; 3) resolves on the responsibility of the supervisory directors; 4) resolves on the distribution of profits; 5) appoints ((the person in charge of carrying out the statutory audit of the accounts)). The second paragraph of Article 2364 applies".*

3.3. Court of Genoa's order of September 19, 2018

According to the stipulations of Articles 22 and 24 TUB, the shareholders' agreement made between shareholders holding 10% or more of the share capital must be considered relevant resulting in the necessary authorization of the Supervisory Authority even in the absence of an agreement on corporate management and with the mere regulation of the exercise of voting for the appointment of an administrative body[34]. The inhibition on the exercise of corporate rights relating to the holding of over 10% of the capital that is not authorized under Article 19 TUB and taken jointly by several parties is punitive in nature and, therefore, must affect all the parties equally and not follow a chronological criterion. Moreover, if the exercise of concert concerns a percentage of the capital of less than 10 %, significant influence should not be deemed to exist automatically but must be the subject of investigation[35] . Before examining the issues in law, it should be recalled that in February 2018 Pop12 acquires stakes amounting to 5.428% of Carige capital. Lonestar during 2015 acquires a 6.011% stake, increased to 9.087% in December 2017.

On June 25, 2018, the Director and Chairman of the BoD resigned, and later other directors did the same. Thereafter, Pop12 sent a request to

[34] G. M. FUMAROLA, Diritto della banca e del mercato finanziario, in Pacini Giuridica, 1/2019

[35] *Ibid*.

the BoD to call a shareholders' meeting in accordance with Article 2376 cc. On August 3, 2018, the meeting is convened, after which five more directors resign, which caused the entire board to fall from office as the majority of the body had lapsed. According to the plaintiff's claim, the shareholders' agreement of August 25, 2018, signed by Pop12, Lonestar and Spininvest, involving the joint exercise of corporate rights referring to a 15.198% stake in Carige's capital notes the need for prior authorization by the ECB, both being a case of significant influence on the bank and as a hypothesis of excess of 10% of the capital[36].

Therefore, the plaintiff asks the court to make an assessment on the holding, qualified in terms of relevant concert among the covenants. In the case analyzed, the relevant legislation is contained in Chapter III, Title II of Legislative Decree No. 21 of January 27, 2001, implementing Directive 2007/44/EC. The Directive aimed at "*ensuring maximum harmonization of procedures and criteria for the prudential assessment of acquisitions of qualifying holdings in the financial sector*" [37], the purpose is to ensure uniform control in both the banking and financial and insurance sectors. In addition, this uniformity of control was ensured by the attribution of authorization power to the ECB.

[36] *Ibid*.

[37] Illustrative report of the Bank of Italy to the CICR Decree 675/2011, containing the technical and detailed rules of the regulation of bank shareholdings under Chapter III TUB.

Article 19 TUB, paragraph 1, stipulates, *"the acquisition in any form in a bank of shareholdings that result in a significant influence on the bank itself or that attribute a share of the rights of at least 10% taking into account the shares already owned, is subject to prior authorization"*.

Article 22, paragraph 1-bis TUB, provides for the application of the entire Chapter III also in the case of *"acquisition of shareholdings by more than one person who, on the basis of agreements in any form concluded, intend to exercise the relevant rights in a concerted manner, when these shareholdings, cumulatively considered, reach or exceed the thresholds indicated in Article 19"*. The Bank of Italy's explanatory report points out that Directive 2007/44/EC required prior authorization of acquisitions by more than one person intending to exercise the relevant rights in concert, while it left it up to member states to decide whether to also subject to authorization the conclusion of voting agreements in the absence of, or independently of, new shareholding acquisitions. The TUB has ruled out this extension; Article 5, paragraph 1 refers to "purchases in concert", while for voting agreements entered into in the absence of purchases or regardless of them, only the ex-post power of intervention provided by Article 20 TUB remains[38].

[38] G. M. FUMAROLA, Diritto della banca e del mercato finanziario, in Pacini Giuridica, 1/2019

Article 5, Paragraph 2 of the CICR Decree provides that voting pacts entered into within the year following the purchase are also to be considered as purchases in concert. So, if the shareholders' agreement of August 25 constitutes a relevant concert agreement within the combined provisions of Articles 19 and 22 TUB and 5 of CICR Decree 675/201, *"are subject to prior authorization by the Bank of Italy the acquisition and change of shareholdings by several persons who, on the basis of agreements in any form concluded, intend to exercise in concert the relevant rights, when such shareholdings, cumulatively considered and together with those already held, reach or exceed the thresholds referred to in Article 2 or attribute control or the possibility of exercising significant influence over the supervised enterprise. The purchase is also considered to be in concert when the agreements are entered into within the year following the acquisition or change of the shareholding"* [39].

Therefore, the position of the covenants is illegitimate since they did not request prior authorization. Following the assessment made by the Bank of Italy, called upon to conduct a preliminary assessment involved in the procedure by the ECB, it will be necessary to wait for the decision of the European Supervisory Authority. If the shareholding of more than 10% is authorized, the covenants will have the opportunity to exercise the rights corresponding to 15.198%; otherwise, it will be necessary to assess whether the 9.99%

[39] *Ibid*.

shareholding remaining in the hands of the covenants constitutes a situation of significant influence over the Bank, with the need for a further authorization process[40]. As analyzed in the previous paragraph, the Bank of Italy in its September 13 communication considered the existence of a relevant concert in the shareholders' agreement of August 25 concluding that it was necessary to apply for authorization to exercise the rights related to the shareholding. Concluding, the defenses are twofold: 1) the acquisition during the year of shareholdings would have concerned only Pop12 as Lonestar would only have subscribed for shares as a consequence and 2) in coincidence with the capital increase operation that affected the Bank, and the agreement would not constitute a concert as it would not refer to an agreement on the company's management[41].

The Genoa Court's ruling n.10907 of September 19 2018 thus aligns with the Bank of Italy's notice, ruling that at the shareholders' meeting, the list presented by Pop12 as representing the shareholders' agreement could express voting rights equal to only 9.99% of the share capital, as opposed to the 15.2% subject to the agreement[40].

[40] *Ibid*.

[41] *Ibid*.

[40] A. MANDALA, Carige, lista patto Mincione in assemblea con 9,99%, rischio stallo governance, Reuters, 19 settembre 2018. Available at: Carige, lista patto Mincione in assemblea con 9,99%, rischio stallo governance | Reuters

Conclusions

Coming to the end of this dissertation, it is clear that the notion of acting in concert has taken on fundamental relevance in the Italian context as a clear anti-elusive tool. The institution analyzed is set within a regulatory context aimed at shedding light on significant shareholdings in listed companies and in those that, although not listed, operate in sectors of particular economic and social importance, such as banking, where the need for transparency emerges, even more poignantly. Alongside a broad legal notion of "acting in concert", the Italian banking system should clearly indicate what factors lead to the conclusion that relevant shareholders are "acting in concert". In this way, European and Italian competent authorities would accelerate its supervision and develop a more consistent supervisory practice, thereby ensuring a legal and administrative framework that allows for predictable decisions. The literature on banking firm governance can be summarized as follows: takeover markets, regarded as a cornerstone of a corporate governance market system, are probably overrated as a governance mechanism. Rather, banks' natural access to funds favors a free cash flow interpretation of many mergers.

Upon conclusion of the conducted analysis and in light of the analyzed case study, it is evident that the notion of “persons acting in concert“ should remain flexible and adaptable to the different objectives pursued in the various regulations. With particular regard to shareholder cooperation in lending institutions, it is important to dwell on the difference between “acting in concert“ and “shareholder engagement“, examining the relationship between shareholders, the effects resulting from such cooperation, and the relevant beneficiaries. In this rationale, among other things, the existence of concert in the conduct of the company was derived directly from the finding of the existence of a shareholders' agreement. If this difference is not precisely drawn, the over-regulation of “acting in concert“ would hinder the monitoring of management, reducing the value of the enterprise. In fact, both acting in concert to evade legal obligations and exercising shareholder rights to monitor management depend on shareholder cooperation. In conjunction with a broad legal definition of "acting in concert," it is essential for the Italian banking system to clearly specify the elements that result in the assessment that significant shareholders are participating in concerted actions. In this manner, the competent authority would speed up its supervision and

develop a more consistent supervisory practice, thereby ensuring a legal and administrative framework that allows for predictable decisions.

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DIPARTIMENTO DI IMPRESA E MANAGEMENT
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ACTING IN CONCERT AND BANKS' OWNERSHIP STRUCTURE REGULATION: THE BANCA CARIGE CASE

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Abstract

1) ***The "Acting in concert" concept in the Italian legal system: general profiles and normative evolution***

The regulation of concert action in the Italian legal system is characterized by a strong regulatory "stratification", which has also made the interpretation and application of the institution in our country particularly difficult. In particular, as far as the national legal system is concerned, it is first of all necessary to point out that Law 149 of 1992 in regulating, for the first time, the subject of "public offers to sell, subscribe, purchase and exchange securities", did not contain an express regulation of the institution in question. The need for a more comprehensive regulation of concerted action has been increasingly recognized by the Italian Securities and Exchange Commission (Consob) as well. In 1995, Consob emphasized the need to modify the regulations concerning public takeover bids (OPAs) to require a public offer even in cases of concerted action when a certain level of ownership was exceeded.

The purpose of this dissertation is to introduce the concept of concerted action in both the European and national contexts to understand its effects as far as credit institutions are concerned. The main element of criticism that was found in the reported notion of concerted action was based on the excessive discretion that it could determine, especially due to the fact that,

in practice, control situations are hardly consecrated in written agreements, thus appearing to be not always easily identifiable. More generally, there were complaints about the risk of excessive vagueness of the rule, a harbinger of not a few interpretative and applicative uncertainties that are difficult for the interpreter to overcome.

Alongside a broad legal notion of "acting in concert", the Italian banking system should clearly indicate what factors lead to the conclusion that the relevant shareholders are "acting in concert". By doing so, the Italian regulatory authority would enhance its oversight and develop a more consistent supervisory practice, ensuring a legal and administrative framework that allows for predictable decisions.

It is worth noting that, prompted by the "maximum harmonization"prescribed by EU regulations (such as the sixth recital of Directive 2007/44/EC), the attention to extra-statutory agreements that affect the management of credit institutions is not unique to the Italian legal system. Similar concerns are found in other EU legal systems, some of which, despite already contemplating a regime of transparency of shareholders' agreements relating to listed companies have, however, maintained a particular regulation, for

banking institutions. However, the elements that define the perimeter of significant influence resulting from agreements entered into outside the statutory seat, are *share ownership* and/or *voting rights*. In particular, Article 122 of the Consolidated Financial Law (T.U.F.) – which, compared to the provisions of the Italian Civil Code, seems to cover a wider range of shareholders' agreements – imposes specific obligations of publication, specifically divided into three fulfillments: communication to Consob; publication in the daily press; and filing with the Register of Companies. These obligations, moreover, are provided for under penalty of nullity of the pacts themselves, which is also followed by the suspension of the right to vote, as well as the administrative sanction under Article 193 T.U.F.. Article 123 of the same decree deals instead with the duration of the pacts, providing - again in observance of the principle of transparency - a time limit in order to hinder the indefinite continuation of concentrations of power. In fact, the aforementioned article provides that shareholders' agreements, if stipulated for a fixed term, cannot, in any case, have a duration of more than three years, even where the parties have established a longer duration, without prejudice to the possibility of renewal.

In conclusion of the conducted analysis, it can be seen that the notion of "persons acting in concert" should remain flexible and adaptable to the different objectives pursued in the various regulations.

With particular regard to shareholder cooperation in lending institutions, it is important to dwell on the difference between "acting in concert" and "shareholder engagement", examining the relationship between shareholders, the effects resulting from such cooperation, and the relevant beneficiaries involved. If this difference is not precisely drawn, an overregulation of "acting in concert" threatens to hinder management monitoring, reducing the value of the enterprise. Indeed, both acting in concert to evade legal obligations and exercising shareholder rights to monitor management depend on shareholder cooperation. Alongside a broad legal notion of "acting in concert", the Italian banking system should clearly indicate what factors lead to the conclusion that relevant shareholders are "acting in concert". In this way, the Italian competent authority would speed up its supervision and develop a more consistent supervisory practice, thereby ensuring a legal and administrative framework that allows for predictable decisions.

2) Acting in concert and banks' equity participations regulation

As has been pointed out, the acquisition of a qualified shareholding in the capital of credit institutions has always been the subject of investigation and attention on the part of national and supranational legislators: the latter, in particular, have intervened several times on the subject in order to harmonize, as much as possible, the regulations of national systems. Moreover, even administrative case law - especially in a well-known ruling by the Lazio Regional Administrative Court, also referred to by the Governor of the Bank of Italy in his report to the CICR ("Comitato interministeriale per il Credito ed il Risparmio)" - has highlighted how the scope of the regulations on the purchase of qualified shareholdings can be «*fully perceived only when one bears in mind the significant changes, induced by EU-based sources, that have affected banking intermediaries (the nature of which is now completely freed from outdated public schemes)*». And it is precisely in this context that the recent regulatory intervention set out in Legislative Decree 182 of 2021, aimed, among other things, at dictating new rules on capital requirements in the banking sector, fits in. With it, in fact, an attempt was made to implement, in our system, Directive (EU) 2019/878, and to adapt national regulations to the provisions set out in Regulation (EU) 2019/876, on Capital Requirements Directive (CRD)

and Capital Requirements Regulation (CRR), respectively. The main objective of this regulatory intervention was to define, at the national level, the minimum requirements referring to capital and other instruments that a bank must hold in order to be able to operate safely and cope independently with operational losses.

The most relevant aspect, for the purposes of this dissertation, of the new regulatory intervention, however, relates to the identification of the notion of "*relevant holding*" in the capital of banks.

In particular, the new legislation has also affected art. 20 TUB, imposing on those authorized to purchase shareholdings, a peculiar disclosure obligation vis-à-vis the Bank of Italy concerning acts and facts that could cause the conditions and prerequisites on the basis of which the authorization was issued, to lapse or change; but above all Legislative Decree no. 182 of 2021 replaced the regulations on indirect shareholdings and concerted purchases set forth in art. 22 TUB: the so-called "multiplier criterion" is now provided for the identification of parties who intend to indirectly acquire a qualified shareholding through a shareholding chain, to be used together with the "control criterion" already provided for by the TUB. The new provision, therefore, delegates to the Bank of Italy the task of concretely identifying the cases in

which, taking into account the "demultiplication", the chain of shareholding gives rise to indirect qualified participation and the consequent authorization obligation.

By virtue of the legislature's express stance on the point, the disclosure requirements set forth in paragraph (b) of the same provision apply only to cases occurring "after" the entry into force of the new provision, while they cannot be applied to already existing chains of participation. Doctrine, moreover, has pointed out the need for intervention by the legislature to provide a transitional provision regarding indirect qualifying holdings through participatory chains, which Article 22 T.U.B. deals with for the first time.

The old Article 22, co. 1-bis, T.U.B. provided for the application of the entire Chapter III also in the case of «*acquisition of shareholdings by more than one person who, on the basis of agreements in any form concluded, intend to exercise in a concerted manner the relative rights, when these shareholdings, cumulatively considered, reach or exceed the thresholds indicated in Article 19*». The provision, in particular, extended the disclosure duties provided for in the Consolidated Law on indirect shareholdings to all those "agreements" between shareholders that

result, even potentially, in effects coinciding with those resulting from the ownership of a shareholding.

This provision has been substantially replaced by the new Art. 22-*bis*, which provides verbatim that «*for the purposes of the application of Chapters III and IV of this Title, the acquisition or holding of shareholdings by more than one person who, on the basis of agreements in any form concluded, even if invalid or ineffective, intend to exercise the relevant rights in a concerted manner, when such shareholdings, cumulatively considered, reach or exceed the thresholds indicated in Article 19 or entail the possibility of exercising control or significant influence, is also subject to prior authorization pursuant to Article 19*». The main reference is to the aforementioned shareholders' agreements, i.e., those agreements that are entered into outside the articles of incorporation and bylaws and that have the effect of "obligating" the stipulating parties to behave in a certain way within or toward the company. Among the main objectives pursued through the conclusion of such agreements is undoubtedly that of stabilizing corporate governance through agreements aimed at conditioning administrative activities and the formation of shareholders' resolutions (so-called voting syndicates), as well as that of stabilizing the ownership structures of the company through constraints on the free transfer of shares (so-called lock-up syndicates).

Hence, the need felt by the legislator - especially in the financial and credit sector - to ensure maximum transparency of power structures, including through the imposition of disclosure and transparency obligations with respect to all possible situations of control, including - for the reasons already stated - shareholders' agreements. Well, for all the reasons stated so far, it appears evident how the aforementioned is manifested, even more clearly, in the banking sector, prompting the legislator to regulate shareholders' agreements even within the T.U.B, by providing, in paragraph 2 of Article 20, that *«any agreement, in whatever form concluded, including those in the form of an association, which regulates or from which in any case may result the concerted exercise of voting in a bank, including a cooperative bank, or in a company that controls it must be communicated to the Bank of Italy by the participants or by the legal representatives of the bank or company to which the agreement refers»*. When the agreement derives from concerted voting such as to jeopardize the sound and prudent management of the bank, the Bank of Italy may suspend the voting rights of the participants in the agreement. In any case, for what is most relevant here, it is worth pointing out that under the old regulations - that is, Art. 22, co. 1-bis, T.U.B. - CICR Decree No. 675 of 2011, had provided, in

Art. 5, a particularly relevant and significant rule on ownership structures, aimed - in light of what was expressly noted in the Bank of Italy's Illustrative Report - at avoiding circumvention of the regulations on concerted purchases, considering such, and therefore requiring prior authorization, even voting agreements entered into in the year following the purchase.

In particular, as will be better seen below in relation to the case involving Banca Carige, the aforementioned Illustrative Report of the Bank of Italy clearly specified how Directive 2007/44/EC required the prior authorization of acquisitions by more than one party wishing to exercise "in concert" the relevant rights, but left to member states the choice of whether or not to subject voting syndicates to authorization as well, in the absence of new shareholding purchases or independently of them.

3) Case Study: The Carige *affaire*

The dissertation involved the analysis of a practical case, that of B*anca Carige*, in which the shareholder agreement concerning the exercise of voting rights in the appointment of corporate bodies was examined. The shareholder agreement concerning the exercise of voting rights in the appointment of corporate bodies is limited to the ordinary shareholders' meeting held on September 20, 2018,

where the new Board of Directors was appointed. This agreement was signed by the following companies: *Pop12*, *Lonestar*, and *Spininvest*, collectively binding 15.198% of Banca Carige's capital. The members of the agreement undertake to provide support for the list submitted by Time&Life and Pop12 companies by also establishing a number of members equal to fifteen. The duration of the agreement is scheduled until the resolution of the items on the agenda. The membership shares in the covenant are distributed as follows: the company Pop12 4.428%, Lonestar Company with 9.087%, and Spininvest with 0.683%.

The three shareholders thus go on to bind all the shares of the bank held by them to a shareholders' agreement, no later than 12 months after the last increase in shareholding, for a total share of 15%.

The publicity requirements set forth in Articles 122 T.U.F. and 20, paragraph 2, T.U.B. are fulfilled and an abstract is published on the bank's website. A few days before the Shareholders' Meeting is convened, the bank's largest shareholder files a petition with the Court of Genoa for failure to obtain prior authorization from the three shareholders imposed by Article 19 T.U.B. and

supplemented by Articles 22 T.U.B. and 5 of the Decree of the Chairman of the Interministerial Committee for Credit and Savings (CICR) number 675 of 2011, implementing the delegation of authority in Article 19, paragraph 9, of the T.U.B.

The minority shareholders do not have voting control of the company, and, in the absence of a shareholders' agreement, these shareholders will exercise minimal influence in the management of said company. Key management decisions may be made by the few controlling shareholders who own more than 50% of the company and may not consider the input of minority shareholders. Although the bylaws protect minority shareholders, the provisions can often be changed through special resolutions approved by the majority of shareholders. The shareholders' agreement can fill these gaps by requiring that key decisions of the company be approved by all shareholders, regardless of their voting power.

These rules limit the ability of majority shareholders to override minority shareholders when making certain decisions, such as issuing new shares, taking on new debt, appointing and removing directors, etc. So, the three parties of the agreement allegedly acquired, without authorization, interests that involve control or the

possibility of exercising significant influence or that allocate a share of voting rights or capital of at least 10%, on the basis of agreements that allow for the concerted exercise of the relevant rights, and, therefore, the acquisition is also considered to be in concert even when the agreements are entered into within the year following the acquisition or change of the shareholding.

For the plaintiff, the lack of authorization led to a concerted excess of the 10% threshold and also to a joint exercise of significant influence over the bank since the purpose was to achieve a majority of board seats in the presence of a statutory election rule based on proportionality. Following these clarifications, the plaintiff seeks the application of the civil law sanction governed by Article 24, paragraph 1 T.U.B., that is, the prohibition of exercising "voting rights and other rights that allow one to influence the company" pertaining to "shareholdings for which authorizations have not been obtained or have been suspended or revoked". The hypothesis is that of illegitimacy due to the failure of the valid exercise of rights relating to the shareholding representing the capital ratio required by the bank's bylaws for the submission of lists. The Bank of Italy taking note of the union pact stipulates that "in the absence of authorization - for which, in

any case, it invites the submission of an application - voting rights and other rights that allow influence over the company cannot be exercised for the shareholding that in the aggregate equals or exceeds the aforementioned threshold of 10% of Banca Carige's capital".

This is a rather general communication that does not dispel the issue or intervene on matters of critical importance. The Bank of Italy, in fact, does not ascertain the existence or non-existence of significant influence, stopping at ascertaining that the threshold has been exceeded in the absence of authorization. In addition, the doctrine highlights how the wording of the notice traces the first paragraph of Article 24 of the T.U.B., namely, «*Voting rights and other rights that allow influence over the company inherent in the shareholdings for which the authorizations provided for in Article 19 have not been obtained or have been suspended or revoked cannot be exercised*». The reference to the aforementioned article, however, did not provide clarity on the issue, leaving it to the interpreter to determine what are the "other rights that allow influence over the company". The authority sterilizes the voting rights in excess of the 10% threshold of Carige's capital in the absence of the signed covenant's authorization

of joint participation. The concept of “influence” understood as an “elliptical form” of the expression “significant influence” has also been debated, suggesting a kind of parity between the case of the exercise (in concrete terms) of significant influence and the case of a shareholding greater than 10%, circumstances that instead remain separate from the plaintiff. It appears as if the participation greater than 10% provides the possibility of considerable influence over the bank, leading to a “sterilization” of the excess part of the voting rights, in this way the Bank of Italy would disprove the plaintiff's argument that in the presence of considerable influence, the sterilization should concern the entire unauthorized participation.

If, on the other hand, we refer to a concept of influence in a broad sense as a generic power to concur in the company's governance decisions, it would appear as the Bank of Italy refrained from taking a position on the exercise of significant influence by the concerting parties, limiting itself to considering only one of the three cases covered by Article 19 T.U.B., namely the exceeding of the 10% threshold , and this would lead to a sterilization of fees only for the difference. In this case, the plaintiff's request would remain rejected; in fact, it is stated that the Bank of Italy has not expressed

itself for the trivial reason that no one has asked it about it.

As mentioned earlier, the wording of the communication clearly traces the first paragraph of Article 24 T.U.B., leaving the intention of the Bank of Italy official to rely on the (deemed) safe wording of the T.U.B.. Similarly, there was an amendment to the conclusion of the paragraph that did not provide clarity as a whole, leaving doubt as to whether the two cases were "intermingled".

"Other rights that allow influence over the company" are regulated by Article 24 following the coordination of the organic reform provisions of corporate law of 2003 with the banking and financial single texts, in order to consider the novelties resulting from the entry into the system of participatory financial instruments that can still provide the possibility of attributions of other rights of an administrative-participatory type and thus provide the possibility of "influencing" management. Precisely in order to include, in the notion of shareholdings, these new financial instruments, Legislative Decree 37 rewrote the provision by removing the specification *«to the capital»* and inserting the following phrase *«other rights that allow to influence the company»*.

Banking executives live in a more complex environment than their industry peers because of strict banking regulations. In addition to shareholder demands, regulators have strong incentives to influence managerial action, and this can conflict with shareholder demands. The literature on the governance of the banking enterprise can be summarized as follows: takeover markets, regarded as a cornerstone of a corporate governance market system, are probably overrated as a governance mechanism. Rather, banks' natural access to funds favors a free cash flow interpretation of many mergers. In particular, it has already been mentioned that the regulatory interest in mergers to achieve the necessary consolidation of the banking sector should be examined more closely. The findings on executive share ownership have been shown to parallel those on the governance of industrial enterprises: ownership can have both positive and negative effects. So, shareholders' agreements assume specific relevance in two other, fundamental provisions of Legislative Decree No. 385/1993: the one referring to "purchases in concert" under Article 22, paragraph 1-*bis*, T.U.B., and the one relating to the notion of "control" under Article 23 T.U.B. The first rule of Directive 2007/44/EC (no longer in force but

which should be cited for its innovative character) provides that, for the application of Title II, Chapters III and IV T.U.B., *«the acquisition of shareholdings by more than one person who, on the basis of agreements in whatever form concluded, intend to exercise in a concerted manner the relevant rights, when such shareholdings, cumulatively considered, reach or exceed»* the thresholds indicated in Article 19 T.U.B. In addition, by virtue of Article 23(2), dominant influence is deemed to exist, unless proven otherwise, in the hands of the *«person who, on the basis of agreements, has the right to appoint or dismiss the majority of the directors or supervisory board or has alone the majority of votes for the purposes of resolutions relating to the matters referred to in Articles 2364 and 2364-bis of the Civil Code»*. The Bank of Italy's illustrative report points out that Directive 2007/44/EC required prior authorization of acquisitions by more than one party intending to exercise the relevant rights in concert, while it left it up to member states to decide whether to also subject to authorization the stipulation of voting pacts in the absence of or independently of new shareholding purchases. The TUB has ruled out this extension; Article 5(1) refers to "purchases in concert", while for voting agreements entered into in the absence of purchases or independently of

them, only the ex post facto power of intervention provided by Article 20 TUB remains. Article 5(2) of the CICR Decree stipulates that voting pacts entered into within the year following the purchase are also considered purchases in concert. So, if the shareholders' agreement of August 25 constitutes a relevant concert agreement within the combined provisions of Articles 19 and 22 TUB and 5 of CICR Decree 675/201, *"are subject to prior authorization by the Bank of Italy the acquisition and change of shareholdings by several persons who, on the basis of agreements in any form concluded, intend to exercise in concert the relevant rights, when such shareholdings, cumulatively considered and together with those already held, reach or exceed the thresholds referred to in Article 2 or attribute control or the possibility of exercising significant influence over the supervised enterprise. The purchase is also considered to be in concert when the agreements are entered into within the year following the acquisition or change of the shareholding".*

Therefore, the position of the covenants appears illegitimate as they did not request prior authorization. Following the assessment made by the Bank of Italy, called upon to conduct a preliminary assessment involved in the procedure by the ECB, it will be necessary to wait for the decision of the European Supervisory Authority. If

the shareholding of more than 10% is authorized, the covenants will have the opportunity to exercise the rights corresponding to 15.198%; otherwise, it will be necessary to assess whether the 9.99% shareholding remaining in the hands of the covenants constitutes a situation of significant influence over the Bank, with the need for a further authorization process.

The Bank of Italy in its September 13 communication considered the existence of a relevant concert in the shareholders' agreement of August 25 concluding that it was necessary to apply for authorization to exercise the rights related to the shareholding. Concluding, the defenses are twofold: 1) the acquisition during the year of shareholdings would have concerned only Pop12 as Lonestar would only have subscribed for shares as a consequence and 2) in coincidence with the capital increase operation that affected the Bank, and the agreement would not constitute a concert as it would not refer to an agreement on the company's management.

The Genoa court's ruling n.10907 of September 19 2018 thus aligns with the Bank of Italy's notice, ruling that at the shareholders' meeting, the list presented by Pop12 as representing the shareholders' agreement could express voting rights equal to only 9.99% of the share capital, as opposed to the 15.2% subject to the agreement.