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THE TAKEOVER BID REGULATION IN EUROPE AND THE JAPANESE CASE

AN ANALYSIS OF SQUEEZE-OUT AND SELL-OUT RULES AND EMPIRICAL EVIDENCE FROM THE ITALIAN MARKET

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TABLE OF CONTENTS

CHAPTER I: TAKEOVER REGULATIONS IN THE EUROPEAN UNION. COMPARATIVE ANALYSIS OF THE IMPLEMENTATION OF REGULATORY PROVISIONS ON SQUEEZE-OUT AND SELL-OUT 7

1.1. Capital Markets Union and relevance of takeover bid regulations in the European Union. 7

1.1.1. Historical overview of takeover regulations and the pivotal role of Anglo-Saxon model. 12

1.1.2. Economic and strategic profiles of takeover bids. 16

1.1.3. Corporate governance issues: the bidder identity and the purposes of takeover bids. 20

1.2. Objectives pursued and interests protected in the Directive 2004/25/EC on takeover bids. 24

1.2.1. Sources of national law and supervisory authorities. 27

1.2.2. The implementation of the takeover Directive in European Union countries. Voluntary and mandatory aspects. 32

1.3. The regulatory cases of squeeze-out and sell-out. 36

1.3.1. *Ratio* and historical origins of squeeze-out and sell-out institutions. 38

1.3.2. Squeeze-out and sell-out in national laws. 41

1.3.3. Different legal instruments to achieve the same goal: the scheme of arrangement in the United Kingdom. 47

1.3.4. Capital markets and the phenomenon of delisting. 49

1.3.5. Public-to-private transactions: the delisting takeover bid. 52

CHAPTER II: THE DISCIPLINE OF TAKEOVER BIDS IN ITALY SQUEEZE-OUT, SELL-OUT AND A POSSIBLE REFORM OF THE TUF 55

2.1. The Italian market of corporate control. Empirical evidence 55

2.2. The regulation of takeover bids in Italy: from the origins to the TUF 57

2.2.1. Systematization of the discipline: the entry into force of the TUF 58

2.2.2. The role of Consob and the Regolamento Emittenti 60

2.2.3. Transposition of the Takeover Directive: gold-plating and internalization of European guidelines into Italian law 62

2.3. Squeeze-out and sell-out included in Italian legislation as typical capital markets rights 63

2.3.1. Articles 108 and 111 of the TUF and operational implementation by the Regolamento Emittenti 65
2.3.2. Theoretical assessment and practical value of regulatory standards 74
2.3.3. Italian capital market: prospects for the development of the corporate control market 82
2.4. Proposal for reform of the TUF: innovation in takeover bid regulations inspired by best practices 83
2.4.1. Extension of the scope of application of squeeze-out and sell-out. Balance or imbalance between market freedom, delisting trend and private equity development 86
2.4.2. Towards the introduction of the scheme of arrangement into Italian law? 87

CHAPTER III: EMPIRICAL EVIDENCE FROM THE ITALIAN CORPORATE CONTROL MARKET 91

3.1. Data and methodology 91
3.2. Evidence collected and data analysis 91
3.3. Data analysis conclusion 114

CHAPTER IV: COMPARING LEGAL AND MARKET SYSTEMS. DISCUSSION ON TAKEOVER BID REGULATION IN THE JAPANESE CASE 117

4.1. Cultural influence on the legislative system: emphasis on corporate governance and capital markets 117
4.2. Japanese regulatory system governing takeover bids: corporate law and capital markets regulations 122
4.2.1. Peculiarity of Japan's interpretation of the *ratio iuris*. Post-takeover norms 127
4.3. Final thoughts on the Japanese model. Eastern and Western conceptions 132

LIST OF TABLES

Table 1. Legislative framework on takeover bids following the Takeover Directive and supervisory authority by country 28

Table 2. Squeeze-out and Sell-out in national laws after Takeover Directive 42

Table 3. Offers sorted by type and year 92

Table 4. Countervalue collected by type of offer and by year (countervalue in millions of euros) 92

Table 5. Top ten offers by countervalue collected (countervalue in millions of euros) 95

Table 6. Offers sorted by nature and year 96

Table 7. Incidence of offer nature on classification by motivation 96

Table 8. Countervalue collected by nature of offer and by year (countervalue in millions of euros) 97

Table 9. Offers sorted by trading venues 98

Table 10. Programmed and pursued delisting broken down by offer motivation 105

Table 11. Weight of programmed and pursued delisting on total offers made (on an annual basis) 106

Table 12. Delisting pursued broken down by listing trading venue 108

Table 13. Offer premiums by offer type 109

Table 14. Analysis of premiums by offer motivation 111

LIST OF FIGURES

Figure 1. Evolution of the number and countervalue of offers in the period 2020-2025 (countervalue in millions of euros) 94

Figure 2. Geographical origin of the bidders 99

Figure 3. Breakdown of bidders by geographical origin and type 100

Figure 4. Sector of issuers 102

Figure 5. Motivation for the offers 104

Figure 6. Comparison between programmed delisting and pursued delisting 108

Figure 7. Evolution of mandatory and voluntary offers and their average 1-year premiums 110

Figure 8. Comparison between average 1-day premiums and market performance 113

Introduction

This dissertation starts from the assumption that the regulation of takeover bids constitutes a structural, and not merely sectoral, element of the European project of capital market integration, directly affecting the depth, attractiveness, and resilience of national financial system.

The first chapter introduces the role of Directive 2004/25/EC within the broader framework of the European Union's Capital Markets Union (CMU) project, which has recently been relaunched and developed with a view to creating a more structured Savings and Investments Union (SIU), aimed at establishing a fully integrated capital market as an essential prerequisite for European economic integration.

Starting from this assumption, the thesis introduces the economic instrument of takeover bids and develops a comparative regulatory analysis of takeover bid regulations in Member countries, with particular attention to squeeze-out and sell-out institutions and their different national variations. The centrality of these instruments emerges considering the wave of delisting affecting European capital markets. Going private transactions are frequently carried out through takeover bids aimed at delisting, in which the application of squeeze-out and sell-out clauses plays a decisive role. This phenomenon appears, at least at first glance, to be at odds with the SIU's objectives of strengthening the integration and attractiveness of the single capital market, making it necessary to conduct an in-depth analysis of the current regulations and their systemic implications.

The second chapter focuses on Italian legislation, reconstructing the legislative process of transposing the Takeover Directive into the TUF and analysing its application within the national market. Attention is focused on the harmonization of squeeze-out and sell-out clauses in accordance with European principles and on the importance of these instruments in the current configuration of the corporate control market, characterized by a significant flow of going private transactions. In this context, the recent proposal to reform the TUF is also examined in light of current regulations and the stated objectives of increasing the attractiveness of capital markets, expanding the freedom of operators, and encouraging the use of alternative fundraising instruments.

The third chapter develops an empirical analysis of the Italian market by examining transactions carried out in the period 2020-2025, with the aim of identifying trends relating to the characteristics of the transactions, the type of bidders, and the motivations underlying the dynamics of corporate control. The quantitative survey aims to provide empirical evidence for the regulatory arguments outlined in the thesis, verifying the consistency between the regulatory framework and its application in practice.

Finally, the fourth chapter offers a comparative analysis of the Japanese case, as a point of comparison with a highly developed capital market characterized by different cultural, economic, and legislative assumptions regarding the regulation of takeover bids. The aim is to offer further insight into how the

regulation of the control market can affect the degree of openness, development, and innovation of financial markets in an increasingly globalized context.

The dissertation thus contributes to the debate on financial markets law, arguing that the regulation of takeover bids is not an isolated segment of financial markets discipline, but rather a structural element of the broader project of European capital markets integration and contemporary thinking on competitiveness and the evolution of economic systems.

CHAPTER I

TAKEOVER REGULATIONS IN THE EUROPEAN UNION. COMPARATIVE ANALYSIS OF THE IMPLEMENTATION OF REGULATORY PROVISIONS ON SQUEEZE-OUT AND SELL-OUT

1.1. Capital Markets Union and relevance of takeover bid regulations in the European Union.

The 1957 Treaty of Rome establishing the European Economic Community (CEE) did not set any objectives for the unification of the capital market laws of the various Member States. This project was instead initiated by the 1966 Segré Report. The European Commission and the Council of the European Union[1] proposed the creation of an internal market that would require a European capital markets law to harmonise national laws. The harmonisation process, following the Segré Report, developed in five stages, culminating in 2015 in the idea of the Capital Markets Union[2]. On 30 September 2015, the European Commission promulgated the Capital Markets Union Action Plan[3], containing twenty key measures to achieve a true single market for capital in Europe. The project is based on the awareness that European capital markets are not as developed as their American counterparts, even though the European and American economies are of equal size[4]. The European Union has set out to change this situation by integrating capital markets so that they can guarantee efficiency and finance growth[5].

The main objectives of the Capital Markets Union are to strengthen the Economic and Monetary Union by helping to absorb economic shocks in the euro area, create new jobs, and attract capital from within the EU and the rest of the world to complement traditional bank financing of businesses in Europe[6].

To achieve these goals, the Action Plan aims to develop new sources of financing for businesses, particularly small and medium-sized enterprises; reduce the cost of raising capital; increase the supply of

[1] The European Economic Community became the European Union with the Maastricht Treaty of 1992. For a chronology of the various treaties that have affected the current European Union and their purposes, please refer to: https://www.europarl.europa.eu/about-parliament/en/in-the-past/the-parliament-and-the-treaties.

[2] The five phases can be summarised as follows: the coordination of stock exchange and prospectus laws, which lasted from 1979 to 1982; the harmonisation of the Laws on Securities Markets, which lasted from 1988 to 1993; the reorganisation of the laws on prospectus and securities, which lasted from 2003 to 2007; overcoming the financial market crisis through unification of European law and a European supervisory architecture, lasting from 2009 to 2016; and finally, the actual capital markets union, which began in 2015 and is still being completed today. For an in-depth discussion of the implementation history of the Capital Markets Union, see VEIL R., *European Capital Markets Law*, 2022, Oxford, pp. 4-25.

[3] The first Action Plan is available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52015DC0468.

[4] On this point, VEIL R., *European Capital Markets Law*, 2022, Oxford, p. 21 and VENTORUZZO M., *Europe's Thirteenth Directive and U.S. Takeover Regulation: Regulatory Means and Political Economic Ends*, 2006, Penn State Law, available at: https://insight.dickinsonlaw.psu.edu/fac_works/277/, p. 173.

[5] EUROPEAN COMMISSION, *Action Plan on Building a Capital Markets Union*, 2015, COM(2015) 468, Brussels, 30 September 2015, p. 3

[6] *Ibidem*. Precisely, stronger capital markets should (i) unlock more investment from the EU and the rest of the world, (ii) improve the connection between financing and investment projects throughout the EU, (iii) make the financial system more stable and (iv) deepen financial integration and increase competition.

savings across the EU; facilitate cross-border investment and attract more foreign investment into the EU; support long-term projects; and make the EU financial system more stable, resilient and competitive[7]. Among the legislative and non-legislative measures implemented, the most effective can be identified in the Regulation (EU) 2017/1129 (Prospectus Regulation), directly applicable in all Member States, which establishes a uniform legal situation for the public offer and admission of securities to trading on a regulated market. The new rules contained therein have been formulated to enable investors to make informed decisions, increase transparency, simplify the rules for companies wishing to issue shares or debt, and foster cross-border investments in the single market.

Other examples include Regulation (EU) 2017/2402 (Securitisation Regulation), which aims to revitalise the securitisation market in Europe, which had collapsed due to the financial market crisis, through a framework for simple, transparent and standardised securitisations; the reform of the European Supervisory Authorities[8] established in 2009, with the aim of integrating Environmental Social and Governance (ESG) concerns and strengthening the powers to promote supervisory convergence; the Regulation on European Crowdfunding Service Providers (ECSP) for Business that create an optional regulatory regime to complement national regulations on crowdfunding; the Directive 2014/65/EU (MiFID II), that introduced the category of "SME growth market" in EU law, and reformed by Regulation (EU) 2019/2115 to reduce the administrative burden and thus ensure greater liquidity in SME growth markets; the Regulation (EU) 2019/2088 on sustainability-related disclosure requirements in the financial services sector (SFDR – Disclosure Regulation) and the EU Regulation on the Establishment of a Framework for Facilitating Sustainable Investments (SFTaxR –Taxonomy Regulation) that pursue the goal of environmental protection through financial markets law and encourage the establishment of sustainable finance[9].

European legislation has intervened with harmonisation measures to reduce the fragmentation of the internal market caused by national laws, which, in the absence of a common framework, would have adopted a heterogeneous set of rules that would have blocked the smooth functioning of the capital market. This unifying action has been implemented above all in areas where regulation has been introduced, which is directly applicable in all Member States' legal systems. The use of regulations increases confidence in the transparency of the single market and reduces regulatory complexity as well as search and compliance costs for companies. Nevertheless, they increase the regulatory complexity of Member States and generate significant capital costs.

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[7] *Ibidem.*

[8] European Banking Authority (EBA), European Securities and Markets Authority (ESMA), European Insurance and Occupational Pensions Authority (EIOPA), also called ESAs. For a discussion of authorities, see M. PELLEGRINI, *Corso di diritto pubblico dell'economia*, 2016, Assago: Wolters Kluwer, p.

[9] For further information and references on the measures adopted under the Capital Markets Union Action Plan, see VEIL R., *European Capital Markets Law*, 2022, Oxford, pp. 21-25.

For this reasons, eleven years after the Action Plan was issued, the European market is still fragmented, and this makes it impossible for European citizens and businesses to take full advantage of the competitive, efficient and reliable sources of funding and investment that capital markets can offer. In this regard, an innovative Action Plan was introduced in 2020, the Capital Markets Union 2020 Action Plan[10], that reports sixteen legislative and non-legislative actions to deliver on three key objectives: support a green, digital, inclusive and resilient economic recovery by making financing more accessible to European companies; make the EU an even safer place for individuals to save and invest long-term; integrate national capital markets into a genuine single market.

Nevertheless, there are strong and persistent barriers to the Capital Markets Union due to resistance from Member States' national laws and the existence of multiple supervisory authorities[11]. The literature discusses a choice in this regard: either abandoning the pursuit of the Capital Markets Union or proposing an effective integration of national laws[12] and the enforcement of a single supervisory authority, which would entail the ESMA in charge of EU-level conduct-of-business supervision across the financial system including the banking and insurance sectors[13]. Following more than ten years of experience since the start of the Capital Markets Union initiative, a single rulebook no longer seems sufficient, and the increase in ESMA's powers appears to be supported by positive examples of supervision at European level, such as that of the European Central Bank regarding the banking union[14]. To date, the most recent proposal of reform that also pursues the goals of the CMU and Banking Union is the Savings and Investments Union

[10] "A strong and complete CMU is needed now more than ever, in order to support the economic recovery following the COVID-19 crisis and finance the green and digital transitions. In addition, CMU can contribute to a more inclusive and resilient society, notably by helping to meet the challenges posed by an ageing population. Lastly, integrated capital markets are crucial for the EU's global competitiveness and its autonomy". Available at: https://finance.ec.europa.eu/capital-markets-union-and-financial-markets/capital-markets-union/capital-markets-union-2020-action-plan_en.

[11] VEIL R., *European Capital Markets Law*, 2022, Oxford, p. 25.

[12] *Ibidem*.

[13] VÉRON N., *Capital Markets Union: Ten Years Later*, 2024, European Parliament, Economic Governance and EMU Scrutiny Unit (EGOV), Brussels. This is a general overview, applied to the Capital Markets Union. If we consider individual directives, an *ad hoc* compromise could be found for each specific case, but this would require considerable effort to interpret European legislation in relation to the different choices made by Member States during implementation. In the case of the Takeover Directive, for example, while it is true that there is a margin of discretion in the implementation of certain rules, it could be counterargued that Article 56 of the Treaty establishing the European Community (Consolidated version 2002, available at: https://eur-lex.europa.eu/eli/treaty/tec_2002/oj/eng) requires the abolition of obstacles to the free movement of capital. Therefore, "any implementation of the Directive in a manner that creates obstacles or restrictions to takeovers ought to be interpreted as being contrary to one of the fundamental Treaty freedoms – the free movement of capital." MUKWIRI J., *Takeovers and the European Legal Framework: A British Perspective*, 2009, New York: Routledge-Cavendish, cit. p. 140. On the other hand, the author himself acknowledges the difficulty of applying this theory, as it is the Directive itself that creates these obstacles. What emerges from this reading, and which is extremely interesting in this context, is that takeovers currently do not have a regulatory framework that maximises the free movement of capital between EU Member States.

[14] The proposal would provide for a twin-peaks model consisting of the ECB as the prudential supervisory authority and ESMA as the authority responsible for supervising investor protection and market conduct, with greater direct powers, more autonomy and an independent financing structure. This would remove the single market from excessive supervisory influence by national authorities and enable an equal level of transparency and efficiency to be achieved. *Ibidem*.

(SIU)[15]. The project aims to create better financial opportunities for EU citizens and simultaneously improve the capacity of the European financial system by connecting savings to productive investments – especially in areas of greatest impact, such as climate change, rapid technological shifts, and new geopolitical dynamics. The European Commission launched a Call for Evidence on 3 February 2025 to collect data to inform the approach to SIU, which kick-started the entire process[16]. Following the strategy's official launch in March 2025, a consultation was held on April 15 involving stakeholders, including financial institutions and other market participants, national supervisors, national ministries, the European Supervisory Authorities, EU institutions, non-governmental organizations, think tanks, consumers, users of financial services, and academics. This consultation aimed to gather feedback on obstacles to financial market integration across the EU, in order to identify and address such barriers to facilitate a more market-driven process for developing and integrating EU capital markets, as a key aspect of implementing the SIU. Following the launch of a feedback channel and a call for evidence on market integration, the first two legislative proposals were submitted. On November 20, 2025, the Proposal to revise the Pan-European Personal Pension (PEPP) Regulation to help citizens secure adequate income in retirement by improving access to better and more effective supplementary pensions, to complement national systems, was presented. On December 4, 2025, the Market Integration Package was proposed, confirming the centrality of achieving more integrated capital markets. The proposal is based on the assumption that EU financial markets remain significantly fragmented, small, and lacking competitiveness, lacking potential economies of scale and efficiency gains. In 2024, the market capitalization of stock exchanges amounted to 73% of EU GDP, compared to 270% in the US and 130% in UK; investment fund are 5 times smaller than US funds. Furthermore, financial institutions are not sufficiently aligned across Member States, thus creating resistance to cross-border operations and narrowing the field of opportunities in the EU area. To address these needs and integrate the over 300 stock exchanges that constitute the market infrastructure, thus incentivizing economic growth, the legislative proposal aims to act along three guidelines (Innovation, Simplification, and Supervision) in three main macro-areas (Trading area, Post-Trading area, and Asset Management).

In the context of the Capital Markets Union, takeover regulations also play a significant role, with ample and meaningful space dedicated to them, also since the market for corporate control is one of the largest

[15] See https://finance.ec.europa.eu/regulation-and-supervision/savings-and-investments-union_en.

[16] On that occasion, Maria Luís Albuquerque, Commissioner for Financial Services and the savings and investments union said: "The scale of investment required to ensure EU competitiveness while addressing the clean and digital transitions is massive. To succeed, we need a well-functioning, efficient, deepened integrated capital market and banking sector that brings together savers, institutional investors and companies. My vision is simple: I want European savers to earn a fair return on their savings. And I want European businesses and innovators to have access to the financing they need to drive our economy forward. I want everyone to be able to find the right counterpart, and the right opportunity under the savings and investments union. I warmly invite all stakeholders to help steer it in the right direction".

corporate markets[17]. Looking at the situation in Europe, the harmonisation of takeover law is a fundamental part of the implementation of the European capital markets law project and plays a prominent role in individual national laws too, which primarily established the regulation.
The basis for the level playing field was effectively laid in 2004 with Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids, the so-called Takeover Directive. The enactment of this directive is the result of a lengthy and complex legislative process, which saw several proposals rejected before a compromise was finally reached for all Member States[18].
The Takeover Directive is limited to substantial harmonisation, classifying itself as a framework directive with the aim of curbing the problems that arose with the previous proposals of 1989 and 1990, which sought to regulate all aspects extensively; therefore, the essential aspects remain subject to the autonomy of Member States[19]. Consequently, the implementation of the Takeover Directive in the laws of Member States has been subject to differences related to the nature of individual national laws, and harmonisation cannot be said to have been fully achieved[20].

It is considered essential, at this point, to provide an initial definition of takeover bid, to be used as a central reference point throughout this document. This definition will be revisited and explored in greater depth as required throughout the discussion:

> *A takeover bid consists of a person or a legal entity – the 'offeror' – making a public offer to the holders of the securities of a company – the 'target' – to acquire all or some of those securities for a price determined by the offeror and usually exceeding the current stock price. It has the aim of acquiring the majority of a company's shares, thus gaining control over the target company. The offer can be friendly or hostile, the latter consisting of an offer that is submitted against the will or without the knowledge or the target company's managing board*[21].

The proposed definition clearly identifies that the types of takeovers that may occur are partial or total; friendly or hostile[22]. Within the scope of the Takeover Directives, "securities" means "transferable securities carrying voting rights in a company", as established by Art. 2(1) (e) of the Directive itself.

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[17] As stated by GORBENKO A.S., MALENKO A., *Strategic and Financial Bidders in Takeover Auctions*, in *The Journal of Finance*, 2014, LXIX, 6, cit. p. 2513, only in 2007 "the value of M&A transactions worldwide was a staggering $4.8 trillion".
[18] See paragraph 1.1.1
[19] See paragraph 1.2.2.
[20] VEIL R., *European Capital Markets Law*, 2022, Oxford, p. 674.
[21] *Ibidem*, cit. p. 673.
[22] The distinction between voluntary and mandatory takeovers is exclusively inherent to the field of jurisprudence and will therefore be introduced in the discussion of the Takeover Directive in paragraph 2.2. The hostile nature of the takeover bid stems from the fact that it has not been agreed in advance with the management of the target company; on the contrary, the takeover bid will be friendly. For an in-depth literature see MORCK R., SHLEIFER A., VISHNY R.W., *Characteristics of Hostile and Friendly Takeover Targets*, 1987, National Bureau of Economic Research, Cambridge.

Before delving into the economic and legal aspects, below is a historical overview to clarify the process that led to the Takeover Directive.

1.1.1. Historical overview of takeover regulations and the pivotal role of Anglo-Saxon model.

The longevity of the phenomenon of mergers and acquisitions is evidenced by the fact that five cycles of such mergers and acquisitions have been identified in economic literature, occurring in the 1900s, the 1920s, the 1960s, the 1980s, and the 1990s. The wave in the 1990s was the most significant in terms of both size and geographical spread[23], as well as Europe's significant participation in transactions. In fact, takeover activity has always been more common in the United States, and in continental Europe in the United Kingdom[24]. Recently the literature added the sixth wave of 2000s[25].

Every phenomenon that occurs in the economic world must then be accompanied by appropriate legal regulation. Given the central role played by the United States in takeovers, the first regulations governing them can be found in the Williams Act of 1968, codified in the Securities Exchange Act of 1934, following the substantial increase in the use of tender offers instead of the more conventional statutory merger as a means of effecting corporate combinations[26]. This focused primarily on disclosure obligations in a takeover context[27], with the aim of protecting the shareholders of the target company from hostile takeovers, thereby filling the gaps in current federal and state company law that do not apply to takeover bids.

At the same time, in the United Kingdom, in March of 1968, the Takeover Panel[28] was established and

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[23] This trend gave rise to the phenomenon of cross-border takeovers. Please refer to VENTORUZZO M., *Europe's Thirteenth Directive and U.S. Takeover Regulation: Regulatory Means and Political Economic Ends*, 2006, Penn State Law, available at: https://insight.dickinsonlaw.psu.edu/fac_works/277/.

[24] MARTYNOVA M., RENNEBOOG L., *The Performance of the European Market for Corporate Control: Evidence from the Fifth Takeover Wave*, in *European Financial Management*, 2011, 17, 2, p. 209.

[25] VAN DER ELST C., VAN DEN STEEN L., *Opportunities in the M&A aftermarket: squeezing out and selling out*, 2006, Working Paper 2006-12, Financial Law Institute, p. 4.

[26] See LEE HAZEN T., *Federal Securities Law*, 2011, Federal Judicial Center, pp. 100 et seq.; VENTORUZZO M., *Europe's Thirteenth Directive and U.S. Takeover Regulation: Regulatory Means and Political Economic Ends*, 2006, Penn State Law, available at: https://insight.dickinsonlaw.psu.edu/fac_works/277/; SAUTTER C.M., *Tender Offers and Disclosure: The History and Future of the Williams Act*, 2016, in Research Handbook on Mergers and Acquisitions, Edward Elgar Publishing, available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2697755.

[27] "[…] section 14(d) of the Act provides that anyone intending to launch a "tender offer" shall publicly disclose this intent and inform investors of the terms and conditions of the offer so that they can make informed decisions about whether or not to accept it." VENTORUZZO M., *Europe's Thirteenth Directive and U.S. Takeover Regulation: Regulatory Means and Political Economic Ends*, 2006, Penn State Law, available at: https://insight.dickinsonlaw.psu.edu/fac_works/277/, cit. p. 185.

[28] It is "a regulatory body set up in response to mounting concern about unfair practices in the conduct of takeover offers." MUKWIRI J., *Takeovers and the European Legal Framework: A British Perspective*, 2009, New York: Routledge-Cavendish, cit. p. 24. See paragraph 1.2.1.

the City Code on Takeovers and Mergers[29] was issued. In particular, the objective was to limit unfair practices, especially resistance from management to takeovers. The approach envisaged by company law required management to answer to the company but not to individual shareholders, who were therefore powerless to influence management in the event of a takeover[30]. In this case too, the City Code aims to ensure that shareholders are treated fairly when evaluating a takeover bid. Although it was created as a self-regulation system, the Panel acquired statutory status with the implementation of the Takeover Directives in 2006[31].

In the European Union, prior to the introduction of the Takeover Directives, Member States' regulations on takeover bids were independent and mainly assigned to the authority of company law and national market law[32]. This resulted in an uneven and fragmented regulatory landscape. The enactment of the Takeover Directive in 2004 is part of the European Union's directives on company law and corporate governance, also known as the Thirteenth Directive, which aim to enable companies to establish

[29] In order to understand the logic behind the City Code – which has been largely incorporated into the Takeover Directive analysed below – its general principles are outlined below: City Code on Takeover and Mergers or Takeover Code is a set of binding rules and principles administered by the Takeover Panel and is based upon six General Principles:

1. (1) All holders of the securities of an offeree company of the same class must be afforded equivalent treatment.
   (2) If a person acquires control of a company, the other holders of securities must be protected.
2. (1) The holders of the securities of an offeree company must have sufficient time and information to enable them to reach a properly informed decision on the takeover bid.
   (2) Where it advises the holders of securities, the board of directors of the offeree company must give its views on the effects of implementation of the takeover bid on:
      (a) employment;
      (b) conditions of employment; and
      (c) the locations of the company's places of business.
3. The board of directors of an offeree company must act in the interests of the company as a whole and must not deny the holders of securities the opportunity to decide on the merits of the takeover bid.
4. False markets must not be created in the securities of:
      (a) the offeree company;
      (b) if the offeror is a company, that company; or
      (c) any other company concerned by the takeover bid in such a way that the rise or fall of the prices of the securities becomes artificial and the normal functioning of the markets is distorted.
5. An offeror must announce a takeover bid only after:
      (a) ensuring that the offeror can fulfil in full any cash consideration, if such is offered; and
      (b) taking all reasonable measures to secure the implementation of any other type of consideration.
6. An offeree company must not be hindered in the conduct of its affairs for longer than is reasonable by a takeover bid for its securities.

Source: https://code.thetakeoverpanel.org.uk/tp/general-principles.html.

[30] The first solution to this practice, prior to the introduction of the City Code, was the requirements of the Notes on Amalgamation of British Businesses introduced by the Governor of the Bank of England in 1959. In 1963 a revision of these Notes required an equal treatment in requiring the offeror to make equivalent offers to other classes of shareholders whose shares had not been purchased after a certain controlling stake had been obtained. *Ibidem*, p. 25.

[31] The implementation of the Takeover Directive and the functioning of the Takeover Panel will be discussed in paragraphs 2 and 2.1.

[32] The regulations of the individual Member States relevant to this work will be examined in detail, as they have been the repositories of the implementation of the Takeover Directives. See paragraph 1.2.1.

themselves and carry out operations throughout the EU; provide protection for shareholders and other parties with a particular interest in companies, such as employees and creditors; make companies more efficient, competitive and sustainable in the long term; encourage companies based in different EU countries to collaborate with each other[33]. The process that led to the Takeover Directive[34], however, was not straightforward but characterised by multiple conflicting interests and compromises[35]. A first legislative attempt to regulate takeovers at European level took shape in the proposal presented by the European Commission in 1989, which was not implemented due to the differing interests of Member States, their heterogeneous regulatory approaches and disagreements regarding the mandatory bid rule and the limitation of defensive measures. In 1996, the Commission presented a new proposal that considered the different opinions and allowed the Council to adopt a common position on 19 July 2000; however, the European Parliament blocked the process by raising objections related to the board neutrality rule – which provides that the board should seek shareholder approval before taking defensive actions – and insufficient protection of employees. Despite the intervention of the Conciliation Committee, the draft presented on 5 July 2001 was not approved. Similarly, a further attempt failed in October 2002. Given the resistance and discontent regarding the content of the drafts, the Commission set up a group of high-level business law experts – the High-Level Group of Experts – to resolve the impasse. This group produced the Winter Report[36], incorporated into subsequent drafts, which proposed a solution based on two principles: shareholder decision-making and proportionality between risk-bearing capital and control[37]. The Takeover Directive, implemented in 2004, was finally the result of a political agreement presented by Portugal, that provided a practical basis for the Winter Report solution by introducing Article 12 of the Takeover Directive. This consisted of making the adoption of Article 9 of the Takeover Directive on the board neutrality rule and Article 11 of the Takeover Directive on the breakthrough rule[38] optional for Member States, while not being able to prohibit individual companies from opting into these rules voluntarily. This created two levels of possible adoption: national and

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33 The regulatory framework on this matter is outlined on the following website, which, however, does not precisely reflect the chronological order that was established at the outset: https://commission.europa.eu/business-economy-euro/doing-business-eu/company-law-and-corporate-governance_it.

34 CLERC C., DEMARIGNY F., VALIANTE D., DE MANUEL ARAMENDÍA M., *A Legal and Economic Assessment of European Takeover Regulation*, Centre for European Policy Studies (CEPS) & European Capital Markets Institute (ECMI), Brussels, 2012; VEIL R., *European Capital Markets Law*, 2022, Oxford; MUKWIRI J., *Takeovers and the European Legal Framework: A British Perspective*, 2009, New York: Routledge-Cavendish.

35 As also evidenced by KNUDSEN J.S., *Is the Single European Market an Illusion? Obstacles to Reform of EU Takeover Regulation*, 2005, in *European Law Journal*, 11, 4, pp. 507-524.

36 HIGH LEVEL GROUP OF COMPANY LAW EXPERTS, *Report on a Modern Regulatory Framework for Company Law in Europe*, Brussels, 4 November 2002.

37 "The former meant that, in the event of a takeover bid, the ultimate decision must be with the shareholders. The latter meant that the holder of the majority of risk-bearing capital should be able to exercise control and break through any company constitutional entrenched voting rights that would frustrate the bid." MUKWIRI J., *Takeovers and the European Legal Framework: A British Perspective*, 2009, New York: Routledge-Cavendish, cit. p. 10.

38 For a presentation of these articles, see paragraph 1.2.2.

corporate. A third option of reciprocity was also established: if a Member State agrees to reciprocity, even if one or both rules are adopted, a company has the option of disapplying them when it encounters a bidder who has not adopted the respective rule[39].

No reform has been considered to date[40] and, following a review between 2010 and 2012, the Commission expressed its general satisfaction with the regime created by the Takeover Directive. At the same time, it identified a few issues that could be clarified at European level in order to provide greater legal certainty for international investors, but no amendment is necessary[41].

It should be emphasised that the UK City Code model had a direct and significant influence on the development of the regulatory framework of the Takeover Directive[42], despite the differences between the UK and continental Europe in terms of both corporate governance and corporate ownership and control regimes. The UK corporate governance system is the so-called market-based and relies on legal rules largely resulting from case law and on the effective legal enforcement of shareholder rights; the blockholder-based system of CE relies on codified law and emphasises rules protecting stakeholders such as creditors and employees. Moreover, most Continental European companies are characterised by majority or near-majority stakes held by one investor or an investor group; in contrast, UK firms predominantly have dispersed equity[43]. These different profiles lead to takeover regulations that are

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[39] "These provisions were controversial because they crystallise oppositions on the value of facilitating and frustrating takeovers" and have heterogeneous effects on each national legal system given the diversity of the underlying systems. CLERC C., DEMARIGNY F., VALIANTE D., DE MANUEL ARAMENDÍA M., *A Legal and Economic Assessment of European Takeover Regulation*, Centre for European Policy Studies (CEPS) & European Capital Markets Institute (ECMI), Brussels, 2012, cit. p. 1.

[40] VEIL R., *European Capital Markets Law*, 2022, Oxford, p. 674.

[41] As presented in EUROPEAN COMMISSION, *Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Application of Directive 2004/25/EC on takeover bids*, COM(2012) 347 final, Brussels, 28 June 2012, para. 21-23. In this regard, the opinions expressed in the literature sometimes disagree with the European Commission's view. MUKWIRI J., *Takeovers and the European Legal Framework: A British Perspective*, 2009, New York: Routledge-Cavendish and VÉRON N., *Capital Markets Union: Ten Years Later*, 2024, European Parliament, Economic Governance and EMU Scrutiny Unit (EGOV), Brussels believe that, with a view to the Capital Markets Union and the harmonisation of the Takeover Directive, greater convergence efforts are needed on the part of Member States, leaving less room for discretion on the part of the European Union.

[42] As early as 1974, Professor Pennington wrote a report on takeover offers in Europe at the request of the European Commission, modelling it on the City Code. Although this initiative was not followed up, the legislative trend continued in this direction. MUKWIRI J., *Takeovers and the European Legal Framework: A British Perspective*, 2009, New York: Routledge-Cavendish, p. 10.

[43] The literature reports that the legal system in the UK ensures better protection for investors and greater focus on shareholder value at the corporate level. This, together with differences in corporate ownership and control structures, leads to different expected and actual returns when takeovers occur. Takeovers in the UK show that bidders expect more realistic returns because they price synergies better; in contrast, in continental Europe, there is a tendency to overestimate returns for the bidder. Furthermore, in systems with a typical controlling blockholder in continental Europe, there will be less reaction to takeover announcements and a greater likelihood that agency costs will be passed on to minority shareholders. MARTYNOVA M., RENNEBOOG L., *The Performance of the European Market for Corporate Control: Evidence from the Fifth Takeover Wave*, in *European Financial Management*, 2011, 17, 2, p. 216. For further information on issues related to governance and corporate control structure, please refer to paragraphs 1.2. and 1.3.

constructed according to the same principles but often result in different implementation choices or outcomes[44].

1.1.2. Economic and strategic profiles of takeover bids.

Before delving into the regulatory aspects, below is a summary of the economic and strategic profiles underlying takeover bids. This overview is essential to bridge the gap between economic dynamics and the regulations designed to incentivise and support market development[45].

The main economic function of takeover bids is linked to corporate restructuring objectives, and these are categorised under the broader umbrella of merger and acquisition transactions[46]. In the European context, the integration of the capital market is explicitly added as a further objective[47]. The legislation is therefore structured, as will be seen, to pursue these objectives, but not without first considering the close interrelationship between corporate governance and the control market. Takeover bids are transactions that change corporate governance and, as such, it is necessary to assess the costs generated and whether these are higher or lower than the benefits[48]: the concept of the takeover bid as a tool for redistributing power and surplus justifies the very likelihood of its launch and effective completion. That said, it is already generally clear that the rules introduced by the legislation have uneven economic effects and legislators must consider which economic objectives to pursue through regulation and what interests need to be protected[49].

It is necessary to begin with broader considerations, digressing slightly from the central topic, which will be immediately resumed.

A key factor in economic analysis is the ownership and control structure[50] of the target company, which affects both the likelihood of a bid being launched and the terms of transfer of control. In continental Europe, the prevalence of concentrated ownership structures and the resulting presence of a major controlling block acts as an economic barrier to takeover bids, particularly hostile ones. These structures

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[44] See paragraphs 1.2, 1.2.1. and 1.2.2.

[45] For a discussion of the following topics, please also refer to BAKER H.K., KIYMAZ H., *The Art of Capital Restructuring: Creating Shareholder Value through Mergers and Acquisitions*, 2011, John Wiley & Sons, Inc.

[46] WESTON J.F., MITCHELL M., MULHERIN J. H., *Takeovers, Restructuring, and Corporate Governance*, Pearson New International Edition, Pearson Education, Limited, 2013, p. 487.

[47] This is one of the objectives that European legislation aims to pursue in the Takeover Directive 2004/25/EC. See paragraph 1.2.

[48] BERGLÖF E., BURKART M., *European Takeover regulation*, 15 July 2003, available at SSRN: https://ssrn.com/abstract=405660, p. 174.

[49] This is the method of analysis proposed by BERGLÖF E., BURKART M., *European Takeover regulation*, 15 July 2003, available at SSRN: https://ssrn.com/abstract=405660, which refers to the broader methodology of Law and Economics, described among others by Francesco Capriglione in M. PELLEGRINI, *Corso di diritto pubblico dell'economia*, 2016, Assago: Wolters Kluwer, p.

[50] For an economic digression on the concept, please refer to MEGHOUAR H., *Motivations and Economic Role of Takeover Bids: A Theoretical and Empirical Characterization*, London, 2016, p. 8.

allow the controlling entity to unilaterally accept or reject the offer, reducing the degree of competition in the control market. This trend is exactly the opposite of what happens in the United Kingdom, where widely held control structures encourage hostile takeover bids[51]. The largest shareholder, however, can exercise control not necessarily through a majority of vote but can use multiple institutional and contractual instruments that separate control and the right to cash flows, and that are designed to amplify the power of control. These may be shares with differentiated voting power[52], specifically shares with increased voting rights; the technique of pyramiding[53], where control is exercised through several layers of companies[54]; and finally, crossholdings[55], such that a corporation indirectly controls its own shares. The divergence between voting rights and cash flow rights allows an individual to exercise control with a relatively small economic stake. The result is a reduction in the contestability of control, together with an increase in the potential private benefits of control[56] that can be extracted; the negative impact of these

[51] "In half of the listed non-financial firms in Austria, Belgium, Germany and Italy a single shareholder controls more than 50% of the votes (compared to 9.9% in the UK). In Dutch, Spanish and Swedish firms the median blockholder holds 43.5, 34.5, and 34.9%, respectively". BERGLÖF E., BURKART M., *European Takeover regulation*, 15 July 2003, available at SSRN: https://ssrn.com/abstract=405660, cit. p. 179. Even today, the OECD reports that concentrated ownership structures prevail. Ownership concentration of the three largest shareholders in Europe in 2024 was over 50% for 53% of listed companies; in contrast, the United States and the United Kingdom confirm their opposite trend with dispersed ownership structures. OECD, *OECD Corporate Governance Factbook 2025*, 2025, OECD Publishing, Paris, available at: https://doi.org/10.1787/f4f43735-en, p. 30-31.

[52] In COMMISSIONE EUROPEA, *Report on the Proportionality Principle in the European Union. External Study Commissioned by the European Commission*, Bruxelles, 2016, pp. 28-30 it is reported that shares with differentiated voting rights and pyramids were particularly used in European countries. Shares with multiple voting rights have a significantly greater variance, being widely used in Sweden, Finland, Denmark, France and the Netherlands and minimally or not at all in other countries. Non-voting preference shares are preferred in Italy, the UK and Germany, often combined with pyramid structures. Pyramid structures are widely used in all European countries except Ireland, Finland and Denmark.

[53] See previous note.

[54] "Pyramiding is particularly powerful, because it works multiplicatively. If a 50% majority is necessary for controlling a firm, one can control a firm by owning 50% of a corporation that owns 50% of the firm's shares, hence with a mere 25% of the total equity at stake. More generally, the multiplier between capital and votes in the pyramid is $\frac{1}{\left(\frac{1}{2}\right)^n}$ if n denotes the number of levels in the pyramid. These control enhancing mechanisms are sometimes used together. By combining shares with different voting power and pyramiding, a controlling owner can maintain control over the company at the bottom of the pyramid with even smaller shares of its cash flow rights". BERGLÖF E., BURKART M., *European Takeover regulation*, 15 July 2003, available at SSRN: https://ssrn.com/abstract=405660, cit. p. 180.

[55] "This refers to as a situation where company X holds a stake in company Y which, in turn, holds a stake in company X". COMMISSIONE EUROPEA, *Report on the Proportionality Principle in the European Union. External Study Commissioned by the European Commission*, Bruxelles, 2016, cit. p. 109. The study shows that their use is rather infrequent in Europe.

[56] By private benefits derived from control, the authors refer to making decisions that benefit a particular investor (or management) at the expense of other investors, or benefits derived from the power, prestige and influence over social and political events that are associated with controlling an important company. These situations can lead to resistance to a change of ownership with incremental value, as those in power want to maintain their privileges. BERGLÖF E., BURKART M., *European Takeover regulation*, 15 July 2003, available at SSRN: https://ssrn.com/abstract=405660, cit. p. 192.
The authors also refer to the study by DYCK I.J.A., ZINGALES L., *Private Benefits of Control: An International Comparison*, 2001, CRSP Working Paper No. 535, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=296107, which measures these benefits through the control premium paid in block trades, showing that in countries where smaller investors are less protected, control premiums tend to be higher, presenting the case of Italy and Portugal.

measures on share value is also often associated with the expropriation of minority shareholders[57].
Even if the benefits of ownership concentration are recognised, such as an increase in the value of the company resulting from greater management monitoring, the costs should not be underestimated when considering the control market: the bidder must compensate not only for the economic value of the company, but also for the loss of the private benefits of the controlling shareholder. As a result, many control transfers take place through private block negotiations rather than through public takeover bids. The different nuances of corporate control explain why the introduction of the mandatory bid rule and the break-through rule have opposite effects on the corporate control market and on incentives for takeover bids. In fact, in a context of concentrated corporate control, requiring the buyer to extend the price paid for the controlling stake to minority shareholders increases the overall cost of the transaction and may also prevent efficient transfers of control[58]. This means that the mandatory bid rule tends to reduce the contestability of control and reinforce entrenchment in the Italian and German models. On the contrary, a break-through rule would reduce the cost of acquiring control by neutralising instruments separating ownership and control; on the contrary, a break-through rule would reduce the cost of acquiring control by neutralising instruments separating ownership and control, thereby altering the rights of controlling shareholders ex post, with possible negative effects on ex ante incentives to invest and list.

Another important strategic issue that should be briefly mentioned is anti-takeover defences. These should not be viewed purely as legal responses to takeovers, but as corporate and financial strategies that management (or the controlling entity) can adopt to change the value, risk or structure of the target company in the event of a takeover threat. They are therefore an integral part of the restructuring process induced by takeovers, as they directly influence the economic viability of the transaction and the outcome of the competition for control[59]. Moreover, in the last decades advances in technology and globalisation have led to increased competition among businesses, which often no longer operate solely within their own country but internationally. From a strategic point of view, it is considered good practice for a company's management and board of directors to periodically consider the opportunities and threats of M&A transactions[60]. This activity also includes reviewing takeover defence tactics.
From an economic point of view, a defence is effective to the extent that it increases the expected cost of the acquisition or reduces the surplus that can be appropriated by the bidder. Many defences do not

[57] Also, the loss in value of shares due to private benefits is at the expense of small shareholders.
[58] BERGLÖF E., BURKART M., *European Takeover regulation*, 15 July 2003, available at SSRN: https://ssrn.com/abstract=405660, cit. p. 198.
[59] WESTON J.F., MITCHELL M., MULHERIN J. H., *Takeovers, Restructuring, and Corporate Governance*, Pearson New International Edition, Pearson Education, Limited, 2013, p. 487.
[60] MEGHOUAR H., *Motivations and Economic Role of Takeover Bids: A Theoretical and Empirical Characterization*, London, 2016, p. 12-13, 16. The US Federal Trade Commission's classification of M&A transactions distinguishes between horizontal M&A, vertical M&A, concentric M&A and conglomerate M&A. The author also highlights how globalisation and the wave of privatisation that swept across Europe in the 1990s paved the way for corporate restructuring in various sectors.

aim to block the takeover bid definitively, but rather to shift the distribution of takeover gains, inducing the bidder to improve the price or negotiate different terms. Defence techniques can be divided into several distinct categories: financial, organisational and institutional, each of which affects specific economic variables of the takeover bid[61].

Defensive financial measures, such as changes to capital structure, extraordinary payouts or increased debt, increase the risk and economic cost of the acquisition, especially for bidders who base their strategy on post-takeover financial restructuring[62]. These are rational responses to the incentives created by regulation: in a context of greater contestability of control, the target may be incentivised to reduce the economic attractiveness of the takeover bid *ex ante*[63].

There are also measures that involve corporate restructuring and reorganisation, distinguishing between asset reorganisation and other strategies such as leveraged recapitalisations and defensive LBOs. These measures alter the very purpose of the acquisition, affecting the synergies expected by the bidder. From an economic perspective, therefore, the bidder has less incentive to bear the costs of an acquisition that no longer guarantees an adequate return[64].

The duty of directors is an additional defensive barrier against takeovers, to be understood as the discretionary decisions of the board that can influence the occurrence of a takeover. It is a further cause of the distribution of bargaining power between bidder and target, which indirectly influences the outcome and price of the transaction[65].

Antitakeover amendments, state laws and poison pills also fall within the context of barriers. These are institutional tools that affect the likelihood of a successful bid and shareholder returns. Such tools strengthen the position of the controlling shareholder or management but can generate ex ante costs in terms of reduced contestability of control and reduced incentives for restructuring. This gives rise to an implicit tension in the regulation itself and a trade-off between the various objectives that can be pursued,

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61 This section briefly describes the classification carried out by *Ibidem*, p. 488. Although not central to the discussion, a brief mention is made here for the sake of completeness and to provide a general overview of the strategic aspects related to takeover bids that are found in the regulations to be analysed. The authors present additional specific categories of barriers, such as greenmail, which focuses on the selective repurchase of the hostile bidder's shares; methods of resistance such as Pac-Man defence, white knight and white squire, which alter the competitive dynamics of the acquisition process by introducing new players or transforming the target into a bidder; shareholder activism, poison puts and golden parachutes.
For an in-depth economic and strategic discussion of takeover defences, please refer to *Ibidem*, pp. 487-519.

62 WESTON J.F., MITCHELL M., MULHERIN J. H., *Takeovers, Restructuring, and Corporate Governance*, Pearson New International Edition, Pearson Education, Limited, 2013, p. 489.

63 BERGLÖF E., BURKART M., *European Takeover regulation*, 15 July 2003, available at SSRN: https://ssrn.com/abstract=405660, p. 195. Furthermore, the two authors refer to the debate in the literature concerning the function of takeover defences: on the one hand, there are those who see them as "an entrenchment device that allows managers to protect their private benefits at the expense of the shareholders", while others recognise their role as "measures that reinforce the bargaining role of management" cit. p. 195. In support of the first argument, reference should be made, among others, to SHLEIFER A., VISHNY R.W., *A Survey of Corporate Governance*, 1996, NBER Working Paper Series No. 5554, available at: https://ssrn.com/abstract=10182, p.17.

64 *Ibidem*, p. 178.

65 *Ibidem.*

such as greater contestability of the control market and the possibility of placing competitive barriers to it, which could in some cases block it and in others maximise its value.

In a nutshell, for the purposes of economic analysis of takeover bids, reference is made to the essential nature of the structural trade-off between two potentially conflicting objectives: on the one hand, promoting corporate control mobility; on the other, protecting minority shareholders. All the economic and strategic profiles examined so far reveal the choices that the legislation has been led to make in terms of pursuing objectives. Due to its function of distributing gains between the bidder and the target, and of protecting minority shareholders, the attempt to harmonise the rules at European level has not been able to escape the burden of the economic characteristics of individual national legal systems[66].
From this perspective, takeover bid regulations are not limited to governing the moment of transfer of control but influence the entire structure of incentives in the control market, affecting the frequency of transactions, the methods of acquisition and, ultimately, industrial restructuring processes. Regulations aimed exclusively at protecting minority shareholders risk excessively reducing the profitability of bids, thereby discouraging potentially efficient acquisitions. Finally, it is not possible to simultaneously maximise the protection of minority shareholders and the intensity of the takeover market: increasing the share of surplus attributed to the target implies, by definition, a reduction in the share that can be appropriated by the bidder and therefore a decrease in the incentives to launch the offer.

1.1.3. Corporate governance issues: the bidder identity and the purposes of takeover bids.

The economic mechanism of the free-rider problem makes the presented trade-off[67] particularly acute and in order to evaluate possible solutions, coordination issues between shareholders must be considered. The free rider problem arises when shareholders are coordinated and have all the information about the bid – which often occurs because there is a situation of concentrated control with a few blockholders – and can thus determine the success of the bid in advance[68]. In the presence of a broad shareholder base, each rational shareholder is incentivised not to accept the offer if the price does not fully reflect the post-takeover value, trusting that they will still benefit from the increase in value generated by the buyer[69]. The result is that a value-increasing takeover bid may not go ahead because the bidder is unable to extract any

66 See paragraph 1.2 and 1.2.2.
67 See paragraph 1.1.2.
68 CLERC C., DEMARIGNY F., VALIANTE D., DE MANUEL ARAMENDÍA M., *A Legal and Economic Assessment of European Takeover Regulation*, Centre for European Policy Studies (CEPS) & European Capital Markets Institute (ECMI), Brussels, 2012, p. 133.
69 "Non- tendering shareholders thus free ride on the increased post-takeover value that the offeror and accepting shareholders are actually generating. This situation may discourage any attempt of potential offerors to acquire control." *Ibidem*, cit. p. 134. However, as counterweights to free-riders, even before arriving at a regulatory solution, there is the impossibility for shareholders to be properly 'fully informed' and the possible presence of high private benefits of control that provide incentives for bids with a higher-than-expected market premium.

profit from the transaction[70], due to the so-called hold-up problem: when a few investors decide not to bid at the offered price in order to force the bidder to pay a higher price if they want to acquire control. The phenomenon of holding up increase the cost of takeovers and therefore reduce the number of transactions and undermines market of corporate control's efficiency. The literature suggests that the hold-up by incumbent shareholders has three main sources, that are: heterogeneous shareholder preferences; anticipation by shareholders that the price offered by the offeror is lower than the value of the company; and shareholders' understanding that the margin of shares required for the bidder to gain control has a higher value than that offered[71]. Therefore, investors who hold up are also free riding on others in an attempt to secure a higher takeover premium, which makes free riding and hold up closely linked. Nonetheless, these two issues affect different sides of takeover regulation: protecting shareholders while securing the efficiency of the transfer of control and ensuring equal treatment of all shareholders.

This issue explains why, from an economic point of view, overly strict protection of minority shareholders can be counterproductive, reducing not only the number of takeover bids but also the expected welfare of minority shareholders themselves, who may not benefit from any takeover premium if the transaction is not even attempted. From the point of view of minority shareholders, the optimal outcome is not maximised protection, but rather a balance that maximises the expected value of the takeover bid premium, combining the probability of the transaction and the price level.

One solution to the free-rider problem could have been to dilute the rights of minority shareholders, allowing bidders to exclude minority shareholders from a portion of the gains resulting from the acquisition[72]. This would imply making the post-takeover share value to the bidder larger than that to the minority shareholders so that the latter are willing to tender at a price that allows bidders to make a profit – regardless of any mandatory bid rule.

Another way to solve the free-rider problem, which was subsequently chosen by the European legislator in the Takeover Directive[73], is to grant a successful bidder a squeeze-out right, that is, the right to compel remaining minority shareholders to sell their shares.[74] At the operational level, the squeeze-out right does not differ greatly from the dilution of minority shareholders' rights. When an offer conditional upon the acceptance of a sufficiently large share – the freeze-out fraction – of the company's share capital is

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[70] The free-rider problem was formalised by Grossman and Hart in 1980. BERGLÖF E., BURKART M., *European Takeover regulation*, 15 July 2003, available at SSRN: https://ssrn.com/abstract=405660, p. 181-182.

[71] CLERC C., DEMARIGNY F., VALIANTE D., DE MANUEL ARAMENDÍA M., *A Legal and Economic Assessment of European Takeover Regulation*, Centre for European Policy Studies (CEPS) & European Capital Markets Institute (ECMI), Brussels, 2012, p. 193.

[72] This solution was proposed by GROSSMAN S.J., HART O.D., *Takeover bids, the free rider problem, and the theory of the corporation*, in *The Bell Journal of Economics*, 1980, 11, 1, pp. 42–64 in response to the free-rider problem that they formalized.

[73] See paragraph 1.3.

[74] YARROW G. K., *Shareholder Protection, Compulsory Acquisition and the Efficiency of the Takeover Process*, in *The Journal of Industrial Economics*, vol. 34, no. 1, 1985, pp. 3–16. Available at: https://doi.org/10.2307/2098478.

successful, all shareholders are forced to sell their shares under the terms of the original offer and may therefore also accept the original offer.

This once again confirms how takeover regulations can affect the distribution of takeover gains and, consequently, the bidder's incentives to make an offer and the target company's shareholders' incentives to accept it. Furthermore, a precise economic reference has been given to the squeeze-out rule, which will be analysed below[75].

Conversely, however, there may be situations where shareholders have little or no information about post-takeover value and no opportunity for coordination. They will therefore not know whether to tender or not, with the possibility of being treated unfairly. This phenomenon is called pressure to tender. A distorted choice of this kind can also occur in the case of a two-iter bid, in which there is price discrimination, and the offeror extracts more benefit from the transaction[76].

Still on the economic analysis of the free-rider problem associated with takeovers, an initial classification of the bidder's identity is identified: there are "good bidders" who generate value mainly through security benefits such as improved operational efficiency, synergies[77] and restructuring; then there are "bad bidders" who profit mainly from private benefits of control[78]. The literature shows that strengthening minority protection erodes the profits of both but affects the two types of bidders asymmetrically: since "good bidders" operate with smaller margins, they are discouraged before "bad bidders". It follows that regulations designed to protect minority shareholders may end up frustrating the most economically efficient acquisitions. This distinction is more economical but fundamental to consider during the legislative process.

There is also another fundamental taxonomy in the literature concerning the identity of the bidder, which is essential for distinguishing between different takeover operations at the empirical level. This is the distinction between financial bidders and industrial – or strategic – bidders, which is expressed in terms

[75] See paragraph 1.3.

[76] CLERC C., DEMARIGNY F., VALIANTE D., DE MANUEL ARAMENDÍA M., *A Legal and Economic Assessment of European Takeover Regulation*, Centre for European Policy Studies (CEPS) & European Capital Markets Institute (ECMI), Brussels, 2012, pp. 134-136 explain that in this case a prisoner's dilemma can happen.

[77] The Net Acquisition Value (NAV) = $[V_{ab} – (V_a + V_b)] – (P+C)$, where V_{ab} repreesents the value of the combined company after the acquisition transaction; V_a and V_b represents the values of the two companies before the acquisition transaction; P is the acquisition premium paid to target shareholders; C is the cost of the acquisition process incurred by the acquirer. In literature synergies are dived among economic (i.e. economies of scale, access to new markets, diversification of products) and financial, that influence the overall cash flows. In this case, the referral is made about economic synergies, because financial synergies eventually give rise to financial takeover bids, referring to following distinction among industrial bidder and financial bidder. MEGHOUAR H., *Motivations and Economic Role of Takeover Bids: A Theoretical and Empirical Characterization*, London, 2016.

[78] This distinction appears for the first time in SHLEIFER A., SUMMERS L.H., *Breach of Trust in Hostile Takeovers*, 1987, NBER Working Paper No. w2342, available at SSRN: https://ssrn.com/abstract=227274, p. 3, who argued that hostile takeovers in particular can often be motivated by wealth redistribution rather than value creation, which is why these two characteristic profiles of bidders emerge. The concept was then taken up and the nomenclature formalised in subsequent literature.

of the purpose of the operation, the method of financing and the expected effects in terms of value creation or redistribution.
To give a clear definition:

> *Strategic bidders are usually companies in a related type of business, such as competitors, suppliers, or customers. They tend to look for targets that offer long-term operational synergies and integrate them into their own business. In contrast, financial bidders, typically private equity firms, look for undervalued targets with a potential to generate high cash flow, often after a reorganization. After the acquisition, a financial bidder treats the target as a part of its financial portfolio and sells it once exit opportunities become sufficiently appealing*[79].

Therefore, the takeover market is segmented: while strategic bidders place greater value on targets with high investment opportunities, financial bidders dominate acquisitions of mature companies in difficulty that need to be financially rescued[80]. This distinction, however, is purely literary; the different nuances that this differentiation can take on and the subtle categories involved will be presented in the appropriate place[81].

The identity of the bidder also determines the existence of a variance in the objectives set by the takeover bid. As already mentioned, takeover bids have the strategic purpose of corporate restructuring[82] and are generally motivated by synergies and efficiency. Although true and inherent in most cases, it would be simplistic to think of takeovers as having this sole purpose. In fact, in literature, the strategic motive for corporate restructuring is often replaced or accompanied by a series of other objectives.
Firstly, takeover bids not only present aspects related to corporate governance that need to be regulated[83], but are also an autonomous expression of it. Indeed, corporate governance responds, among other things, to the need to keep the agency problem[84] under control; however, even in countries with more advanced corporate governance systems, it manages to mitigate the issue but does not resolve it entirely. Takeovers

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[79] GORBENKO A.S., MALENKO A., *Strategic and Financial Bidders in Takeover Auctions*, in *The Journal of Finance*, 2014, LXIX, 6, cit. p. 2513.
[80] This refutes the idea, widespread in literature, that industrial buyers are systematically willing to pay more. For an in-depth economic and econometric distinction between financial bidders and strategic bidders, see *Ibidem*.
[81] In empirical cases, this distinction is very clear: industrial bidders include entrepreneurs or industrial groups, while financial bidders often include banking or insurance groups and funds. See PICCO F., PONZIANI V., TROVATORE G., VENTORUZZO M., *Le OPA in Italia dal 2007 al 2019. Evidenze empiriche e spunti di discussione*, 2021, Discussion papers Consob, p. 31. This classification will be referred to again in the case study presented in Chapter III.
[82] BERGLÖF E., BURKART M., *European Takeover regulation*, 15 July 2003, available at SSRN: https://ssrn.com/abstract=405660; MEGHOUAR H., *Motivations and Economic Role of Takeover Bids: A Theoretical and Empirical Characterization*, London, 2016; WESTON J.F., MITCHELL M., MULHERIN J. H., *Takeovers, Restructuring, and Corporate Governance*, Pearson New International Edition, Pearson Education, Limited, 2013.
[83] See paragraph 1.1.2.
[84] "The essence of the agency problem is the separation of management and finance, or – in more standard terminology – of ownership and control". SHLEIFER A., VISHNY R.W., *A Survey of Corporate Governance*, 1996, NBER Working Paper Series No. 5554, available at: https://ssrn.com/abstract=10182, cit. p. 7.

allow investors to exercise additional control over management[85]. Therefore, while on the one hand there is the strategic concept of takeovers aimed at restructuring the company from an industrial perspective, creating synergies and increasing its value, on the other hand there is the expression of tension in the corporate control market, where those who hold control do not want to lose it, just as they do not want to lose the benefits that come with it[86]. This latter type of takeover bid could also lead to a loss of value for shareholders and instead be due to an increase in private benefits for managers[87].

The profiles of the bidder's identity and the purpose of the takeover bid, although not often explored in sufficient depth, are of primary empirical importance. It is no coincidence that takeover bid regulations in Europe, following the Anglo-Saxon model, require both to be specified in the offer document[88], precisely to monitor the size of transactions on the corporate control market.

1.2. Objectives pursued and interests protected in the Directive 2004/25/EC on takeover bids.

To the aim of the Takeover Directive, a takeover bid or bid is defined in Article 2 as

> *a public offer (other than by the offeree company itself) made to the holders of the securities of a company to acquire all or some of those securities, whether mandatory or voluntary, which follows or has as its objective the acquisition of control of the offeree company in accordance with national law*[89].

As already presented, on the one hand, takeover bids are a useful and necessary tool for the proper development of the market. Consider a case of mismanagement of a company and consequent undervaluation on the stock exchange: management can be replaced through this operation. The market for corporate control regulates a company's governing bodies, ensuring, with the possibility of a takeover, that management pursues the interests of the company and follows a strategy aimed at maximising the value of the company itself. Furthermore, it can sometimes be an opportunity for shareholders to sell their shares above market price.

On the other hand, a takeover bid could induce management to take measures that could prove detrimental to the company in the long term. Furthermore, cash offers require a viable financing concept; this can lead to large debts that the bidder may subsequently try to offload onto the target company.

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[85] This same interpretation of takeovers as a mechanism for disciplining management directly leads to the resistance that management itself exerts to preserve its position, expressed through takeover defences. This same function is also jointly performed by large shareholders and banks. *Ibidem*, p. 10-11.

[86] *Ibidem*.

[87] SHLEIFER A., VISHNY R.W., *A Survey of Corporate Governance*, 1996, NBER Working Paper Series No. 5554, available at: https://ssrn.com/abstract=10182, p.30. Again, as with the identity of the bidder, the distinctions proposed refer purely to the literature. Empirical cases will be examined in greater depth in Chapter III.

[88] See paragraph 1.2.2.

[89] Article 2(1) Takeover Directive.

Furthermore, sometimes the management of a company may launch a takeover bid on another company in order to enhance its reputation and remuneration in a larger conglomerate of companies.
That said, the risks involved cannot be allowed to hinder the development of the market for corporate control from a market economy perspective. For this reason, the main objective of the Takeover Directive, as stated in Recital 1, is to safeguard the interests of shareholders and other stakeholders[90]. Furthermore, Recital 2 states that: "It is necessary to protect the interests of holders of the securities of companies […] when those companies are the subject of takeover-bids or of change of control". In addition, the Takeover Bids Directive aims to ensure "community-wide clarity and transparency in respect of legal issues to be settled in the event of takeover-bids and to prevent patterns of corporate restructuring within the community from being distorted by arbitrary differences in governance and management cultures", as stated in Recital 3[91].

These core objectives are set out even more systematically in Article 3 of the Takeover Directive, that requests:

a) equal treatment of all shareholders, and protection of the remaining shareholders where one has acquired control;
b) sufficient time and information to enable shareholders of the offeree company to reach an informed decision on the bid;
c) that the offeree board must act in the interest of the company as a whole and must not deny the shareholders the opportunity to decide on the bid;
d) to not create false markets in the securities of the companies concerned by the bid;
e) an offeror must announce a bid only after ensuring that he/she can fulfil in full any cash consideration and meet other considerations;
f) an offeror must not hinder the business of the offeree for an unreasonable length of time.

These principles are directly incorporated into national legislation, and Member States may provide for their stricter application. They were already present in the UK City Code in the form of self-regulation.

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[90] As will be presented in paragraph 2.2., This is reflected, for example, in the prohibition on the management board from obstructing takeover bids; furthermore, the obligation on the bidder to announce its decision to launch a bid is aimed at reducing insider dealings, as stated in Recital 12; or the obligation on the latter to submit an offer document is intended to reduce any information asymmetries between bidders and shareholders of the target company, and the same can be said of the mandatory offer in the event of a change of control of the company. See VEIL R., *European Capital Markets Law*, 2022, Oxford, p. 674 et seq. In particular, Three main groups of interest can be identified that require protection: minority shareholders, employees and offeree companies. CLERC C., DEMARIGNY F., VALIANTE D., DE MANUEL ARAMENDÍA M., *A Legal and Economic Assessment of European Takeover Regulation*, Centre for European Policy Studies (CEPS) & European Capital Markets Institute (ECMI), Brussels, 2012, p. 12.

[91] Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004, available at: https://eur-lex.europa.eu/eli/dir/2004/25/oj/eng. With regard to the objectives set out in the Directive, shareholder protection has been the most successful, while there has been controversy surrounding the harmonisation framework. MUKWIRI J., *Takeovers and the European Legal Framework: A British Perspective*, 2009, New York: Routledge-Cavendish, p. 14.

As anticipated[92], the Takeover Directive coordinates Member States' laws, regulations and administrative provisions on takeover bids; its scope is limited to bids for securities of companies whose securities are admitted to trading on a regulated market[93] – the London Stock Exchange in the UK case – in one or more Member States and which are governed by the laws of a Member State, as established by Art. 1(1), and therefore does not apply to bids for the acquisition of securities on Multilateral Trading Facilities[94]. Specifically, as defined by Recital 9 of Takeover Directive, takeover bids for securities that are not traded on a regulated market, or that are traded on a regulated market but issued by non-EEA[95] companies, or for non-voting securities are not subject to the provisions of the Directive will be governed entirely by the national laws of the Member States, with the resulting disparity. However, national law may extend the application of the Directive to such bids.

Before proceeding with the discussion, it is essential to clarify the issue of relations with the UK after Brexit[96] and how this has affected the takeover bid regime. In this regard, it is useful to note the following:

> *After Brexit, as the directive is only applicable to securities issued by companies from EU Member States, it will not be applicable in the UK and to UK securities traded on EU markets. However, as mentioned national authorities may still consider that investors in their jurisdiction deserve protection and hence apply some of the provisions to a takeover for UK shares which are traded only in one of the EU Member States. On the UK side, it can be expected that the UK regulation, adopted pursuant to the directive, will remain in place and this in the*

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[92] See paragraph 1.1.1.

[93] A regulated market is "a multilateral system operated and/or managed by a market operator, which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments – in the system and in accordance with its non-discretionary rules – in a way that results in a contract, in respect of the financial instruments admitted to trading under its rules and/or systems, and which is authorised and functions regularly and in accordance with Title III of this Directive" as defined by Art. 4(1) (21) of Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments (MiFID II), available at: https://eur-lex.europa.eu/eli/dir/2014/65/oj/eng. The lists of regulated markets in Member States are kept by the supervisory authorities of the Member States. In Italy, for example, Consob has published the following on its website: https://www.consob.it/web/area-pubblica/mercati-italiani. ESMA maintains a public register of all regulated markets, which can be consulted upon authorisation, at the following website: https://registers.esma.europa.eu/publication/searchRegister?core=esma_registers_upreg.

[94] A Multilateral Trading Facility is "a multilateral system operated by an investment firm or a market operator, which brings together multiple third-party buying and selling interests in financial instruments – in the system and in accordance with non-discretionary rules – in a way that results in a contract in accordance with the Title II of this Directive" as defined by Art. 4(1) (22) of *Ibidem.*

[95] The European Economic Area, abbreviated as EEA, consists of the 27 Member States of the European Union (EU) and three countries of the European Free Trade Association (EFTA) (Iceland, Liechtenstein and Norway; excluding Switzerland). The Agreement on the EEA entered into force on 1 January 1994. It seeks to strengthen trade and economic relations between the contracting parties and is principally concerned with the four fundamental pillars of the internal market, namely: the free movement of goods, people, services and capital. https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Glossary:European_Economic_Area_(EEA).

[96] Brexit is a term that refers to the United Kingdom's exit from the European Union, as requested by British citizens in a referendum held on 23 June 2016 and implemented through the activation of Article 50 of the Treaty on European Union. For more details on the term Brexit, see, for example, https://www.affarieuropei.gov.it/it/comunicazione/europarole/brexit/.

framework of the Repeal act. A similar outcome can be expected fom the EU side. The Brexit may make the cooperation between the supervisory authorities somewhat more difficult but would in practice not result in substantial differences with the pre-Brexit situation. In principle, an EU supervisor could consider a UK offer document non-equivalent and require an offer document according to its own rules. In practice however, in some states at least, it has been customary to use the third country document (e.g. the US one) along with an information note dealing with the conditions of the operation in the EU state concerned (e.g. the rules applicable to accepting the bid)[97].

Having clarified this, the following sections present the various legal systems and how they have implemented the Takeover Directive, with particular attention to the voluntary aspects that have created differences in application.

1.2.1. Sources of national law and supervisory authorities.

Each Member State was required to transpose the Directive by 20 May 2006[98]. The implementation of the Directive in national legal systems has implicitly led to a change in the sources of law relating to takeover bids in the various legal regimes. Therefore, the implementation of the Directive has only modified and supplemented certain aspects of the national laws of Member States that already regulated takeover bids.

For the sake of clarity, below is a summary of the various sources, together with the supervisory authorities, in the UK, Italy, Germany, France, the Netherlands and Sweden[99], which aims to create a concise framework for subsequent references that will be proposed to the various national laws.

[97] EUROPEAN COMPANY LAW EXPERTS, *The Consequences of Brexit for Companies and Company Law, in Legal Studies Research Paper Series*, 2017, No. 22, University of Cambridge, cit. p. 34.

[98] Article 21 Takeover Directive.

[99] The comparative analysis focuses on the United Kingdom as a reference model, the major Central European countries such as France, Germany, the Netherlands and Italy, and Sweden as the country with the highest level of deal activity in Northern Europe, as reported by KPMG, *Nordic Deal Trend Report*, Q3 2025, Norwegian edition, available at: https://kpmg.com/dk/en/insights/deals/nordic-deal-trend-report-q3-2025.html. Please note that the Takeover Directive also applies to EEA countries, see note 95.

Table 1. Legislative framework on takeover bids following the Takeover Directive and supervisory authority by country

Country	Sources of national law governing takeover bids	Legislative acts implementing the Takeover Directive	Supervisory Authority
United Kingdom	• Companies Act; • City Code on Takeovers and Mergers.	SI 2006/1183 (the "Interim Regulations"), then replaced by Part 28 of the Companies Act 2006	Takeover Panel on Mergers and Acquisitions
Italy	• Legislative Decree no. 58 of 24 February 1998, artt. 101 - 112 (*Testo Unico della Finanza* – TUF); o Regulation no. 11971 of 14 May 199 (*Regolamento Emittenti* by CONSOB).	Legislative Decree no. 229/2007	*Commissione Nazionale per le Società e la Borsa* (CONSOB)
Germany	• WpÜG (*Wertpapiererwerbs- und Übernahmegesetz* – Securities Acquisition and Takeover Act); o Stock Corporation Act (*Aktiengesetz* – AktG); o Commercial Code (*Handelsgesetzbuch* – HGB)	Takeover Directive Implementation Act (*Gesetz zur Umsetzung der Richlinie 2004/25/EG des Europäischen Parlaments und des Rates vom 21 April 2004 betreffend Übernahmeangebote, Übernahmerichtlinie - Umsetzungsgesetz*)	Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht* – BaFin)
France	• *Code monétaire et financier* (CMF), Articles L. 433-1 to L. 433-4; o General Regulation (*Réglement général*) of the *Autorité des Marchés Financiers* (AMF), Title III of Book II; o AMF regulations[100].	• Law no. 2005-842 dated 26 July 2005 (*Loi Breton*); • Law no. 2006-387 dated 31 March 2006 relating to takeover bids; • *arrêté* dated 18 September 2006 modifying the General Regulation (*réglement général*) of the *Autorité des*	*Autorité des Marchés Financiers* (AMF)

[100] AMF Instruction no. 2006-07 dated 25 July 2006 relating to takeover bids, AMF Instruction no. 2006-08 dated 25 July 2006 relating to fairness opinions, AMF Instruction no. 2005-11 dated 13 December 2005 relating to public offerings and AMF Recommendation dated 28 September 2006 relating to fairness opinions, as reported in TÉZENAS DU MONTCEL A., BAIRD-SMITH M., *France*, in Common Legal Framework for Takeover Bids in Europe, 2010, Cambridge University Press, II, p. 95.

		Marchés Financiers ('AMF').	
Netherlands	• Civil Code (Companies Act); • Financial Supervision Act 2007 (*Wet op het financieel toezicht* – FSA); concerning public offers and the implementing Public Offer Decree (*Besluit openbare biedingen Wft*); • Competition Act, Works Councils Act, SER-Merger Code 2000; • sector-specific statutes, rules and regulations.	Law of 24 May 2007	Authority for the Financial Markets (*Autoriteit Financiële Markten* – AFM)
Sweden	• Act Concerning Public Takeover Bids in the Stock Market (SFS 2006:451 – Takeover Act); • Swedish Securities Market Act (SFS 2007:528); • Swedish stock exchanges and other regulated markets[101]; • OMX Nordic Exchange's rule book for issuers; • Swedish Companies Act (SFS 2005:551); • Swedish Financial Instruments Trading Act (SFS 1991:980); • Swedish Market Abuse Penalties Act (SFS 2005:377); • Swedish Act on Notification Obligations for Certain Holdings of Financial Instruments (SFS 2000:1087).	Act Concerning Public Takeover Bids in the Stock Market (SFS 2006:451 – Takeover Act)	Swedish Financial Supervisory Authority (*Finansinspektionen* – SFSA)

Source: personal elaboration[102]

[101] Among these, the Rules Concerning Public Takeover Bids in the Stock Market on 1 July 2007 by the OMX Nordic Exchange Stockholmplay a significant role.

[102] Data taken from VAN GERVEN D., *Rules of Community law applicable to takeover bids*, in *Common Legal Framework for Takeover Bids in Europe*, 2010, Cambridge University Press, I-II.

In the case of the United Kingdom, the Code already contained a large part of the provisions subsequently included in the Takeover Directive, so the implementation process was not disruptive. Following implementation of the Takeover Directive, the rules contained in the Code have gained statutory force. The same can be said for France and Germany, which issued the WpÜG in 2002 and was already based on the previous proposal for the Takeover Directive. In the Netherlands the transposition of the Takeover Directive required a greater effort to align the legislation, as well as in Sweden, which has particularly complex and detailed national legislation on takeover bids, and in Italy, where the implementation of the directive has been the subject of criticism and debate, involving even the Bank of Italy with regard to voluntary and mandatory aspects[103].

The aspects regulated by the directive in greater detail and with less discretion for Member States are the takeover procedure[104] and its supervision by national authorities[105].
Article 4(1) of Takeover Directive clarifies the subject of supervision, requiring Member States to appoint a body from among "public authorities, associations or private bodies recognised by national law or by public authorities expressly empowered for that purpose by national law" to supervise bids and ensure that the law is applied in accordance with the principles of impartiality and independence.
The United Kingdom opted for the latter possibility with Sections 943 and 944 of the Companies Act 2006, which designated the Takeover Panel as the competent body, whose key roles are to organise, administer, monitor compliance and enforce the rules[106] contained in the UK City Code[107]. Section 945

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[103] JONES C., *United Kingdom*, in Common Legal Framework for Takeover Bids in Europe, 2010, Cambridge University Press, I, p. 415; MARTIN D.G., TÉZENAS DU MONTCEL A., BAIRD-SMITH M., *France*, in Common Legal Framework for Takeover Bids in Europe, 2010, Cambridge University Press, II, p. 95; ZIEMONS H., SCHLOTTER J., HILMER K., *Germany*, in Common Legal Framework for Takeover Bids in Europe, 2010, Cambridge University Press, I, p. 166; RYDBERGER M., NOSTELL N., *Sweden*, in Common Legal Framework for Takeover Bids in Europe, 2010, Cambridge University Press, II, p.224; GIANNI F., AIELLO A., *Italy*, in Common Legal Framework for Takeover Bids in Europe, 2010, Cambridge University Press, II, p. 126.
[104] For the sake of completeness, it will be briefly presented in paragraph 2.2.
[105] VEIL R., *European Capital Markets Law*, 2022, Oxford, p. 674.
[106] "The Panel had recourse to various nonstatutory sanctions to enforce compliance with the Code and to deal with the consequences of rule breaches. These sanctions included private censure, public censure, the suspension or withdrawal of any exemption, approval or other status granted by the Panel, the reporting of the offender's conduct to another regulatory authority (e.g., the Financial Services Authority) or, in certain circumstances, 'cold-shouldering' procedures prohibiting persons authorised by the Financial Services Authority or certain other professional bodies from acting for the individual responsible for the breach in a transaction subject to the Code." JONES C., *United Kingdom*, in Common Legal Framework for Takeover Bids in Europe, 2010, Cambridge University Press, I, cit. p. 418.
[107] In 2001, the Code Committee was established to review and amend the code in order to separate the regulatory and judicial functions of the Panel (https://www.thetakeoverpanel.org.uk/structure/committees/code-committee). The Takeover Panel Executive (https://www.thetakeoverpanel.org.uk/structure/executive) makes most of the decisions; it fulfils the key roles mentioned above, provides advice on the operation of the code and can issue binding rules on the conduct of market participants. It can act on its own motion or the parties can appeal to the Hearings Committee (https://www.thetakeoverpanel.org.uk/structure/committees/hearings-committee). The Panel does not need to apply the rules of evidence to make its decisions but only conducts oral hearings. It then publishes its decisions and reasons in the form of a Panel Statement. The Panel issues guidance in the form of Notes to the rules of the code and annual reports containing interpretations. In 2004, it also began issuing Practice Notes. ARMSON E., *Assessing the performance of takeover panels: a comparative*

of the Companies Act 2006 also allows the Takeover Panel to lay down rules on the applicability and interpretation of the City Code in the event of disputes. Pursuant to Section 942 of the Companies Act, the Takeover Panel may do anything it considers necessary to carry out its functions and is the sole competent body[108], and in the same section, the Panel is given a legislative basis under the Companies Act 2006, following the implementation of the Takeover Directive. Therefore, the Panel, whilst remaining an independent body, has been provided with certain statutory powers since the implementation of the Takeover Directive[109] to allow it to ensure compliance with the Code. Shortly after its establishment, the Panel set itself the goal of acting according to criteria of speed, flexibility and certainty[110].

On the contrary, most of the current Member States have assigned responsibility for supervising takeover bids to a public authority[111]. The AFM in the Netherlands was given the power to supervise takeover bids in 2001; prior to that, supervision was self-regulatory and entrusted to a non-statutory regulator. In Sweden the SFSA is accompanied by The Swedish Securities Council (*Aktiemarknadsnämnden*), that offer guidance on the interpretation of the Takeover Rules and the Takeover Act. As already mentioned, supervision is one of the areas subject to the least discretion by Member States, therefore each of these authorities ensures compliance with the obligations required by the Directive. First, the authority of a certain Member State is responsible for supervising a takeover bid if the securities of the offeree company are admitted to trading in the Member State where its registered office is located, pursuant Article 4(2) (a) of the Directive. If securities are admitted to trading on several regulated markets in different Member States, the competent authority shall be that where admission took place first; if admission took place simultaneously, the company shall determine the competent authority and notify all regulated markets and supervisory authorities, accordingly, as provided for in Article 4(2) (b) and (c). Moreover, at Article 4(5), the Directive requests the Member States to vest the supervisory authorities with all the powers

study, in U. VAROTTIL, W.Y. WAN, *Comparative takeover regulation. Global and Asian Perspective*, Cambridge University Press, 2018, available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3187045.

[108] *Ibidem*, p. 676.

[109] Prior to the implementation of the Takeover Directive, the Panel had been a non-statutory body. JONES C., *United Kingdom*, in Common Legal Framework for Takeover Bids in Europe, 2010, Cambridge University Press, I, p. 418.

[110] The three objectives were then adopted by the Court of Appeal in its 1987 decision *Panel on Takeovers and Mergers, Ex parte Datafin Plc & Anor7*, and the same court took on a fundamental role in reviewing the Panel's decisions and thus ensuring their certainty. The three criteria were then emphasised as "essential characteristics of the Panel system" in all of the Panel's annual reports starting in 1992. ARMSON E., *Assessing the performance of takeover panels: a comparative study*, in U. VAROTTIL, W.Y. WAN, *Comparative takeover regulation. Global and Asian Perspective*, Cambridge University Press, 2018, available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3187045, p. 7. Please refer to the article for more details on how the Takeover Panel works, its performance and a comparison with other countries that have adopted it, and to MUKWIRI J., *Takeovers and the European Legal Framework: A British Perspective*, 2009, New York: Routledge-Cavendish.

[111] A list of all supervisory authorities has been compiled by ESMA in the report ESMA/2014/677-REV, available at: https://www.esma.europa.eu/sites/default/files/library/esma-2014-677-rev_public_statement_concerning_shareholder_cooperation_and_acting_in_concert.pdf.

necessary for the purpose of carrying out their duties, including that of ensuring that the parties to a bid comply with the rules made or introduced pursuant the Directive, with a minimum margin of discretion to allow the authority to adapt to national circumstances[112]. To ensure the smooth functioning of the corporate control market and the efficiency of cross-order takeover bids, the Directive also requires cooperation between supervisory authorities in Member States[113].

Having clarified the sources of takeover bid regulations at national level and the authorities responsible for supervising them, the following section will now present an overview of the most debated voluntary aspects of the Takeover Directive, which have given rise to differences in implementation between Member States. The analysis presented will focus on squeeze-out and sell-out rights as means of acquiring total control of the target company, in order to analyse the implications and consequences that this type of objective has on the real market of corporate control.

1.2.2. The implementation of the takeover Directive in European Union countries. Voluntary and mandatory aspects.

Once the objectives pursued by the Directive[114] and the regulatory context provided by the national laws implementing the Directive and the supervisory authorities[115] ensuring its enforcement have been clarified, the main aspects of the Takeover Directive are briefly presented below, before going into detail on the squeeze-out and sell-out rights that constitute the core of this discussion. Despite the Takeover Directive's general characterization as a framework aimed at ensuring minimum harmonization, on the one hand, it proposes a procedural "hard core" that leaves Member States little room for interpretation to ensure transparency, timeliness, and proper functioning of the market. On the other hand, sensitive issues that affect the balance between contestability of control and stability of ownership structures are often left to the discretion of Member States.

The aspects regulated in greater detail and with a more mandatory nature are the takeover procedure and its supervision. This leads to a sequence of requirements that national legal systems must implement to ensure compliance with the general principles, which can be described as follows:

i) ensure complete and timely information to the market and to security holders, pursuant to Article 6(1) and 8 of the Directive;

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[112] Recital 6 of Takeover Directive.

[113] Art. 4(4) of Takeover Directive, also in line with the request to all authorities that supervise capital markets to cooperate, coherent with the idea of Capital Market Union. See VAN GERVEN D., *Rules of Community law applicable to takeover bids*, in *Common Legal Framework for Takeover Bids in Europe*, 2010, Cambridge University Press, I, p. 13.

[114] See paragraph 1.2.

[115] See paragraph 1.2.1.

ii) also in compliance with point i), draft an offer document/prospectus with minimum content, which allows shareholders to make an appropriate assessment of the price, conditions and purpose of the offer, pursuant to Article 6(3) of the Takeover Directive. The data requested includes the terms of the offer and the identity of the offeror, and is essential for tracing the purpose of the offer itself and the offeror's intentions regarding future business;

iii) fix certain times of the offer, with reference to opening and closing, any extensions and rules for competing offers and re-bids. Article 7(1) of the Directive establishes that Member States are given the possibility to determine the time allowed to accept the offer; in any case this cannot be less than two weeks and not more than ten weeks from the date of publication of the offer document. In article 7(2) is specified that a Member State may authorise a supervisory authority to grant a derogation from the period to allow the offeree company to call a general meeting of shareholders to consider the bid;

iv) provide for rules of conduct during the bidding period to avoid distortions and ensure an orderly process, pursuant to Article 13.

To provide some practical examples, in Italy, after the publication of the takeover bid notice, the offeror must submit the prospectus to CONSOB for approval and file the guarantee – cash confirmation – documentation, with disclosure obligations on the result at the end of the acceptance period[116]. Similarly, in the Netherlands, the offering of instruments admitted to a regulated market is prohibited unless an offer document approved by the AMF – or by the competent authority of another Member State – is provided, with the introduction – post-implementation – of typical Takeover Directive elements such as certain funds, passporting of the document ,and minimum and maximum terms of the acceptance period. Looking at the process management, in the Netherlands for example, there are steps involved in the initial announcement, the request for document approval, the acceptance period, and the declaration of fulfilment or ineffectiveness of the conditions, as well as rules on counteroffers and best price[117].

Remaining on the procedural level, a perceived binding aspect is established by Article 10 in reference to the disclosure of defensive structures and mechanisms[118], with the aim to enable the potential bidder to assess the target ant the possible barriers to the takeover bid. Pursuant to Article 10(2) and (3) these must be published in the company's annual report[119] and accompanied by an explanatory report from the board to the annual meeting.

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116 See GIANNI F., AIELLO A., *Italy*, in Common Legal Framework for Takeover Bids in Europe, 2010, Cambridge University Press, II.

117 See DE BRAUW C., JONG B., DE MOL VAN OTTERLOO H., OLDEN P., *The Netherlands*, in Common Legal Framework for Takeover Bids in Europe, 2010, Cambridge University Press, I.

118 Cfr. Recital 18 Takeover Directive.

119 The information required to be included in this document, pursuant to Article 10 of the Takeover Directive, is: the capital structure, to ensure that a bidder is able to understand the company's financing method; restrictions on the transfer of their securities, which vary among Member States. For example, Germany does not allow limitations on the ownership of securities

Finally, of extreme importance is the extensively analysed mandatory bid rule regulated by Article 5 of the Directive, which the Commission itself identifies as one of the components that has contributed most to strengthening minority shareholders, clarity, and disclosure[120]. This rule provides that following a bid that signifies the transfer of control of the company to the acquirer, the acquirer is obliged to launch a bid for the remaining shares, in order to protect minority shareholders. European law leaves the responsibility of determining the boundaries of corporate control to the Member States. The calculation of the percentage of voting rights required to control a company, and therefore triggering the obligation to launch a bid, must therefore be determined by the national law of the Member State where the company is headquartered, pursuant to Article 5(3) of the Directive. Although most Member States have introduced a 30 percent threshold, some have chosen thresholds of 33, 50, or 66 percent, or even actual control criteria[121], which have led to a confusing and fragmented landscape[122]. Furthermore, the price of a mandatory offer must be fair, and there may be exemptions.

The more voluntary part of the Directive is more controversial. This refers to Articles 9, 11 and 12(3), respectively on the passivity/board neutrality rule, breakthrough rule and reciprocity. This discretion was granted precisely because differences in national laws, and the impossibility of finding a compromise on the issues, had long blocked the issuing of a Directive harmonizing Takeover Bids[123].

Article 9 of the Directive requires that during the offer period the target's board obtain prior approval from the shareholders' meeting before taking any action that could frustrate the offer. The supporting economic and regulatory argument consists in reducing the agency problem, ensuring that the final

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in its company law, while Italy and the Netherlands allow for the possibility of introducing limitations on the percentage of shares that can be held in the company's articles of association; significant shareholdings, for example in the form of pyramid financial schemes and cross-shareholdings; system of control for employee share schemes; voting rights and any restrictions applicable to them; agreements between shareholders, which in some countries such as Germany may be confidential, while in Italy there is a legal obligation to make the agreement public, under penalty of invalidity; appointment and replacement of board members; powers of board members to issue and buy back shares; any significant agreements to which the company is a party and which take effect, alter or terminate upon a change of control of the company following a takeover bids, and the effects thereof; compensation agreements between company and its board members (golden parachutes) or employees (tin parachutes). See VEIL R., *European Capital Markets Law*, 2022, Oxford, pp. 674 et seq.

120 EUROPEAN COMMISSION, *Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Application of Directive 2004/25/EC on takeover bids*, COM(2012) 347 final, Brussels, 28 June 2012.

121 Since the Directive makes no clear statement on this matter, most Member States adopt a formal concept of control, which therefore does not require the formal verification of the influence of voting rights that the formal concept would presuppose. The advantage is certainly legal certainty, but the results are controversial, as stated by VEIL R., *European Capital Markets Law*, 2022, Oxford, p. 689.

122 See CLERC C., DEMARIGNY F., VALIANTE D., DE MANUEL ARAMENDÍA M., *A Legal and Economic Assessment of European Takeover Regulation*, Centre for European Policy Studies (CEPS) & European Capital Markets Institute (ECMI), Brussels, 2012; EUROPEAN COMMISSION, *Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Application of Directive 2004/25/EC on takeover bids*, COM(2012) 347 final, Brussels, 28 June 2012; VEIL R., *European Capital Markets Law*, 2022, Oxford; BERGLÖF E., BURKART M., *European Takeover regulation*, 15 July 2003, available at SSRN: https://ssrn.com/abstract=405660.

123 See paragraph 1.1.1.

decision remains with shareholders, thus increasing the contestability of control; furthermore, it improves the predictability of the process for bidders and the market. The downside is equally well-known and consistent with the Commission's analysis: neutrality can weaken the target's ability to negotiate or resist opportunistic or short-term offers and may conflict with stakeholder-oriented governance models. Above all, in the absence of a European level playing field, it can expose more open companies to bidders from more defensive jurisdictions[124]. Precisely because of this tension, Member States have implemented neutrality inconsistently and a very complex picture has emerged. Countries like the UK and Sweden have made the rule mandatory without reciprocity requirement; Germany and the Netherlands have made the rule statutory, allowing companies to opt in; Italy, again differently, has adopted the rule while allowing companies to opt out[125].

Article 11 neutralizes pre-bid defences, restrictions on the transfer of shares or voting, during the offer period and allows a successful offeror to easily remove the incumbent board of the offeree

company and to modify its articles of association. From an economic perspective, the supporting argument is the reduction of entrenchment embedded in control structures – agreements, voting limits, transfer restrictions – thus making contestability credible and reducing the premium required by investors to enter protected companies. The downside is that the breakthrough directly affects governance balances and shareholder agreements: it can increase the risk of hostile takeovers and destabilize control models considered efficient, for example, where ownership concentration reduces monitoring costs, but above all, it creates asymmetries if not uniformly adopted across Europe. It's not surprising, in fact, that the Commission has recorded minimal adoption in only three Member States. France and Italy apply it with different reservations, or other countries use it with opt-in or opt-out mechanisms[126].

Finally, Article 12(3) It allows states to permit companies subject to passivity and/or breakthrough rules, by law or by statute, to waive them when the offeror is not subject to the same rules or is controlled by someone who does not apply them. From an economic and regulatory perspective, reciprocity is justified as a tool to mitigate the competitive disadvantage resulting from the unilateral adoption of pro-contestability rules such as neutrality and breakthrough in a non-uniform European context: it serves to recreate, at least partially, a level playing field and protect companies in more open jurisdictions from bidders from more defensive systems. The downside is that reciprocity reintroduces complexity and

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[124] See CLERC C., DEMARIGNY F., VALIANTE D., DE MANUEL ARAMENDÍA M., *A Legal and Economic Assessment of European Takeover Regulation*, Centre for European Policy Studies (CEPS) & European Capital Markets Institute (ECMI), Brussels, 2012; BERGLÖF E., BURKART M., *European Takeover regulation*, 15 July 2003, available at SSRN: https://ssrn.com/abstract=405660.

[125] See CLERC C., DEMARIGNY F., VALIANTE D., DE MANUEL ARAMENDÍA M., *A Legal and Economic Assessment of European Takeover Regulation*, Centre for European Policy Studies (CEPS) & European Capital Markets Institute (ECMI), Brussels, 2012; PASSADOR M.L., *Le OPA in una prospettiva comparata: confronto tra alcuni modelli stranieri*, in Rivista delle Società, 2024, LXIX, 3, 2, pp. 348-373.

[126] CLERC C., DEMARIGNY F., VALIANTE D., DE MANUEL ARAMENDÍA M., *A Legal and Economic Assessment of European Takeover Regulation*, Centre for European Policy Studies (CEPS) & European Capital Markets Institute (ECMI), Brussels, 2012, p. 80.

uncertainty as it requires assessing equivalences between regimes, potentially leading to disputes. Italy perfectly illustrates this trade-off: reciprocity means that passivity, unless there is a statutory opt-out, and breakthrough, if there is a statutory opt-in, do not apply if the bidder is not subject to equivalent rules; furthermore, CONSOB must assess equivalence within a deadline, and determining this is not straightforward due to the lack of legal criteria[127]. Sweden, on the other hand, rejected reciprocity because it would add too much complexity and because companies are unlikely to include breakthrough clauses in their articles of association; therefore, any statutory clauses would continue to apply even if the bidder is not subject to similar rules[128].

This is the overall picture of the Takeover Directive, including its inherent potential, strengths, and critical issues. Although beyond the scope of this discussion, the following sentence summarizes the complexity of the Directive's overall and organic interpretation, which is essential for its implementation and potential improvements.

> *Legal and economic analysis shows the intrinsic contradiction between the mandatory bid rule, which acts as an anti-takeover device, and the board neutrality rule, breakthrough and squeeze-out rules, the purposes of which are to facilitate bids*[129].

1.3. The regulatory cases of squeeze-out and sell-out.

Recital 9 of the Takeover Directive stipulates that Member States must take the necessary measures to protect shareholders, with particular attention to minority shareholders, in the event of a takeover of a company; to this end, they must ensure this protection by obliging the person acquiring control of a company to make an offer to all holders of shares in that company for all their holdings at a fair price. Moreover, Recital 24 states that:

> *Member States should take the necessary measures to enable an offeror who, following a takeover bid, has acquired a certain percentage of a company's capital carrying voting rights to require the holders of the remaining securities to sell him/her their securities. Likewise, where, following a takeover bid, an offeror has acquired a certain percentage of a company's capital carrying voting rights, the holders of the remaining securities should be able to require him/her to buy their securities. These squeeze-out and sell-out procedures should apply only under specific*

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127 GIANNI F., AIELLO A., *Italy*, in Common Legal Framework for Takeover Bids in Europe, 2010, Cambridge University Press, II, p. 143.

128 RYDBERGER M., NOSTELL N., *Sweden*, in Common Legal Framework for Takeover Bids in Europe, 2010, Cambridge University Press, II, p. 240.

129 CLERC C., DEMARIGNY F., VALIANTE D., DE MANUEL ARAMENDÍA M., *A Legal and Economic Assessment of European Takeover Regulation*, Centre for European Policy Studies (CEPS) & European Capital Markets Institute (ECMI), Brussels, 2012, cit. p. 5.

conditions linked to takeover bids. Member States may continue to apply national rules to squeeze-out and sell-out procedures in other circumstances.

The same Directive gives substance to these requirements in Articles 15 and 16 that provide for, respectively, "The right of squeeze-out" and "The right of sell-out", which correspond to the final stages of the takeover bid process.

The right of squeeze-out intervenes

a) where the offeror holds securities representing not less than 90% of the capital carrying voting rights and 90% of the voting rights in the offeree company[130] or
b) where, following acceptance of the bid, he/she has acquired or has firmly contracted to acquire securities representing not less than 90% of the offeree company's capital carrying voting rights and 90% of the voting rights comprised in the bid[131].

In these cases, the bidder may compel the holders of the remaining shares to sell them at a fair price. The first area of discretion left to Member States concerns the threshold in hypothesis a), which may be set higher than 90% but not higher than 95%[132]. In this way, the bidder who has acquired almost all the shares can force minority shareholders to sell the remaining shares in order to acquire total equity. Member States must ensure that it is possible to calculate when the threshold is reached and that the right of squeeze-out can be exercised in the class of securities in which the threshold has been reached, in the hypothesis that the offeree company has issued more than one class of securities[133] - it applies on a class-by-class basis. In general, the Directive applies the squeeze-out right only to transferable voting securities within the meaning of the Directive[134], but national laws may extend it to other types of securities. The offeror can exercise his squeeze-out right within three months of the end of the time allowed for acceptance of the bid[135]. The price paid to squeeze out minority shareholders should be fair and must

130 So-called ownership test, "which is based on the shares held by the initiator at the end of the bid (whether held prior to the bid or acquired during or pursuant to the bid)." CLERC C., DEMARIGNY F., VALIANTE D., DE MANUEL ARAMENDÍA M., *A Legal and Economic Assessment of European Takeover Regulation*, Centre for European Policy Studies (CEPS) & European Capital Markets Institute (ECMI), Brussels, 2012, cit. p. 89. In this case, the company's total shareholding structure counts, not just the offering.

131 So-called acceptance test, "which is based on the shares acquired (or acquisition of which is firmly contracted) in the bid." CLERC C., DEMARIGNY F., VALIANTE D., DE MANUEL ARAMENDÍA M., *A Legal and Economic Assessment of European Takeover Regulation*, Centre for European Policy Studies (CEPS) & European Capital Markets Institute (ECMI), Brussels, 2012, cit. p. 89. This is a more market-based criterion, which looks only at the securities covered by the offering but can raise the legitimacy of the squeeze-out.

132 Article 15 (2) Takeover Directive.

133 Article 15 (3) Takeover Directive.

134 See page 8.

135 Article 15(4) Takeover Directive. The time given to accept a takeover bid, determined by Member States, may not be less than two weeks or more than ten weeks from the publication date of the offer document, pursuant to Article 7(1) of the Takeover Directive. For a detailed examination of the takeover bid procedure, please refer to VAN GERVEN D., *Rules of Community law applicable to takeover bids*, in *Common Legal Framework for Takeover Bids in Europe*, 2010, Cambridge University Press, I, pp. 26 et seq.

take the same form as the consideration offered in the takeover bid or be in cash. Nevertheless, national law may require that a cash alternative be offered. If the squeeze-out follows a mandatory takeover bid, the consideration offered in the bid shall be presumed fair; if the squeeze-out happens after a voluntary takeover bid, he consideration offered in the bid shall be presumed to be fair where, through acceptance of the bid, the offeror has acquired securities representing not less than 90% of the capital carrying voting rights comprised in the bid[136].

On the other hand, with the right of sell-out, Member States shall ensure that the holders of the remaining securities are entitled to request that the offeror buy their securities, under the same circumstances as provided for in Article 15(2)[137]. Article 15(3) to (5) shall apply *mutatis mutandis*[138]. As can be read in Recital 24, Member States may extend the national rules on squeeze-out and sell-out also in other circumstances.

1.3.1. *Ratio* and historical origins of squeeze-out and sell-out institutions.

Historically, at common law if one company made an offer to another, it had no power to compel shareholders to sell their shares against their will. The first historical reference to squeeze-out rules in Europe, in the sense later adopted by the Directive, can be found in the 1926 recommendation of the Green Committee on Company Law Amendments to allow the compulsory purchase of minority shareholders after a takeover, later inherited by article 209 of the Companies Act 1929 and accompanied by the reverse right of sell-out, and since 1985 merged into Companies Act in its part XIIIA, entitled "Takeover Offers". As in the more general case of takeover regulations, other continental European countries began to take a practical interest in takeover bids between the 1990s and 2000s[139], although squeeze-out and cell-out rights were already included in many legal systems. Nevertheless, the Takeover Directive introduced squeeze-out and sell-out rights for the first time in several jurisdictions[140], or modified the provisions relating to these rights in legal systems where they already existed, always with the ultimate aim of harmonising the rules between Member States.

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136 Article 15(5) Takeover Directive.

137 Article 16(2) Takeover Directive.

138 Article 16(3) Takeover Directive.

139 See paragraph 1.1.1.

140 Squeeze-out procedure has been introduced for the first time by the Takeover Directive in seven member states: Cyprus, Estonia, Germany, Greece, Luxembourg, Slovakia and Spain; Sell-out procedure has been introduced for the first time by the Takeover Directive in ten member states: Belgium, Cyprus, the Czech Republic, Estonia, Germany, Greece, Luxembourg, the Netherlands, Slovakia and Spain. CLERC C., DEMARIGNY F., VALIANTE D., DE MANUEL ARAMENDÍA M., *A Legal and Economic Assessment of European Takeover Regulation*, Centre for European Policy Studies (CEPS) & European Capital Markets Institute (ECMI), Brussels, 2012, p. 89. The introduction of these two provisions into the Directive is attributable to the suggestions contained in HIGH LEVEL GROUP OF COMPANY LAW EXPERTS, *Report on a Modern Regulatory Framework for Company Law in Europe*, Brussels, 4 November 2002.

In the context of the Takeover Directive, the squeeze-out has been seen as a bid-enhancement mechanism. This mean was introduced with the aim of encouraging takeovers[141] by imposing an obligation on minority shareholders to exit the company in the event of a successful takeover bid that has acquired a significant shareholding, and the resulting advantage for the bidder, who will not have to bear the costs and risks caused by the remaining shareholders and will receive the post-takeover value of the shares, without the remaining minority shareholders seeking to extort it, thereby causing the transaction to fail. Therefore, the introduction of the squeeze-out provision is intended to resolve the hold-up problem[142] and the consequent free-rider problem. Precisely, this is what can happen and the exact way in which the free-rider problem is solved:

> *The shareholder compares the returns of tendering and retaining. There are five possible outcomes but one of them is unlikely to happen. First, if the bid fails, the position of the shareholder does not change whether he tenders or retains. Theoretically his value of the shares remains at the level of the pre-takeover value. If the shareholder tenders, he will receive the bid price if the bid is successful. If he retains and he is squeezed the shareholder receives the bid price. If the bid is successful and the bidder does not squeeze the retaining shareholders, their return will be the post-takeover value. However, if this value is higher than the bid price, it is very unlikely the bidder will not make use of the squeeze-out procedure. He will have to share the additional value with the retaining shareholders. Hence, the shareholder will realize a maximum return when accepting the bid price. The additional post-takeover value flows to the bidder, solving the Grossman and Hart free rider problem*[143].

The squeeze-out right therefore guarantees the bidder the effectiveness of an offer that has met with broad acceptance and the consequent acquisition of control. This rule can only be applied following an offer made to all holders of the securities of the company subject to the offer for all their securities at a fair price, and therefore does not harm minority shareholders, for whom the protection sought by the Directive is ensured[144]. The economic efficiency of the transaction is ensured precisely by the determination of the squeeze-out price, that is the variable that makes possible the hold-up problem to raise. The pricing rules laid down in the Directive[145] apply the principle of equal treatment and it can therefore be assumed that they will not lead to an increase in the overall cost of the transaction. If the

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[141] It may discourage only bids that do not seek to control all the shares of the offeree company, as specified by CLERC C., DEMARIGNY F., VALIANTE D., DE MANUEL ARAMENDÍA M., *A Legal and Economic Assessment of European Takeover Regulation*, Centre for European Policy Studies (CEPS) & European Capital Markets Institute (ECMI), Brussels, 2012, p. 191.

[142] See paragraph 1.1.3.

[143] VAN DER ELST C., VAN DEN STEEN L., *Opportunities in the M&A aftermarket: squeezing out and selling out*, 2006, Working Paper 2006-12, Financial Law Institute, cit. p. 10.

[144] CLERC C., DEMARIGNY F., VALIANTE D., DE MANUEL ARAMENDÍA M., *A Legal and Economic Assessment of European Takeover Regulation*, Centre for European Policy Studies (CEPS) & European Capital Markets Institute (ECMI), Brussels, 2012, p. 88. At the same time, the authors point out that the squeeze-out procedure has a downside, as it can lead to acquisitions that reduce value, for example when a 100% post-squeeze-out stake allows the bidder to replace equity with tax-deductible debt and thus obtain a public subsidy for a private transaction.

[145] See paragraph 1.3.

squeeze-out right reduces the consideration of the transaction below the value of the company after the takeover, the bidders will tend to make the acquisitions conditional upon reaching the squeeze-out threshold[146].

The threshold, with reference to the capital, is a detail left to the discretion of Member States, although it must remain within the range of 90 to 95 per cent[147] of shares acquired by the bidder, thus representing a point of differentiation among national laws in the European Union's attempt to harmonise regulations. The reasons behind this range of percentages are that, on the one hand, with a threshold below 90%, concentrated ownership, which is extremely widespread in continental Europe, would be damaged, while setting a threshold above 95% would make it difficult to stem the problem of untraceable shareholders or stubborn minorities who refuse the offer even on reasonable terms[148]. Not only that, but in theory, the optimal threshold level depends on the concentration of ownership of the company[149], which is why the best formula for determining it should be based on the decision of the individual company. Instead, the legislator has provided for the application of a single threshold within the same jurisdiction, even though the ownership structures of companies within that jurisdiction are not homogeneous. Moreover, the choice of threshold must support the protection of investors' rights over their shares and the bidder's interest in acquiring control of the company; a low threshold would undermine shareholders' right to determine whether holding the shares has a higher expected value for them than liquidating them, while a threshold that is too high would undermine the bidder's willingness to pursue the offer.

Fundamentally, the introduction of the squeeze-out right implies that the acquisition of control by the bidder should be encouraged even at the cost of limiting shareholders' rights, given the social benefits it

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146 CLERC C., DEMARIGNY F., VALIANTE D., DE MANUEL ARAMENDÍA M., *A Legal and Economic Assessment of European Takeover Regulation*, Centre for European Policy Studies (CEPS) & European Capital Markets Institute (ECMI), Brussels, 2012, p. 194. In theory, squeeze-out transactions are likely to reduce the total consideration paid in the offer and allocate a larger share of the acquisition gains to the offeror, as long as they do not increase the premium for shareholders by increasing the efficiency of the transaction. However, this is not permitted by the Takeover Directive, which nevertheless ensures equal treatment. Precisely, "When an offer conditional upon acceptance of the freeze-out fraction succeeds, the rival has the option to squeeze-out the remaining minority shareholders. As a result, these shareholders realize at most a return equal to the bid price p and may therefore as well accept the offer. This holds true also for bid prices below the post takeover share value ($p_x < R$). That is, a takeover conditioned on the squeeze-out threshold prevents shareholders from becoming minority shareholders, thereby solving the free-rider problem."

147 See paragraph 1.3. Please note that the threshold set with reference to the number of acceptances of the offer is unique, at 90%.

148 VAN DER ELST C., VAN DEN STEEN L., *Opportunities in the M&A aftermarket: squeezing out and selling out*, 2006, Working Paper 2006-12, Financial Law Institute, p. 26.

149 "In all European countries the threshold is very high and we agree with Enriques (2004) that smaller controlling blocks offer more interesting opportunities of expropriation than a large controlling block. Hence a lower threshold should be encouraged. However, considering the modest ownership dispersion in most European countries a lower threshold can endanger the business process of a large number of European companies. A constant threat of controlling and minority shareholders to make use of their squeeze-out or sell-out right will hamper the development of a well-balanced corporate strategy. Hence as a second best solution the high threshold can be supported." VAN DER ELST C., VAN DEN STEEN L., *Opportunities in the M&A aftermarket: squeezing out and selling out*, 2006, Working Paper 2006-12, Financial Law Institute, cit. p. 28. BURKART M., PANUNZI F., Takeovers, ECGI Working Paper Series in Finance, 2006, 118, cit. p. 15.

could bring. Therefore, according to the logic that regulation has the capacity to redistribute the benefits and profits deriving from takeovers, squeeze-outs allocate a greater share of the benefits to the bidder. However, there is always the other side of the coin, according to which value-decreasing takeovers could also occasionally be favoured if the social benefit does not materialise, solely for the convenience of the bidder[150].

As a direct counterbalance of the squeeze-out, the sell-out has been included. It has the objective to defend minority shareholders from any improper and abusive conduct by the offeror, giving them the opportunity to exit the company. Minority shareholders are further protected by the fair compensation that the bidder is obliged to pay them, which is likely to be better than that set by a potentially illiquid market. This rule alleviates the pressure-to-tender[151], as minority shareholders do not risk being trapped in a situation where they have low liquidity and a high risk of private benefits being extracted from control if they do not submit an offer. This promotes investment in general[152]. In this case, there is a redistribution of profits to the benefit of minority shareholders.

When evaluated simultaneously, the squeeze-out rule mitigates the hold-up problem and the free-riding[153], incentivising takeovers, while the sell-out rule has the opposite effect and protect minority shareholders, discouraging takeover. This explains how the inclusion of both clauses in the Takeover Directive and their implementation at national level strikes a balance between incentivising the takeover market and protecting minority shareholders themselves[154].

1.3.2. Squeeze-out and sell-out in national laws.

Following the logic of the squeeze-out and sell-out cases just presented, Member States have implemented these provisions in an uneven manner, thus failing to fully achieve the level playing field desired by the Directive. Below, before discussing the various positions, an overview of the rules introducing or modifying squeeze-out and sell-out rights under the Takeover Directive is provided,

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150 CLERC C., DEMARIGNY F., VALIANTE D., DE MANUEL ARAMENDÍA M., *A Legal and Economic Assessment of European Takeover Regulation*, Centre for European Policy Studies (CEPS) & European Capital Markets Institute (ECMI), Brussels, 2012, p. 194.

151 See paragraph 1.1.3.

152 *Ibidem*.

153 See paragraph 1.1.3. in which it has been already exposed how these two issues are closely linked, in particoular the holding-up by some sharehoders take them to free-ride on others.

154 A more pessimistic view sees the introduction of squeeze-outs into company law as "effect a promotion of capitalism at the cost of protection of minority shareholders where such minority does not wish to give up its shareholding. It is a naïve law's response to commercial demands and reality." MUKWIRI J., *Takeovers and the European Legal Framework: A British Perspective*, 2009, New York: Routledge-Cavendish, cit. p. 73. The author counter-argues the aims of the directive by reporting that the property rights of minority shareholders are rendered obsolete and criticises the vision of The Winter Report which "considered this enigma and concluded that, so long as the squeeze-out right applies only when the minority is fairly small and appropriate compensation is offered, the use of squeeze-out to address these public interests is appropriate." *Ibidem*, cit. p. 75.

highlighting if national law has chosen to implement the acceptance test or the ownership test[155] and, in the case of the ownership test, which triggering threshold has been fixed.

Table 2. Squeeze-out and Sell-out in national laws after Takeover Directive

Country	Squeeze-out and Sell-out rules	Directive scheme implemented	Squeeze-out threshold	Sell-out threshold
United Kingdom	Sections 974 to 991, Companies Act 2006	b) acceptance test	90%	90%
Italy	Artt. 108 and 111, TUF	a) ownership test	95%	90% - 95% double level
Germany	Section 39a and 39c, WpÜG	a) ownership test	95%	95%
France	Artt. 236-237, *Règlement Général de l'AMF*	a) ownership test	95%	95%
Netherlands	Section 2:359c Civil Code	a) ownership test	95%	95%
Sweden	Chapter 22, Swedish Companies Act (SFS 2005:551)	a) ownership test	90%	90%

Source: personal elaboration

As can be seen, none of the countries considered have introduced different squeeze-out and sell-out thresholds[156], except Italy, which has a dual threshold aimed at increasing shareholder protection. This approach requires the sell-out right to be exercised in a low-liquidity environment, unless a float sufficient to ensure regular trading performance is restored within 90 days[157].

Also, among the two choices made available by the Directive, only UK opted for acceptance test scheme, and even considering other Member States the same choices has been performed just by Romania and Spain. In the UK, the discipline was largely structured, as we have seen, even before the Takeover Directive which was defined on its model. Specifically, the model envisaged for the squeeze-out right was

[155] See paragraph 1.3.

[156] With regard to this point, the Directive doesn't express itself on the possibility of deciding for a different threshold of squeeze-out and sell-out. Generally speaking, just Romania and Luxembourg opted for introducing differentiated thresholds of squeeze-out and sell-out. CLERC C., DEMARIGNY F., VALIANTE D., DE MANUEL ARAMENDÍA M., *A Legal and Economic Assessment of European Takeover Regulation*, Centre for European Policy Studies (CEPS) & European Capital Markets Institute (ECMI), Brussels, 2012, p. 90.

[157] The Italian legislation regarding squeeze-out and sell-out rights will be discussed in detail in Chapter III, specifying the regulatory choice behind this provision.

already bid-based, meaning it applied to at least 90% of the shares being offered, not the total capital. It's no coincidence that this same model was proposed as an alternative under the Takeover Directive to activate the squeeze-out and sell-out right, and it aligns perfectly with the dispersed ownership structures typical of Anglo-Saxon corporate governance: in a company with dispersed ownership, any offer reaching 90% acceptances can alter the balance of power, something that doesn't happen with major shareholders from Continental Europe. It's no coincidence that other countries have opted for the alternative model, the ownership test.

Having clarified the type of test that Member States have introduced into their legal systems to trigger squeeze-out and sell-out rights and the related threshold, it should be noted here that the general framework proposed by the Directive in Articles 15 and 16[158] has been largely respected. Nonetheless, there has been some room for manoeuvre that has led Member States to create differences in the interpretation and therefore application of the Directive, depending on the specificities of their respective legal systems. Below, will be specified the specific characteristics of the various national legal systems, thus assuming faithful application of the Directive for all other purposes.

In the UK, Section 979 CA 2006 introduces a dual test to implement Article 15 of the Directive[159]. By accepting the offer, the offeror must have acquired – or unconditionally agreed to acquire –

- an amount greater than or equal to 90 percent in value of the shares to which the offer relates and
- an amount greater than or equal to 90 percent of the voting rights carried by those shares.

The same dual test is foreseen for the implementation of Article 16 of the Directive[160].

In Italy – aside from the aforementioned double sell-out threshold, which will be analysed later – it is clearly established, regarding the principle of a fair price, that the sell-out price must be equal to that of the previous offer if the offer was voluntary and at least 90% of the voting share capital subject to the offer has been purchased; otherwise, CONSOB will determine it, usually referring to the market price of the last six months or the previous offer. The same applies to squeeze-outs. In this case, the shares will be automatically transferred and the price deposited in a bank. The bidder must also declare its intent to exercise the squeeze-out right in the offering prospectus[161].

This last requirement also occurs in French law, and the rules relating to the squeeze-out price are also similar to the Italian ones, providing for the application of the price of the previous offering if it was

[158] See paragraph 1.3.

[159] Following the guidance of DEPARTMENT OF TRADE AND INDUTRY, *Modern Company Law for a Competitive Economy: Final Report*, 2001, in *Company Law Review*, Steering Group, London.

[160] JONES C., *United Kingdom*, in Common Legal Framework for Takeover Bids in Europe, 2010, Cambridge University Press, I, pp. 431-432-

[161] GIANNI F., AIELLO A., *Italy*, in Common Legal Framework for Takeover Bids in Europe, 2010, Cambridge University Press, II, pp. 143-144.

public, or an objective valuation of the securities under supervision by the AMF[162]. The French system requires the terms and conditions of a squeeze-out – *retrait obligatoire* – to be reviewed and approved by the AMF based on a draft document, a fairness opinion issued by an independent expert appointed by the offeree, and an evaluation report. This is not required if the squeeze-out follows a cash consideration tender offer in one of the following alternative cases:

i) an offer was launched by an offeror which held less than one-half of the share capital or voting rights of the offeree before the filing of the public offer;
ii) at the time of the public offer, the AMF was provided with an evaluation report, and a fairness opinion has been issued, including with respect to the squeeze-out, by an independent expert appointed by the offeree.

In these cases, the squeeze-out occurs in a very fluid and linear manner. Once the squeeze-out has been completed following an offer, the shares will automatically be delisted. Furthermore, in the French system the right of exit of minorities does not emerge as an autonomous institution but is functionally absorbed in the *offre publique de retrait* procedure, which plays an economic role equivalent to the sell-out provided for by art. 16 of the Directive. If the squeeze-out was not conducted after the offering, those who have acquired 95 percent of the share capital may launch a buyout offer and then execute the squeeze-out, declaring at the time of filing whether they will automatically execute the squeeze-out immediately after the closing of the buyout offer, or they may launch the squeeze-out after the closing of the buyout. At the end of the buyout offer, if a total of 5 percent or less of the share capital remains with minority shareholders, an automatic squeeze-out may take place, or the bidder may request the AMF to implement it on the remaining shares, which will also carry out the review and approval actions. The offer period for a buyout is at least ten days; thereafter, the bidder can request that the AMF and NYSE Euronext delist its securities. Delisting in this case, therefore, is not automatic, but the authorities evaluate certain criteria, such as average daily transactions in euros and number of securities traded, and percentage of the share capital held by the public. Furthermore, the shares of any minority shareholders will remain listed on a non-regulated market – *compartiment des valeurs radiées des marches réglementés*. In some rare cases, the buyout may be mandatory by the AMF[163].

In Germany, the legislator has decided not to change the rules relating to stock corporation squeeze-out[164] contained in the Stock Corporation Act, thus leaving them separate from the regulation on takeover

[162] Pursuant to Article 237, *Règlement Général de l'AMF*, available at: https://www.legifrance.gouv.fr/codes/id/LEGISCTA000025347548.

[163] MARTIN D.G., TÉZENAS DU MONTCEL A., BAIRD-SMITH M., *France*, in Common Legal Framework for Takeover Bids in Europe, 2010, Cambridge University Press, II, pp. 120-122.

[164] Sections 327a et seq. of the Stock Corporation Act provides for a squeeze-out, which presupposes that neither the stock corporation concerned be listed, nor any association with the takeover or mandatory bid. This exclusion is made by means of an entry of a corresponding shareholders' resolution into the commercial register. ZIEMONS H., SCHLOTTER J., HILMER K., *Germany*, in Common Legal Framework for Takeover Bids in Europe, 2010, Cambridge University Press, I, p. 184, note 26.

bids that are regulated at Section 39a WpÜG according to a judicial model[165]. However, some references are made to the Stock Corporation Act. For the calculation of the threshold, Section 39a(2) WpÜG refers to the rules of the AktG, Section 16(2) and (4), which stipulate that shares of controlled companies, companies holding shares on behalf of the bidder and dependent companies are also to be considered, even if the influence is only potential and not exercised. This makes share ownership the determining factor for the existence of exclusion conditions, while the attribution of voting rights is irrelevant for this purpose. In order to determine the fair price in case of squeeze-out, If the offer reaches the 90 percent acceptance threshold, the offered price is considered fair; this, in addition to causing a doctrinal divide in Germany[166], also leaves open the debate if this threshold is not reached. The determination of the fair price is therefore postponed to lengthy compensation settlement proceedings – *Spruchverfahren*). Moreover, Section 39a(3) of the WpÜG has provided that the bidder must offer a cash payment, always taking up the logic foreseen in the AktG, considering this choice preferable from the point of view of protecting minority shareholders. The takeover law squeeze-out judicial procedure in Germany is based on the Act on Matters of Non-Contentious Jurisdiction – *Gesetz über die Angelegenheiten der freiwilligen Gerichtsbarkeit*. The bidder applies to the regional court. The request is then published in the company gazettes by the regional court, and the court verifies the grounds for the exclusion request. Only after the decision by the competent judges[167] becomes final, and the price revision was conducted following the above-mentioned criteria, does the transfer of the shares occur. The final peculiarity to consider in German law concerns the process of implementing the sell-out. The sell-out consideration is not regulated because, given that shareholders in an offeree company may accept the takeover or mandatory bid within a three-month period after the acceptance period expires, it is a voluntary right, for which no further protection is necessary[168]. This is highly questionable in relation to the directive's requirement to ensure a fair price for both the squeeze-out and the sell-out[169].

Swedish law has explicitly established that ownership through subsidiaries also counts towards the threshold for triggering the squeeze-out right, but the target's own shares held in treasury are not counted, thus returning to a more ownership-based than voting-rights-based model similar to Germany. Furthermore, in Sweden the squeeze-out also applies to warrants and convertibles. The squeeze-out price will be the same as the offer price, but there are certain exceptions that the Swedish legislator has introduced: the price may be adjusted if a significant amount of time has passed since the closing of the tender offer or there has been a material change in value. Therefore, while the presumption of adequacy

165 Thi salso provides that, following a top-up offer, recourse must be made to the stock corporation squeeze-out.

166 For reference to written works on the subject cfr. ZIEMONS H., SCHLOTTER J., HILMER K., *Germany*, in Common Legal Framework for Takeover Bids in Europe, 2010, Cambridge University Press, I, p. 185, note 29.

167 The Regional Court and the Higher Regional Court of Frankfurt am Main are the sole competent courts.

168 ZIEMONS H., SCHLOTTER J., HILMER K., *Germany*, in Common Legal Framework for Takeover Bids in Europe, 2010, Cambridge University Press, I, pp. 183-189.

169 See paragraph 1.3.

of the price[170] applies, it has a strong but not absolute meaning. If the rule does not apply, the price must reflect the market value of the shares at the time the squeeze-out is initiated and no minority discount applies. It is also specified that if the company is listed, the price must be equal to the market price at the time the squeeze-out begins except for special reasons. The sell-out right is constructed to mirror the squeeze-out right, as required by the Directive[171].

Ultimately, the Dutch case applies the principle of presumption of adequacy of the takeover bid price only if:

- the offeror has purchased an amount equal to or greater than 90 percent of the shares subject to the offer or
- it is a mandatory takeover bid.

In this case, both the majority and the minority can challenge the price. The general rule, however, or this potential challenge, is implemented in the judicial context because "The Court will determine a reference date and set a fair price for the shares"[172]. The judge may use independent experts in the price-setting process. This price can only be paid in cash, not in shares, and statutory interest will be due until the transfer date. Once the price is deposited in a special account held by the Ministry of Finance – *Consignatiekas* – the shares will be automatically transferred. Depository receipts that are issued with the cooperation of the company are considered shares. Instead, a minority shareholder can exercise their right to sell out within three months by filing a petition with the Enterprise Chamber and requesting that the majority shareholder, who now holds 95% of the company's voting rights, purchase the remaining shares. The other provisions relating to the sell-out are the same as those for the sell-out[173].

The above framework reveals that, despite the general framework proposed by the Directive, which Member States have adhered to closely, actual implementation has involved areas of interpretation and detail that have led to discrepancies and inconsistencies in national laws. The European Commission's 2012 Report on the Application of the Takeover Bid Directive[174] does not express any dissent regarding the implementation of Articles 15 and 16 of the Directive. However, a closer reading clearly reveals heterogeneity in Member States' typical ownership structures, the tendency to adopt more or less market-based visions, the preference for judicial proceedings, and the centrality of supervisory authorities in squeeze-out and sell-out procedures with respect to elements such as determining a fair price and the

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170 This means the presumption that the takeover bid price is appropriate.

171 RYDBERGER M., NOSTELL N., *Sweden*, in Common Legal Framework for Takeover Bids in Europe, 2010, Cambridge University Press, II, p. 243.

172 DE BRAUW C., JONG B., DE MOL VAN OTTERLOO H., OLDEN P., *The Netherlands*, in Common Legal Framework for Takeover Bids in Europe, 2010, Cambridge University Press, I, cit. p. 328.

173 *Ibidem*, pp. 328-329.

174 EUROPEAN COMMISSION, *Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Application of Directive 2004/25/EC on takeover bids*, COM(2012) 347 final, Brussels, 28 June 2012.

trigger threshold, which were intended to create a level playing field. In this regard, the asynchronicity between the objectives of the Capital Market Union itself, introduced organically in 2015[175], and the Takeover Bid Directive, which dates back to 2004, is thought-provoking.

1.3.3. Different legal instruments to achieve the same goal: the scheme of arrangement in the United Kingdom.

In most countries there were provisions promoting the same effects as the squeeze-out and sell-out rules, prior to the Takeover Directive, which were not linked to the acquisition of control in the strict sense. A well-known example is the Enterprise Agreements – *Unternehmensverträge* – in German law[176]. By virtue of these, a parent company is authorised to enter into a corporate agreement with its subsidiary, under which the parent company issues certain instructions to the management of the subsidiary, even to the detriment of the subsidiary itself, provided that such instructions are in the interest of the parent group – domination agreement, *Beherrschungsvertrag* – and/or receives all or part of the profits of the subsidiary – profit-sharing agreement, *Gewinnbeteiligungsvereinbarung*. The German Stock provides for a detailed procedure, including approval by the subsidiary's shareholders with a 75% majority, and various provisions to protect the subsidiary's minority shareholders. Minority shareholders of a public limited company that is party to a company agreement have the right to offer their shares to the parent company at a predetermined price for two months from the date of the company agreement. The adequacy of the exit price is determined on the basis of a valuation involving, among other things, a form of discounted cash flow analysis, the liquidation value of the subsidiary and its market price[177].

Then there are cash-out mergers, which are more common in the United States[178]. In the EU, the rules have not evolved in the same way, and only a few Member States allow cash mergers. Furthermore, such mergers cannot involve full payment in cash to the shareholders of the dissolved company without their consent.

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[175] See paragraph 1.1.

[176] Cfr. FRESHFIELDS BRUCKHAUS DERINGER, *Public Takeovers in Germany*, 2012, available at: https://www.yumpu.com/en/document/read/24594064/public-takeovers-in-germany-june-2012-freshfields.

[177] CLERC C., DEMARIGNY F., VALIANTE D., DE MANUEL ARAMENDÍA M., *A Legal and Economic Assessment of European Takeover Regulation*, Centre for European Policy Studies (CEPS) & European Capital Markets Institute (ECMI), Brussels, 2012, p. 92.

[178] Traditionally, mergers were considered share exchange transactions subject to shareholder approval. On a practical level, they could be summarised as a combination of three transactions: the dissolution of the incorporated company, the contribution in kind of its assets by the former shareholders of the dissolved company to the incorporating company, and the issue of shares by the incorporating company to those shareholders as consideration for their contribution. This traditional view has long since disappeared in the United States, where mergers are now considered shareholder-approved transactions that can be structured almost freely (leading to "triangular mergers" and "reverse triangular mergers"). *Ibidem.*

The last example worth mentioning here, which is of great theoretical importance, is the scheme of arrangement present in the United Kingdom[179] and regulated by Sections 895-899 of the Companies Act 2006[180]. This is an agreement that requires High Court – or equivalent authority – approval between the company and the qualified majority, represented by 75% of the value, of the members of each class present and voting in person or by proxy at the meeting convened to approve the scheme. So, there is a long preliminary phase of discussion between the shareholders and the meeting. This system has the advantage of ensuring that all shares are obtained by a specific date, provided that the required majority and the court approve the scheme, requiring a lower approval threshold for the plan than that of a takeover bid, and requiring court approval[181]. This can also be applied, among other things, to achieve the same objective of takeovers, namely a shift in control of the target company[182].

When considering whether to achieve a change of control through either a traditional offer or a scheme of arrangement, it is appropriate to compare the potential advantages and disadvantages of the two instruments. Given the primary purpose of the acquisition of control, a successful scheme of arrangement will result in the bidder acquiring all the shares of the target company, making it an extremely effective tool. Conversely, a bidder must ensure – depending on the shares already held – that he or she acquires at least 50% of the target company's voting rights, for example by making the offer conditional upon reaching a certain acceptance threshold. Therefore, it is far from a given that a bidder will eventually be able to obtain 100% of the target company, and only if he or she achieves 90% of the voting rights will the bidder be able to exercise the squeeze-out right[183]. Conversely, in terms of transaction speed, given the need to fit in two court hearings and members' meetings to vote on the scheme, the timeframes are longer compared to a takeover offer[184]. Moreover, if there are lost or untraceable shareholders, it may be better to proceed with the scheme, as they cannot be taken into account when assessing the level of acceptance for an offer; conversely, their presence is not essential to reaching the 75% acceptance level required for the scheme. The scheme is severely restrictive in this regard, while to exclude these

[179] Schemes of arrangement are adopted also in India, Australia, Canada and Hong Kong. PASSADOR M.L., *Le OPA in una prospettiva comparata: confronto tra alcuni modelli stranieri*, in Rivista delle Società, 2024, LXIX, 3, 2, pp. 348-373.

[180] See on this point PAYNE J., *Schemes of Arrangement. Theory, Structure and Operation*, 2021, Cambridge Universiry Press, available at: https://assets.cambridge.org/97811088/35329/frontmatter/9781108835329_frontmatter.pdf.

[181] PASSADOR M.L., *Le OPA in una prospettiva comparata: confronto tra alcuni modelli stranieri*, in Rivista delle Società, 2024, LXIX, 3, 2, pp. 348-373.

[182] Cfr. PAYNE J., *Schemes of Arrangement. Theory, Structure and Operation*, 2021, Cambridge Universiry Press, available at: https://assets.cambridge.org/97811088/35329/frontmatter/9781108835329_frontmatter.pdf. Since 2015, only transfer schemes are applicable for this purpose.

[183] See paragraph 1.3.4. for an explanation about the reasons why a bidder could be interested in acquiring 100% of the target company.

[184] The estimated time for a scheme of arrangement is between seven and eight weeks from posting. PAYNE J., *Schemes of Arrangement. Theory, Structure and Operation*, 2021, Cambridge Universiry Press, available at: https://assets.cambridge.org/97811088/35329/frontmatter/9781108835329_frontmatter.pdf, p. 117.

shareholders from consideration in the event of an offer, it would be necessary to reach the 90% required for the squeeze-out to be applied. Along this same line, it will be easier for dissenting shareholders to block a bid than a scheme. An important consequence given by the structural differences among a scheme and an offer is that the process for a scheme is controlled by the target; is the bidder that control the process for an offer, instead. For this reason, if the bid is hostile, the bidder will opt for an offer rather than a scheme[185]. Another point that is worth mentioning is that being the target and not the bidder that control the scheme process, is more difficult eventually for the bidder to change the terms of the scheme[186]; then, if a competing bid is possible, an offer would be more suitable than a scheme.

Finally, a very recent empirical study has demonstrated how and to what extent the scheme of arrangement could be disadvantageous for minority shareholders. The scheme of arrangement is a friendly procedure largely controlled by the target's board, which thus has room to negotiate private post-acquisition benefits. This could lead, on the one hand, to a slowdown in the market for control due to a loss of competitiveness; on the other, it is estimated that the bid premium could be reduced by between 8 and 11% compared to takeover offers. This creates the potential for cheaper and more damaging offers, as it could reduce the value for minority shareholders[187].

What is clear is that a tool like a scheme of arrangement would make takeovers much more fluid, likely increasing the number of transactions and the contestability of corporate control. On the other hand, minority shareholders would be completely absorbed by the majority, resulting in a scheme that affords them a lower level of protection than a takeover bid[188]. Another criticism is that it would bypass the takeover regime, detrimental to market rights regarding disclosure and transparency[189].

1.3.4. Capital markets and the phenomenon of delisting.

Empirical evidence suggests that takeover transactions in Europe are mainly finalized to gain the full control of a firm[190]. The literature explains this trend giving reasons why full ownership often has a higher value than majority or large majority ownership. The reasons for this are linked to wanting to avoid costs

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185 It could happen that a scheme has an hostile characteristic but it is really unlikely. See PAYNE J., *Schemes of Arrangement. Theory, Structure and Operation*, 2021, Cambridge Universiry Press, available at
: https://assets.cambridge.org/97811088/35329/frontmatter/9781108835329_frontmatter.pdf, p. 124.

186 For example, if the bidder want to raise the offered price, it is at the discretion of the court whether to change the price of the scheme or start the procedure again from the beginning. The possibility of a change is more likely to happen if it is convenient for the shareholders and they have enough time to consider it. *Ibidem*, p. 126.

187 See ALOQBALI H., LI D., *The Consequence of Takeover Methods: Schemes of Arrangement vs. Takeover Offers*, in *International Journal of Financial Studies*, 10, 69, 2022, available at: https://doi.org/10.3390/ijfs10030069.

188 *Ibidem*, pp. 153 et seq.

189 *Ibidem*, pp. 169 et seq.

190 CLERC C., DEMARIGNY F., VALIANTE D., DE MANUEL ARAMENDÍA M., *A Legal and Economic Assessment of European Takeover Regulation*, Centre for European Policy Studies (CEPS) & European Capital Markets Institute (ECMI), Brussels, 2012, p. 192.

associated with minority shareholders, facilitate the recovery of the costs of the deal, aligning strategy and management if the acquired company becomes part of a group, and enjoying accounting and tax benefits that in some jurisdictions require full ownership. It is also worth highlighting the usefulness of achieving full control of the company in order to go private[191], thereby avoiding the costs of public ownership, both direct – listing costs – and indirect – costs of complying with the legal requirements for listed companies. In the case of leveraged buyouts of private equity in this way is possible to replace all equity with debt that is tax-deductible[192].

In a historical period marked by profound transformations in corporate financing methods, the structure of corporate governance, and the role of institutional and activist investors, the phenomenon of delisting has gained widespread prominence across Europe[193]. Between 2010 and 2022, the number of companies listed in the European Union decreased by approximately 15%, from around 7,400 to just over 6,300. This decline was accompanied by an increase in overall market capitalization, indicative of a trend toward concentration in a smaller number of large players. Moreover, the European Central Bank highlighted a negative net balance between new listings and delisting in 2024[194].

There are several reasons why delisting cases are growing exponentially, often interconnected and tied to financial, strategic, or regulatory considerations. They can be summarized as follows[195]:

i) Cost-benefit imbalance related to the stock price and undervaluation. Often, the costs of disclosure requirements, controls, governance, and reporting associated with a listing are perceived as excessive compared to the benefits, and particularly if there is a perception that the stock is undervalued, controlling shareholders and management may place more trust in the private dimension;

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191 See paragraph 1.3.5.

192 VAN DER ELST C., VAN DEN STEEN L., *Opportunities in the M&A aftermarket: squeezing out and selling out*, 2006, Working Paper 2006-12, Financial Law Institute, p. 9.

193 Other delisting cycles are located in different eras and geographical contexts, such as the two main waves in the 1980s in the USA and UK and between the 1990s and 2007 which also affected European stock markets and was interrupted by the 2008 crisis. BALDI F., PARCO M., MANCINI V., *Il fenomeno dei delisting in Europa: dinamiche, attori e implicazioni per i mercati dei capitali*, Rome Business School Research Center, 2025.

194 There were 434 delistings on the European Euronext market – which includes the lists of Paris, Amsterdam, Brussels, Milan, Dublin, Oslo and Lisbon – between 2019 and 2023, with an increase on an annual basis between 2022 and 2023 of 136.4%. *Ibidem*.

195 Reference is made to the systematization proposed by BALDI F., PARCO M., MANCINI V., Il fenomeno dei delisting in Europa: dinamiche, attori e implicazioni per i mercati dei capitali, Rome Business School Research Center, 2025. Cfr. BESSLER W., BEYENBACH J., RAPP M. S., VENDRASCO M., *Why do firms down-list or exit from securities markets? Evidence from the German Stock Exchange*, 2023, in *Review of Managerial Science*, 17, pp. 1175-1211, available at: https://research-api.cbs.dk/ws/portalfiles/portal/94161342/wolfgang_bessler_et_al_why_do_firms_down_list_or_exit_from_securities_markets_publishersversion.pdf; THOMSEN S., VINTEN F., *Delistings in Europe and the Costs of Governance*, 2006, Copenhagen Business School Working Paper No. 12-2006, available at: https://research-api.cbs.dk/ws/portalfiles/portal/59048580/wp12_06.pdf.

ii) Regulatory and external contextual reasons, particularly participation in a regulated market is often tied to short-term visions, typically with respect to quarterly results. To reclaim a long-term strategy, delisting is seen as a solution;

iii) Organizational incentives and corporate structure streamlining. Delisting can be a lever for simplifying the organizational structure of complex corporate groups. This does not result in an effective disinvestment from the capital market, but rather in avoiding the simultaneous participation of multiple entities belonging to a single conglomerate;

iv) Regulatory frameworks, that directly influence the potential decision to exit capital markets because they impose compliance obligations that are unsustainable from a company's perspective – particularly minimum free float or capitalization requirements, disclosure, internal controls – especially when related to alternative financing channels.

v) Access to alternative capital. The growth of private equity and the availability of low-cost debt have encouraged the acquisition of listed companies by institutional investors, often through structured leveraged buyouts (LBOs). These transactions replace the discipline of the stock market with internal control mechanisms based on leverage and ownership concentration, potentially correcting managerial inefficiencies resulting from excess liquidity[196].

With reference to the last point, private equity is currently growing further, establishing itself as an increasingly valid investment alternative in global markets[197]. In the context of takeover bids, private equity funds often act as financial bidders[198].

Furthermore, equity activism is progressively more common in Europe[199]. It represents a form of direct intervention by investors – typically hedge funds, specialized funds, or large institutional investors – gained at significantly influencing the strategy and governance of a listed company. This approach often focuses on companies exhibiting lower-than-expected financial performance, depressed market valuations, or governance structures deemed inefficient, and can lead to a forced delisting.

Despite the growth of alternative investment instruments, the question remains as to whether the decline of listed companies and Initial Public Offerings represents an efficient choice or a signal of structural market crisis[200].

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196 Cfr. JENSEN M.C., *Agency Costs of Free Cash Flow, Corporate Finance, and Takeovers*, 1986, in *The American Economic Review*, 76, 2, pp. 323-329, available at JSTOR: https://www.jstor.org/stable/1818789.

197 As reported by ELOVITZ M.E., KAPLAN J.S., MAHMOUD A., SHWARTZ I., SISKIND H., *Market analysis: 10 trends affecting global private markets for 2026*, McDermott Will & Schulte, available at: https://www.jdsupra.com/legalnews/market-analysis-10-trends-affecting-7472581/.

198 GORBENKO A.S., MALENKO A., *Strategic and Financial Bidders in Takeover Auctions*, in *The Journal of Finance*, 2014, LXIX, 6, cit. p. 2513.

199 In 2023, 25% of equity activism cases performed in Europe, in particoular in UK, France, Germany and Netherlands.

200 For future perspectives about new possible structures of the capital markets and the role of PE and M&A, see BALDI F., PARCO M., MANCINI V., Il fenomeno dei delisting in Europa: dinamiche, attori e implicazioni per i mercati dei capitali, Rome Business School Research Center, 2025.

Since the enactment and implementation of the Takeover Directive, among the regulatory innovations it introduced and which have been implemented by Member States, the squeeze-out and sell-out rules have generally received less attention than others[201]. However, considering the general delisting trend that the European markets are experiencing and the squeeze-out and sell-out rules as important "post-deal integration tools aimed at finalizing the acquisition of control"[202] – regardless of whether this acquisition of control is aimed at delisting or at one of the other reasons mentioned above – it is a case that is assuming ever greater relevance and interest. By combining the empirical data just reported and the ongoing regulatory analysis, it can be highlighted that to date there is already literary evidence of a direct link between the use of the squeeze-out and a significant number of delisting cases[203].

1.3.5. Public-to-private transactions: the delisting takeover bid.

Putting all the presented factors together[204], a tender offer can serve as a mean to acquire full control of a company and then delist it. In this scenario, if the offer fails to secure all shares, the squeeze-out and sell-out clauses become essential to making the offer attractive to those who wish to pursue this goal and for whom obtaining full control is therefore essential.
Leaving aside the mandatory case[205], voluntary delisting becomes relevant in this case, that is, when the company itself, at the initiative of the board of directors or the controlling shareholders, requests delisting. The most common implementation tool for carrying out a voluntary delisting is a private takeover or buyout, a phenomenon known as going private. In this situation, the acquirer detects all or a significant majority of the outstanding shares, reducing the free float below the required minimums and initiating the delisting process. Squeeze-out mechanisms are very common in these transactions, aiming to achieve a closed ownership structure and halt public trading of the shares.

The category of public-to-private transactions (PtP) is now defined, that represents the situations in which public listed firms are acquired by a private entity, typically incumbent management, an outside management team, or institutional investors such as private equity funds, involving a buyout of the

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201 This refers to the vast literature and intellectual production on the mandatory bid rule, passivity rule and break-through rule. Cfr. HABERSACK M., *Non-frustration Rule and Mandatory Bid Rule – Cornerstones of European Takeover Law?*, 2018, in *European Financial Law Review*, 15, 1; BENNEDSEN M., NIELSEN K. M., *The impact of a Break-Through Rule on European Firms*, 2004, in *European Journal of Law and Economics*, 17, 3.

202 VAN DER ELST C., VAN DEN STEEN L., *Opportunities in the M&A aftermarket: squeezing out and selling out*, 2006, Working Paper 2006-12, Financial Law Institute, cit. p. 4.

203 For example, "In Germany […] during the first year that the squeeze-out procedure was introduced, almost 90 per cent of all delistings followed a squeeze-out procedure." VAN DER ELST C., VAN DEN STEEN L., *Opportunities in the M&A aftermarket: squeezing out and selling out*, 2006, Working Paper 2006-12, Financial Law Institute, cit. p. 4.

204 See paragraph 1.3.4.

205 Meaning when the Stock Exchange or the supervisory authority orders the delisting of a company following failure to comply with the minimum regulatory requirements for continued listing. BALDI F., PARCO M., MANCINI V., Il fenomeno dei delisting in Europa: dinamiche, attori e implicazioni per i mercati dei capitali, Rome Business School Research Center, 2025.

shareholders. At a theoretical level, private equity investors can pursue a PtP transaction launching a public takeover bid directly to shareholders of the target firm; alternatively, participating in controlled sales and auctions when a target company is put up; or, finally, backing PtP transactions initiated by incumbent management or outside management teams[206]. Therefore, attention must be paid to the broad participation of Private Equity funds in this type of transaction, that have affirmed themselves as financial buyers that compete with corporate buyers for target firms, and its relevance in the context of the corporate control market given that "represent a significant portion of public takeover activity today."[207] Taking into consideration the outlined framework, the delisting takeover bid takes shape, meaning a takeover that indicate as purpose of the offer the abandonment of the listing[208]. The conjunction between this case and the growing configuration of private equity funds as financial bidders results in a specific empirical case study that can be observed and analysed[209].

[206] ROOSENBOOM P., FIDRMUC J.P., *Public-to-Private Transactions*, in *The Palgrave Encyclopedia of Private Equity*, Springer Nature Switzerland AG 2025, p. 1001.
[207] KATZ J., RAGGETT J., *Public to Private Transactions*, 2021, ICAEW Corporate Finance Faculty, cit. p. 6.
[208] See paragraph 1.2.2.
[209] See Chapter III.

CHAPTER II
THE DISCIPLINE OF TAKEOVER BIDS IN ITALY
SQUEEZE-OUT, SELL-OUT AND A POSSIBLE REFORM OF THE TUF

2.1. The Italian market of corporate control. Empirical evidence

The 1970s marked a period of profound change in the Italian capital market. Recalling Law No. 216 of June 7, 1974, which brought about an initial mini reform of companies and established Consob in Article 1[210], thus contributing to the creation of an initial, albeit partial, framework of provisions relating to the securities market. Between the late 1990s and the beginning of the new millennium, the great privatization process and the modernizing spirit of the 1998 TUF and the 2003 corporate law reform marked a positive period for market growth[211]. From 1975 to 2014, the Italian market experienced undeniable growth when looking at the overall picture. During this period, despite ups and downs caused by successive economic crises over the decades, the number of listed companies increased from 152 to 290[212]. In addition, there was also an increase in takeover bids and, consequently, in the number of regulations governing them[213]. Given the typical nature of the Italian business landscape, with its prevalence of concentrated corporate governance, the Italian market for control has historically been less prone to hostile takeover bids than other markets where control is predominantly based on widespread share ownership, such as the United Kingdom[214]. Furthermore, this typical structure has profoundly influenced the evolution of the corporate control market in Italy, which has developed symbiotically with the applicable legislation.

These incentives marked a positive period for market growth but were not sufficient to overcome the system's structural weaknesses and to foster the growth of businesses and the productive use of savings over time. To date, there are 353 listed companies with an aggregate historical capitalization of approximately €644 billion on the Italian Stock Exchange, part of the Euronext group[215]. Therefore, the growth trend in the capital market would appear to be continuing, were it not for the fact that the trend

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210 "È istituita, con sede in Roma, la Commissione nazionale per le società e la borsa.". See *infra*.

211 ASSONIME, *Proposte per una riforma organica del TUF. Eliminazione del goldplating, valorizzazione dell'autonomia statutaria, allineamento alle best practice internazionali per rendere più attrattivo il nostro mercato di Borsa*, Position Papers 4/2024, p. 7.

212 This is the latest data collected by the World Bank (https://data.worldbank.org/indicator/CM.MKT.LDOM.NO?locations=IT).

213 See paragraph 1.2.

214 As reported by PICCO F., VENTORUZZO M., *Offerte pubbliche d'acquisto e di scambio*, in *Diritto delle società quotate e dei mercati finanziari*, Giappichelli, Torino, 2023, p. 437, in Italy, the average shareholding of the largest shareholder, with reference to all listed companies, is equal to 47.8% of the capital. See Chapter I; STELLA RICHTER JR M., *Le offerte pubbliche di acquisto*, in *Quaderni di Diritto Commerciale Europeo*, a cura di C. Angelici e G. Marasà, Torino, Giappichelli; RORDORF R., *TUF e sistema legislativo*, in *Il Testo Unico della Finanza. Un bilancio dopo 15 anni*, a cura di F. ANNUNZIATA, Milano, Egea.

215 BALDI F., PARCO M., MANCINI V., Il fenomeno dei delisting in Europa: dinamiche, attori e implicazioni per i mercati dei capitali, Rome Business School Research Center, 2025, p. 31.

in delisting is increasing significantly. In 2023, there were 23 delisting on Euronext in Milan, of which eight on the main Euronext market and sixteen on Euronext Growth, compared to only 24 IPOs. Therefore, the balance sheet is negative, aggravated by the fact that the eight delisting on the main market had an economic weight of 10 billion in capitalization, compared to less than 1 billion for the delisting recorded on Euronext Growth. These data must also be contextualized at a time when the development of the capital market is the focus of attention, as demonstrated by the European capital markets union project. This is also confirmed by the recent 2025 Corporate Governance report, which sets out the objectives of the reform prospects for national regulations in terms of competitiveness and growth prospects for the capital market[216]. In this regard, therefore, while on the one hand there is extensive investment in the development of capital markets and their unification within Europe, on the other hand the emergence of alternative ways for companies to raise capital seems to be generating an opposing and contrary force.

In this debated landscape, the takeover bid tool and the importance of the corporate control market come into play. On the one hand, it is necessary to emphasize that a takeover bid can pursue a variety of objectives, which are not limited to the acquisition of control, but may also include corporate restructuring, the purchase of own shares, and delisting[217]. On the other hand, the trend toward delisting that is occurring on the Italian market, as well as on European markets[218], has highlighted how often takeover bids are currently used for delisting purposes. A recent study analysing takeover bids from 2007 to 2019 produced by Consob shows that the trend of delisting following takeover bids has grown from 20% in 2015 to 90% in 2019[219]. This phenomenon would appear to be at odds with the European Union's capital markets union project, from which the Takeover Directive also derives, as well as, in parallel with the regulatory objectives of the capital market, those of encouraging alternative investments such as private equity[220]. Nevertheless, the figure of the delisting takeover bid appears increasingly common both in practice and in literature, and the primary objective of takeover regulations is to ensure fairness and

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216 COMITATO ITALIANO CORPORATE GOVERNANCE, *Relazione 2025 sull'evoluzione della corporate governance delle società quotate. 12° Rapporto sull'applicazione del codice di autodisciplina*, 2025, available at: https://www.borsaitaliana.it/comitato-corporate-governance/homepage/homepage.htm.

217 The purpose of the takeover bid has been briefly described by PICCO F., VENTORUZZO M., *Offerte pubbliche d'acquisto e di scambio*, in *Diritto delle società quotate e dei mercati finanziari*, Giappichelli, Torino, 2023, p. 494, as, on the one hand, the key instrument of the market for corporate control; on the other hand, a capital market operation aimed at investing efficiently (reduced time and costs) in financial instruments.

218 See para. 1.3.4.; GEROSA F., *L'opa ha ormai un unico obiettivo: il delisting, spesso ingiustificato. La Consob riapre il dibattito*, in Milano Finanza, 2021, available at: https://www.milanofinanza.it/news/l-opa-ha-ormai-un-unico-obiettivo-il-delisting-spesso-ingiustificato-la-consob-riapre-il-dibattito-202101210933173589?refresh_cens.

219 PICCO F., PONZIANI V., TROVATORE G., VENTORUZZO M., *Le OPA in Italia dal 2007 al 2019. Evidenze empiriche e spunti di discussione*, 2021, Discussion papers Consob.

220 See para. 2.3.3.

transparency for the recipients of the offer, as well as their equal treatment, in order to ensure the efficiency of the capital market[221]. Hence the objective of investigating whether this trend will persist.

2.2. The regulation of takeover bids in Italy: from the origins to the TUF

The public offering, if viewed from a conceptual perspective, is conceived as a market technique that presupposes a mass economy and an industrial production system. In Italy at the beginning of the 20th century, driven by the demands of industrial production systems conveyed by commercial doctrine, article 1336 of the Civil Code of 1942, entitled *Offerta Pubblica*, was introduced as the first example of commercialization in the fourth book of the Code itself[222].

However, for a long time, Italy lacked even minimal comprehensive regulations governing public offerings for the purchase of shares or any other financial instruments. The first transactions of this type, which took place in the 1970s[223], highlighted the need not only for regulations governing the negotiation of transactions, but also for regulations that considered the broader interests of the company that had issued the securities subject to the offer and of the financial market. This led to a mini reform of companies, with the provision of Article 1/18 of Law No. 216/1974:

> *Coloro che intendono procedere all'acquisto o alla vendita mediante offerta al pubblico di azioni o di obbligazioni, anche convertibili, o di qualsiasi altro valore mobiliare italiano o estero, ivi compresi i titoli emessi da fondi di investimento mobiliari ed immobiliari, italiani o esteri, ovvero sollecitare con altri mezzi il pubblico risparmio, devono darne preventiva comunicazione alla CONSOB indicando la quantità e le caratteristiche dei valori mobiliari offerti nonché le modalità e i termini previsti per lo svolgimento dell'operazione*[224].

The publication of a prospectus was also planned, and Consob's prescriptive powers regarding the methods of publication of the offer and the content of the prospectus were also already planned. In this context, aspects aimed at ensuring the accuracy and completeness of information were reinforced, leading

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221 MUCCIARELLI F., *Le offerte pubbliche d'acquisto e di scambio*, in *Trattato di Diritto Commerciale*, Giappichelli Editore, Torino, 2014, p. 3.

222 As remembered by STELLA RICHTER JR M., *Le offerte pubbliche di acquisto*, in *Quaderni di Diritto Commerciale Europeo*, a cura di C. Angelici e G. Marasà, Torino, Giappichelli, p. 4, the first arguments on public offerings can be found in a monograph written in 1902 by Antonio Scialoja, the family's accountant, entitled *L'offerta a persona indeterminata ed il contratto concluso mediante automatico* (Offers to an indeterminate person and contracts concluded automatically), when Vittorio Scialoja still maintained that a rule on promises to the public and offers to the public was unnecessary in the reform of the civil code. Then, within the doctrine formed on the then Italian commercial code and in that following the unified code of private law, the idea took shape that the general rules governing offers to the public should apply substantially without distinction, regardless of the subject matter and cause of the relationship that the offer was intended to establish, provided, of course, that it did not involve the creation of a bond in which the person of one or both parties to the relationship was relevant.

223 *Ibidem*, p. 5, recalls the offer on Bastogi and refers to, for example, FERRI G., *Manuale di Diritto Commerciale*, 1972, Utet.

224 As reported by STELLA RICHTER JR M., *Le offerte pubbliche di acquisto*, in *Quaderni di Diritto Commerciale Europeo*, a cura di C. Angelici e G. Marasà, Torino, Giappichelli, cit. p. 5.

to today's transparency. However, there was still no distinction between subscription or sale offers and purchase or exchange offers[225].

The first comprehensive regulation governing takeover bids in Italy can therefore be found in Law No. 149 of February 18, 1992. This law maintains the aforementioned Article 18, supplementing it with the regulations governing investment solicitation in Articles 1-8[226]. The most significant changes, however, relate to solicitation for divestment, i.e., takeover bids and exchange offers. This makes the Law a historically significant legal milestone. Beyond its now obsolete technical specifics, the law is considered significant because, for the first time, it implements the project of identifying and balancing the various interests that come into play in a takeover bid.
The law only considered listed securities with voting rights, pursuant to Article 9, paragraph 1. Chapter II of the law regulated purchase offers, exchange offers, and purchase and exchange offers, strictly distinguishing between them in Article 9, paragraph 2. Furthermore, for the first time, a distinction was made between voluntary and mandatory offers.

2.2.1. Systematization of the discipline: the entry into force of the TUF

This has led to the implementation in Italy of a legislative project concerning markets and financial intermediation, including listed companies, in the *D. lgs. 24 febbraio 1998, n. 58*, denominated "Testo unico delle disposizioni in materia di intermediazione finanziaria, ai sensi degli articoli 8 e 21 della legge 6 febbraio 1996, n. 52", and more simply called the *Testo Unico della Finanza* or, abbreviated, TUF.
This was an ambitious and unifying piece of legislation in the Italian market context[227], which had shown a first, vaguely more defined form only with Law No. 1 of 1991[228] and then, implementing Directives 93/22/EC and 93/6/EC, with Legislative Decree No. 415 of 1996[229], which delegated to the government the task of issuing a consolidated law that would coordinate the various laws governing specific areas of

[225] The primary regulation, which has been criticized as incomplete on several occasions, was intended to regulate exclusively the solicitation of public savings, thus not distinguishing between the solicitation of investment and divestment on the financial market.
[226] As summarized by SPIALTIERI P. A., in PATRONI GRIFFI A., SANDULLI M., SANTORO V., *Intermediari finanziari mercati e società quotate*, 1999, Torino, Giappichelli, p. 645, The general statute governing public offerings prior to the TUF had to be derived from a combined reading of the specific provisions for listed securities contained in Law No. 149/1992 and, for unlisted securities, the provisions of Article 18 of Law No. 216/1974.
[227] As presented by RORDORF R., *TUF e sistema legislativo*, in *Il Testo Unico della Finanza. Un bilancio dopo 15 anni*, a cura di F. Annunziata, Milano, Egea, pp. 293-301.
[228] So called *Legge SIM* regarding the regulation of securities brokerage activities and the organization of securities markets, available at: https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:Legge:1991-01-02;1.
[229] So called *Decreto Eurosim*, in implementation of Directive 93/22/EEC of May 10, 1993, on investment services in the securities sector, and Directive 93/6/EEC of March 15, 1993, on the capital adequacy of investment firms and credit institutions. Available at: https://www.gazzettaufficiale.it/atto/serie_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=1996-08-09&atto.codiceRedazionale=096G0428. Then, replaced by MiFID I and now MiFID II. See Chapter I, paragraph 1.

financial market law into a single body of legislation. Moreover, these laws gave systematic form to listed companies, which at the time were still being debated as to whether they constituted a separate type of company. In a logic increasingly inspired by and closer to the European and international economic context, the objective of the 1998 legislator was to revitalize the Italian financial market and make it attractive and competitive with the major foreign stock exchanges, in order to offer domestic companies a valid alternative to the traditional and more rigid channels of bank financing. The main changes to give shape to the new requirements included the privatization of the stock exchange, effective rules of fairness and transparency, a guarantee of adequate information for investors, and greater protection for minority shareholders. This resulted in a coherent and balanced response between the strong deregulatory demands of the 1990s and the idea of the market as an artificial place that needs appropriate regulation, which employed a multi-level regulatory system[230] starting with general rules, often transposed from the European Union, followed by more detailed rules at the national level. Following the enactment of the TUF and the start of the process of unifying the European capital market[231], a series of rapid and ambitious projects have been incorporated into the legislative framework, guided by the economic vision of law as a tool to stimulate market development. This has probably led to short-sighted visions and a strain on the legislative system that has prevented the hoped-for development, especially when viewed from a transnational perspective. Nevertheless, the TUF is a national instrument of utmost regulatory importance, which is still the subject of criticism and ideas for improvement, and the law continues to prove itself an indispensable tool for the functioning of the economic context both nationally and in transnational trade. That said, viewing law as merely a tool at the disposal of the market is reductive and should be avoided, accepting that it necessarily takes longer to adapt than the market context[232].

The TUF is divided into six parts[233] and, since its enactment, it has undergone many reforms that have seen it adapt to profound changes in the market[234].

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230 Referred to as the Lamfalussy method, also described by ANNUNZIATA F., *La disciplina del mercato dei capitali*, 2023, Torino, Giappichelli, pp. 15-34, provided for in Article 202 of the previous EC Treaty and supplemented by the Treaty of Lisbon. This is an important legislative practice in the EU capital markets plan, which consists of four levels: Level 1 concerns the enactment of framework directives or broad but sufficiently precise regulations, issued following the legislative process (Article 294 TFEU), conducted with the participation of the European Parliament and the Council, on the basis of proposals from the Commission; Level 2 measures include delegated acts, pursuant to Article 290 TFEU, which may take the form of acts issued by the Commission after consulting the ESAs or Regulatory Technical Standards typically concerning methodologies and procedures supplementing Level 1 acts, or as implementing acts, provided for in Article 291 TFEU, used to apply the provisions of Level 1 legislation; Level 3 provides for soft law acts issued by the ESAs, individually or through the Joint Committee, which provide useful interpretations for national authorities concerning Level 1 and 2 measures; Finally, Level 4 is dedicated to the control measures that EU institutions have in place to ensure that Member States apply legislation consistently.

231 The Capital Markets Union, presented in Chapter I, paragraph 1.

232 In this sense, also ANNUNZIATA F., *La disciplina del mercato dei capitali*, 2023, Torino, Giappichelli, pp. 15-34.

233 To provide a comprehensive overview, the six parts are titled as follows: I. *Disposizioni Comuni*; II. *Disciplina degli Intermediari*; III. *Disciplina dei Mercati*; IV. *Disciplina degli Emittenti*; V. *Sanzioni*; VI: *Disposizioni Transitorie e Finali.*

234 Among the most significant reforms, mention may be made of legislative decrees nn. 6/2003 and 37/2004 following the comprehensive reform of corporate law; by virtue of Law no. 62/2005; by virtue of Law no. 2/2009 during the financial and

To resume the historical review, it is precisely in the TUF that the true Italian regulation on takeover bids converges and takes shape, specifically in Part IV, Title II, Chapter II, Articles 101-*bis*-112, classified as divestment transactions. At this point, it is necessary to provide the definition of takeover bids and exchange offers presented in the TUF, given that these are regulated in the same contexts[235], which should be understood as follows:

> *ogni offerta, invito a offrire o messaggio promozionale, in qualsiasi forma effettuati, finalizzati all'acquisto o allo scambio di prodotti finanziari e rivolti a un numero di soggetti e di ammontare complessivo superiori a quelli indicati nel regolamento previsto dall'articolo 100, comma 1, lettere b) e c); non costituisce offerta pubblica di acquisto o di scambio quella avente a oggetto titoli emessi dalle banche centrali degli Stati comunitari*[236].

This provides the initial elements of the abstract case, which will then be detailed in Articles 101-bis and 105.

Although still included in Title II, entitled *Appello al Pubblico Risparmio*, it definitively and clearly distinguishes investment transactions, regulated in Chapter I, Articles 94-101, thus resolving the lack of systematization in previous regulations[237].

2.2.2. The role of Consob and the Regolamento Emittenti

Since its establishment in 1974, Consob has supervised the Italian securities market, including takeover bids since their inception and regulation. With the introduction of the Takeover Directive, cross-border takeover bids have been facilitated, and supervisory responsibilities have been divided according to specific criteria. What is important for the purposes of this dissertation, therefore, is to understand which takeover bids fall under the jurisdiction of Consob, rather than the supervisory authority of another

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economic world crisis. See para. 2.2.2. for the reforms of the TUF concerning takeover bids. Cfr. STELLA RICHTER JR M., *Le offerte pubbliche di acquisto*, in *Quaderni di Diritto Commerciale Europeo*, a cura di C. Angelici e G. Marasà, Torino, Giappichelli, p. 6. The history of changes to the TUF is kept by Consob and can be consulted on the website: https://www.consob.it/web/area-pubblica/storico-modifiche-tuf.

235 Although not covered by the Takeover Directive, for the sake of clarity under Italian law, a public exchange offer can be seen as something of an intermediate figure between investment and divestment transactions, as exposed by STELLA RICHTER JR M., *Le offerte pubbliche di acquisto*, in *Quaderni di Diritto Commerciale Europeo*, a cura di C. Angelici e G. Marasà, Torino, Giappichelli, p. 6. Although included in Chapter II together with public purchase offers, paragraph 4-bis of Article 102 provides that, limited to public exchange offers involving bonds and other debt securities, the offeror may request Consob that the offer be subject, even in derogation from the provisions of Chapter II to the rules governing public offers for sale and subscription. Consob has 15 days from the submission of the request to accept it, provided that this does not conflict with the purposes of Article 91.

236 Art. 1, para. 1, lett. v), TUF.

237 See paragraph 2.2. Mirroring the definition of public purchase and exchange offers, i.e., divestment transactions, provided for in Art. 1, lett. v), TUF, investment transactions are defined in Art. 1, lett. t), TUF, as "ogni comunicazione rivolta a persone, in qualsiasi forma e con qualsiasi mezzo, che presenti sufficienti informazioni sulle condizioni dell'offerta e dei prodotti finanziari offerti così da mettere un investitore in grado di decidere di acquistare o di sottoscrivere tali prodotti finanziari, incluso il collocamento tramite soggetti abilitati".

country, and to which takeover bids Italian law applies. Consob is responsible for supervising offers involving securities (i) issued by a company with registered office in Italy and listed on an Italian regulated market, or (ii) issued by a company with registered office in an EU Member State other than Italy, but listed exclusively on an Italian regulated market, or (iii) issued by a company with registered office in an EU Member State other than Italy and listed both on an Italian regulated market and on regulated markets of other Member States, other than the country of registered office, provided that they have been admitted to trading first on the Italian market, or, if admission took place simultaneously, if the issuing company has expressly chosen to apply Italian law[238]. In such cases, Italian law applies with regard to the consideration of the offer, the offer procedure and disclosure requirements, the content of the offer document, and the disclosure of the offer itself[239]. In addition to its supervisory role, Consob also performs the equally important function of secondary legislator. Article 103, paragraph 4, of the TUF authorizes Consob to issue regulations implementing the provisions on takeover bids and, in particular, to regulate: the content of the offer document, as well as the procedures for publishing the document and conducting the offer; the fairness and transparency of transactions involving the financial products covered by the offer; the effects on the offer price of purchases of financial products covered by the offer made by the offerors or persons acting in concert with them after the notification referred to in Article 102, paragraph 1, pending the offer or in the six months following its closure; changes to the offer, increase offers and competing offers, without limiting the number of bids, which may be made until the expiry of a maximum period; the recognition of offer documents approved by supervisory authorities of other EU Member States or by supervisory authorities of non-EU countries with which cooperation agreements exist; the procedures for publishing the measures adopted by it pursuant to this section[240]. Consob therefore performs its secondary national regulatory function, as regards the TUF, through implementing regulations. In particular, Consob Regulation No. 11971 of May 14, 1999, implementing Legislative Decree No. 58 of February 24, 1998, concerning the regulation of issuers (*Regolamento Emittenti* – RE), regulates in detail the technical aspects of takeover bids in relation to which the TUF has delegated authority to Consob[241].

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238 Art. 101-ter, comma 3, Tuf.

239 These are only basic guidelines for the allocation of supervisory powers. The issue is particularly complex due to the increasingly strong interconnection of capital markets. For further information on this topic, and on cross-border takeover bids in general, please refer to MUCCIARELLI F., *Le offerte pubbliche d'acquisto e di scambio*, in *Trattato di Diritto Commerciale*, Giappichelli Editore, Torino, 2014, pp. 29-37; BENEDETTELLI M. V., La disciplina Internazionalprivatistica, in STELLA RICHTER JR M., *Le offerte pubbliche di acquisto*, in *Quaderni di Diritto Commerciale Europeo*, a cura di C. Angelici e G. Marasà, Torino, Giappichelli, pp. 16-47.

240 Art. 103, para. 4, TUF.

241 The *Regolamento Emittenti* and other implementing Regulations of the TUF by Consob can be consulted on the website: https://www.consob.it/web/area-pubblica/tuf-e-regolamenti-consob.

2.2.3. Transposition of the Takeover Directive: gold-plating and internalization of European guidelines into Italian law

The Takeover Directive was introduced into Italian law, and more specifically incorporated into the TUF as the core of the legislation, by Legislative Decree No. 229 of November 19, 2007[242]. This was followed by Legislative Decree No. 146 of September 25, 2009, containing supplementary and corrective provisions to Legislative Decree No. 229/2007, which came into force on July 1, 2010[243]. The implementation of the Takeover Directive is part of a broader process of regulatory harmonization at the European level and the Capital Markets Union project. The primary objective was to facilitate cross-border transactions efficiently and fairly, with uniform regulations for all. This inevitably clashed with national interests and the very different legal traditions of Member States.

Our legal system provides, at the primary level, a general ban on gold-plating. That is, during the implementation of European directives, a ban on introducing or maintaining levels of regulation higher than the minimum levels required by the directives themselves[244]. This is a general principle that should prevent national legislators from providing unnecessary additional measures and burdens for companies beyond the minimum level of protection imposed by European legislation, except in the case of special transposition criteria. Regulatory interventions in recent years, however, have often disregarded this general principle, resulting in less competitive regulations compared to other jurisdictions, encouraging listing/forum shopping and making our markets less attractive. This situation is further complicated for listed companies by a broad level of secondary regulation that affects not only purely implementation or detailed aspects, but also substantive aspects of the regulation. Compared to the secondary source, moreover, the TUF lacks an express prohibition on goldplating that would prevent more burdensome regulations than those envisaged at the European level. This gap poses very significant risks of overregulation[245].

The previous chapter of the dissertation discussed Articles 15 and 16 of the Takeover Directive, regarding the squeeze-out right and the sell-out obligation. These provisions were subsequently internalized into Italian law by the aforementioned decrees, and this process will be presented below. It will be clear that the discretionary scope left to Member States is, on the one hand, necessary to protect national interests and optimally adapt case law to new requirements; on the other hand, a divergence in legislation and therefore in application remains, given the different choices made by Member States. In particular, the

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[242] Available at: https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2007;229.

[243] Available at: https://www.normattiva.it/uri-res/N2Ls?urn:nir:stato:decreto.legislativo:2009;146.

[244] Art. 14, para. 24-bis et seq., Law No. 246/2005.

[245] ASSONIME, *Proposte per una riforma organica del TUF. Eliminazione del goldplating, valorizzazione dell'autonomia statutaria, allineamento alle best practice internazionali per rendere più attrattivo il nostro mercato di Borsa*, Position Papers 4/2024, p. 13.

Italian case will highlight the extreme complexity of adapting the provisions to a legislative body with a strong tradition, and all the complexities this entails, including those of interpretation.

2.3. Squeeze-out and sell-out included in Italian legislation as typical capital markets rights

Squeeze-out and sell-out rights as they are understood today have their roots in regulatory provisions dating back to before the introduction of the TUF.

Article 108, TUF, which now regulates sell-out[246], was titled in its first version *Offerta pubblica di acquisto residuale*[247], thus defining a separate type of public offering and not simply a right of purchase. The original version read:

1. *Chiunque venga a detenere una partecipazione superiore al novanta per cento promuove un'offerta pubblica di acquisto sulla totalità delle azioni con diritto di voto al prezzo fissato dalla Consob, se non ripristina entro quattro mesi un flottante sufficiente ad assicurare il regolare andamento delle negoziazioni.*

The "residual" takeover bid thus conceived was already regulated by Article 10, paragraph 9, of Law No. 149/1992[248], which imposed this obligation on anyone who acquired control of a listed company in the event that the free float fell below 10% or the lower limit set by Consob[249], regardless of whether this reduction was attributable to the acquirer. The TUF, therefore, transformed this obligation into a burden[250], stipulating that only those who came to hold – individually or jointly, directly or through an intermediary or trust company – a stake of more than 90% were required to make the old "residual"

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246 See paragraph 2.3.1.

247 Cfr. COTTINO G., *La legge Draghi e le società quotate in borsa*, 1999, Utet, pp. 62-70, in particular, at pp. 63-64, the author explains the derivation of the Italian "residual" takeover bid from the French *offre de retrait*; VENTORUZZO M., in MARCHETTI P., BIANCHI L. A., *La Disciplina delle Società Quotate nel Testo Unico della Finanza D. Lgs. 24 Febbraio 1998, N. 58. Commentario*, I, 1999, Milano, Giuffrè Editore, pp. 406-428; WEIGMANN R., in CAMPOBASSO G. F., *Testo Unico della Finanza. Commentario*, in *Le Riforme del Diritto Commerciale*, II, 2002, Utet, pp. 929-931.

248 "Chi, direttamente o indirettamente, abbia acquisito, anche a seguito delle procedure di cui ai commi 1, 3, 7 e 8 il controllo di una società quotata nei mercati regolamentati deve promuovere un'offerta pubblica di acquisto sulla totalità dei titoli, alle condizioni anche di prezzo stabilite dalla CONSOB, quando il flottante è inferiore al 10 per cento o al minor limite stabilito dalla CONSOB con effetto dalla data di pubblicazione nella Gazzetta Ufficiale della relativa comunicazione." The entire text is available at: https://www.gazzettaufficiale.it/atto/serie_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=1992-02-21&atto.codiceRedazionale=092G0095&elenco30giorni=false.

249 Art. 112 TUF of 1998. This power has been retained in the current version of the article. See *infra*. Moreover, even then, Consob itself established the procedure for restoring the free float in Article 50 of Consob Regulation 11971/1999, allowing other avenues to be pursued besides the re-placement of shares on the market, such as diluting the shareholding through a merger with another company or increasing the capital with the dominant shareholder waiving their option rights.

250 In this sense both WEIGMANN R., in CAMPOBASSO G. F., Testo Unico della Finanza. Commentario, in Le Riforme del Diritto Commerciale, II, 2002, Utet, pp. 929 and COTTINO G., *La legge Draghi e le società quotate in borsa*, 1999, Utet, pp. 62.

takeover bid, within four months[251] and at the price set by Consob[252]. The TUF also introduced the possibility for those holding more than 90% of the shares to reconstitute a free float sufficient to ensure the regular course of trading, if they did not wish to launch the "residual" takeover bid and delist the company pursuant to art. 2.5.1., para. 5, *Borsa Italiana* Regulation approved by Consob by resolution no. 11764 of December 22, 1998. Moreover, the "residual" takeover bid of 1998 changed its target from all securities to all voting shares, including preferred shares[253]. The original rationale behind the "residual" takeover bid was therefore, even at that time, to compensate minority shareholders who had been deprived of their status as shareholders in a listed company[254].

The previous version of Article 111, dated 1998 and titled as today *Diritto di Acquisto*[255], states:

1. *Chunque, a seguito di un'offerta pubblica avente a oggetto la totalità delle azioni con diritto di voto, venga a detenere più del novantotto per cento di tali azioni, ha diritto di acquistare le azioni residue entro quattro mesi dalla conclusione dell'offerta, se ha dichiarato nel documento d'offerta l'intenzione di avvalersi di tale diritto.*
2. *Il prezzo di acquisto è fissato da un esparto nominato dal Presidente del tribunale del luogo ove la società emittente ha sede, tenuto conto anche del prezzo dell'offerta e del prezzo di mercato dell'ultimo semester. All'esperto si applica l'art. 64 del codice di procedura civile.*
3. *Il trasferimento ha efficacia dal momento della comunicazione dell'avvenuto deposito del prezzo di acquisto presso una banca alla società emittente, che provvede alle conseguenti annotazioni nel libro dei soci.*

This law, on the other hand, represented a real turning point for the TUF because it did not innovate something that already existed, but introduced the right of squeeze-out into Italian law. At the time, this was understood as the discretionary right, granted to those holding more than 98% of the voting shares[256],

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251 Despite the practical time available to restore the free float, Article 35, para. 1, lett. b), of Consob Regulation 11971/1999 established the obligation to inform Consob and the market of the existence or non-existence of the intention to restore the free float within 10 days of exceeding the 90% threshold.

252 As clearly explained by WEIGMANN R., in CAMPOBASSO G. F., *Testo Unico della Finanza. Commentario*, in *Le Riforme del Diritto Commerciale*, II, 2002, Utet, p. 931, Consob referred to four fundamental criteria for determining the price, which at the time were set out in Article 50, para. 3, Consob Regulation 11971/1999 and have now been moved forward by only two paragraphs and slightly modified as it will be presented in para. 3.1.: a) the consideration for the previous offer; b) weighted average market price of the securities covered by the offer over the last six months; c) the issuer's adjusted net assets at current value; c) the company's income performance and prospects.

253 This refers to shares entitled to vote at the ordinary shareholders' meeting. For an in-depth examination of the calculation of the threshold of 90% in the 1998 TUF, see WEIGMANN R., in CAMPOBASSO G. F., *Testo Unico della Finanza. Commentario*, in *Le Riforme del Diritto Commerciale*, II, 2002, Utet, pp. 930.

254 Consob also expressed this view in the communication n. BOR/RM/93006029 of July 20, 1993, cited by COTTINO G., *La legge Draghi e le società quotate in borsa*, 1999, Utet, p. 63, note 5.

255 Cfr. COTTINO G., *La legge Draghi e le società quotate in borsa*, 1999, Utet, pp. 62-70; VENTORUZZO M., in MARCHETTI P., BIANCHI L. A., *La Disciplina delle Società Quotate nel Testo Unico della Finanza D. Lgs. 24 Febbraio 1998, N. 58. Commentario*, I, 1999, Milano, Giuffrè Editore, pp. 458-494; WEIGMANN R., in CAMPOBASSO G. F., *Testo Unico della Finanza. Commentario*, in *Le Riforme del Diritto Commerciale*, II, 2002, Utet, pp. 938-940.

256 Please refer to the same interpretation criterion in note 232.

to purchase the remaining shares at a price determined by an expert, taking into account the price of the previous offer and the market price over the last six months. In addition, the purchaser was already required to indicate in advance, in the offer document, their intention to exercise the squeeze-out right, a requirement that responded to the need to inform the shareholders of the target company that if they did not accept the total public offer, they could be subject to this type of expropriation[257].
The rule allowed, then as now, the controlling shareholder to get rid of a minority and its possible disruptive actions. An extremely interesting interpretation given at the time, which was complementary, was that the provision actually also contributes to actively protecting minorities, since the right of squeeze-out is only recognized for those who have launched a total takeover bid and have declared in the offer document that they intend to exercise this right, thus excluding those who have reached the same percentage by other means. It was also found to protect small shareholders, as the rule encourages the bidder to launch a total takeover bid in order to avoid having to bear the costs of managing a residual minority[258].

What must remain for the purposes of the subsequent discussion of the modern Articles 108 and 111 of the TUF are precisely the rationales that can already be gleaned from the previous texts just presented. Obviously, the texts have now been replaced, partly because they were incomplete in their previous version[259] and are now outdated.

2.3.1. Articles 108 and 111 of the TUF and operational implementation by the Regolamento Emittenti

This process has led to the current version of Articles 108 and 111 of the TUF[260], which implement Articles 15 and 16 of the Takeover Directive into Italian law. These articles govern sell-outs and squeeze-outs, both of which apply when one or more parties acting in concert following a total takeover bid – or following other types of acquisition – come to hold a stake close to the total share capital, causing a significant thinning of the float and liquidity, since in such cases the legislator regulates the rights of the remaining minority shareholders or the controlling shareholder. While they share common characteristics, these two principles have different rationales: one, the sell-out, is designed to protect minority

[257] The term expropriation is considered very strong in legal terms and has sparked widespread debate on the subject. It will be discussed in detail in section 3.1.

[258] COTTINO G., *La legge Draghi e le società quotate in borsa*, 1999, Utet, p. 72.

[259] COTTINO G., *La legge Draghi e le società quotate in borsa*, 1999, Utet, p. 63.

[260] Cfr. CAVALLARO G., *Commentario al Testo Unico della Finanza*, in *I commentari di giurisprudenza e dottrina*, 2021, Pacini Giuridica; MOSCA C., in CERA M., PRESTI G., *Il Testo Unico finanziario. Mercati ed emittenti*, in *Le riforme del diritto italiano*, 2020, Bologna, Zanichelli Editore, pp. 1457-1462; VELLA F., *Commentario T.U.F. Decreto legislativo 24 febbraio 1998, N. 58 e successive modificazioni*, in *Le nuove leggi del Diritto dell'Economia*, 2012, Torino, Giappichelli; STELLA RICHTER JR M., *Le offerte pubbliche di acquisto*, in *Quaderni di Diritto Commerciale Europeo*, a cura di C. Angelici e G. Marasà, Torino, Giappichelli; FRATINI M., GASPARRI G., *Il Testo Unico della Finanza*, in *Le leggi commentate*, 2012, II, Utet

shareholders; the other, the squeeze-out, represents a measure that favours the controlling shareholder beyond a certain threshold. The provisions establishing the sell-out obligation and the squeeze-out right are applicable to listed Italian companies as defined in Article 101-bis, paragraph 1 of the TUF[261].
The current Article 108 states:

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

[261] This scope of application was clarified by the amendments made by Article 2 of Legislative Decree No. 146 of September 26, 2009, to Articles 108, paragraph 1, and 111, motivated by the need to clarify the cases of applicability of the aforementioned institutions in consideration of the fact that the Takeover Directive – Annex to Article 4, transposed into the TUF by Article 101-ter, paragraphs 4 and 5 – does not lay down a default rule on the law applicable to takeover bids but contains a list of matters governed by the law of the country where the issuer has its registered office and a list of matters subject to the law applicable to the obligation and right to purchase in cases of offers involving securities issued by Italian companies listed exclusively in other EU countries; hence the need to clarify the applicability of these institutions exclusively to the companies indicated by the amended regulations. CAVALLARO G., *Commentario al Testo Unico della Finanza*, in *I commentari di giurisprudenza e dottrina*, 2021, Pacini Giuridica, p. 545.

7. *La Consob detta con regolamento norme di attuazione del presente articolo riguardanti in particolare:*
   a) *gli obblighi informativi connessi all'attuazione del presente articolo;*
   b) *i termini entro i quali i possessori dei titoli residui possono richiedere di cedere i suddetti titoli;*
   c) *la procedura da seguire per la determinazione del prezzo.*

Article 108 on sell-outs is therefore not only concerned with protecting minority shareholders who find themselves shareholders of an issuer whose regular trading is no longer guaranteed, in which case they will encounter difficulties in liquidating their investment; in fact, there is more precise and direct protection for investor-shareholders[262].

The first paragraph, which derives directly from Article 15 of the Takeover Directive, of Article 108 provides for the right, and the corresponding obligation of the bidder, of minority shareholders to demand the purchase of their shareholding in the event that the bidder comes to hold at least 95% of the issuer's securities following a total public offer[263].

Paragraph 2, on the other hand, regulates a case that existed prior to the transposition of the Takeover Directive[264], which occurs when anyone, individually or in concert[265] with others, exceeds 90% of the securities[266]. Upon exceeding this threshold, which may occur, unlike in paragraph 1, following any type of acquisition and not only as a result of a total takeover bid[267], in view of the scarcity of free float, the

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262 ANNUNZIATA F., *La disciplina del mercato dei capitali*, 2023, Torino, Giappichelli, pp. 15-34. This same concept of the investor-shareholder will also be central when the issue of delisting is raised, confirming that it is currently the prevailing interpretation when it comes to assessing the quality of shareholdings. See para. 2.3.2.

263 Purchases made outside the tender offer but within the acceptance period are also counted (Consob DEM/DCL/8081984 of September 3, 2008). As presented by MUCCIARELLI F., *Le offerte pubbliche d'acquisto e di scambio*, in *Trattato di Diritto Commerciale*, Giappichelli Editore, Torino, 2014, p. 216, provides a second chance to shareholders who did not accept an offer that was highly successful.

264 This provision does not originate from EU legislation but replicates the concept of a "residual takeover bid" contained in the previous Law No. 149/92.

265 For the concept of concerted purchase, which is particularly important in the context of mandatory takeover bids, see Article 109 of the TUF. Cfr. ANNUNZIATA F., *La disciplina del mercato dei capitali*, 2023, Torino, Giappichelli, pp. 435-468. The Takeover Directive also recognizes its specific importance, defining it in Article 2(d) of the directive: "persons acting in concert' shall mean natural or legal persons who cooperate with the offeror or the offeree company on the basis of an agreement, either express or tacit, either oral or written, aimed either at acquiring control of the offeree company or at frustrating the successful outcome of a bid". Furthermore, the concept has also been the subject of specific clarification by the Commission, as it has given rise to differences in its implementation in national laws, See EUROPEAN COMMISSION, *Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Application of Directive 2004/25/EC on takeover bids*, COM(2012) 347 final, Brussels, 28 June 2012, para. 16. Cfr. Also VENTORUZZO M., in MARCHETTI P., BIANCHI L. A., *La Disciplina delle Società Quotate nel Testo Unico della Finanza D. Lgs. 24 Febbraio 1998, N. 58. Commentario*, I, 1999, Milano, Giuffrè Editore, pp. 458-494.

266 However, it should be noted that in both cases, the sell-out does not involve the launch of a public offering, as was the case in the residual takeover bid system, but simply a purchase obligation governed by Consob in its specific aspects, as in ANNUNZIATA F., *La disciplina del mercato dei capitali*, 2023, Torino, Giappichelli, pp. 435-468.

267 Since the *ratio* behind the rule is not to limit the collective action problems suffered by the shareholders of the issuing company, but to protect shareholders from the loss of liquidity of the security, it is irrelevant whether the 90% stake was acquired through a takeover bid or by other means, as argued by MUCCIARELLI F., in VELLA F., *Commentario T.U.F. Decreto*

controlling shareholder is required to restore an adequate free float within three months, i.e., a situation in which the distribution of the security is such as to ensure regular trading and, therefore, allow minority shareholders to liquidate their investment. If this is not restored, the law requires the purchase of the remaining securities admitted to trading on a regulated market by anyone who requests it[268]. In fact, based on the controlling shareholder's stated intention not to restore the free float – as stated in the offer document, if the 90% threshold is exceeded as a result of the offer, or by means of a specific announcement published at the time of exceeding the threshold and no later than ten days in accordance with Article 50, paragraph I, *Regolamento Emittenti* – the controlling shareholder may proceed with the sell-out immediately after the threshold is exceeded. The threshold relevant for the purposes of paragraph 2 may be raised by Consob for individual large-cap companies, where the regularity of trading is ensured even if a lower percentage of the capital is held by the market, pursuant to Article 112[269]. In both cases of sell-out, referred to in the first and second paragraphs, the security will be delisted from trading pursuant to Title 2.5 of the *Regolamento dei Mercati organizzati e gestiti da Borsa Italiana S.p.A.* Please note that, if multiple categories of securities are issued, both paragraph 1 and paragraph 2 provide for the existence of a sell-out obligation only for those categories of securities for which the 95% threshold has been reached[270]. The coordination of the dual threshold mechanism implies that, following a full takeover bid, a bidder holding a stake greater than 90% but less than 95% may always restore the regularity of trading to avoid the obligation to purchase. However, a party who, following a full takeover bid, has exceeded the higher threshold of 95% may never be exempted from this obligation. It is, however, understood that it is always possible to execute the obligation to purchase, but the bidder may then take steps to maintain the issuer's listing[271].

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legislativo 24 febbraio 1998, N. 58 e successive modificazioni., in *Le nuove leggi del Diritto dell'Economia*, 2012, Torino, Giappichelli, II, p. 1093.

[268] As rightly pointed out by ANNUNZIATA F., *La disciplina del mercato dei capitali*, 2023, Torino, Giappichelli, pp. 435-468, the mere existence of a regulated market for securities trading is not sufficient: what matters, and what strongly supports the regulatory provision, is the market's ability to perform its functions efficiently, demonstrating both an effective capacity to match supply and demand and the ability to form meaningful prices. These conditions are unlikely to exist when capital is not widely distributed among the public.

[269] See Consob, communication no. DME/11065125 of 21 July 2011. For an in-depth examination of the timing relating to the exercise of the purchase obligation, see MUCCIARELLI F., *Le offerte pubbliche d'acquisto e di scambio*, in *Trattato di Diritto Commerciale*, Giappichelli Editore, Torino, 2014, pp. 223-224.

[270] MOSCA C., in CERA M., PRESTI G., *Il Testo Unico finanziario. Mercati ed emittenti*, in *Le riforme del diritto italiano*, 2020, Bologna, Zanichelli Editore, pp. 1457-1462. The possibility of exercising the right to sell out only with respect to the category of voting shares with respect to which the threshold has been reached could represent an obstacle to the possibilities of a squeeze-out, since the offeror who obtains 95% of the entire voting capital, but less than 95% in a category of voting shares, even partial, does not have the right to squeeze out the latter. Cfr. VENTORUZZO M., *Freeze-outs: Transcontinental Analysis and Reform Proposals*, Legal Studies Research Paper No. 5-2010, Penn State Law.

[271] MOSCA C., in CERA M., PRESTI G., *Il Testo Unico finanziario. Mercati ed emittenti*, in *Le riforme del diritto italiano*, 2020, Bologna, Zanichelli Editore, pp. 1457-1462.

As for the procedure applicable to exercising the sell-out following the exceeding of 90%, pursuant to Article 108, paragraph 2, it is fully provided for in Consob Regulation No. 11971/99 RE[272] and essentially consists, if the relevant percentage was reached following a previous public tender offer (i.e., by taking into account the securities purchased during a public tender offer, whether within the scope of the offer or outside of it, but during the acceptance period), in a sort of reopening of the offer, once the results of the offer have been published. Otherwise, if the 90% threshold is exceeded following acquisitions other than the offer, a full-fledged sell-out procedure will be initiated, for which the publication of an Information Document is required, as required by Article 50-*quinquies*, paragraph 4, of the RE. Once, at the end of this phase, 95% of the shares have been held – calculated using the same methods described above or if this threshold is exceeded directly following a takeover bid – a *Procedura Congiunta* (Joint Procedure) will be initiated to exercise the sell-out option, pursuant to Article 108, paragraph 1, and the squeeze-out option, pursuant to Article 111.

The calculation for reaching the threshold of 90% and 95% of the capital represented by securities[273] is carried out taking into account the shares directly and indirectly owned by the subject held – with regard to the 90% also by the subjects acting in concert with it; in this calculation any treasury shares held by the issuer are included both in the numerator – as they are considered indirectly owned by the controlling subject - and in the denominator[274]. The TUF defines securities as all financial instruments carrying even partial voting rights, pursuant to Article 101-bis. However, for the purposes of calculating the threshold under Article 108, paragraph 1, TUF, the denominator of the fraction is given by the "capital represented by securities." This includes only shares and not financial instruments, provided that the former carry even partial voting rights[275]. The reasoning regarding the numerator is more complex, since Article 108, paragraph 1, TUF states that the obligation to purchase arises when "shareholdings"[276] representing 95% of the voting capital are purchased. Hence, a literal interpretation of the provision leads to a numerator and denominator with a non-homogeneous composition and consequent possible practical problems[277].

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272 Articles 50-*quinquies* et seq.

273 It should be noted that, while paragraph 1 refers to a threshold calculated with reference to the capital represented by "securities", paragraph 2 deals with a threshold that takes into account the "securities admitted to trading on a regulated market" as underlined by ANNUNZIATA F., *La disciplina del mercato dei capitali*, 2023, Turin, Giappichelli, pp. 435-468.

274 Cfr. art. 44-*bis*, para. 5, RE.

275 MUCCIARELLI F., *Le offerte pubbliche d'acquisto e di scambio*, in *Trattato di Diritto Commerciale*, Giappichelli Editore, Torino, 2014, p. 217.

276 Pursuant to Article 105, paragraph 2, of the TUF, the definition of shareholdings also includes securities that grant voting rights on the appointment and removal of directors, while securities that grant voting rights only on other matters are excluded. The previous version of the TUF did not present the same problem, however, since Article 108, paragraph 1, of the TUF linked the obligation to launch a residual takeover bid to the holding of a "holding exceeding 90% of the ordinary shares," which grant voting rights (also) on the appointment and removal of directors. See MUCCIARELLI F., *Le offerte pubbliche d'acquisto e di scambio*, in *Trattato di Diritto Commerciale*, Giappichelli Editore, Torino, 2014, note 389.

277 On this topic MUCCIARELLI F., *Le offerte pubbliche d'acquisto e di scambio*, in *Trattato di Diritto Commerciale*, Giappichelli Editore, Torino, 2014, cit. p. 218, offers an application example: "La società Alpha decide di emettere azioni con voto solo su materie

A non-literal interpretation is therefore preferable in order to equate the two quantities. The interpretation that appears most consistent with the Takeover Directive also considers the term participation as shares with voting rights on any matter[278]. As with paragraph 1, the threshold in paragraph 2 is composed of the "capital represented by securities" and, therefore, it includes only shares, not other financial instruments with voting rights; unlike the situation in paragraph 1, however, the denominator extends only to shares listed on a regulated market of the European Union and does not concern unlisted shares of listed companies[279].

Paragraphs 3 and 4 of Article 108 contain provisions relating to the determination of the consideration to be offered in the sell-out procedure, requiring it to be the same as the previous offer in the cases referred to in paragraphs 1 and 2. The rules distinguish between the case of a mandatory offer, in which the consideration is always that of the offer as it is considered fair by definition, and that of a voluntary offer, since, as seen above, in this case the consideration is freely determined by the offeror. Therefore, in the latter circumstance, the use of a consideration of the same amount as the offer also for the sell-out depends on market appreciation and is measurable by the quantity of acceptances received in the voluntary offer; acceptances must be at least 90% of the total securities subject to the offer[280]. In other cases, Consob determines the consideration according to the criteria set out in Article 50 of the RE, which require taking into account the market price of the last six months and the price of any takeover bid launched on such shares, considering the percentage of subscriptions, as well as the value attributed to the issuer's securities by any existing valuation reports prepared no more than six months before the obligation to purchase arises, by independent experts and the price paid for any other purchases of

diverse da nomina e revoca degli amministratori (le chiameremo «azioni leggere») per il 6% del capitale. Tutte le altre azioni attribuiscono il diritto di voto anche su nomina e revoca degli amministratori («azioni pesanti»). Di conseguenza, il numero delle «azioni pesanti» in circolazione è pari al 94% del capitale rappresentato da azioni con voto. Secondo l'interpretazione letterale della norma, la soglia dell'art. 108 Tuf non potrà mai essere raggiunta, poiché in circolazione le azioni con tali caratteristiche sono meno del 95% del capitale delle azioni con voto. Generalizzando: è sufficiente che una società emetta «azioni leggere» per un valore superiore al 5% del capitale rappresentato da tutte le azioni con voto (escluse, quindi, le sole azioni del tutto prive del voto), per rendere l'art. 108, comma 1, Tuf inapplicabile".

[278] The alternative would have been to maintain the concept of participation in the numerator and adjust the denominator, which would thus only include shares with voting rights on the appointment and removal of directors. However, this would not comply with the Takeover Directive, in which the obligation to purchase protects owners of voting shares without restrictions. MUCCIARELLI F., *Le offerte pubbliche d'acquisto e di scambio*, in *Trattato di Diritto Commerciale*, Giappichelli Editore, Torino, 2014, p. 218. Furthermore, this interpretation, which stems from the need to understand the term "capital" in the literal sense of "nominal share capital," could also conflict with the Takeover Directive, which establishes a double threshold: the holding of securities representing at least 90% of the capital (therefore only shares) with voting rights and representing 90% of the total voting rights (including non-share "securities" with voting rights, if eligible). From the perspective of Italian law, therefore, the issue hinges strictly on the general question of whether financial instruments with voting rights are eligible, even if they concern specific matters. This specificity is beyond the scope of this discussion, but it clearly illustrates the complexity of multilevel EU legislation, which must not only be interpreted and applied, but also integrated into a complex and detailed national regulatory framework.

[279] *Ibidem.*

[280] Therefore, the same price will be applied even if it is a voluntary takeover bid and 90% of the bidders have accepted.

securities of the same category in the last twelve months by the offeror or the concerted players, as in Article 50, paragraph 5, RE[281]. The purpose of the secondary provision, as clearly represented in the Consultation Document published by Consob[282] on the occasion of the regulatory changes, was mainly to limit, where possible, Consob's discretion in determining the consideration, providing for the coincidence of the sell-out price with that of the previous offer even in the event that the aforementioned percentage of ninety percent of acceptances – with respect to the quantity subject to the offer – had not been reached, provided that in the presence of: i) a voluntary offer made pursuant to Article 107; ii) a total voluntary offer approved by those who hold the majority of the securities tendered for participation, or[283]; iii) a total offer to which the rules on the reopening of the terms are applicable – mandatory or voluntary – and in the context of which acceptances have already been obtained in the first phase – expressed by unrelated parties, so as to exclude, from the market assessment, that expressed by subjects linked to the Offeror and therefore in some way participating in the purchase project – in an amount greater than 50% of the securities subject to the offer[284].

In all other cases, Consob determines the consideration by taking into account, among other things, the consideration of any previous offering or the market price in the six-month period prior to the announcement of the offering to the market or prior to the purchase that gave rise to the obligation. The form of the consideration may be the same as that recognized in the previous full-market offering – therefore, outside of the cases where 90% of the shares are exceeded due to other acquisitions as provided for in paragraph 2 –, and it will be possible to fulfil the purchase obligation by offering the same securities and in the same proportion as the previous offering, in the event of identical consideration. However, in cases where Consob determines the consideration, in monetary value, based on the criteria described above, the RE[285] provides that this value will be converted into the same form as the consideration of the previous offering. In any case, the shareholder may always request full cash consideration[286]; to this end,

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281 Cfr. MUCCIARELLI F., *Le offerte pubbliche d'acquisto e di scambio*, in *Trattato di Diritto Commerciale*, Giappichelli Editore, Torino, 2014; MOSCA C., in CERA M., PRESTI G., *Il Testo Unico finanziario. Mercati ed emittenti*, in *Le riforme del diritto italiano*, 2020, Bologna, Zanichelli Editore, pp. 1457-1462.

282 Consob, Modifiche regolamentari richieste dal D.lgs. di recepimento della Direttiva 2004/25/CE (e da successivi interventi legislativi), Roma, 2007, pp. 82 et seq., available at:
file:///Users/martina/Downloads/consultazione_emittenti_20101006_all_1.pdf.

283 Art. 50, para. 4, lett. b), RE refers to art. 40-bis, para. 3, lett. d), RE.

284 Art. 50, para. 4, lett. c), RE. MARCHEGIANI L., in STELLA RICHTER JR M., *Le offerte pubbliche di acquisto*, in *Quaderni di Diritto Commerciale Europeo*, a cura di C. Angelici e G. Marasà, Torino, Giappichelli, p. 253, notes that in order to avoid fueling expectations of a higher sell-out price than that of the previous tender offer, the consideration for this transaction should be considered adequate in relation to the obligation to purchase, even in situations where the offer has not received the number of acceptances required by Article 108, paragraph 3. Article 50, paragraph 4 of the Issuers' Regulation should be read in this light, as it extends the application of the rule of identical consideration in certain specific situations.

285 Art. 50-*bis*, paragraph 3.

286 Art. 50-*bis*, paragraph 5.

the RE[287] defines the criteria for such conversion. Finally, if the consideration is the same as the previous tender offer, the purchase obligation can be fulfilled by simply reopening the terms of the first tender offer, as per Article 108, paragraph 6, of the TUF.

Art. 111 of the TUF states:

1. *L'offerente che venga a detenere a seguito di offerta pubblica totalitaria una partecipazione almeno pari al novantacinque per cento del capitale rappresentato da titoli in una società italiana quotata ha diritto di acquistare i titoli residui entro tre mesi dalla scadenza del termine per l'accettazione dell'offerta, se ha dichiarato nel documento d'offerta l'intenzione di avvalersi di tale diritto. Qualora siano emesse più categorie di titoli, il diritto di acquisto può essere esercitato soltanto per le categorie di titoli per le quali sia stata raggiunta la soglia del novantacinque per cento.*
2. *Il corrispettivo e la forma che esso deve assumere sono determinati ai sensi dell'articolo 108, commi 3, 4 e 5.*
3. *Il trasferimento ha efficacia dal momento della comunicazione dell'avvenuto deposito del prezzo di acquisto presso una banca alla società emittente, che provvede alle conseguenti annotazioni nel libro dei soci.*

In the same case that triggers the sell-out right, the controlling shareholder may have a legitimate interest in liquidating these shareholders and gaining full control of the issuer, essentially eliminating the presence of minimal shareholders in the shareholding structure. This is governed by Article 111, which governs the squeeze-out mechanism, i.e., the right that arises for a controlling shareholder who, following a full offer, has achieved a particularly high stake (95%) in the capital represented by securities in a listed company, to purchase the residual securities held by minority shareholders[288]; This purchase may be completed for each category of securities for which the threshold has been exceeded. Upon completion of the procedure, the offeror will hold 100% of the capital represented by securities. This institution was already known prior to the implementation of Directive No. 2004/25/EC; in the first version of the TUF, the right was exercisable upon exceeding the highest percentage of 98% of the shares with voting rights[289]. The squeeze-out, as mentioned, was confirmed following the transposition of the Takeover Bid Directive, embodying it, similarly to the sell-out right provided for in Article 108, paragraph 1, within the

[287] Article 50-*ter*.

[288] Since its first enactment, the TUF has followed the first option proposed by Article 15 of the Takeover Directive, namely the identification of a rigid threshold linked to the shareholding held following the takeover bid, but independent of the number of acceptances in the takeover bid itself. According to this threshold, a squeeze-out occurs if the bidder obtains a stake equal to at least 90% of the voting capital and 90% of the votes, percentages that can be increased to 95%, as in the Italian case presented. See Chapter I for a discussion of Article 15 of the Takeover Directive. Cfr. MUCCIARELLI F., *Le offerte pubbliche d'acquisto e di scambio*, in *Trattato di Diritto Commerciale*, Giappichelli Editore, Torino, 2014, cit. p. 226.

[289] A participation defined by the legislator as particularly high, also considering the critical sources that had been expressed at the time regarding the highly expropriative nature of the institution in question. Cfr. CAVALLARO G., *Commentario al Testo Unico della Finanza*, in *I commentari di giurisprudenza e dottrina*, 2021, Pacini Giuridica, pp. 558-561.

set of mechanisms aimed at regulating the fate of an issuer that, due to the extreme rarity of its free float, has lost the characteristics of a company that resorts to the risk capital market. In other words, the loss of liquidity of the stock therefore justifies, on the one hand, the right of the remaining minority shareholders to dispose of securities whose divestment on the market has become difficult, if not impossible, and, on the other, the forced sale of the shares held by them where a transaction intended from the outset to result in such a loss of liquidity has been successfully concluded[290]. It is envisaged that the squeeze-out can be exercised only if the relevant threshold is exceeded following a full public offering – whether mandatory or voluntary – and therefore shareholders are given the option of a complete exit. This intention is expressed *ex ante* during the offering itself, and therefore shareholders have this information from the moment they are solicited to sell[291]. Therefore, upon reaching, following a total offer, 95%[292] of the securities of the same category i) the obligation to sell-out arises pursuant to art. 108 – and only after this fulfilment will the offeror possibly be able, if it intends to, restore the free float – and, at the same time, ii) the right to squeeze-out arises pursuant to paragraph 1 of Article 111 – if he has expressed this intention. If the threshold is reached also through the exercise of the sell-out clause pursuant to Article 108, paragraph 2, of the TUF, the bidder, upon completion of the purchase, shall issue a press release stating whether the conditions that give rise to the obligation to purchase pursuant to paragraph 1 or the right to purchase pursuant to Article 111 of the TUF have been met, pursuant to Article 50-*quinquies*, paragraph 5, letter c), of the RE.

Regarding the composition of the relevant threshold, the same issues arise as those raised by Article 108 of the TUF and are resolved with the same non-literal interpretation of shareholdings as shares with voting rights on any matter, in order to have a homogeneous numerator and denominator[293].

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290 Since it is a forced transfer, the right of purchase has been compared to an institution with substantially expropriative effects on the shareholders' property rights. VENTORUZZO M. in MARCHETTI P., BIANCHI L. A., *La Disciplina delle Società Quotate nel Testo Unico della Finanza D. Lgs. 24 Febbraio 1998, N. 58. Commentario*, I, 1999, Milano, Giuffrè Editore. This is only partially mitigated by provisions designed to ensure fair consideration, similar to those governing the obligation to purchase. Thanks to this right, the controlling shareholder, who has borne the burden of a total takeover bid, can avoid the risk of potential opportunistic behavior by the minority. Ibidem, p. 466 and FRATINI M., GASPARRI G., *Il Testo Unico della Finanza*, in *Le leggi commentate*, 2012, II, Utet, p. 1457. Another perspective, which also arises from the institution's affinity with a statutory option mechanism and from constitutional issues, is that these issues are counterbalanced by the 95% threshold, which indicates that the vast majority of third-party shareholders have accepted the full offer and the market has become illiquid and inefficient. ANNUNZIATA F., *La disciplina del mercato dei capitali*, 2023, Torino, Giappichelli, pp. 15-34.

291 the preliminary declaration of the intention to avail of the right to purchase does not, however, impose, ex post, the exercise of the right by the offeror, in the opinion of MARCHETTI P., BIANCHI L. A., *La Disciplina delle Società Quotate nel Testo Unico della Finanza D. Lgs. 24 Febbraio 1998, N. 58. Commentario*, I, 1999, Milano, Giuffrè Editore, sub. Art. 111 and MARCHEGIANI L., in STELLA RICHTER JR M., *Le offerte pubbliche di acquisto*, in *Quaderni di Diritto Commerciale Europeo*, a cura di C. Angelici e G. Marasà, Torino, Giappichelli, p. 246.

292 This percentage is lower than the 98% originally envisaged by the TUF, but it is the maximum amount available to Member States permitted by Article 15 of the Takeover Bid Directive, see paragraphs 1.3. and 3.3., Chapter I.

293 MUCCIARELLI F., *Le offerte pubbliche d'acquisto e di scambio*, in *Trattato di Diritto Commerciale*, Giappichelli Editore, Torino, 2014, cit. pp. 225-227.

Regarding the consideration, before the implementation of the Takeover Directive, an expert appointed by the President of the Court determined the squeeze-out price, taking into account the offer price and the market price of the last six months[294]. Therefore, the purchase price was not necessarily identical to that of the previous public offering. The Takeover Directive established the fair price criterion, for which two criteria are established. When the relevant threshold is exceeded thanks to a mandatory public offering, the price of that public offering is considered the fair price of the squeeze-out, pursuant to Article 15, paragraph 3, of the Takeover Directive. However, when the relevant threshold is exceeded following a voluntary takeover bid, the squeeze-out consideration must match that of the takeover bid only if no less than 90% of the share capital with voting rights included in the offer has participated in the takeover bid, pursuant to paragraph 2 of the aforementioned article. In implementing the Takeover Bid Directive, Legislative Decree no. 229/2007 refers entirely to the provisions governing sell-outs[295]. Despite the ambiguity of the provisions, it must be assumed that the generic reference to Article 108 of the TUF actually concerns only paragraph 1 – which is of EU origin and whose threshold is identical to that of the squeeze-out. Therefore, the consideration has the same form as the offer consideration, but if it was an exchange offer, shareholders may opt for a cash consideration in the proportion determined by Consob. Regarding the amount of the consideration, this is equal to that of the previous public tender offer if the offeror has purchased, pursuant to the offer itself, securities representing at least 90% of the voting capital included in the offer or if the public tender offer is mandatory. In other cases, the consideration is determined by Consob, also taking into account the market price of the last six months and the price of any public tender offer launched on such shares and in accordance with the provisions of the RE[296].

2.3.2. Theoretical assessment and practical value of regulatory standards

First, sell-out and squeeze-out apply to Italian companies with securities admitted to trading on Italian regulated markets, without prejudice to the provisions of Article 101-*ter*, paragraphs 4 and 5. Therefore, we are within the scope of corporate law with regard to Article 108, paragraph 1, and Article 111, which apply to all Italian companies, as confirmed by the wording of these paragraphs. The scope of Article 108, paragraph 2, is more uncertain, since if this provision is deemed to be intended to protect the market, it should be considered to fall within the market law rules that apply if the target company is listed in

[294] See para. 2.3. Numerous questions and uncertainties arose regarding the identification of the time to which the valuation should refer – whether prior to the offering or including the offering period – and the criteria the expert should follow to determine the price. Cfr. MARCHETTI P., BIANCHI L. A., *La Disciplina delle Società Quotate nel Testo Unico della Finanza D. Lgs. 24 Febbraio 1998, N. 58. Commentario*, I, 1999, Milano, Giuffrè Editore.

[295] similarly to what Article 16 does with Article 15 of the Takeover Directive.

[296] Cfr. MUCCIARELLI F., *Le offerte pubbliche d'acquisto e di scambio*, in *Trattato di Diritto Commerciale*, Giappichelli Editore, Torino, 2014, cit. pp. 227-229. For the mechanics and timing of the operation, see pp. 229-231, *ibidem*.

Italy and Consob is the competent authority. If the continuity between this provision and the similar one prior to the implementation of the Takeover Bid Directive is emphasized, then it, like the other provisions, will be included within corporate law rules[297].

The obligation of sell-out therefore represents a final divestment opportunity, granting the minority the right to require the controlling company, upon exceeding one of the thresholds indicated in Article 108, paragraphs 1 and 2, of the TUF, to purchase the remaining shares, if the parent company has not participated in a highly successful takeover bid. Paragraph 1 is an instrument that aims to alleviate the pressure to tender on the residual shareholders of a company that was the subject of a previous total public offer, that is, reduces the incentive to join the takeover bid, through the *ex ante* promise that once a high participation threshold is exceeded, the risk of remaining prisoners in the issuer is averted[298]. The situation referred to in paragraph 2 aims to protect the residual shareholders tout court from the subsequent condition of illiquidity of the securities created following any operation conducted by the majority shareholder aimed at buying up the target company's securities[299]. Therefore, the squeeze-out mechanism serves multiple functions: it reduces the risk that the persistence of small minorities could facilitate obstructionist positions and abusive behaviour, it incentivizes the submission of total offers, and, above all, it facilitates delisting procedures. With regard to this last aspect, it is worth noting that the exclusion of the minority, and with it the delisting due to the depletion of the free float, is thus subject

[297] Without any doubt, however, all the institutions under examination are traced back to corporate interests, and therefore arising and operating within the scope of corporate law, from in GUACCERO A., NUZZO G., *Profili societari delle opa*, in DONATIVI V., Trattato delle società, 2022, Utet giuridica, Milano, IV, pp. 581-613.

[298] MOSCA C., in CERA M., PRESTI G., *Il Testo Unico finanziario. Mercati ed emittenti*, in *Le riforme del diritto italiano*, 2020, Bologna, Zanichelli Editore, pp. 1457-1462. Or, the reading given by MUCCIARELLI F., *Le offerte pubbliche d'acquisto e di scambio*, in *Trattato di Diritto Commerciale*, Giappichelli Editore, Torino, 2014, cit. pp. 216 et seq. provides that the *ratio* behind Article 108, paragraph 1, of the TUF can be interpreted in two ways: *ex post*, as mentioned, it serves to protect small shareholders trapped in a company that has been the subject of a successful takeover bid; and *ex ante*, that is, from the perspective of a shareholder whose shares are the subject of a full takeover bid, the obligation to purchase is a tool – albeit an imperfect one – to reduce the pressure to tender. Shareholders, in fact, know that if they decide not to participate in the takeover bid and it is nevertheless successful, they will have a second chance, but only if the bidder has obtained a particularly significant stake in the capital (95% of the voting shares). The rationale behind Article 108, paragraph 2, of the TUF is not to limit the class action problems faced by the issuing company's shareholders, but to protect shareholders from the loss of liquidity of the stock. Therefore, it is irrelevant whether the 90% stake was acquired through a takeover bid or otherwise. The rationale of paragraph 2, as understood in this way, explains why the obligation ceases if the majority shareholder restores a free float sufficient to ensure the regular conduct of trading. The notion of sufficient free float is different from the 90% threshold and represents an additional condition; the obligation to purchase is automatically triggered once 90% is exceeded, unless the majority shareholder reduces its stake sufficiently to ensure the regular conduct of trading, a measure that may vary from company to company depending on the circumstances. Also, the concept of floating is necessarily elastic and uncertain. In this regard, we must remember that, according to the Italian Stock Exchange Regulations, admission to listing presupposes that at least 25% of the share capital be held by the public. Furthermore, the admission requirements do not automatically translate into delisting requirements, which may be ordered by the market management company if it deems that, due to particular circumstances, it is not possible to maintain a normal and regular market for such instrument, as established in Articles 2.2.2 and 2.5.1 of the *Regolamento dei Mercati Organizzati e Gestiti da Borsa Italiana S.p.A*,

[299] FRATINI M., GASPARRI G., *Il Testo Unico della Finanza*, in *Le leggi commentate*, 2012, II, Utet.

to the prior cessation of the conditions governing the existence of a liquid and efficient market and the acquisition of the relevant threshold following a total tender offer[300]. Having crystallized the *ratio* of the provision and presented the interpretative and application criteria, what is relevant from a more pragmatic perspective is that the bidder launching a total public offering is usually motivated, among other things, by the desire to pursue the delisting of the target company. Consequently, the *Regolamento dei Mercati Organizzati e Gestiti da Borsa Italiana S.p.A* expressly provides that the onset of the sell-out obligation pursuant to Article 108, paragraph 1, entails the delisting of the securities[301]. Therefore, the article should also be interpreted as a further demonstration that the interest in the listing has in reconstructing the shareholder-investor's position within the corporate structure and the relationship with the majority[302].

If the sell-out consists of the right to divest from an issuer with highly concentrated ownership, the squeeze-out makes this exit mandatory (freeze-out of the minority), facilitating the delisting of the company[303]. Article 111 mirrors the others presented. If, in fact, it is true that the shareholder-investor assumes – as a qualifying element of his or her participation in the company's capital – the existence of a liquid market on which to trade his or her investment, the loss of this element, on the one hand, justifies and requires the initiation of appropriate remedies to protect the investor. On the other hand, the successful conclusion of a transaction originally intended to cause, admittedly, the disappearance of a liquid market (a total takeover bid) justifies and requires the forced divestment of the shareholding. This is because one of the conditions on which the shareholder-investor's original acceptance of the contract was based no longer exists, or, in a different perspective, an event occurs that could impact the very cause of the relationship, resulting in its dissolution. The compression of the stock's liquidity thus acts, once again, as an event that leads to the termination of the partnership. an event that will impact the company's ownership structure, in a similar sense – but specular in terms of effects – to what we saw for the obligation to purchase and the right of withdrawal[304].

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300 ANNUNZIATA F., SCOPSI M., *Il delisting*, in V. DONATIVI, Trattato delle società, 2022, Utet giuridica, Milano, IV, p. 750.

301 Art. 2.5.1, para. 6.

302 ANNUNZIATA F., *La disciplina del mercato dei capitali*, 2023, Torino, Giappichelli, pp. 15-34.

303 MOSCA C., in CERA M., PRESTI G., *Il Testo Unico finanziario. Mercati ed emittenti*, in *Le riforme del diritto italiano*, 2020, Bologna, Zanichelli Editore, pp. 1457-1462. The rationale behind Article 111 of the TUF is that if the bidder obtains almost all of the shares, it may be in its interest to "liquidate" the remaining minorities and obtain full control. The typical case, already addressed several times, is that of full takeover bids launched by the controlling shareholder or by directors, aimed at "expelling" the minorities and simplifying the delisting process. Therefore, the squeeze-out tool is used, under which the bidder who obtains almost all of the target company's capital has the right to "forcefully" purchase the securities of the remaining shareholders at a fair price, thus protecting the bidder who has obtained almost all of the shares. This is for various reasons, such as the fact that the persistence of small minorities could increase the industrial costs of the transaction and could lead to obstructionist positions and the risk of abuse by the minorities themselves. Furthermore, the possibility of a squeeze-out incentivizes full takeover bids. Furthermore, it prevents free-riding by small shareholders, which risks derailing efficient takeover bids. Finally, and importantly here, the squeeze-out right facilitates delisting procedures. MUCCIARELLI F., *Le offerte pubbliche d'acquisto e di scambio*, in *Trattato di Diritto Commerciale*, Giappichelli Editore, Torino, 2014, cit. pp. 216 et seq.

304 ANNUNZIATA F., *La disciplina del mercato dei capitali*, 2023, Torino, Giappichelli, pp. 15-34.

Based on what has been presented on the Italian[305] and European[306] capital markets, and the desire to move towards the union of all these, it is impossible to ignore certain considerations on the regulatory issue of delisting and how it can be applied, with what scope for freedom and for what purposes. Doubts currently concern the possibility of implementing pure delisting, i.e., a resolution to withdraw securities from the market, and its relationship with the provisions of Articles 108 and 111 of the TUF[307].
Previously, only delisting at the initiative of the competent admission authority[308] was contemplated, leaving questions as to whether it was possible at the initiative of the issuing company[309]. At the same time, there has always been limited doctrinal elaboration on this point, which instead focused on the prerequisites and methods for exercising the power of revocation by the administrative authority[310].
The first provision that can be found on the subject of shareholder withdrawal due to delisting is Article 13 of Law No. 149/1992 on takeover bids, in relation only to merger resolutions, pursuant to and for the purposes of Article 2437 of the Civil Code. Alongside this, there is the aforementioned Article 10, paragraph 9, Law No. 149/1992, the ancestor of today's sell-out right, which at the time provided for the residual takeover bid. Then, with the introduction of the TUF and the 2003 reform of company law, the contents of the latter were crystallized in the legal system.
Therefore, in order to examine the body of rules relating to delisting and draw conclusions, the provisions of the TUF must be coordinated with those contained in Article 2437-*quinques* of the Civil Code, entitled *Disposizioni speciali per le società con azioni quotate in mercati regolamentati.*

There are two types of delisting that the trading venue operator is expressly authorized to carry out under the TUF. The first is the delisting for market protection reasons, as provided for in Articles 66-*ter* and 66-*quater* of the TUF. These articles are of European origin, specifically based on Article 52(1) of Directive 2014/65/EU[311], and aim to limit the technical discretion of the management company of the trading venue that revokes instruments from the trading system. Exclusion may only take place on condition that it does not risk causing significant damage to the interests of investors or the orderly

305 See para. 2.1.
306 See para. 1.1. and 1.3.4.
307 ANNUNZIATA F., SCOPSI M., *Il delisting,* in V. DONATIVI, Trattato delle società, 2022, Utet giuridica, Milano, IV, p. 564.
308 Borsa Italiana S.p.A., pursuant to Article 2.5.1., *Regolamento dei Mercati Organizzati e Gestiti da Borsa Italiana S.p.A*, available at: https://www.borsaitaliana.it/borsaitaliana/regolamenti/regolamenti/regolamentodeimercati27012025.pdf.
309 Cfr. SOTGIA S., il ritiro delle azioni di società dalla quotazione in borsa, in Banca, borsa, tit.cred., 1958, I, 45, which already noted a strange limitation of the discipline in this regard, as stated by *Ibidem* in note 1.
310 Cfr. *Ibidem*, note 2, for some references. Moreover, cfr, PACE D.I., *Ammissione sospensione esclusione dai mercati regolamentati. I poteri della Consob e delle società di gestione dei mercati*, 2012, Milano, Giuffrè; DE MARI M., *La quotazione di azioni nei mercati regolamentati: profili negoziali e rilievo organizzativo*, 2004, Torino, Giappichelli.
311 It states: "Without prejudice to the right of the competent authority under Article 69(2) to demand suspension or removal of a financial instrument from trading, a market operator may suspend or remove from trading a financial instrument which no longer complies with the rules of the regulated market unless such suspension or removal would be likely to cause significant damage to the investors' interests or the orderly functioning of the market." The entire Directive is available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0065.

functioning of the market and may be carried out directly by Consob in the event of inaction on the part of the trading venue operator. Article 66-*ter* does not provide for the issuer's right to request and obtain from the trading venues operator the delisting of its securities but only deals with conveying the operator's assessment in situations that no longer allow for the regular listing of the instruments or that conflict with investor protection[312]. These cases also include corporate or market transactions that have the same consequences. The practical case is precisely the events referred to in Articles 108 and 111 of the TUF, following which a delisting occurs that is formally ordered *ex officio* due to the impossibility of maintaining a normal and regular market, but essentially derives from the will of the company or a specific investor, the bidder[313].

The second type is the delisting for the purpose of transferring the listing to another regulated market in Italy or another EU country, provided that equivalent investor protection is guaranteed, in accordance with the criteria established by Consob in its regulations[314], pursuant to Article 133 TUF. This provision, unlike Article 66[315], falls within Part IV, relating to *Disciplina degli emittenti*, and consequently within the scope of corporate law, referring only to Italian companies as recipients of the provision. Furthermore, it does not precisely regulate a true delisting, but rather a change of seat. Therefore, this will not be relevant for the purposes of applying the special statute applicable to Italian companies with securities listed on a regulated market[316]. What is lacking is the applicability of the rules on mandatory takeover bids and those contained in the market regulations relating to transparency, structure, and functioning, hence the requirement in Article 133 for a guarantee of equivalent protection for investors in the target market[317]. In this provision, listing appears to constitute a constraint to which the majority submits in the general interest of the company, and therefore also of the shareholders, and which entails limitations in pursuing delisting[318].

Moreover, Article 13 of Law No. 149/1992 on takeover bids, following a regulatory process[319], it was

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312 ANNUNZIATA F., SCOPSI M., *Il delisting*, in V. DONATIVI, Trattato delle società, 2022, Utet giuridica, Milano, IV, p. 565.

313 See. Art. 2.5.1. *Regolamento dei Mercati Organizzati e Gestiti da Borsa Italiana S.p.A*, available at: https://www.borsaitaliana.it/borsaitaliana/regolamenti/regolamenti/regolamentodeimercati27012025.pdf.

314 Art. 144 RE.

315 Included in Part III of the TUF, dedicated to *Disciplina dei mercati.*

316 This means that is not affected the company's subjection to the provisions of the Civil Code relating to listed companies and those that resort to the risk capital market, and to the rules on corporate governance laid down in Articles 119-165-*septies* of the TUF.

317 ANNUNZIATA F., SCOPSI M., *Il delisting*, in V. DONATIVI, Trattato delle società, 2022, Utet giuridica, Milano, IV, p. 567. Furthermore, as the authors note, no provision is made for cases where the transfer is to a multilateral trading facility that is not a regulated market or to a trading venue in a country outside the European Union, thus creating a significant regulatory gap, p. 568.

318 ANNUNZIATA F., *La disciplina del mercato dei capitali*, 2023, Torino, Giappichelli, pp. 15-34.

319 It was first replaced by Article 131 of the Consolidated Law on Finance, which was in turn repealed by Legislative Decree No. 37/2004. *Ibidem*, p. 571.

replaced by Article 2437-*quinques* of the Civil Code. The most significant aspect of this latest provision is undoubtedly that it has broadened the grounds for withdrawal beyond merger and demerger resolutions alone to include all those that involve exclusion from trading on regulated markets. In order to understand the *ratio* behind the rule, we can start from the interpretation that exercising the sell-out option is nothing more than the withdrawing shareholder reappropriating wealth equal to the price he would receive from the sale of his stake to third parties, in response to the majority adopting a decision that would change the fundamental characteristics of his investment operation[320]. The premise of this case is to frame the matter from the individual perspective of the investor-shareholder: what is therefore important is the representation of participation in a joint-stock company as an investment phenomenon and the consequent and speculative framing of withdrawal as a structurally disinvestment institution[321]. The institution of withdrawal indicates that, similarly to the abstract negotiability of shares, the concrete possibility of liquidating them at any time and at reduced transaction costs also represents, from the perspective of the individual shareholder-investor, a defining feature of share ownership. From this perspective, the purchase of securities on a regulated exchange market contributes to defining the essential features of the investment transaction and establishes the possibility of an exit at a predetermined price, where the loss of the listing depends on a decision voluntarily taken by the shareholders[322].

In addition to the regulatory cases expressly described, delisting is often the direct or ancillary objective of takeover bids, whether voluntary or mandatory. In these cases, delisting may be achieved through the bid itself, or subsequently through a merger with an unlisted company or recourse to squeeze-out and sell-out mechanisms. Hence the importance and relevance of having analysed these regulatory instruments in light of the increasing use of takeover bids for delisting purposes.
Both the original version of the article and the original concept of the "residual" takeover bid provided for in the previous Article 108 of the TUF are therefore based on the loss of negotiability of the security on the regulated market, which has remained the cause of the institutions to date: in the case of

[320] This provision appears directly related to the goal of protecting shareholders in the event of the loss of listing of financial instruments, thus enhancing the right of withdrawal, a typically corporate right, with a broader scope than that historically provided for by law, and also tied to the organizational structures resulting from listing. Or perhaps, on the contrary, it is the interest in listing that takes on internal corporate significance and, therefore, requires corporate-level protection mechanisms. ANNUNZIATA F., *La disciplina del mercato dei capitali*, 2023, Torino, Giappichelli, pp. 15-34.

[321] As described by MUCCIARELLI F., *Le offerte pubbliche d'acquisto e di scambio*, in *Trattato di Diritto Commerciale*, Giappichelli Editore, Torino, 2014, with takeover bids "l'offerente invita gli investitori a disinvestire, ossia a scambiare flussi di cassa futuri e incerti, derivanti dallo strumento finanziario oggetto dell'originario investimento, con una somma di danaro attuale e certa, ossia il prezzo dell'opa". Cit. p. 2.

[322] It must therefore be considered that all resolutions capable of producing the effect of delisting, whether certain or merely possible, may justify withdrawal. The interpretation presented is the modern interpretation and the one most relevant to current law; the previous interpretation, which provided that the justification for withdrawal following delisting was based on the organizational significance of the decision, was abandoned due to its lack of consistency, given that no similar scenario was envisaged for the reverse case of a new listing. ANNUNZIATA F., SCOPSI M., *Il delisting*, in V. DONATIVI, Trattato delle società, 2022, Utet giuridica, Milano, IV, pp. 571-574.

withdrawal, as a result of a resolution adopted by a majority and capable of causing the market to cease to exist; in the case of the purchase obligation, due to the concentration in the hands of a single shareholder of a qualifying portion of the securities admitted to trading and the consequent insufficiency of the free float to ensure the regular functioning of the market. In both cases, this involves identifying the consideration to be paid to minority shareholders who declare their intention to sell their shares at the current market value of the shareholding[323].

This framework gives rise to the importance of takeover bids for delisting, which are used so frequently – and, upstream, squeeze-out and sell-out rights – since the legislation is extremely uncertain about the possibility of allowing a resolution concerning pure delisting. Pure delisting would be unrelated to other company events – such as a merger – and formally attributable to the collective will of the shareholders, according to the decision-making mechanisms provided for by company law.
A joint reading of Articles 133 of the TUF and 2437-*quinques* of the Civil Code leads, on the one hand, to an uncompromising solution whereby, except in the case of a transfer expressly provided for in Article 133 of the TUF, the issuer's request for exclusion cannot be accepted. The listing would thus be expendable only if the market is already illiquid or in the implementation of corporate restructuring operations, guaranteeing shareholders who did not participate in the adoption of the relevant resolution the right of withdrawal. This would lead to having to launch a total takeover bid as the only viable option in order to achieve delisting.
A more permissive interpretation[324], based on the assumption that there is a regulatory gap in our legal system, would see Article 133 of the TUF as setting out the conditions under which the issuer is allowed to leave the market without offering the holders of the instruments subject to exclusion an exit in the form of a right of withdrawal, with all remaining requests having to be brought back within the scope of Article 2437-*quinquies* of the Italian Civil Code. These could therefore include a pure delisting, with a resolution that would require the intervention of an extraordinary shareholders' meeting[325]. At present, this interpretation raises many questions. The numerous cases of takeover bids for delisting in practice confirm that, when there is a desire to withdraw a company's shares from trading on a regulated market, this remains a widely used tool alongside extraordinary financial transactions.

This gap is further amplified by the fact that, with regard to delisting of the Euronext Growth Milan MTF, Article 41 of the Euronext Growth Milan Market Rules stipulates that Euronext Growth Milan

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323 *Ibidem*, p. 574.

324 See SAGLIOCCA M., DE NIRO E., *Il delisting per volontà dell'emittente: il fenomeno del delisting "puro"*, in *Non Solo Diritto Bancario*, February 7, 2023, available at: https://www.dirittobancario.it/art/il-delisting-per-volonta-dellemittente-il-fenomeno-del-delisting-puro/.

325 This would be inferred from the need for alignment with the provisions of Article 133 of the TUF, which equates the mere transfer of negotiations with voting at an extraordinary shareholders' meeting.

issuers requesting *Borsa Italiana* to revoke the admission of their financial instruments must communicate this intention by also informing the Euronext Growth Advisor and, unless *Borsa Italiana* decides otherwise, the revocation must be subject to the approval of no less than 90% of the shareholders at a shareholders' meeting[326]. This is justified by a difference in the operating regime of issuers listed on these trading venues, due to the purely contractual nature of the applicable rules. Conversely, the Regulation makes no provision regarding the possibility of configuring the various and additional hypotheses of voluntary delisting resulting from corporate transactions and the applicable rules for such cases. Any doubts in this regard must now be considered dispelled in light of Article 41 of the Regulation. Article 41 of the Regulation Guidelines expressly clarifies that the enhanced quorum applies to any resolution by the issuer that could result, even indirectly, in the delisting of the issuer's financial instruments. This includes, therefore, cases of indirect voluntary delisting, as well as any resolution amending the clause implementing this rule in the company's bylaws. However, a further difference with companies listed on regulated markets arises: the provision of a different form of protection for minority shareholders, which does not include any right of withdrawal for those who did not participate in the delisting resolution. Nonetheless, legal doctrine emphasizes that denying the right of withdrawal to shareholders who did not participate in the adoption of the shareholders' resolution entailing the delisting from the unregulated market would contradict the very rationale of the regulation and the general principles of the law. Therefore, it would seem appropriate, even if in conflict with the letter of the law, to also apply, by analogy, the right of withdrawal provided for by Article 2437-*quinquies* of the Italian Civil Code in such cases for voluntary delisting from regulated markets[327].

It is therefore undeniable that Articles 108 and 111 of the TUF are intrinsically linked to other provisions of the legal system aimed at protecting similar interests. This connection therefore gives rise to the complexities presented above, which must be taken into account, and which emerge forcefully in the case of takeover bids, particularly those where their ultimate goal is delisting. These take on an even more evident instrumental purpose given the lack of a clear regulatory response to the pure delisting request. Delisting is often associated with takeover bids as a purpose, and it certainly can be, but the regulatory gap described contributes to accentuating a purely negative connotation of the delisting takeover bid. It will be presented below, also in light of the most recent reform proposals, which is not necessarily a

[326] It is unclear whether this refers to the ordinary or extraordinary meeting; the latter option seems more likely, consistent with what has been said regarding the regulated market. See SAGLIOCCA M., DE NIRO E., *Il delisting per volontà dell'emittente: il fenomeno del delisting "puro"*, in *Non Solo Diritto Bancario*, February 7, 2023, available at: https://www.dirittobancario.it/art/il-delisting-per-volonta-dellemittente-il-fenomeno-del-delisting-puro/.

[327] See VISMARA A., *Note in Tema di Offerte Pubbliche di Acquisto*, in *Competitività dei Capitali e Riforma del Testo Unico della Finanza*, a cura di MONTALENTI P. e NOTARI M., in *Quaderni di Giurisprudenza Commerciale*, 468, 2025, Lefebvre Giuffrè, p. 257.

factor to be feared – always without underestimating it – but should be contextualized within the perspective of market development.

2.3.3. Italian capital market: prospects for the development of the corporate control market

Compared to international and European markets, the Italian market currently appears small, with a small free float and low capitalization. Italy's capitalization/GDP ratio is two-thirds that of Germany and Spain, one-third that of the UK, and a quarter that of the Netherlands and France. The Italian market is significantly undersized compared to other European countries, also in terms of raising fresh capital. The existence of a more favorable environment for listing and company management, which characterizes the most dynamic European financial centers and international markets, has further weakened the growth of the Italian market in the last decade. Over the last 10 years, the balance between entries and exits from the regulated market has been strongly negative: approximately 40 IPOs against more than 100 delistings. In terms of value, the IPO and delisting balance was negative by approximately €60 billion. The value of companies that have transferred their headquarters abroad amounts to approximately €60 billion. Today, the transferred companies are worth approximately €200 billion. The average free float of Italian companies is less than 60%; among European countries, only Portuguese companies have a lower free float. The reluctance of companies to broaden their shareholder base also negatively impacts the weight of Italian listed companies in the international stock indices that guide the investments of passive funds: Italy accounts for 3% of the main European index (MSCI Europe), compared to 12% for Germany and 17% for France. Some encouraging signs regarding access to capital markets come from the development of the Euronext Growth Milan market for small and medium-sized enterprises, which provides a simplified listing regime and where more than 200 companies are currently listed. Although this phenomenon has a modest impact on the real economy, given its low level of capitalization, it has the advantage of being a gateway for SMEs to venture capital and a springboard for subsequent listing on the main market[328].

In this sense, the growth in delisting phenomenon in recent years, especially involving large-cap companies, is even more sobering, often regardless of a bearish phase in share prices. Furthermore, in some situations, delisting in Italy has been accompanied by listing on another European market with a different organization. This raises questions about the reasons for a certain disaffection with listing and the competitiveness of the domestic venture capital market[329]. The effect that goldplating may have had on the decision to abandon listing in Italy should also not be ignored.

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[328] ASSONIME, *Proposte per una riforma organica del TUF. Eliminazione del goldplating, valorizzazione dell'autonomia statutaria, allineamento alle best practice internazionali per rendere più attrattivo il nostro mercato di Borsa*, Position Papers 4/2024, p. 7.

[329] PICCO F., PONZIANI V., TROVATORE G., VENTORUZZO M., *Le OPA in Italia dal 2007 al 2019. Evidenze empiriche e spunti di discussione*, 2021, Discussion papers Consob, p. 66.

2.4. Proposal for reform of the TUF: innovation in takeover bid regulations inspired by best practices

The only way to revitalize the capital market appears to be through a comprehensive regulatory reform that pursues the goal of making the system competitive, aligning the regulatory framework with the experiences of the most advanced legal systems, also with a view to anticipating and influencing the process of fully implementing the Capital Markets Union[330]. Efficient market regulation, aimed at creating an environment favourable to listing and supporting business activity, without compromising investor and market protection, is a driving force for economic growth and is instrumental in the competitive development of the legal system.

In this scenario, in March 2024, Law No. 21 of 5 March 2024 was published, containing the *Interventi a sostegno della competitività dei capitali e delega al Governo per la riforma organica delle disposizioni in materia di mercati dei capitali recate dal testo unico di cui al decreto legislativo 24 febbraio 1998, n. 58, e delle disposizioni in materia di società di capitali contenute nel Codice civile applicabili anche agli emittenti – Legge Capitali*[331]. It introduced a series of amendments to the Consolidated Law on Finance and the Civil Code in line with the recommendations of the 2020 OECD Report on the Italian Capital Market and the 2022 Ministry of the Economy and Finance Green Paper, which pursue the objective of making companies' access to and permanence in the capital market more efficient, increasing their competitiveness. Of great significance was the broad delegation to the Government to adopt legislative decrees for a comprehensive reform of the capital markets regulations contained in the TUF, as provided for by art. 19 of the *Legge Capitali*. In compliance with constitutional principles, particularly the protection of savings, the European Union legal system, and international law, as well as the principles and guidelines set forth in this Article, Article 19, paragraph 1, letter f), sets out the need, among other things, to reorganize and update the rules governing appeals to public savings, with particular regard to public offerings of securities and public purchase and exchange offers. This has come to the *Schema di decreto legislative recante attuazione della delega di cui all'articolo 19 della legge 5 marzo 2024, n. 21, per la riforma organica delle disposizioni in materia di mercati dei capitali recante dal Testo unico di cui al decreto legislative 24 febbraio 1998, n. 58, e delle dispozioni in materia di società di capitali contenute nel Codice civile, nonché per la modifica di ulteriori disposizioni vigenti al fine di assicurarne il miglior coordinamento*, provisionally approved by the Council of Ministers on 8 October 2025 (Draft Decree). It meets the objectives of streamlining and coordinating the

330 ASSONIME, *Proposte per una riforma organica del TUF. Eliminazione del goldplating, valorizzazione dell'autonomia statutaria, allineamento alle best practice internazionali per rendere più attrattivo il nostro mercato di Borsa*, Position Papers 4/2024, p. 8.

331 This is contextualized as an implementing act of the European Listing Act, consisting of Directive (EU) 2024/2811 and Article 1 of Regulation (EU) 2024/2809, adopted in 2024 to make public capital markets in the EU more attractive for companies and facilitate access to capital for small and medium-sized enterprises. Cfr. VALENSISE P., *Note in tema di accesso delle imprese ai mercati: qualche considerazione prospettica, anche alla luce delle novità del listing act*, in *Competitività dei Capitali e Riforma del Testo Unico della Finanza*, a cura di MONTALENTI P. e NOTARI M., in *Quaderni di Giurisprudenza Commerciale*, 468, 2025, Lefebvre Giuffrè.

TUF and the Civil Code to ensure greater coherence and simplification of regulatory sources and to eliminate or streamline obligations or prohibitions not provided for by European Union law and not justified on the basis of interests worthy of protection, while also correcting any identified dysfunctions[332]. In this sense, therefore, the concrete objective is to curb the phenomenon of goldplating of our legislative system, which has acted as a deterrent to the development of the capital market.

With specific reference to the scope of this dissertation, and in accordance with the provisions of Article 19, paragraph 1, letter f) of the *Legge Capitali*, among the various areas affected by the Draft Decree, the innovations in the field of takeover bids[333], which were among the most central of the proposals, will be highlighted below. Before introducing the specific reform proposals relating to the takeover bid regulation, let's consider some premises useful for understanding the objectives pursued by the innovation itself. First, despite the uncertainties regarding the effects of takeover bids on the economic system, it seems reasonable to believe that takeover bids contribute positively to the functioning of the corporate control market and to the overall efficiency of the system. Second, changes to takeover regulations in general must never ignore a delicate balance between the objective of reducing regulatory obstacles and costs for potential bidders and adequate protection for the shareholders of the target company receiving the offer. Given that one of the objectives is to reduce the costs of takeover bids, regulations must be pursued that simplify the process and increase legal certainty. It must also be considered that goldplating, when it does not create undue burdens for the bidder or create ambiguous rules for the interpreter, fosters the confidence of international investors and the influx of resources into the capital of Italian companies, thus contributing to the liquidity and depth of the market, its allocative and informational efficiency, and therefore the competitiveness of

[332] Specifically, the main objectives include: facilitating businesses' access to venture capital, particularly in regulated markets; facilitating small and medium-sized enterprises' access to alternative forms of financing and channeling investments into businesses; making businesses more attractive to international investors; increasing the competitiveness of the domestic market by simplifying and streamlining the regulations for issuers and corporate governance, also taking into account the provisions of self-regulatory codes; facilitating business financing throughout all stages of growth, including the transition from listing on unregulated markets to listing on regulated markets; reviewing the rules governing private investment activities to encourage their widest possible diffusion, including by expanding the range of corporate forms eligible for collective asset management services, ensuring correctness and compliance with disclosure requirements to protect investors; Provide for the reorganization, coordination, and updating of the regulations governing investment services and activities, including disclosure requirements and contract regulations, and regarding solicitations to public savings, with particular regard to public offerings of securities and public purchase and exchange offers; ensure a coherent and integrated system of internal controls, eliminating overlaps or duplications in control functions and structures and also identifying appropriate forms of coordination and information exchange to more effectively combat any irregularities detected. AMENDOLA P.R., *La riforma del TUF e le novità per gli intermediari*, in *Non solo diritto bancario*, 8 gennaio 2026, available at: https://www.dirittobancario.it/art/la-riforma-del-tuf-e-le-novita-per-gli-intermediari/.

[333] For a complete presentation of all the proposals relating to the takeover regulation introduced by the Draft Decree, see VENEZIANO G., MINNITI D., GIOVETTI C., *Riforma del TUF: le novità proposte per i mercati dei capitali*, in *Non solo diritto bancario*, 20 ottobre 2025, available at: https://www.dirittobancario.it/art/riforma-del-tuf-le-novita-proposte-per-i-mercati-dei-capitali/.

the Italian financial system. This creates a contradiction that can only be resolved by carefully balancing goldplating with minority protection and streamlining the process[334].

That said, the proposed innovations are presented below, specifically regarding the squeeze-out right and the sell-out obligation, and the proposal to introduce a full takeover procedure very similar to the Anglo-Saxon Scheme of Arrangement. This is to understand the direction in which the legislation is moving, the prospects for the control market, and how the development of the capital market is proposed to be reconciled with more accessible and incentivizing takeover regulations. However, these regulations currently carry a strong trend toward delisting from the regulated market, which, while not the sole purpose of pursuing takeovers, now appears to be a dominant trend[335].

Another aspect to consider, which deserves a separate analysis, is the fact that the TUF reform also provides significant incentives for alternative investments, particularly private equity with the proposal to include in the legal system the *società di partenariato*. These constitute a new investment vehicle inspired by the limited partnership model already widespread in major European jurisdictions, such as France, Germany, and Luxembourg, with the aim of incentivizing long-term investments in private equity and venture capital. The rationale behind the regulation of partnership companies is to transpose into Italian law, and therefore into the relevant capital market, operating models already successfully tested in other European countries. The distinction between limited partners and general partners responds to the need to separate the capital contribution function from the management function, thus bringing the Italian system closer to that with which major foreign financial institutions are familiar. This is to attract capital and contribute to the growth of a system considered crucial for supporting the initial and development stages of businesses[336]. Therefore, capital market development in this sense is not uniquely linked to the regulated market. This could lead to an extremely interconnected vision, given that the stock market often represents the exit of many private equity and venture capital operators. Therefore, an efficient stock market remains the central issue, whether regulated or not[337].

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334 As observed by MAUGERI M., *Undici tesi per una riforma della disciplina delle o.p.a.*, in *Orizzonti del Diritto Commerciale*, 2, 2024, pp. 676-677. Also remembered again by NATALI G. in *Competitività dei Capitali e Riforma del Testo Unico della Finanza*, a cura di MONTALENTI P. e NOTARI M., in *Quaderni di Giurisprudenza Commerciale*, 468, 2025, Lefebvre Giuffrè, "Il goldplating dev'essere drasticamente ridotto, ma alcune norme più severe possono essere giustificate da reali esigenze di tutela degli investitori", cit. p. 301.

335 VISMARA A., *Note in Tema di Offerte Pubbliche di Acquisto*, in *Competitività dei Capitali e Riforma del Testo Unico della Finanza*, a cura di MONTALENTI P. e NOTARI M., in *Quaderni di Giurisprudenza Commerciale*, 468, 2025, Lefebvre Giuffrè, p. 255, Considers that, given that approximately 120 billion euros of total capitalization have been delisted, representing approximately 15% of the current Italian market capitalization, there is no need to simplify the regulations for bidders, which are already supported by an effective regulatory framework.

336 Cfr. AMENDOLA P.R., *La riforma del TUF e le novità per gli intermediari*, in Non solo diritto bancario, 8 gennaio 2026, available at: https://www.dirittobancario.it/art/la-riforma-del-tuf-e-le-novita-per-gli-intermediari/.

337 See, of great interest, the intervention of GERVASONI A., in *Competitività dei Capitali e Riforma del Testo Unico della Finanza*, a cura di MONTALENTI P. e NOTARI M., in *Quaderni di Giurisprudenza Commerciale*, 468, 2025, Lefebvre Giuffrè. Cfr. BRACCHI

2.4.1. Extension of the scope of application of squeeze-out and sell-out. Balance or imbalance between market freedom, delisting trend and private equity development

With reference to Articles 108 and 111 of the TUF, the draft decree provides for the extension of the scope of the squeeze-out right, establishing that the threshold that gives rise to the right to purchase may be exceeded not only following a total takeover bid, but also through purchases made in fulfilment of the obligation to sell-out pursuant to Article 108, paragraph 2, of the TUF. It also reduces the threshold of securities whose holding gives rise to the right to squeeze-out from 95% to 90%, leading to the activation of the *Procedura Congiunta*[338] already at the 90% threshold. In fact, the 90% threshold already allows the company to be delisted from the market, therefore it would be consistent to prevent shareholders with insignificant stakes from blocking the post-delisting offer from obtaining 100% of the capital[339]. This would be consistent with Article 108, paragraph 2, regarding the sell-out obligation[340].

Furthermore, it proposes the introduction of a new paragraph 1-*bis* to Article 111 of the TUF to extend the squeeze-out right to cases in which the offeror, following a total takeover bid involving financial instruments other than "securities" as defined in Article 93-*bis*, paragraph 1, letter b), c) TUF, including savings shares, holds a percentage of at least 90% of such financial instruments, regardless of their free float, the same ratio being deemed applicable. The rationale for this broadening of the provision would be justified by the fact that the squeeze-out serves to neutralize the management costs of a minority of investors without administrative rights, who are solely interested in the return on their participation and, as such, can be adequately protected with appropriate rules for determining the fair price of the squeeze-out, ensuring the compatibility of the regulation with the constitutional principle of property protection[341].

The Draft Decree also provides for the recognition of the shareholder's right to the so-called cash alternative within the sell-out consideration referred to in Article 108, paragraphs 1 and 2, TUF following a total takeover bid, determined according to the criteria established by Consob regulation, only if the offer includes financial instruments other than securities admitted to trading on a regulated market of the

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G., BECHI A., *Mercati Alternativi e Private Equity*, in *I mercati alternativi di strumenti finanziari in Italia: problemi e prospettive*, a cura di Cesarini F. e Gioscia M., 2011, il Mulino, pp. 65-86.

338 See para. 2.3.1.

339 This would not be an incentive to delist but, once delisting is achieved in any case, a way to avoid the permanence of a particularly small shareholder base that has not accepted an offer that has received broad consensus. See VISMARA A., *Note in Tema di Offerte Pubbliche di Acquisto*, in *Competitività dei Capitali e Riforma del Testo Unico della Finanza*, a cura di MONTALENTI P. e NOTARI M., in *Quaderni di Giurisprudenza Commerciale*, 468, 2025, Lefebvre Giuffrè, p. 260.

340 See MAUGERI M., *Le offerte pubbliche di acquisto e l'appello al pubblico risparmio*, in *Competitività dei Capitali e Riforma del Testo Unico della Finanza*, a cura di MONTALENTI P. e NOTARI M., in *Quaderni di Giurisprudenza Commerciale*, 468, 2025, Lefebvre Giuffrè, p. 237.

341 As claimed by MAUGERI M., *Le offerte pubbliche di acquisto e l'appello al pubblico risparmio*, in *Competitività dei Capitali e Riforma del Testo Unico della Finanza*, a cura di MONTALENTI P. e NOTARI M., in *Quaderni di Giurisprudenza Commerciale*, 468, 2025, Lefebvre Giuffrè, p. 238. The same extension can be considered for warrants that give the right to purchase or subscribe to the shares now subject to the squeeze-out as well as for bonds convertible into such shares.

European Union as consideration[342]. This provision would prevent minority shareholders from demanding full cash consideration in the event of a sell-out following a public exchange offer if the securities offered do not enjoy the benefits of securities listed on a European regulated market. This would constitute two significant and unjustified burdens for the offeror: a cash outlay of uncertain amount at the time of the offer's launch; and, furthermore, shareholders wishing to proceed down this path for speculative purposes might voluntarily refuse the offer, thus increasing the possibility that the offeror will fail to reach the 90% threshold. Furthermore, they might gain an advantage over those who accepted the exchange offer, who could therefore demand a balancing payment[343].

2.4.2. Towards the introduction of the scheme of arrangement into Italian law?

The Draft Decree proposes to insert a new Article 112-*bis* of the TUF, introducing into the TUF the procedure for the full purchase of shares with the authorization of the shareholders[344]. This procedure takes up the idea of schemes of arrangement of certain common law systems, also regulated by the Takeover Code[345], with the aim of aligning our system with international best practices[346]. The civil law model, which clearly cannot be directly transposed into Italian law, has been adjusted accordingly. Disclosure replaces the High Court judge who issues the court sanction, and procedural discipline replaces the fairness ruling[347].

The regulation would provide that the issuer's extraordinary shareholders' meeting may approve a transaction aimed at acquiring all the issuer's shares by a party identified by the board of directors. The consideration must be exclusively in cash and cannot be lower than the arithmetic mean of the closing prices of the shares in the six months preceding the board's announcement of the potential acquirer, or any higher price paid by the acquirer or persons acting in concert with the acquirer for purchases made during the same period.

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342 Cfr. VENEZIANO G., MINNITI D., GIOVETTI C., *Riforma del TUF: le novità proposte per i mercati dei capitali*, in *Non solo diritto bancario*, 20 ottobre 2025, available at: https://www.dirittobancario.it/art/riforma-del-tuf-le-novita-proposte-per-i-mercati-dei-capitali/.

343 So explained by MAUGERI M., *Le offerte pubbliche di acquisto e l'appello al pubblico risparmio*, in *Competitività dei Capitali e Riforma del Testo Unico della Finanza*, a cura di MONTALENTI P. e NOTARI M., in *Quaderni di Giurisprudenza Commerciale*, 468, 2025, Lefebvre Giuffrè, pp 234-237, which had not actually foreseen this mitigating circumstance compared to the regulated market. The law therefore gives value to securities listed on regulated markets, which in the context of a public exchange offer cannot be rejected for an equivalent cash consideration.

344 Cfr. Cfr. VENEZIANO G., MINNITI D., GIOVETTI C., *Riforma del TUF: le novità proposte per i mercati dei capitali*, in *Non solo diritto bancario*, 20 ottobre 2025, available at: https://www.dirittobancario.it/art/riforma-del-tuf-le-novita-proposte-per-i-mercati-dei-capitali/.

345 See para. 2.3.3.

346 PASSADOR L., *L'art. 112-bis T.U.F. come courtless scheme of arrangement: nodi problematici*, in *Le Società*, 12, 2025, cit. p. 1304, describes it as a "crocevia simbolico tra la liturgia consolidata del diritto societario e la nuova semantica del mercato dei capitali".

347 *Ibidem*, p. 1307.

The Board of Directors would be required to play an active role in managing the procedure, requiring directors to identify the potential acquirer, based on a binding and irrevocable purchase proposal, after assessing the company's interest and with the approval of a committee of independent directors, on equal terms for all holders of the securities being acquired. The Board of Directors would also be required to notify Consob and the public and prepare a report to enable the evaluation of the proposal, containing all relevant information, the assessments of the administrative body, and the reasoned opinion of the independent directors on the proposal and the appropriateness of the consideration. Therefore, the Board of Directors is even more invested with the internal verification of the company's interest, not as the holder of an obligation to seek the offer, but as a rational body that, if necessary, seeks the legitimacy of the operation[348].

Regarding the quorum required to approve the transfer of shares, Article 112-*bis*, paragraph 5 of the TUF establishes that the favourable vote of the majority of shareholders present at the meeting must also be present, other than the shareholder who submitted the proposal and the persons acting in concert with the same, if they are already shareholders of the company; and the shareholder or shareholders who hold, even jointly, a majority stake, even a relative one, provided it exceeds 1/10 of the share capital. Thus, a concept of threshold emerges that is more distant from the arithmetic rule and more akin to a participatory and qualitative principle.

Furthermore, Consob has significant powers in managing the procedure under consideration. It will regulate the content of the communication that the administrative body is required to make regarding the identification of the buyer, as well as the explanatory report, the opinion of the independent directors, and the related publication methods; the guarantees of exact compliance to be provided by the buyer; the cases in which a takeover bid for the same shares is launched between the date of the aforementioned communication and the day before the extraordinary meeting; the fairness and transparency of transactions involving the shares being sold; the effects on the consideration of purchases of shares subject to the binding and irrevocable proposal, made by the buyer or persons acting in concert with it from the aforementioned communication; and any amendments to the proposal. Consob may also suspend the proposal as a precautionary measure if there is a well-founded suspicion of a violation of the provisions of Article 112-*bis* of the TUF or of the regulatory provisions, or for a period not exceeding 30 days, if new or previously undisclosed facts arise that prevent the addressees from reaching an informed judgment on the proposal. It may also declare the proposal lapsed if there is a confirmed violation of the provisions of Article 112-*bis* of the TUF or of the regulatory provisions. Consob may also require, in order to ensure the correctness of the price, that the purchase be made at a price higher than that specified in the proposal, when there has been collusion between the potential buyer or persons acting in concert

[348] PASSADOR L., *L'art. 112-bis T.U.F. come courtless scheme of arrangement: nodi problematici*, in *Le Società*, 12, 2025, p. 1306.

with it and one or more shareholders of the issuer, or when there is a well-founded suspicion that market prices have been manipulated. Furthermore, to enable the Authority to supervise this new institution, Consob's reporting powers are being extended accordingly.
Therefore, the choice of buyer, following an informed selection by the Board of Directors, is then submitted to the Authority's control. Given the Italian legislator's inability to import the Anglo-Saxon principle of fairness by court, oversight has been entrusted to the administrative authority: the judging function becomes regulatory, and is manifested *ex ante* during the trial, even being able to take an active part in it[349].

The requirements that the consideration be paid in cash and that the buyer provide a cash confirmation sufficient to guarantee the seriousness and effectiveness of the commitment undertaken provide a double anchor of objectivity, capable of neutralizing speculative fluctuations and guaranteeing a form of measurable and verifiable substantive fairness[350]. For now, the regulation applies only to companies with shares listed on regulated markets, excluding multilateral trading systems[351].

Finally, paragraph 11 reproduces the same put-up or shut-up clause provided for in the event of rumours of a potential takeover bid against buyers. It is noted that – unlike the amendment to Article 102, paragraph 8 – this clause also requires that there be irregularities in the market performance of the securities in question, a requirement not required under the same clause applicable in the event of rumours of a potential takeover bid.

It is undeniable that this introduction would make exiting the market extremely easy. However, delisting should not be seen solely as an escape route, but rather as an orderly dissolution of the market that becomes its own form of attractiveness. This provision can be seen as a compromise between competition and corporate self-determination; it is an institution that no longer belongs entirely to either the law on public offerings or that on extraordinary transactions, but rather is positioned somewhere in between: it itself becomes an instrument for the transfer of control, representing a sort of takeover bid without a market[352]. The core of a takeover bid and a scheme are profoundly different. In a takeover, control is contested, and since it is based on the atomistic plurality of consensus, there is less guarantee of the outcome. In contrast, in a scheme, control arises from a joint decision in which the majority becomes the legitimate interpreter of the collective interest. Therefore, certainty prevails over risk. And

[349] For example, in the English model, the Court does not intervene on the value, but can block the scheme if it deems the transaction unfair to minorities; in the Italian model, on the other hand, Consob can impose an adjustment of the consideration, translating a judgment of reasonableness into an arithmetic mean.
[350] PASSADOR L., *L'art. 112-bis T.U.F. come courtless scheme of arrangement: nodi problematici*, in *Le Società*, 12, 2025, p. 1306.
[351] *Ibidem*, who believes this is a temporary limitation, the result of a technical delay choice intended to be addressed in a future version of the Regolamento Emittenti.
[352] PASSADOR L., *L'art. 112-bis T.U.F. come courtless scheme of arrangement: nodi problematici*, in *Le Società*, 12, 2025, pp. 1304-1314.

this is also the source of uncertainty surrounding the regulation. Since Italy lacks judicial oversight of transactions, but instead relies solely on the procedure, there is a risk of losing market demands in the broadest sense, understood as supply and demand; the lack of contestability could excessively dampen the competitive demands of the market. The key issues relate primarily to due diligence, as there is no actual offering document and no market requiring disclosure, so due diligence is conducted during the interaction between the bidder and the board. Furthermore, the legislation is currently silent on the possibility of competing offers, thus perpetuating and increasing the risk of decisions that fail to meet the competitiveness and dynamism advocated by the *Legge Capitali*.

In conclusion, the complexity of the multiple regulatory levels and the objectives to be pursued emerges once again. On the one hand, delisting is seen as a worrying trend given how the regulated market is perceived, but on the other, there are many options equally consistent with the objective of developing the Italian capital market, suggesting that delisting may not simply be the result of discontent, but a strategic choice that does not preclude a possible return. The scheme of arrangement itself will certainly, from a certain perspective, facilitate delisting for companies, but on the other, it could instead prove to be a demeaning tool for contestability and a source of stagnation. Furthermore, the regulatory gap, both positive and negative, regarding pure delisting is a factor to be considered, as it significantly impacts the use of takeover bids, as well as the excessive concern expressed about their regulation in relation to delisting, simply because they are perceived as a single instrument along with extraordinary transactions. These paradoxes and contradictions lead us to believe that the Capital Market Union project, and in particular the contribution that takeover legislation makes to it, has reached a turning point, fully felt and supported in Italy through the *Legge Capitali* and this proposed reform of the TUF.

CHAPTER III
EMPIRICAL EVIDENCE
FROM THE ITALIAN CORPORATE CONTROL MARKET

3.1. Data and methodology

To provide further scientific support for the thesis presented here, and to provide current data on the Italian control market, an analysis was conducted of the offers that took place between 2020 and 2025. The offer documents for 116 offers that took place between January 1, 2020, and December 31, 2025, were collected. The analysis was conducted only on the 102 offers involving ordinary shares, thus excluding all offers that took place on types of securities other than ordinary shares, even if combined with them. This choice was made to ensure data homogeneity. Since the majority of the databases consist of offers on ordinary shares, it was deemed appropriate not to include securities for which different considerations must be made. Furthermore, during the time period considered, the number of offers on other types of securities would not have been significant enough to guarantee the accuracy of the results and conclusions drawn from the analysis. The offering documents were found in the dedicated section on the official Consob website[353]. Each offer document is drafted in accordance with Article 6 of the Takeover Directive, transposed into national law by Article 102 of the TUF.

All calculations, graphs, and tables represent personal processing of data and were created starting from the main database.

3.2. Evidence collected and data analysis

The types of offers are divided according to the distinction made by the TUF, thus distinguishing between public purchase offers (Opa), public exchange offers (Ops), and public purchase and exchange offers (Opas), based on the nature of the consideration. Additionally, there may be a sell-out obligation pursuant to Article 108, paragraph 2, TUF, which arises outside of an offer. This is the only category for which the components have been purposely left with an Italian acronym, to avoid confusion regarding the type of offer and in line with what is presented regarding Italian legislation in Chapter II.

Table 3 highlights a clear predominance of cash tender offers (Opa) over the period 2020-2025. Out of 102 total transactions, 86 are structured as Opa, representing 84.3% of total offers. This confirms that cash consideration remains the preferred mechanism in the Italian market. By contrast, exchange offers (Ops) are relatively rare with just 4 cases (3.9%), while mixed offers (Opas) account for 5 transactions

[353] https://www.consob.it/web/area-pubblica/documenti-opa.

(4.9%). The limited incidence of Ops suggests that share-based consideration is not commonly used, likely due to valuation complexity and market volatility concerns. The data also show that sell-out obligations represent a limited but non-negligible component, with the 6.9% overall, concentrated in the most recent years, which may reflect increased delisting dynamics.

Table 3. Offers sorted by type and year

Year	Sell out (**)		Opa		Opas		Ops		Total per Year
	Number	% (*)	Number	% (*)	Number	% (*)	Number	% (*)	Number
2020	0	0.0%	11	84.6%	2	15.4%	0	0.0%	13
2021	0	0.0%	15	100.0%	0	0.0%	0	0.0%	15
2022	3	15.8%	15	78.9%	1	5.3%	0	0.0%	19
2023	0	0.0%	16	94.1%	0	0.0%	1	5.9%	17
2024	2	10.5%	16	84.2%	1	5.3%	0	0.0%	19
2025	2	10.5%	13	68.4%	1	5.3%	3	15.8%	19
Total by type	7	6.9%	86	84.3%	5	4.9%	4	3.9%	102

(*) Percentage on total offers per year

(**) Sell-out obligation pursuant to art. 108, paragraph 2, TUF

An analysis of the countervalue by type of offering is reported in Table 4.

Table 4. Countervalue collected by type of offer and by year (countervalue in millions of euros)

Year	Sell out (**)		Opa		Opas		Ops		Total per Year
	Countervalue	% (*)	Countervalue	% (*)	Countervalue	% (*)	Countervalue	% (*)	Countervalue
2020	0	0.0%	1,590	27.8%	4,123	72.2%	0	0.0%	5,713
2021	0	0.0%	7,346	100.0%	0	0.0%	0	0.0%	7,346
2022	53	0.4%	14,215	97.2%	361	2.5%	0	0.0%	14,629
2023	0	0.0%	692	36.4%	0	0.0%	1,207	63.6%	1,899
2024	38	0.9%	3,937	93.4%	240	5.7%	0	0.0%	4,215
2025	6	0.0%	2,037	14.1%	298	2.1%	12,144	83.8%	14,485
Total by type	97	0.2%	29,817	61.7%	5,022	10.4%	13,351	27.6%	48,287

(*) Percentage on total countervalue collected per year

(**) Sell-out obligation pursuant to art. 108, paragraph 2, TUF

The data exhibited highlights a prevalence of value in Opa, which account for 61.7% of the total value in the period under consideration (€29,817 million out of €48,287 million). These results are consistent with what was presented in Table 3 above but at the same time they highlight an important reality: although Opa are the most frequent form and therefore absorb the largest part of financial resources,

considering that Opas and Ops represent rare cases, they have a particularly significant economic weight. Opas accounted for 10.4% of the total value (€5,022 million), while Ops accounted for 27.6% (€13,351 million). This finding makes Opas and Opa higher than Opa in terms of average value. This can be explained by the fact that Opas/Ops are used to achieve large business combinations with particularly high value, hence the choice to pay both cash and securities. Indeed, in the analysed dataset, all public takeover bids/public offerings had as their primary objective control acquisition for business combinations, and these include the large banking consolidation transactions that occurred during the period under consideration[354].
Sell-outs, although present in numerical terms, are economically marginal (0.2% of the total), confirming their predominantly residual and ancillary nature compared to Opa strictly speaking.

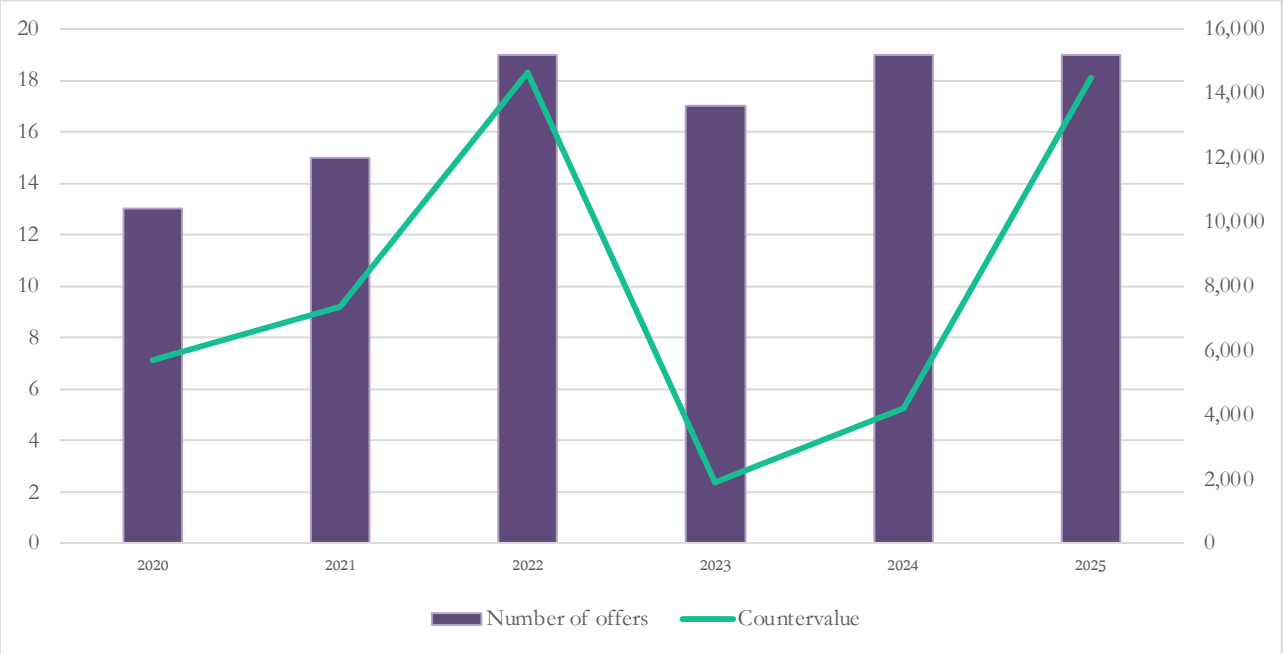
From a temporal perspective, 2023 represents a turning point: the weight of Opa dropped to 36.4% of the annual countervalue, while Ops reached 63.6%. This data points to a different transaction pattern, likely related to industrial or reorganizational transactions, in which the consideration in securities has assumed a predominant role. In 2024, a strong concentration of Opa (93.4%) was observed, while in 2025, Ops dominated, reaching 83.8%, consistent with the occurrence of three major consolidations in the banking sector.

Overall, compared to the numerical distribution, the turnover data shows greater volatility and concentration, consistent with the so-called lumpy nature of market transactions[355].

Figure 1 clearly highlights the imperfect correlation between the number of transactions and the countervalue collected, indicating that the public offering market is characterized by a concentrated structure, in which a few large transactions have a significant impact on the overall amount of capital raised[356].

[354] 4 out of 9 transactions carried out through Opas/Ops involved consolidation for business combinations in the banking sector, namely: Banca Monte dei Paschi di Siena on Mediobanca, 2025; BPER Banca on Banca Popolare di Sondrio, 2025; Banca Ifis on Illimity Bank, 2025; Unicredit on Banco BPM, 2024; Intesa Sanpaolo on UBI Banca, 2020.
[355] A few large transactions can significantly impact the annual percentage distribution.
[356] Confirming a trend already observed in the period 2007 - 2019 by PICCO F., PONZIANI V., TROVATORE G., VENTORUZZO M., *Le OPA in Italia dal 2007 al 2019. Evidenze empiriche e spunti di discussione*, 2021, Discussion papers Consob, p. 19.

Figure 1. Evolution of the number and countervalue of offers in the period 2020-2025 (countervalue in millions of euros)



From a quantitative perspective, the number of deals shows a relatively stable, slightly increasing trend over the period considered, starting from 2020 (13 deals) to 2022 (19 deals), with only a small decline in 2023 (17 deals), and a subsequent stabilization in the two-year period 2024-2025 (19 deals per year). The trend suggests an active and structurally consolidated market, without drastic changes in the volume of deals.

The evolution of the value of the deal is different. After an increase between 2020 and 2022, culminating in a peak in 2022, a marked contraction was observed in 2023, followed by a partial recovery in 2024 and a new peak in 2025. This trend confirms that the economic intensity of deals does not automatically correspond to their number: a peak in 2022 and a comparable peak in 2025 had the highest value, indicating the presence of deals significantly larger than average. 2023 represents a year of disruption: the number of deals remains relatively high, but the overall value has decreased significantly. This shift presumably indicates a prevalence of small-to-medium-sized deals.

Considering the macroeconomic scenario, the 2020–2021 two-year period is still affected by post-pandemic dynamics, characterized by high liquidity and accommodative financial conditions, which have favoured increasingly large transactions. The peak in turnover in 2022, however, occurred during a transitional phase, preceding the full implementation of monetary tightening. The subsequent contraction in 2023 appears consistent with the changed market environment, marked by rising interest rates and greater financial uncertainty, coinciding with the outbreak of the Russia-Ukraine armed conflict in 2022. These factors tend to reduce the average size of transactions, without significantly impacting their number.

In summary, the graph clearly shows that the economic size of the offering market is driven by large-scale transactions, rather than mere frequency. Therefore, the number of offerings is an indicator of market vitality, but not of its financial intensity, and the volatility of the value reflects the episodic nature of extraordinary transactions, consistent with the findings of the previous historical analysis.

Table 5 first confirms the market's strong concentration in a limited number of large-scale deals.

Table 5. Top ten offers by countervalue collected (countervalue in millions of euros)

	Issuer	Offeror	Type of offer	Nature of the offer	Total/partial offer	Countervalue	Year
1	Atlantia Spa	Schema Alfa Spa	OPA	Voluntary	Total	12,706	2022
2	Mediobanca-Banca di Credito Finanziario Spa	Banca Monte dei Paschi di Siena Spa	OPS	Voluntary	Total	8,310	2025
3	Unione di Banche Italiane Spa (UBI Banca)	Intesa San Paolo Spa	OPAS	Voluntary	Total	4,120	2020
4	Banca Popolare di Sondrio S.p.A.	BPER Banca S.p.A.	OPS	Voluntary	Total	3,834	2025
5	Cerved Group Spa	Castor Bidco Spa	OPA	Voluntary	Total	1,992	2021
6	ASTM Spa	Nuova Argo Finanziaria Spa	OPA	Voluntary	Total	1,846	2021
7	Anima Holding Spa	Banco BPM Vita Spa	OPA	Voluntary	Total	1,547	2025
8	Autogrill Spa	Dufry AG	OPS	Mandatory	Total	1,207	2023
9	Società Cattolica di Assicurazione Spa	Assicurazioni Generali Spa	OPA	Voluntary	Total	1,176	2021
10	UnipolSai Assicurazioni Spa	Unipol Gruppo Spa	OPA	Voluntary	Total	1,131	2024

The Atlantia deal (2022), with a value of €12,706 million, stands out from the others and significantly contributes to the peak value recorded that year, and in the next three positions there are strategic operations for the consolidation of the banking sector, of which two relate to the peak year 2025., which reflects the results in Table 4. This highlights how individual transactions can significantly impact the annual aggregate performance, resulting in marked variations in overall countervalue even with a relatively stable number of offers. Coherently with what was observed in the previous analysis, a clear prevalence of voluntary takeover bids emerges among the most significant transactions. The only mandatory takeover bid included in the ranking (Dufry on Autogrill, 2023), despite also being total, has a lower countervalue than the main voluntary deals. This confirms that the most economically significant transactions of the period are not attributable to purely regulatory dynamics, but rather to deliberate

strategic choices of integration and consolidation. Overall, the table highlights how, in the period 2020-2025, the most economically significant transactions are characterized by a recurring combination of elements: voluntary nature, total structure[357], and large financial size, with a potentially distorting impact on the aggregate annual dynamics of the takeover bid market, as the previous chart suggests.

Table 6 allow to analyse the distribution of offers based on their legal nature, dividing them into mandatory, voluntary and sell-out, while table 7 shows the weight that each nature of the offer has in pursuing the main offer motivations that are of interest to this analysis (control acquisition for business combination, pure control acquisition and delisting)[358].

Table 6. Offers sorted by nature and year

Year	Sell out (**)		Mandatory		Voluntary		Total per Year
	Number	% (*)	Number	% (*)	Number	% (*)	Number
2020	0	0.0%	7	53.8%	6	46.2%	13
2021	0	0.0%	4	26.7%	11	73.3%	15
2022	3	15.8%	6	31.6%	10	52.6%	19
2023	0	0.0%	7	41.2%	10	58.8%	17
2024	2	10.5%	6	31.6%	11	57.9%	19
2025	2	10.5%	6	31.6%	11	57.9%	19
Total by nature	7	6.9%	36	35.3%	59	57.8%	102

(*) Percentage on total offers per year

(**) Sell-out obligation pursuant to art. 108, paragraph 2, TUF

Table 7. Incidence of offer nature on classification by motivation

Offer motivation	Sell out (**)		Mandatory		Voluntary		Total by motivation
	Number	% (*)	Number	% (*)	Number	% (*)	Number
Control acquisition for business combination	0	0.0%	17	44.7%	21	55.3%	38
Pure control acquisition	0	0.0%	14	66.7%	7	33.3%	21
Delisting	7	24.1%	1	3.4%	21	72.4%	29
Total by nature	7	8.0%	32	36.4%	49	55.7%	88

(*) Percentage on total offers by motivation

(**) Sell-out obligation pursuant to art. 108, paragraph 2, TUF

Overall, voluntary offers accounted for the majority of the 2020-2025 sample (57.8%, Tab. 6), suggesting[359] that the Italian public offering market continues to be driven primarily by strategic initiatives

[357] It is important to note that all the deals in the top ten are total offers., consistently with the economic nature of larger deals, which tend to pursue the full acquisition of the residual capital or, in any case, the full consolidation of control, often with a view to a delisting or ownership reorganization. Partial offers are absent among the largest deals, constituting transactions of smaller size in terms of scale.

[358] See also Figure 5.

[359] PICCO F., PONZIANI V., TROVATORE G., VENTORUZZO M., *Le OPA in Italia dal 2007 al 2019. Evidenze empiriche e spunti di discussione*, 2021, Discussion papers Consob, p. 21.

by the bidder rather than regulatory obligations arising from exceeding significant thresholds. Nonetheless, mandatory offers accounted for 35.3%, a lower but still significant weight. This data should be interpreted in light of what is further explored in Table 7. Voluntary offers are predominant in terms of their weight on the total, but excluding buyback offers and financial investments, it emerges that voluntary and mandatory offers are almost equally important when pursuing the main motivations typical of offers indicated in Table 7. Indeed, considering the smaller number of mandatory offers that occur, they still account for 44.7% of offers pursuing control acquisition for business combination and a full 66.7% of pure control acquisitions, establishing itself as a typical offering in the context of operations aimed at corporate control[360]. Sell-outs remained a residual phenomenon (6.9%, Table 6), in line with their essentially ancillary and protective function for minority shareholders. The most interesting part of this data is found in Table 7, which highlights the apparently unique purpose of the sell-out mechanism as a tool to achieve going private, as this thesis aimed to demonstrate.

Therefore, a joint reading of Tables 6 and 7, excluding cases of lesser interest at the market level (buybacks and financial investments), leads to the recognition of a greater number of voluntary offers and their predominance in pursuing the delisting objective (72.4%). At the same time, mandatory takeover bids assume exceptional importance, especially considering their smaller number, within the scope of corporate control.

Table 8 complements the analysis in Table 1.4 by distinguishing the counter value collected by nature of the transaction, allowing to evaluate not only the frequency but also the actual economic weight of the different categories.

Table 8. Countervalue collected by nature of offer and by year (countervalue in millions of euros)

Year	Sell out (**)		Mandatory		Voluntary		Total per Year
	Countervalue	% (*)	Countervalue	% (*)	Countervalue	% (*)	Countervalue
2020	0	0.0%	1,255	22.0%	4,458	78.0%	5,713
2021	0	0.0%	195	2.7%	7,151	97.3%	7,346
2022	53	0.4%	1,133	7.7%	13,444	91.9%	14,630
2023	0	0.0%	1,404	73.9%	495	26.1%	1,899
2024	38	0.9%	1,477	35.0%	2,701	64.1%	4,216
2025	6	0.0%	304	2.1%	14,176	97.9%	14,486
Total by nature	97	0.2%	5,768	11.9%	42,425	87.9%	48,290

(*) Percentage on total countervalue collected per year

(**) Sell-out obligation pursuant to art. 108, paragraph 2, TUF

360 This confirms that the transfer of control in Italy occurs mainly through mandatory offers; hostile takeover bids remain few, and this leaves more room for voluntary takeover bids that assume a friendly and concordatory nature.

In the 2020-2025 period, the clear prevalence of voluntary offerings in terms of value is evident, representing 87.9% of the resources raised (€42,425 million out of €48,290 million). Mandatory offerings account for 11.9%, while sell-outs play a completely marginal role (0.2%), confirming their essentially ancillary role in the TUF system.

The annual analysis, however, highlights differing dynamics. In 2020 and 2021, almost all of the value was attributable to voluntary transactions (78.0% and 97.3%), consistent with a phase of strategic market transactions. 2022 was notable for a significant spike in overall value (€14,630 million), still largely driven by voluntary transactions (91.9%), confirming the concentration of value in a few significant transactions and evidence from Table 5. Conversely, 2023 represents an anomaly in the period under consideration: the weight of mandatory offers (73.9%) exceeds that of voluntary ones (26.1%), indicating that, despite a relatively low overall number of transactions, some mandatory activations had a significant economic impact. In the following years (2024-2025) we see a return to the typical sample structure, with a predominance of volunteers both in percentage terms (64.1% and 97.9%) and in absolute terms.

Table 9 analyses the distribution of offerings by issuer's listing market, highlighting the varying degrees of involvement of Euronext Milan's segments over the period 2020–2025[361].

Table 9. Offers sorted by trading venues

Year	Euronext Growth Milan		Euronext Milan		Euronext STAR Milan		Mercato Vorvel (ex Hi-MTF)		Unlisted		Total per Year
	Number	% (*)	Number	% (*)	Number	% (*)	Number	% (*)	Number	% (*)	Number
2020	0	0.0%	13	100.0%	0	0.0%	0	0.0%	0	0.0%	13
2021	1	6.7%	12	80.0%	0	0.0%	1	6.7%	1	6.7%	15
2022	3	15.8%	10	52.6%	5	26.3%	1	5.3%	0	0.0%	19
2023	8	47.1%	6	35.3%	3	17.6%	0	0.0%	0	0.0%	17
2024	5	26.3%	8	42.1%	6	31.6%	0	0.0%	0	0.0%	19
2025	5	26.3%	12	63.2%	1	5.3%	0	0.0%	1	5.3%	19
Total by trading venues	22	21.6%	61	59.8%	15	14.7%	2	2.0%	2	2.0%	102

(*) Percentage on total offers per year

Overall, the main market (Euronext Milan) accounts for the vast majority of transactions (61 out of 102, equal to 59.8%), confirming its position as the dominant market for public offerings. Euronext Growth

[361] Please note that the Takeover Directive applies only to companies with securities listed on a regulated market, as previously reported, leaving the takeover regime applicable to MTFs to national law. The TUF applies the voluntary takeover regime set forth in Article 102 also to issuers that are unlisted or listed on MTFs, therefore, the sample will not include cases of mandatory takeovers involving issuers with these characteristics. The exception is Euronext Growth Milan (formerly AIM), an SME growth market pursuant to MiFID II, organized and managed by Borsa Italiana S.p.A. In this context, the mandatory takeover regime was introduced on a voluntary basis; that is, it is provided for in the Market Regulations, with reference to the issuer's bylaws, a completely original solution in the European context. The legal framework for mandatory takeover bids is thus incorporated into company bylaws according to the criteria set out in Schedule Six attached to the Euronext Growth Milan Regulations, in force since October 25, 2021, which requires each issuer to adopt and maintain appropriate corporate governance rules, including rules specifically regulating takeover bids. Therefore, in the event of a takeover bid being launched against an issuer that has adopted takeover bid provisions in its bylaws, much of the provisions of the TUF and the related implementing provisions will apply. ANNUNZIATA F., *La disciplina del mercato dei capitali*, 2023, Torino, Giappichelli, pp. 15-34.

Milan follows with 22 transactions (21.6%) and Euronext STAR Milan with 15 (14.7%), while the Vorvel Market and unlisted companies are of marginal importance (2% each).

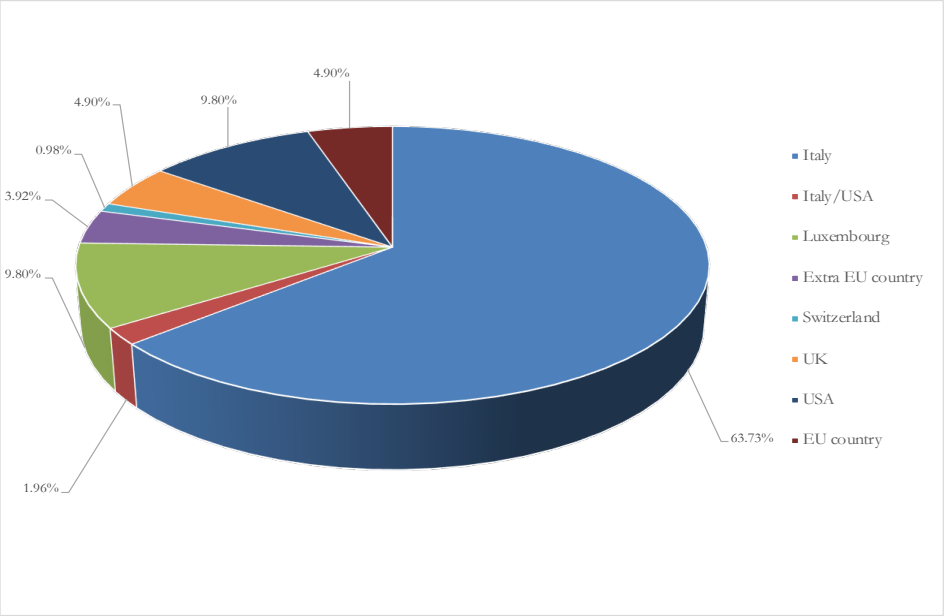
The year-by-year analysis highlights some significant trends. In 2020, all deals involved issuers listed on Euronext Milan (100%), confirming a strong concentration in the core segment. Starting in 2022, however, a progressive diversification was observed: that year, deals on Euronext Milan decreased to 52.6%, while those on Euronext STAR Milan (26.3%) and Euronext Growth Milan (15.8%) increased.

2023 marked the peak of the involvement of companies listed on Euronext Growth Milan (47.1%), exceeding the core market in percentage terms (35.3%). This data suggests greater dynamism in deals involving smaller companies or those with more concentrated ownership structures. In the two-year period 2024-2025, a rebalancing took place, with a return to the prevalence of Euronext Milan (42.1% in 2024 and 63.2% in 2025), while the presence of the other segments will remain significant.

Overall, the data confirms that the main regulated market remains the hub of the most significant transactions, but there is growing participation in segments dedicated to SMEs and companies with the highest growth potential, consistently with the structural evolution of the Italian market, characterized by a greater diversity of listing segments and increasing ownership mobility. However, it also highlights that the delisting trend is affecting more than just the main market[362].

Figure 2 highlights a clear predominance of Italian bidders, representing 63.73% of the total transactions considered.

Figure 2. Geographical origin of the bidders



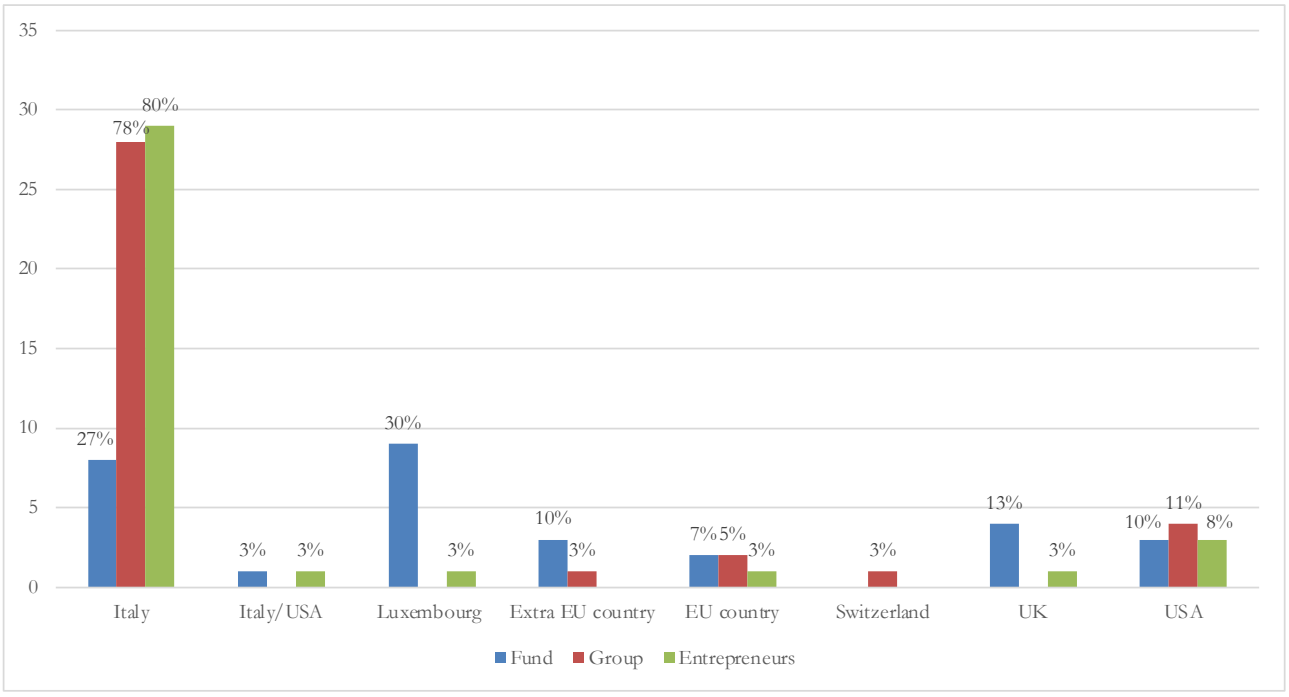
[362] Cfr. MAGRI V., *Piazza Affari, nel '25 più delisting che nuove quotazioni*, February 13, 2026, in Financecommunity, available at: https://financecommunity.it/piazza-affari-nel-25-piu-delisting-che-nuove-quotazioni/.

This data confirms the strong domestic dimension of the Italian public offering market during the period analysed, consistent with the findings of the reference paper, where corporate control tends to remain predominantly within the national system.
Alongside the domestic component, a significant but fragmented foreign presence emerges. Bidders from other USA and Luxembourg each account for 9.80%, followed by UK and EU countries (4.80%). The contribution of non-EU countries (3.92%) and Switzerland (0.98%) is residual, while deals with a mixed Italian/US structure account for 1.96%.

Overall, the picture portrays a market that is still strongly domestic, but with increasing openness to European and US investors. The relatively limited impact of non-EU operators suggests that corporate consolidation and reorganization dynamics remain predominantly limited to the European area, consistent with the regulatory framework and ownership structure of Italian listed companies.

Figure 3 provides a complementary reading to the pie chart previously analysed. While the latter highlights the overall distribution of bidders by country of origin, the bar chart allows to observe how each bidder category (Fund, Group, Entrepreneurs) is distributed geographically, thus offering an internal perspective on the subjective typology. The percentages shown above the bars represent the share that each country assumes within the specific category.

Figure 3. Breakdown of bidders by geographical origin and type



Three categories have been created to classify the nature of the bidder: fund, group, and entrepreneurs. This highlights the distinction between financial and industrial bidder[363], which includes the fund category on one side and entrepreneurs and groups on the other. Furthermore, given the typically Italian industrial physiognomy characterized by SMEs, a distinction has been proposed between industrial groups, with pre-established strategic objectives at a group level, and entrepreneurs, meaning individuals who hold a controlling or significant shareholding, even jointly with family members, which allows them to pursue their own entrepreneurial objectives even if using significant financial and organizational means[364].

The distribution of funds appears significantly more fragmented than that of industrial groups and entrepreneurs. Only 27% of the funds operating in the Italian corporate control market are of Italian origin, while a significant share comes from Luxembourg (30%), the United Kingdom (13%), the United States (10%), and non-EU countries (10%). This data is consistent with the findings in the pie chart, which already showed a significant presence of foreign financial jurisdictions, particularly Luxembourg. Luxembourg's high incidence should not be interpreted purely geographically, but rather as an indicator of the legal and tax structure of investment vehicles. Despite having a limited overall percentage share, is almost exclusively attributable to financial vehicles, consistent with its role as a European hub for investment structures. The US component appears more balanced, with a significant presence of both industrial groups and funds, while operators from other EU countries show a mixed but numerically small profile.
The data therefore suggests a strong internationalization of the financial component of the control market. In other words, international outlook is more oriented toward financial and opportunistic approaches and the financial capital operating in the Italian market is predominantly cross-border, even when investing in domestic companies.

Italy's centrality is confirmed, not only in quantitative terms (63.73% of the total, Figure 2), but also in qualitative terms: the domestic component is largely driven by industrial groups (78%) and entrepreneurs (80%), while the role of funds is more limited. This data is consistent with the traditional ownership structure of Italian capitalism, characterized by concentrated assets and strong entrepreneurial continuity. Moreover, the idea of a market characterized predominantly by industrial transactions and internal consolidation dynamics, rather than purely financial strategies is reinforced.
Foreign intervention in the control market, which maintains its domestic nature, is therefore selective and more frequently attributable to structured financial entities.

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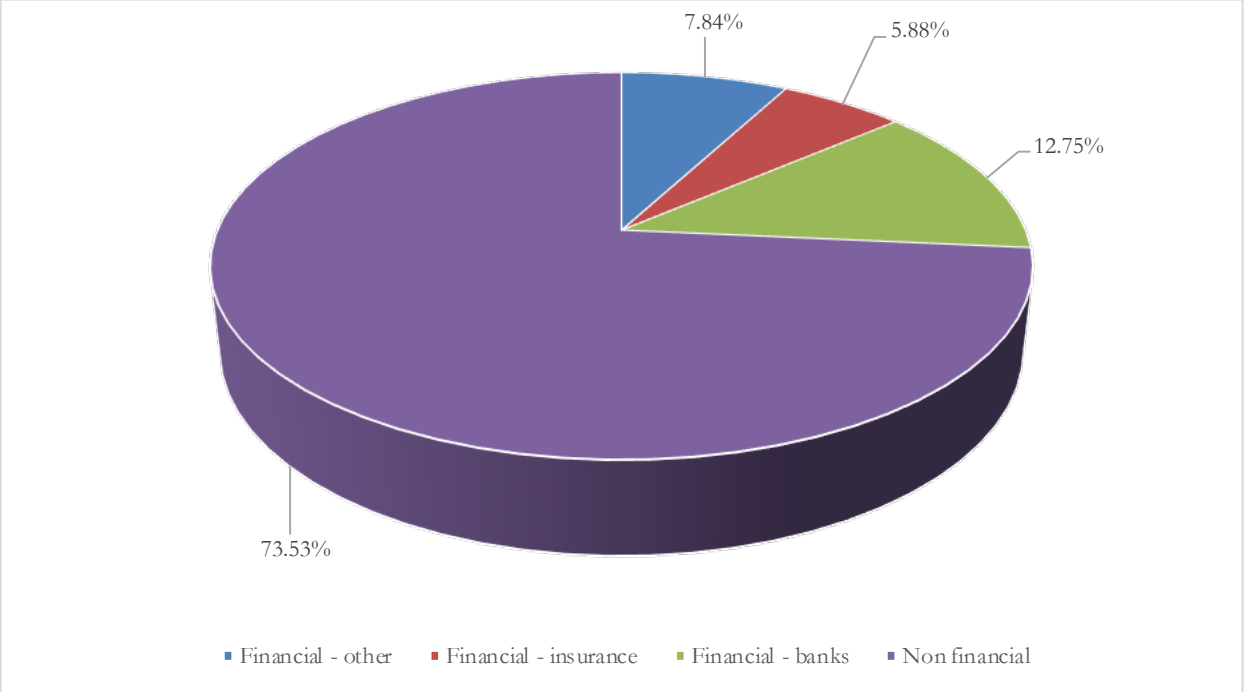
[363] See para 1.1.3.

[364] For example, there are many family holding companies that fall into this category. It should be kept in mind, however, that the category of entrepreneurs often straddles a very fine line between industrial and financial objectives, being often supported both economically and strategically by funds.

From a combined reading, while the pie chart showed a clear predominance of Italy as the overall country of origin of bidders, the bar chart distinguishes between the highly national industrial and entrepreneurial component and the significantly transnational financial component (funds), thus revealing a dual structure in the control market. This is consistent with the growing importance of private equity funds in delisting processes, the integration of capital markets within Europe, and the role of financial jurisdictions as investment hubs.

Figure 4 shows the distribution of offerings by issuer's sector and highlights a clear predominance of the non-financial sector, which accounts for 73.53% of total transactions.

Figure 4. Sector of issuers



This data confirms that the Italian public offering market is primarily driven by industrial reorganization and consolidation, often including delisting, as discussed below, rather than by internal financial sector factors.

The financial sector as a whole accounts for 26.47% and is divided into three segments: banks (12.75%), financial – other (7.84%), and insurance (5.88%). The greater share of banks compared to other financial subsectors suggests that, when the issuer belongs to the financial sector, this occurs primarily in connection with banking transactions, consistent with the dynamics of concentration and capital strengthening typical of the sector, which has affected several transactions in recent years.

Consistent with the evidence already highlighted in the previous tables – particularly the prevalence of voluntary takeover bids and total transactions – the sectoral distribution of issuers reinforces the interpretation of a bidding market primarily oriented towards acquisition and control within the national industrial fabric, while the financial sector maintains a more selective and limited role.

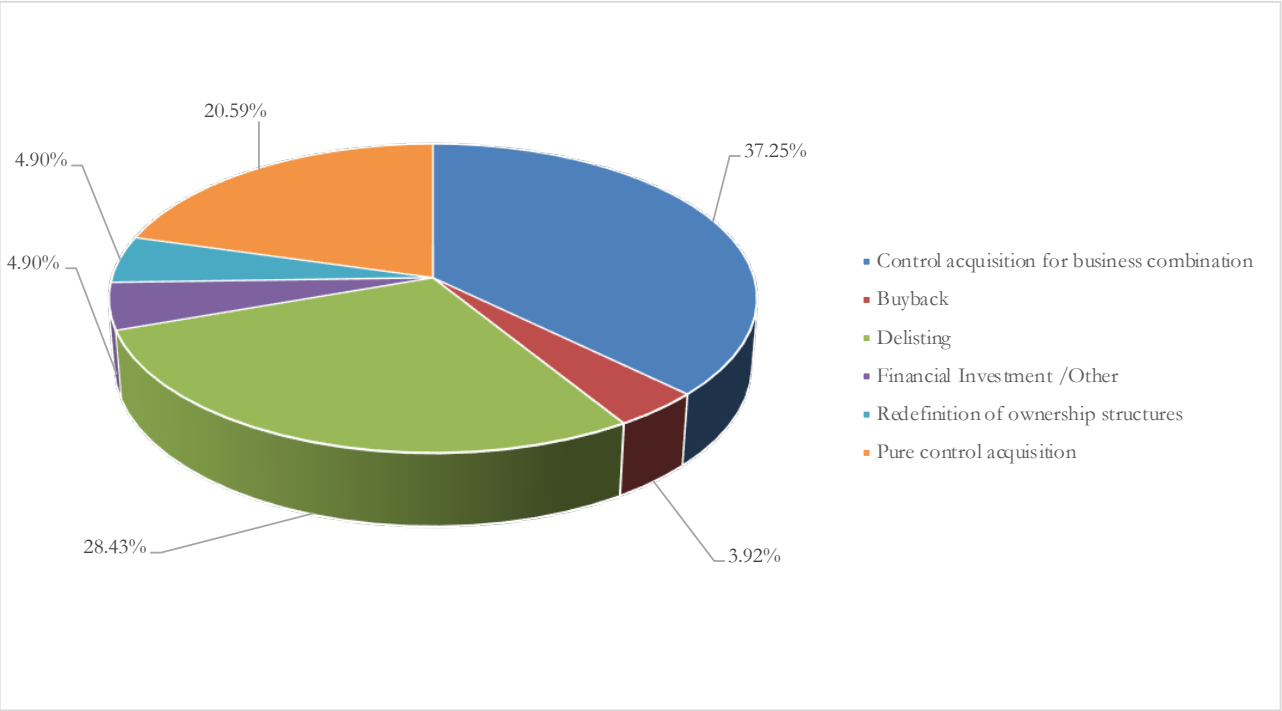
To classify the motivations for the offers, the following taxonomy was applied, in line with what was proposed by Consob[365]:

i) Control acquisition for business combination: requires that the offer be linked to a takeover of corporate control (friendly or hostile) in conjunction with a more or less structured business combination project aimed at exploiting potential synergies. The offeror is often an industrial operator (usually connected to an industrial/banking or insurance group);
ii) Pure control acquisition: compared to the previous case, the objective of a business combination is missing. The offeror is typically a financial operator interested in corporate control (for example, a private equity fund) in order to improve the target's performance, corporate governance, management, and strategies;
iii) Delisting: the sole objective is to delist the ordinary shares. This may arise also if the offer is motivated by one of the other reasons presented.
iv) Buyback: this category includes offers on financial instruments issued by the offeror (or its parent/subsidiary companies).
v) Redefinition of ownership structures: this category includes mandatory offers, launched pursuant to Article 106 of the TUF, which do not entail an actual transfer of control but only a substantial qualitative (expansion of the subjective scope) or quantitative (strengthening, for example, through the "corporatization" of shareholders' agreements[366]) modification of existing control and which therefore cannot be classified as acquisitions of control.
vi) Financial Investment/other: The last category includes offers motivated by purely financial reasons.

[365] PICCO F., PONZIANI V., TROVATORE G., VENTORUZZO M., *Le OPA in Italia dal 2007 al 2019. Evidenze empiriche e spunti di discussione*, 2021, Discussion papers Consob, p. 35.
[366] PICCO F., PONZIANI V., TROVATORE G., VENTORUZZO M., *Le OPA in Italia dal 2007 al 2019. Evidenze empiriche e spunti di discussione*, 2021, Discussion papers Consob, p. 48, note 82.

Figure 5 shows the motivations for the offer.

Figure 5. Motivation for the offers



It is highlighted that the primary driver is the acquisition of control in a strategic sense, with two categories accounting for the majority of transactions: control acquisition through business combination (37.25%) and pure control acquisition (20.59%). Considered together, these two objectives account for approximately 57.84%, suggesting that the offer market in the sample is dominated by transactions geared towards gaining control – both through industrial integration/aggregation and through pure acquisition. While this is a direct consequence of the results previously revealed during the analysis, it should be noted that the result does not take into account the transactions that plan for delisting. Indeed, even if the primary stated and pursued objective is to acquire control, there is often an associated delisting objective[367].

The second most significant component is delisting (28.43%), which represents a highly significant share and is consistent with a context in which takeover bids are frequently used as a tool for exiting the regulated market and simplifying the ownership structure. Furthermore, this data will be completed as the analysis progresses, since these are the cases in which delisting is the primary objective of the transaction, however, it is also achievable and feasible even if the primary objective is different.

[367] See *infra*.

This result is directly linked to the findings in the previous tables regarding the prevalence of total transactions: a high incidence of delisting is typically associated with offers aimed at reaching very high control thresholds and completing delisting processes.

The other motivations are residual: buyback (3.92%), financial investment/other (4.90%), and redefinition of ownership structures (4.90%). Their limited size indicates that, in the period observed, the offers were not primarily used as mere financial leverage or tactical capital management, but rather as a mechanism for reallocating control and strategic restructuring. Consistent with the previously discussed findings of the prevalence of voluntary initiatives and the centrality of total transactions, the distribution of motivations reinforces the interpretation of a control-driven market, where industrial and governance logic prevails over purely financial objectives.

The table 10 provides a more detailed analysis of the relationship between the motivation for the offer and delisting, distinguishing between planned delisting and actually pursued delisting. For this analysis, it was deemed more appropriate to exclude the two unlisted companies since they could not have set themselves the objective of delisting. Therefore, the sample consists of 100 listed companies.

Table 10. Programmed and pursued delisting broken down by offer motivation

Offer's Motivation	Total Number	Delisting programmed	Delisting pursued
Control acquisition for business combination	37	32	29
Buyback	4	0	0
Delisting	29	29	25
Financial Investment /Other	4	0	0
Redefinition of ownership structures	5	5	4
Pure control acquisition	21	21	19
Total	100	87	77

First, it clearly emerges that transactions aimed at gaining control constitute not only the numerically predominant category (37 cases of control acquisitions for business combinations and 21 pure control acquisitions), but also those most closely associated with a plan to exit the market, further confirming the relevance and veracity of the previously reported result. Specifically, of the 37 business combinations, 32 envisage delisting and 29 actually pursue it; similarly, of the 21 pure control acquisitions, all plan delisting and 19 carry it out. This data confirms what was already highlighted in the previous tables: the total dimension and the purpose of consolidating control are closely linked to the decision to delist the stock.

Even more significant is the case of transactions classified as delisting: all 29 involve delisting, and 25 actually pursue it. This highlights a strong coherence between the stated purpose and the structure of the transaction, reinforcing the interpretation of delisting as an independent driver, not merely an ancillary one. Conversely, buyback and financial investment/other transactions show no correlation with delisting (0 cases planned or pursued), confirming their predominantly financial nature and not aimed at reorganizing the ownership structure or concentrating control – already known both in theory and practical application. Transactions redefining ownership structures, however, exhibit an intermediate relationship: 5 out of 5 plan delisting, and 4 pursue it, indicating that delisting is often a functional tool even in internal restructuring processes.

Overall, the aggregate data (87 delisting planned out of 100 total offerings; 77 pursued) highlights that over three-quarters of the sample are structurally linked to a plan to exit the regulated market. Consistent with the findings already discussed, namely, prevalence of voluntary offers, high incidence of total transactions, and strong concentration on control purposes, the table confirms that the bidding market in the period analysed is characterized by a marked vocation for ownership concentration and privatization of target companies, rather than interventions of a merely financial or tactical nature[368].

The Table 11 allows us to verify the consistency between planned and actually pursued delisting on an annual basis, complementing the previous analysis of the reasons for the offer. For this analysis, it was deemed more appropriate to exclude the two unlisted companies since they could not have set themselves the objective of delisting. Therefore, the sample consists of 100 listed companies.

Table 11. Weight of programmed and pursued delisting on total offers made (on an annual basis)

Year	Total Number	Delisting programmed		Delisting pursued		
		N.	% on tot.	N.	% on tot.	% on programmed
2020	13	8	61.54%	6	46.15%	75.00%
2021	14	12	85.71%	12	85.71%	100.00%
2022	19	18	94.74%	16	84.21%	88.89%
2023	17	14	82.35%	13	76.47%	92.86%
2024	19	18	94.74%	17	89.47%	94.44%
2025	18	17	94.44%	13	72.22%	76.47%
Total	100	87	87.00%	77	77.00%	88.51%

368 According to these results, the observation made by PICCO F., PONZIANI V., TROVATORE G., VENTORUZZO M., *Le OPA in Italia dal 2007 al 2019. Evidenze empiriche e spunti di discussione*, 2021, Discussion papers Consob, p. 49, takes on current relevance: the Italian market of corporate control is traditionally and apparently oriented toward Anglo-Saxon takeovers, i.e., hostile takeovers aimed at gaining control. Although a large portion of the motivations for takeover bids launched between 2020 and 2025 are aimed at gaining control, it is also recognized that this is not the only motive, often accompanied by going private. It would therefore be reductive and minimalist not to consider this dual aspect, in order to precisely guide an analysis of the legislation and the economic context.

In aggregate terms, out of 100 total transactions, 87 (87.00%) envisage delisting and 77 (77.00%) actually pursue it, with a completion rate of 88.51% of planned transactions. This data therefore confirms that delisting is a structural element of the offering market in the period analysed, not a residual or accidental outcome.

In 2020, planned delisting affected 61.54% of transactions, with a completion rate of 75% compared to the planned rate: this was the least intense year in terms of delisting activity. Starting in 2021, however, the weight of offers with planned delisting increased steadily (85.71% in 2021; over 94.74% in 2022 and 2024), reaching levels close to the entire sample. The completion rate also remains high (100% in 2021; 88.89% in 2022; 92.86% in 2023; 94.44% in 2024), confirming a high degree of consistency between the stated purpose and the actual structure of the transaction. 2025 shows a slight decline in the number of delisting pursued (72.22% of the annual total; 76.47% of the planned total), but the figure remains consistent with an overall trend strongly oriented towards delisting.

Linking these results to the previous table on the motivations for the offer, a clear convergence emerges, that is acquisitions of control – whether in the form of business combinations or pure control acquisitions – are those that most frequently plan and implement delisting. The annual distribution therefore confirms that the high incidence of delisting is not episodic or concentrated in a single year, but rather constitutes a structural and persistent trend over the period considered.
The likelihood of delisting is therefore confirmed as the natural outcome of a strategy of ownership concentration and corporate reorganization, rather than a marginal consequence of market dynamics.

Finally, of fundamental importance in the context of the regulatory analysis conducted in Chapter II and concluding this section on delisting, the data shows that, of the 77 delisting pursued, 74 of them triggered the *Procedura Congiunta* pursuant to Articles 108 and 111 of the TUF. In one of the remaining three cases, the procedure has been triggered under the applicable Luxembourg law. This confirms what was already partially observed in Table 8 regarding the structural purpose of squeeze-out and sell-out clauses in pursuing delisting.

The Figure 6's representation confirms the strong alignment between the planned delisting and the actual delisting over the period under consideration. The limited gap between the two historical series, particularly from 2021 onwards, further supports the interpretation of delisting as a structural result of takeover activity, fuelling the view that the market is exploiting it to voluntarily achieve delisting[369].

[369] See para. 2.3.2.

Note that of the 10 delisting that were scheduled but did not occur as part of the offering, 4 were carried out at a later date.

Figure 6. Comparison between programmed delisting and pursued delisting

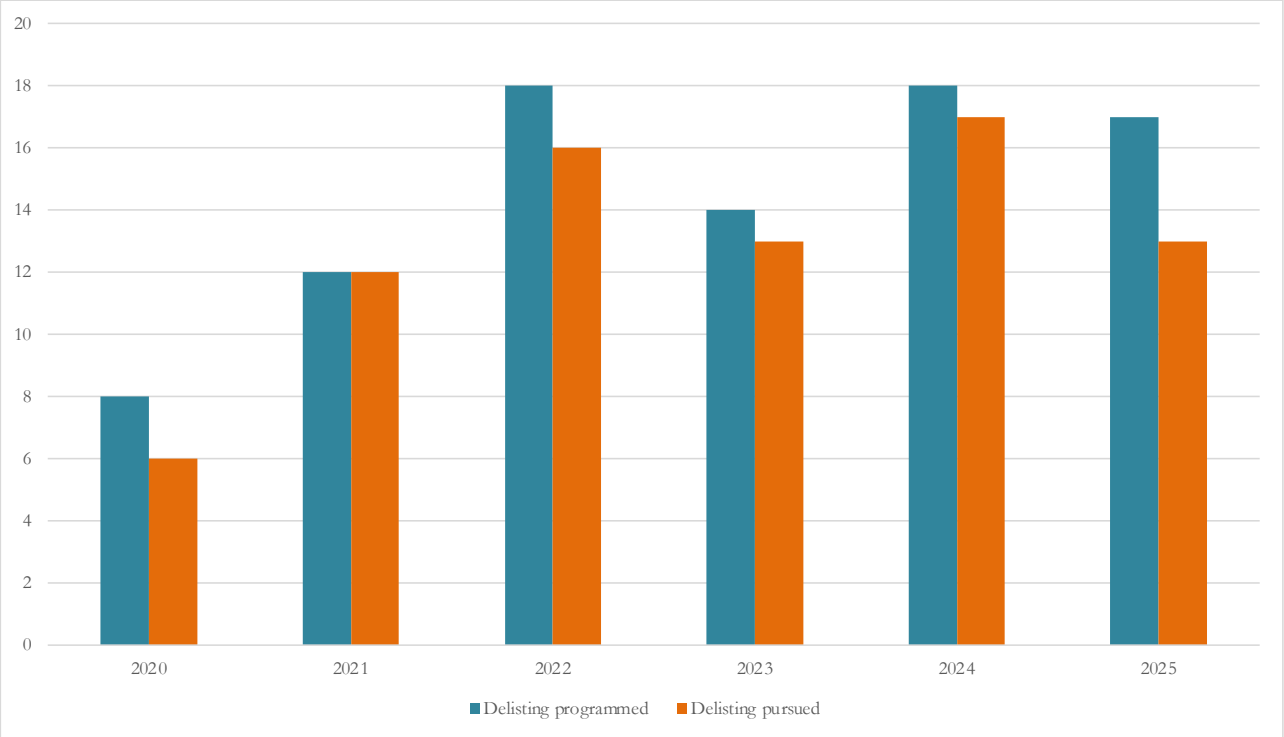


Table 12 shows the distribution of transactions that actually led to delisting, broken down by listing market, highlighting significant differences in terms of relative incidence.

Table 12. Delisting pursued broken down by listing trading venue

Listing trading venues	Total Number	Delisting pursued	
		N.	% on tot.
Euronext Growth Milan	22	20	90.91%
Euronext Milan	61	43	70.49%
Euronext STAR Milan	15	13	86.67%
Mercato Vorvel (ex Hi-MTF)	2	1	50.00%
Total	100	77	77.00%

In the period considered, out of a total of 100 transactions, 77 resulted in delisting (77%). However, the propensity to delist is not homogeneous across the different market segments. Euronext Growth Milan has the highest relative incidence, with 20 delisting out of 22 total transactions (90.91%). Euronext STAR Milan also shows a strong correlation, with 13 delisting out of 15 transactions (86.67%). Euronext Milan

records a lower but still significant incidence, with 43 delisting out of 61 transactions (70.49%). Mercato Vorvel (ex Hi-MTF) shows a more limited incidence (1 out of 2 transactions; 50%), but the small number of transactions is not statistically significant enough to draw clear conclusions.
In percentage terms, the incidence of delisting is highest on Euronext Growth Milan (90.91%) and STAR (86.67%), demonstrating a clear trend toward SMEs going private.
Obviously, in absolute terms, the largest number of delisting is concentrated on Euronext Milan (43 cases), which represents the largest market given its larger overall capitalization. It follows that the phenomenon cannot be interpreted as limited to certain market segments. On the contrary, while it occurs more frequently in markets dedicated to SMEs and companies with high growth potential, delisting also significantly impacts the main regulated market. The data, therefore, do not highlight a peripheral trend or one limited to secondary segments, but rather confirm the structural and transversal nature of the phenomenon across the entire listing system.

Table 13 shows the average premiums (or discounts) broken down by offer type and time frame[370]. The premium is calculated over different time frames to capture both the immediate effect of the announcement and price dynamics over longer time frames.

Table 13. Offer premiums by offer type

Type of offer	Number	Average premium/Average discount				
		1 day	1 month	3 months	6 months	1 year
Opa	86	24.6%	26.3%	29.1%	34.1%	34.0%
Opas/Ops	9	14.0%	16.8%	15.9%	18.2%	18.8%

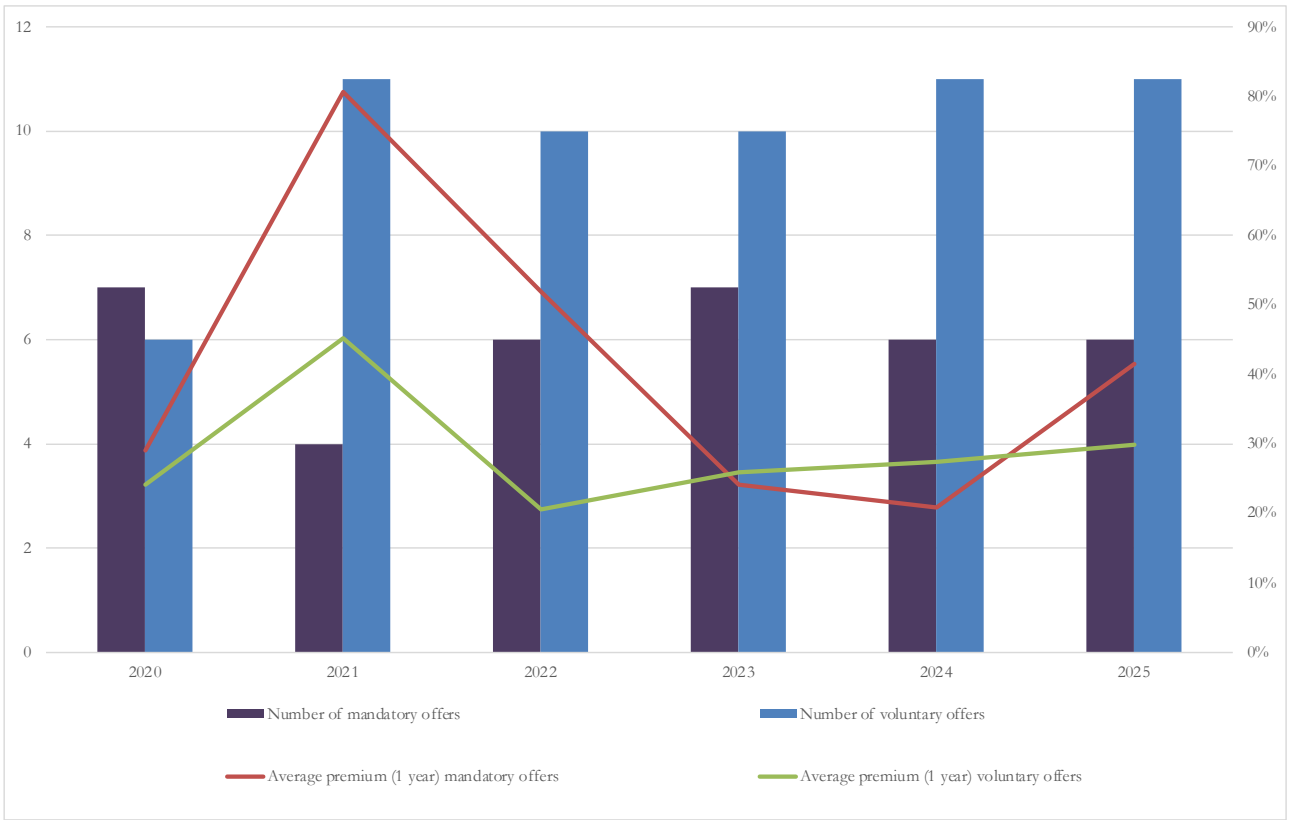
A first clear result concerns the systematic difference between public Opa and Opas/Ops. Opa exhibit significantly higher average premiums across all time frames considered.
At 1 day, the average premium is 24.6% for Opa, compared to 14% for Opas/Ops; at 3 months, the spread widens to 29.1% for Opa versus 15.9% for Opas/Ops. At 6 months and 1 year, Opa remain consistently above 34%, while Opas/Ops remain below 20%, even over the annual window.
The gap is consistent with the economic structure of the transactions. Cash tender offers – which constitute almost the entire sample (86 out of 95 observations) – are predominantly aimed at acquiring control and,

[370] Obviously, data are not available for offers on unlisted instruments that do not record market prices. Furthermore, data are not always available for the same offer for all time horizons. Specifically, there are 3 missing data points for 1-day, 6-months, and 1-year premiums, and 2 missing data points for 1-month and 3-months premiums. See also PICCO F., PONZIANI V., TROVATORE G., VENTORUZZO M., *Le OPA in Italia dal 2007 al 2019. Evidenze empiriche e spunti di discussione*, 2021, Discussion papers Consob, p. 52, note 86.

frequently, delisting. In such contexts, offering a significant premium is an essential tool to incentivize participation and reach significant thresholds for consolidating control or a potential squeeze-out.
Opas/Ops, on the other hand, are based on share exchange mechanisms and are often included in corporate integration or reorganization transactions, as seen in Tables 3-5. The lack of an immediate cash component tends to result in lower average premiums, consistent with their nature and the economic rationales.
Another notable element is the growth in the average premium as the reference time horizon for Opa increases. The shift from 24.6% (1 day) to 34% (1 year) suggests that the premium is not merely the result of short-term speculative movements, but reflects a structural differential compared to pre-announcement prices over longer time horizons.

Figure 7 introduces the joint temporal dimension between numbers and rewards, distinguishing between mandatory and voluntary offers[371]. The analysis should therefore be interpreted on two levels: the quantitative distribution of offers and the intensity of the average reward on an annual basis.

Figure 7. Evolution of mandatory and voluntary offers and their average 1-year premiums



[371] By carrying out the same analysis excluding the purposes of buyback, financial/other investments and redefinition of control and/or considering only total offers, the trend is not altered.

Voluntary offers consistently outnumbered the rest of the market, ranging from 6 to 11 transactions per year, as already clarified by Table 6. Mandatory offers, on the other hand, ranged between 4 and 7 cases per year, confirming their strong heterogeneity, given the greater dependence on the pre-existing shareholding structure. The voluntary component therefore structurally represents the dominant share of the market, confirming what was already highlighted in Table 6. This is also reinforced by the number of transactions aimed at delisting, for which the voluntary tender offer method is consistent.

The average annual premium profile shows a differentiated dynamic. Mandatory premiums exhibit marked volatility: very high in 2021 (over 80%), declining in 2023-2024 (around 20-25%), with a recovery in 2025.
Voluntary premiums, on the other hand, are more stable, fluctuating within a more moderate range (around 25-40%). This evidence complements and reinforces the findings in Table 13 regarding the differences between types, which are not only structural but also cyclical.

The greater variability in premiums for mandatory offerings may be due to the bidder's different position in the capital at the time the threshold is exceeded, to the different market context, or to the presence or absence of competitive tensions.
In some years, such as 2021, the mandatory premium reflects transactions with high strategic value and a strong incentive to participate. In 2023–2024, the premium is compressed, suggesting less contestable or already widely controlled transactions.
Voluntary offerings, although numerically prevalent, show more regular average premiums, consistent with their planned nature and the frequent strategic and delisting purpose already documented in Tables 6-7.

Table 14 allows for a deeper analysis of the premiums by shifting the focus from the legal type of the offer to its economic motivation.

Table 14. Analysis of premiums by offer motivation

Offer motivation	Number	Average premium/Average discount				
		1 day	1 month	3 months	6 months	1 year
Control acquisition for business combination	38	28.7%	29.7%	32.3%	36.5%	38.0%
Pure control acquisition	21	21.0%	23.5%	27.7%	39.0%	34.8%
Buyback	4	4.0%	4.0%	7.1%	8.1%	11.0%
Delisting	29	24.2%	26.9%	29.2%	30.6%	31.5%
Financial Investment /Other	5	14.9%	16.6%	14.4%	18.2%	24.2%
Redefinition of ownership structures	5	20.2%	21.2%	14.6%	10.9%	7.7%

Transactions aimed at control acquisitions through business combinations (38 cases) exhibit the highest average premiums across the entire time horizon, ranging from 28.7% (1 day) to 38% (1 year). This data is consistent with what has already emerged in the previous sections and with the theoretical explanation: when the objective is industrial or strategic integration, the premium represents an essential tool for incentivizing participation and reducing uncertainty about the outcome of the transaction.

Pure control acquisitions (21 cases) exhibit lower but still significant premiums (34.8% at 1 year), confirming that strengthening control still requires a significant financial incentive, albeit less pronounced than business combinations.

Transactions motivated by delisting (29 cases) exhibit average premiums of 31.5% on an annual basis, with progressive growth from the short to the long term. This result fits consistently with the framework outlined in Tables 6-8 and 10, which show the high incidence of transactions aimed at exiting the regulated market. However, the average premium is lower than for business combinations, suggesting that the objective of exiting the market, while requiring an incentive, does not always imply the same strategic intensity as a true industrial integration.

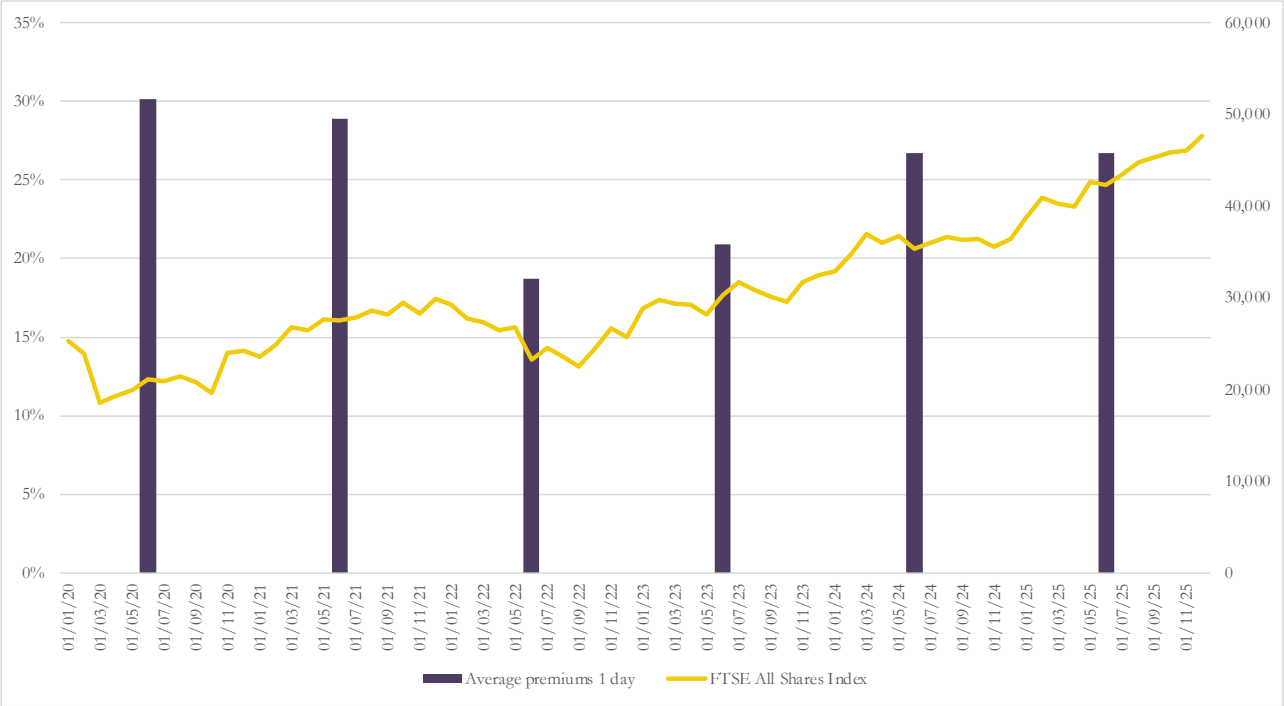
Buyback transactions (4 cases) present significantly lower premiums (11% at one year), while transactions classified as financial investment/other show intermediate values (24.2%). This reflects the different economic nature of these initiatives: in the absence of an industrial project or a structural acquisition of control, the monetary incentive required from shareholders is generally lower.

Redefinition of ownership structures (5 cases) show a decreasing trend over time (from 20.2% at 1 day to 7.7% at 1 year). This trend, somewhat atypical compared to other categories, suggests that these transactions are often connected to restructurings already widely anticipated by the market or even budgeted for, with less room for increasing premiums in the medium term.

In summary, the prize does not appear to be distributed uniformly among the different categories but is strictly linked to the economic function of the operation.

Figure 8 compares average one-day premiums with the performance of the FTSE All Shares Index, allowing for a joint interpretation of market price dynamics and the intensity of the premium paid to shareholders.

Figure 8. Comparison between average 1-day premiums and market performance



First, there is no apparent mechanical, linear relationship between the index level and the premium offered. In 2020 and 2021, with the index still recovering from the pandemic shock, average premiums were particularly high (approximately 30% and 29%), consistent with a context of greater uncertainty and the need to incentivize participation in still-unstable markets.

In 2022, a significant reduction in the premium (approximately 19%) was observed in a more volatile market environment characterized by macroeconomic tensions. In the following years (2023–2025), while the index shows an increasing trend and progressive strengthening, premiums begin to increase again (over 26% in 2024 and 2025), indicating that even in positive market conditions, offering a significant premium remains a key tool for the success of the transaction.

The premium, therefore, does not depend exclusively on the market cycle but is closely linked to the structure and rationale of the transaction. The index's performance provides context, but the level of the premium primarily reflects the strategic nature of the offering and the need to ensure sufficient take-up. In summary, the graph reinforces the idea that the premium represents a variable endogenous to the logic of the transaction rather than a simple function of the market's economic situation.

3.3. Data analysis conclusion

The empirical analysis of public offerings completed between 2020 and 2025 identifies several structural characteristics of the Italian corporate control market, which emerge clearly and consistently across the entire sample.

First, delisting is a central and recurring outcome of offering activity. Of the 100 transactions examined on listed companies, 87 involve delisting (87.00%) and 77 actually pursue it (77.00%), with a completion rate of 88.51% of the planned transactions. The annual distribution confirms that this phenomenon is not episodic or concentrated in a single financial year but is persistent and transversal across the entire period analysed: planned delisting ranges from 61.54% of total transactions in 2020 to peaks above 94% in 2022 and 2024, while effective delisting remains consistently high (84.21% in 2022; 89.47% in 2024). Delisting, therefore, emerges not as a marginal or accidental effect, but as a structural component of the offering market.

Second, the breakdown by reason for the transaction highlights a close correlation between the acquisition of control and exit from the regulated market. Transactions aimed at business combinations (37 cases) and pure control acquisitions (21 cases) represent the largest share of the sample (58% overall) and show the highest incidence of planned and pursued delisting: 32 out of 37 business combinations envisage delisting and 29 implement it; all 21 pure control acquisitions plan delisting and 19 carry it out. Furthermore, 29 transactions are explicitly classified as delisting operations, of which 25 are effectively pursued. Conversely, purely financial transactions – such as buybacks (4 cases) or financial investment/other operations (4 cases) – show no significant correlation with delisting (0 cases planned or pursued). This suggests that delisting appears functionally linked to strategies of ownership concentration and corporate reorganization, rather than tactical or short-term interventions. This also clarifies that the Italian corporate control market appears to be predominantly focused on the exchange or consolidation of corporate control; indeed, the data reveal a clear tendency to use offerings as a tool for going private.

Moreover, the analysis by listing market demonstrates that the phenomenon is not limited to smaller or lower-capitalization segments. Although the relative percentages are particularly high in Euronext Growth Milan (20 delisting out of 22 transactions, 90.91%) and in Euronext STAR Milan (13 out of 15, 86.67%), the largest absolute number of delisting is concentrated in Euronext Milan, the main regulated market (43 out of 61 transactions, 70.49%). This confirms the cross-cutting nature of the phenomenon and its impact on companies listed on the primary regulated market.

Further qualifying elements emerge from the analysis of the type and origin of the bidders. Industrial groups and entrepreneurs are predominantly domestic (78% and 80% respectively), while funds display

a markedly international distribution: only 27% of funds are Italian, compared to 30% based in Luxembourg, 13% in the UK and 10% in the United States. This configuration reflects the growing integration of the Italian market for controlling interests into transnational capital flows, while maintaining a strong national footprint in industrial dynamics.

Overall, the data confirm that, in the period under review, the Italian public offering market is characterized by a marked propensity for ownership concentration and the privatization of target companies. With 77% of all transactions effectively resulting in exit from the regulated market and over half of the sample (58%) directly linked to control acquisition strategies, delisting emerges as the natural outcome of strategies for acquiring and consolidating control, outlining a model of evolution of the market for controlling interests that favours more concentrated ownership structures over permanence in the regulated market.

CHAPTER IV

COMPARING LEGAL AND MARKET SYSTEMS.

DISCUSSION ON TAKEOVER BID REGULATION IN THE JAPANESE CASE

4.1. Cultural influence on the legislative system: emphasis on corporate governance and capital markets

As has been widely discussed, the Takeover Directive's legislative model draws on the UK Code, thus generating an inseparable normative and conceptual derivation within the takeover bid field, which then adapts to the market, more or less consistently, depending on the substantial differences in economic systems. Furthermore, there are several points in common with the US model[372]. Both the UK and US models operate within dispersed ownership systems, share common law traditions and developed financial markets, and view takeovers as a management discipline mechanism. In both systems, moreover, takeovers are considered a central tool of corporate governance. What differs is that the UK model is shareholder-oriented, providing strong protections for equal treatment of shareholders. This is supported by the centrality of the mandatory bid rule and, historically, an aversion to the free use of defence mechanisms[373]. The US model is manager-oriented, without a mandatory bid rule, and allows the board broad discretion to defend itself consistently with fiduciary duties. The market-oriented vision typical of the US relies heavily on the efficiency of financial markets, including the corporate control market, while in the UK the goal is to steer it by giving priority to shareholders. Despite discrepancies in corporate governance systems, underlying concepts of corporate control – particularly whether it should be emphasized or retained, and which interests should prevail – and how this relates to broader capital market management, the regulatory connection and some common threads of Western capitalism have allowed for ongoing discussion and exchange.

As has emerged from the discussion, the underlying logic and regulatory decisions regarding corporate governance, the capital market, and thus the corporate control market are profoundly influenced by the cultural and economic model. Even when looking for similarities between models with similar ancestry,

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372 The relationship between the UK model, and consequently the European one, and the US model has been widely discussed in the literature. Cfr. ARMOUR J., SKEEL JR. D.A., *Who Writes the Rules for Hostile Takeovers, and Why? – The Peculiar Divergence of U.S. and U.K. Takeover Regulation*, in *The Georgetown Law Journal*, 2007, Vol. No. 95, pp. 1727-1794, available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=928928; VENTORUZZO M., *Europe's Thirteenth Directive and U.S. Takeover Regulation: Regulatory Means and Political Economic Ends*, 2006, Penn State Law, available at: https://insight.dickinsonlaw.psu.edu/fac_works/277/.

373 With the introduction of the Takeover Directive, there have been many advances in this regard, leaving Member States with ample room for discretion in the implementation of Article 9 on the Board Neutrality Rule. See CLERC C., DEMARIGNY F., VALIANTE D., DE MANUEL ARAMENDÍA M., *A Legal and Economic Assessment of European Takeover Regulation*, Centre for European Policy Studies (CEPS) & European Capital Markets Institute (ECMI), Brussels, 2012, pp. 169 et seq.

the cultural and regulatory roots always emerge in a disruptive way, creating misalignments and bringing out specificities typical of the countries[374]. This is even more true and amplified when considering Eastern cultures, which have a profoundly different cultural tradition from Western cultures in the broadest sense. If we take Japan, for example, there are cultural assumptions that economics, or any other discipline, cannot ignore. Japan falls within the sphere of influence of the ancient Chinese civilization, from which it has inherited profound influence. Nevertheless, it has always maintained its sovereignty, never falling under the control of the Chinese empire. This was due to its island nature: on the one hand, in times before technology, this form guaranteed natural protection from foreign powers; on the other, the oceans served as a gateway for trade between Japan and adjacent cultures, thus fostering processes of learning and interaction that, however, never resulted in a loss of independence. This selective approach to interacting with Chinese power characterized all subsequent encounters with foreign peoples. In particular, following the first industrial revolution, Western civilization became the first world civilization in human history; at the same time, the Chin Dynasty in China entered its period of decline, and Japan's era of seclusion came to an end with the Black Ships, precisely in 1853[375]. This forced opening to the civilization of the early Western industrial era led to Japan's selective approach, which managed to develop without losing its identity and became the "first non-Western country to successfully modernize"[376]. With this brief introduction, it is now appropriate to delve deeper into the discussion, after having established a few clear references to the recent history of contact between the West and Japan. Therefore, the subject will be analysed with due humility, seeking to understand that behind regulatory and economic choices lies a different culture that is not based on the same assumptions and values, and can therefore be difficult to understand at times if Western syllogisms are forced into practice.

Japan is one of the most modern and advanced economies in the world, ranking as the world's third largest economy[377], as is its capital market. Listed companies rose from 1,398 in 1975 – already a

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374 This emerged both in relation to the discussion at European level in Chapter I, and, even more markedly, in the analysis of Italian legislation in Chapter II.

375 At that date, US Commodore Perry asked Japan to open ports for refuelling and provisioning of American ships or become the target of modern instruments of war. This event marks the historical moment in which Japan opened up to trade, with particular reference to Western populations. Thus Japan, just emerging from feudalism, had an impact with the modernizing world. See FERRARI A., *Giappone: Estremo Occidente*, in *Rivista di Studi Politici Internazionali*, Vol. 36, No. 2, 1969, pp. 193-198, available at JSTOR: https://www.jstor.org/stable/42735376?seq=1; IOKIBE M., *The Diplomatic History of Postwar Japan*, 2011, Routledge, New York; ALLISON G., *Destined for War: Can America and China Escape Thucydides's Trap?*, 2018, Houghton Mifflin. Although this is the shared date from which exchanges between Japan and the West began in the modern era, there were previous occasions for encounters in earlier eras, which however were limited to interactions in pre-modern times and therefore remained marginal, without taking shape in a subsequent and prolonged encounter. As early as 1600, the English merchant William Adams landed in Japan aboard a Dutch ship and established trade relations with the East India Company. Traces of Portuguese merchants and Christian missionaries in Japan have also been found between 1500 and 1600. See IANNELLO T., *Il Giappone Marittimo del Primo Seicento Attraverso le Relazioni dei Mercanti Inglesi*, in *Il Giappone*, 1997, Vol. 37, pp. 69-92, available at: https://www.jstor.org/stable/20753020.

376 IOKIBE M., *The Diplomatic History of Postwar Japan*, 2011, Routledge, New York, cit. p. 211.

377 As reported by https://www.infomercatiesteri.it/paese.php?id_paesi=126.

considerable number – to 3,971 in 2024, underscoring an unstoppable growth and accounting for a market capitalization of listed domestic companies equal to 6.31 trillion USD dollars[378]. Before addressing takeover regulations, it is important to first introduce the regulatory model of the capital market and the importance of corporate governance in the Japanese business landscape.

The Japanese corporate landscape is predominantly made up of joint stock companies[379], most of which are classified as small or medium-sized enterprises (*chūshō kigyō* – 中小企業)[380]. Of these, many are privately held[381].

Then, the share-holding structure in Japan is very specific and characteristic, greatly influencing the regulatory system, particularly the takeover bids one. From the 1940s to the 1990s, the typical share-holding structure in Japan "was characterized by long-term business and financial relationships which were safeguarded through stable ownership structures"[382]. Furthermore, until the 1990s, the so-called Main Bank System was in force, according to which Japanese companies financed themselves mainly indirectly through banks, and with much less direct raised capital on the capital market. Since the financial crisis of the 1990s, the shareholding structure has changed significantly – while still maintaining some unique and characteristic features – giving extreme importance to financial markets[383].

To briefly reconstruct the history of today's financial market law in Japan, after the end of World War II financial market law was extensively revised and modelled after the American model. Precisely on the heels of the US Securities Act of 1933 and the Securities Exchange Act of 1934, the Japanese Securities and Exchange Act was issued (*Shōken torihiki-hō* – 証券取引法)[384], which was amended in 2006 and

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[378] As reported by the World Bank at: https://data.worldbank.org/indicator/CM.MKT.LDOM.NO?locations=JP; https://data.worldbank.org/indicator/CM.MKT.LCAP.CD?locations=JP.

[379] This figure includes the former limited liability companies (*tokurei yūgen kasiha* – 特例有限会社), that are treated as closed stock corporations since the company law reform of 2005. The other three types of companies, which are rarely used, are: the general partnership company, limited partnership company, and limited liability company. See BAUM H., KANDA H., *Financial Markets Regulation in Japan*, Financial Business Law Working Paper Series, 2017, 2017-1, University of Tokyo, Graduate School of Law and Politics, note 1.

[380] In Japan, a company is classified as large (*dagaisha* – 大会社) if it has capital of at least 500 million Yen or liabilities of 20 billion Yen on its balance sheet, pursuant to Art. 2 No. 6 Companies Act.

[381] Despite the widespread use of the capital market, the total number of small and medium-sized enterprises alone amounts to over 3.36 million accounts for 99.7% of all businesses, as written in a recent article by the WORLD ECONOMIC FORUM, *How Japan's SMEs can secure talent and build economic resilience*, May 30, 2025, available at: https://www.weforum.org/stories/2025/05/japan-small-businesses-economic-resilience/.

[382] BAUM H., KANDA H., *Financial Markets Regulation in Japan*, Financial Business Law Working Paper Series, 2017, 2017-1, University of Tokyo, Graduate School of Law and Politics, cit. p. 2.

[383] Among listed companies, shares held by banks or insurance companies have increased from 42% in 1990 to 21% in 2016, while shares held by foreign investors have increased from 5% in the 1990s to 30% in 2016.

[384] Act No. 25/1948.

renamed the Financial Instruments and Exchange Act (*Kin'yū shōhin torihiki-hō* – 金融商品取引法)[385]. Initially, from the 1950s to the 1990s, the Ministry of Finance was at the centre of financial market regulation and supervision; it held fiscal jurisdiction, oversight of all financial sectors, and the power to conceive all laws and decrees pertaining to the financial market. In that context, a sort of licensing system existed for market access: a new business could only be established with the express approval of the Ministry of Finance. This led to a clear prevalence of market supervision rather than market regulation[386], and the Ministry of Finance, in addition to supervising the financial industry, consequently protected it from excessive competition. Another distinctive feature of the system was the interaction between public and private interests in the process of making and applying laws, unique among modern industrialized economies. The turning point was marked by the bankruptcy of Yamaichi Securities Co., Ltd, the country's then fourth-largest investment firm, which in 1997 marked the collapse of the bubble economy in Japan, from which a crisis arose caused by the inability to adapt and innovate, and by the tendency to overregulate[387]. From that date, the prerequisites of the regulatory model of the 1940s disappeared[388], and the wave of globalization began. The international push to open the market was accompanied by domestic pressure for reforms, respectively *gaiatsu* (外圧) and *naiatsu* (内圧)[389], and both forces were directed towards a more consumer-oriented society. In 1998, the Japanese government published the strategic manifesto "Structural Reform of the Japanese Financial Market – Toward the Revival of the Tōkyō Market by the Year 2001"[390] that served as the driving force for all the numerous reforms that followed. The wave of reforms brought more than twenty financial market laws and had two objectives:

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385 FIEA, Act. No. 65/2006, effective from September 30, 2007. Available in english at: https://www.japaneselawtranslation.go.jp/en/laws/view/4633. "Article 1 of the FIEA states as its overall legal aim the creation of a regulatory framework which guarantees that the issuing and trading of securities should protect investors' interests and be in the interests of the development of the Japanese economy. For this the FIEA allocates two types of norms, mandatory disclosure regulations and rules forbidding fraudulent behavior on the financial services market; in addition, it provides for the supervision of market actors". BAUM H., KANDA H., *Financial Markets Regulation in Japan*, Financial Business Law Working Paper Series, 2017, 2017-1, University of Tokyo, Graduate School of Law and Politics, cit. p. 9.

386 "Such a regulatory model was characterized by prior coordination of interests (ex ante monitoring) rather than subordinate legal controls placed on market behavior (ex post monitoring)" BAUM H., KANDA H., *Financial Markets Regulation in Japan*, Financial Business Law Working Paper Series, 2017, 2017-1, University of Tokyo, Graduate School of Law and Politics, cit. p. 4.

387 Cfr. NAKATANI I., *A Design for Transforming the Japanese Economy*, in *The Journal of Japanese Studies*, Vol. 23, No. 2, pp. 399-417, available at JSTOR: https://www.jstor.org/stable/133162.

388 According to BAUM H., KANDA H., *Financial Markets Regulation in Japan*, Financial Business Law Working Paper Series, 2017, 2017-1, University of Tokyo, Graduate School of Law and Politics, p. 5, the regulatory model of the 1940s was based on three prerequisites: the first was to protect the market from the exit of domestic operators and the entry of foreign ones, but globalization forced Japan to reconsider this principle; the second concerned the possibility of authorized bureaucratic supervision, but public trust was eroded by the management of the crisis, which revealed that the responsible operators had not been overwhelmed, but had often engaged in scandalous and fraudulent practices; finally, the primary aim of Japan's financial market policy, which was to provide the country's industry with cheap credit, also failed.

389 Cfr. KUSANO A., *Deregulation in Japan and the Role of "Naiatsu" (Domestic Pressure)*, in *Social Science Japan Journal*, Vol. 2, No. 1, pp. 65-84, available at JSTOR: https://www.jstor.org/stable/30209746.

390 Available at: https://www.fsa.go.jp/p_mof/english/big-bang/ebb7.htm.

to ensure the stability of the financial system and to create a transparent market-oriented regulatory regime. Thus, market forces took priority, and increased attention was paid to transparency along with investor protection. The reforms were based on a paradigm shift from a "consensus-oriented" to a "rule-oriented" regulatory model for financial markets, according to which market participants are required to adhere to a specific binding code of conduct, compliance with which is monitored and, if necessary, sanctioned in the event of misconduct[391]. This resulted in a regulatory system that made Japanese financial markets law more international and competitive, with an increasing significance of private law in market contexts.

This is how the current Japanese market regulation system was configured. This includes, since 1998, the Financial Supervisory Agency (*Kin'yū Kantoku-chō* – 金融監督庁), established as an independent supervisory body and assigned to the Prime Minister's cabinet office as an external department. This held the operational responsibility for making the regulatory system transparent and based on an *ex post* timeline. The structure was then reorganized in 2001, and a new FSA replaced the previous one, created by the split up of the Ministry of Finance, and exercises its supervisory power over almost every segment of the Japanese financial market. Its authority was delegated by the Japanese Prime Minister to the President of the FSA under Article 194-7 (1) of the FIEA. The Securities and Exchange Surveillance Commission (*Shōken Torihiki-tō Kanshi I'inkai* – 証券取引等監視委員会)[392] is responsible for implementing the FIEA with respect to all market players. The FIEA contains the capital market regulation, including takeover regulation and prospectus law, and is supplemented by special laws (*Shōken Roppō* – 証券六法). Furthermore, there are regulations relating to the listing of financial instruments for trading on organised markets, namely the stock exchanges, with particular reference to the Tōkyō Stock Exchange (*Tōkyō Shōken Torihikijo* – 東京証券取引所)[393]. The act encompasses more than 400 articles, divided in 19 chapters[394].

To date, Japan is a rare and exceptional case, as it formally represents the jurisdiction with the most dispersed shareholding in the world, after the US and the UK. However, despite being widely dispersed, shareholders are stable and, therefore, strongly incentivized to support incumbent management. This creates a unique situation, yet one essentially attributable to the ownership structure of continental

[391] BAUM H., KANDA H., *Financial Markets Regulation in Japan*, Financial Business Law Working Paper Series, 2017, 2017-1, University of Tokyo, Graduate School of Law and Politics, p. 6. This ex post judgment consequently requires the development of a country's judicial branch.

[392] The predecessor of FSA, then incorporated in it.

[393] Available in english at: https://www.jpx.co.jp/english/rules-participants/rules/regulations/index.html.

[394] See BAUM H., KANDA H., *Financial Markets Regulation in Japan*, Financial Business Law Working Paper Series, 2017, 2017-1, University of Tokyo, Graduate School of Law and Politics, p. 8.

Europe and many Asian countries[395]. From this perspective, the corporate control market appears to be influenced by little dynamism, and the relevance of shareholding structures confirms their primary role in the design and implementation of takeover regulation[396].

Therefore, despite the common law tradition and these seemingly widely dispersed ownership structures, which in reality are characterized by stable shareholders, the takeover regulation that will be analysed below does not assume the typically Anglo-Saxon character of a governance-enhancing mechanism; rather, it is limited to facilitating organized changes of control, so as not to harm the interests of minority shareholders[397]. This shareholder-centricity has also been encouraged by the Corporate Governance Code, introduced on 1 June 2015 by the Tokyo Stock Exchange, endorsed by the FSA[398]. The following discussion presents takeover regulations in Japan, specifically the dynamics of squeeze-outs, sell-outs, and going-private transactions that have affected the discussion.

4.2. Japanese regulatory system governing takeover bids: corporate law and capital markets regulations

The first rules regulating takeovers in Japan were enacted in 1971 when a bill amended the Securities and Exchange Law of 1948. Before that time, no takeover bid had ever taken place in Japan, but the need to prepare for foreign companies launching a takeover bid was emerging[399]. The previous regulations were

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395 The literature has often predicted that the Japanese takeover market would develop similarly to the Western one, especially in the UK and US. This has been contradicted by practice, as VAROTTIL U., WAN W.Y., *Comparative takeover regulation. Global and Asian Perspective, Cambridge University Press*, 2018, available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3187045, p. 24.

396 This system was geared more toward individual regulatory observance than economic performance. However, when enforcing statutory orders, written waivers (*tsūtatsu* – 通達) and oral suggestions, through informal administrative actions (*gyōsei shidō* – 行政指導), were used with discretion.

397 VAROTTIL U., WAN W.Y., *Comparative takeover regulation. Global and Asian Perspective, Cambridge University Press*, 2018, available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3187045, p. 30. In this sense, even if this current of thought is presented, a clear position is not taken since WHITTAKER D.U., HAYAKAWA M., *Contesting "Corporate Value" Through Takeover Bids in Japan*, in *Corporate Governance*, 2007, 15, 1, pp. 16-26 presented a vision on the subject equally interesting: The 2005 Livedoor–NBS case is seen as a turning point in Japanese takeover law, highlighting how it challenged the traditional community firm model and forced judges and legislators to redefine the boundaries of corporate governance. The authors' central contribution is the examination of the concept of corporate value, introduced by the METI Guidelines as a parameter for assessing the legitimacy of anti-takeover defensive measures: such measures are permissible only if aimed at protecting and increasing the company's value and the common interest of shareholders. However, the concept remains deliberately broad and ambiguous, encompassing not only shareholder value but also elements related to stakeholders and business continuity. The paper thus shows how Japan has not adopted a purely shareholder-oriented model along the lines of Delaware, but has instead developed a hybrid structure, in which the market for control is recognized but filtered through a substantive and contestable notion of corporate value.

398 See https://www.jpx.co.jp/english/equities/listing/cg/. The code follow a soft law approach, with seventy-three conduct norms that apply to listed companies in the comply-or-explain fashion.

399 SAKUAE M., *Takeover bids in Japan*, in *International Corporate Law*, 2000, Bloomsbury Publishing Plc, I, p. 143. Furthermore, having addressed the European regulatory case with the Takeover Directive, the Italian case and now introducing the Japanese legislation, following an observation by the cited author, we would like to propose a food for thought: "takeover bids, that is,

more oriented toward the activism of Japanese companies in foreign transactions, and with the impetus of 1990 and the Tender Offer Ordinance[400], the Japanese takeover bid system was harmonized with foreign systems, particularly taking inspiration from both the US and UK, in order to internationalize stock markets and protect investors[401]. Nonetheless, the discipline maintains a strong character typical of the cultural and economic physiognomy of the country.

The regulation of takeovers to date is contained in the FIEA in Articles 27-2 to 27-22-4, Chapter II-2, entitled Disclosure in a Tender Offer. To clarify the scope of application, takeover regulation deals with public listed companies[402], and Article 2(1) of the FIEA defines the term "securities" (*yūka shōken* – 有価証券) to which the provision applies. Since the definition is rather broad, but not exhaustive and legally precise, clauses 1-21 contain a detailed list of the types of securities that fall within the scope of the FIEA[403], which may be expanded by government decree if necessary. According to the meaning of the law, a tender offer is a

> *solicitation of offers for purchase, etc. or offers for sale, etc. of share certificates, etc. to and from many and unspecified persons through a public notice (meaning a sale or other transfer for value; hereinafter the same applies in this Chapter), and making the purchase, etc. of share certificates, etc. outside of a financial instruments exchange market[404].*

An off market share purchase[405] where more than five percent of shares already in circulation are to be

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TOB or tender offers", cit. p. 143. The terminology surrounding takeovers often leaves room for confusion. For example, the author uses them interchangeably, as is correct and consistent with practice. Conceptually, the two terms simply indicate different nuances of the same phenomenon. A takeover bid, which gives its name to the relevant European Directive, refers to a bidder's proposal to acquire control – although it has been seen that the ultimate goal may not always be the same – while a tender offer (in italian *Offerta Pubblica di Acquisto* o OPA) refers more to the formal process dictated by the regulations.

400 Cabinet Office Ordinance for Disclosure Required for Tender Offer for Share Certificates, etc. by Person Other than Issuer (Ordinance of the Ministry of Finance No. 38 of 26 November 1990, the "Tender Offer Ordinance"), see https://resourcehub.bakermckenzie.com/en/resources/global-public-ma-guide/asia-pacific/japan/topics/general-legal-framework.

401 Concretely, for example, "while retaining the requirement under the 1971 Law that a non-resident offeror must appoint a resident as a proxy to submit the offer documents, the 1990 Law provides that anyone who lives or has an office in Japan can be a proxy", SAKUAE M., *Takeover bids in Japan*, in *International Corporate Law*, 2000, Bloomsbury Publishing Plc, I, cit. p. 144.

402 As in the EU Takeover Directive.

403 The article uses a distinction in paragraphs 1 and 2 between securities represented by certified investment securities and are frequently traded, such as shares and bonds, and securities not represented by certified investment securities and thus rarely traded, for example units in trusts and funds.

404 Pursuant to Article 27-2 (6), that in Japanese states: この条において「公開買付け」とは、不特定かつ多数の者に対し、公告により株券等の買付け等の申込み又は売付け等（売付けその他の有償の譲渡をいう。以下この章において同じ。）の申込みの勧誘を行い、取引所金融商品市場外で株券等の買付け等を行うことをいう。

405 This is a very subtle point and needs to be clarified. "It is important to note that the term 'off-market' not only excludes the exchange market but also the 'over-the-counter' (OTC) market. Exchange trading is conducted in accordance with the

acquired must occur by means of a public tender offer, pursuant to article 27-2 (1)(i) of the FIEA[406]. The threshold was lowered from 10 to 5 percent from the 1971 to 1990 legislative version, with the intent of providing companies whose shares are acquired slowly and with secret notice that they might be the subject of a takeover bid[407]. The regulation focuses heavily on the formal tendering process, and therefore on all the detailed disclosure obligations that arise from it for the benefit of the investors in question. On the same day as the offering, the bidder must make a public announcement of its offering in a Japanese daily newspaper with international relevance or on the Electronic Disclosure for Investors' Network; it must also notify the FAS[408]. Copies of these notifications must be sent to the target company and to the exchange or other marketplace where the target's shares are listed. Furthermore, pursuant to Article 27-9 of the FIEA, the bidder must prepare a tender offer prospectus (*kōkai kaitsuke setsumei-sho* – 公開買付説明書) to be made available to all shareholders interested in selling their shares. The same price and the same conditions must be guaranteed to all shareholders. "But, unlike EU regulations, the bidder does not have to offer a reasonable price nor does a minimum bid price for such an acquisition of shares exist in Japan"[409]. At the end of the bidding period, the bidder must disclose how many shares were tendered, how many of these he acquired, and whether, if more shares were offered then he wished to acquire, a pro rata purchase is planned.

In addition to the legislation just presented, which represents the core of the regulation on tender offers in Japan, there is the Act No. 86 of 26 July 2005, called Companies Act (*Kaishahō* – 会社法), for rules concerning the rights of shareholders and the duties of the board of directors of the target. Moreover,

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self-regulatory rules of the Stock Exchange. Similarly, OTC trading is conducted under a set of self-regulatory rules. This self-regulation has achieved fairness and transparency. Consequently, in principle, both exchange trading and OTC trading are outside the scope of TOB regulation", as specified by SAKUAE M., *Takeover bids in Japan*, in *International Corporate Law*, 2000, Bloomsbury Publishing Plc, I, cit. p. 145. But BAUM H., KANDA H., *Financial Markets Regulation in Japan*, Financial Business Law Working Paper Series, 2017, 2017-1, University of Tokyo, Graduate School of Law and Politics, p. 13, wrote "an over-the-counter share purchase where more than five percent of shares already in circulation are to be acquired must occur by means of a public tender offer". The apparent discrepancy stems from the different uses of the term "OTC": while some authors employ it broadly to describe any off-exchange acquisition, others reserve it for organized over-the-counter markets subject to self-regulatory rules. The tender offer requirement ultimately applies to privately negotiated acquisitions outside organized trading systems.

406 An exception exists for a purchase from less than ten people within a period of sixty days. If such an exempted investor, however, seeks to increase his stake in the target company to more than a third of the shares, he has to make a tender offer, as stated in Article 27-2 (1)(ii) of the FIEA. "That ratio (one-third of the voting rights) has an important bearing on the control of the company as it is the threshold for preventing the passing of an extraordinary resolution" SAKUAE M., *Takeover bids in Japan*, in *International Corporate Law*, 2000, Bloomsbury Publishing Plc, I, cit. p. 145.

407 Regarding the dispersal of ownership structures in Japanese companies, it should be noted that the threshold in question is consistently very low. Nonetheless, the regulation has a clear objective of transparency and protection when a takeover may arise, which suggests a certain rigor in the way this type of transaction is perceived.

408 Pursuant to art. 27-3 (1)(2) of the FIEA.

409 As underlined by BAUM H., KANDA H., *Financial Markets Regulation in Japan*, Financial Business Law Working Paper Series, 2017, 2017-1, University of Tokyo, Graduate School of Law and Politics, cit. p. 13.

the Corporate Governance Code (*Kōporēto Gabanansu Kōdo* – コーポレートガバナンス・コード) which, since its promulgation in 2015, has based the governance principles of listed companies on the guarantee of shareholders' rights and their effective equal treatment. Furthermore, it explicitly requires the board of a listed company to expressly clarify its position on an incoming tender offer and not to frustrate shareholders' right to sell their shares. The Code was promulgated in 2018 to promote sustainable growth and increase the corporate value of Japanese listed companies over the mid- to long-term, and in 2021 to integrate ESG principles. A new reform has now been proposed, benefiting shareholder value[410].

Based on this regulatory framework, since the 2001 reform, corporate takeovers have been seen in Japan as a way to increase the productivity of Japanese companies, also allowing a degree of openness to foreign acquisitions in the case of underperforming or failing companies, which would otherwise have been bailed out at taxpayer expense. Despite this conception, the Japanese corporate control market is perceived as highly conservative and protectionist, benefiting corporate value, community value, shareholders, and stakeholders[411]. The Japanese capital market is perceived as closed due to the difficulty foreign capital has in gaining control of Japanese companies. To date, there is still great attention to the type of foreign investments that are made on the national territory in accordance with the principles established by the Foreign Exchange and Foreign Trade Act (*Gaikoku Kawase oyobi Gaikoku Bōeki-hō* – 外国為替及び外国貿易法)[412]. However, this does not imply a lack of internationalization in the Japanese capital market; foreign investors find ample investment opportunities, having reached 32% of the stock market at the beginning of 2025[413].

The main reason for this historical barrier to control of Japanese companies is due to the peculiar ownership structure mentioned above. When analysing corporate governance systems that influence the contestability of control, the role of cross-shareholding (*keiretsu* – 系列) and lifetime employment must

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410 See https://www.jpx.co.jp/english/equities/listing/cg/04.html.

411 LEE J., *The Current Barriers to Corporate Takeovers in Japan: Do the UK Takeover Code and the EU Takeover Directive Offer a Solution?*, in *European Business Organization Law Review*, 2017, p. 762.

412 Act No. 228 of 1 December 1949. To be precise, this also occurs in Italy through the Law Decree 15 March 2012, n. 21, converted into Law 56/2012 (Golden power). The concept differs slightly from the Japanese to the Italian context: in the former, the MOF carries out preventive screening of foreign investments as soon as a certain percentage is reached, primarily in Japanese public companies conducting sensitive activities (see https://resourcehub.bakermckenzie.com/en/resources/global-public-ma-guide/asia-pacific/japan/topics/general-legal-framework); in Italy, the Presidency of the Council of Ministers has special powers over strategic assets that are activated following notification of the achievement of control or effective power of influence (see https://www.governo.it/it/dipartimenti/dip-il-coordinamento-amministrativo/dica-att-goldenpower/9296).

413 TAMURA Y., *Foreign Funds Owned Record Japanese Stocks Last Fiscal Year*, July 2, 2024, Bloomberg, available at: https://www.bloomberg.com/news/articles/2024-07-02/foreign-funds-owned-record-japanese-stocks-last-fiscal-year.

be considered; both insulate management from market-oriented external scrutiny. Originally, these systems included the Main Bank System mentioned above. With the economic crisis and the reforms that took place between the late 1990s and early 2000s, the Main Bank System fell into disuse. As for cross-shareholdings, the reform process has brought about a change in trend. These involve, operationally, partial ownership, which is an arrangement in which a nonfinancial company holds a portion of the shares in another company[414]. The government committed to buying cross-held shares in a special fund sold to private equity firms. This led to an increase in takeover activity, including hostile takeovers, which had previously been virtually absent[415]. Finally, it cannot be denied that in Japan, the cultural effect is pervasive when it comes to dynamics related to the economic and social structure[416]. While these factors are difficult to evaluate objectively, the reading, analysis, and application of legislation and strategies should always take them into account. To date, the M&A market is increasingly active in Japan, and although it retains characteristics of more outbound than inbound activities, few takeovers by foreign investors, and friendly rather than unsolicited, hostile takeover bids, the market is increasingly open[417].

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414 OSANO H., *Revisiting the Issue of Cross-Shareholding*, RIETI Report November 2008, available at: https://www.rieti.go.jp/en/rieti_report/100.html. The author explains that there are three patterns of partial ownership:
"1) Mutual or unilateral shareholding between companies in a strategic partnership. This type of partial ownership is typically observed in cases where one company supplies products or services to the other and, in that context, can be defined as vertical partial ownership.
2) Mutual or unilateral shareholding between companies in a competitive relationship in the same industry. This type of partial ownership concerns companies that compete with each other within the same industry and can be defined as horizontal partial ownership.
3) Mutual or unilateral shareholding between companies having no or only a minimal business relationship between one another. This type of partial ownership concerns companies that are respectively engaged in business unrelated to that of the other, and can be defined as conglomerate partial ownership". For an empirical study about positive effects correlated to cross-shareholding cfr. ARIKAWA Y., KATO A., *Cross Shareholding and Initiative Effects*, RIETI Discussion Paper Series 04-E-017.

415 As reported by LEE J., *The Current Barriers to Corporate Takeovers in Japan: Do the UK Takeover Code and the EU Takeover Directive Offer a Solution?*, in *European Business Organization Law Review*, 2017, p. 764. For an on point treatment of Japan's resistance to hostile takeovers and defensive measures see PUCHNIAK D.W., NAKAHIGASHI M., *The Enigma of Hostile Takeovers in Japan Bidder Beware*, NUS Law Working Paper Series, 2018, 008, available at: http://law.nus.edu.sg/wps; VAROTTIL U., WAN W.Y., *Comparative takeover regulation. Global and Asian Perspective, Cambridge University Press*, 2018, available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3187045.

416 As also recognized by VAROTTIL U., WAN W.Y., *Comparative takeover regulation. Global and Asian Perspective, Cambridge University Press*, 2018, available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3187045, p. 30.

417 As reported by INAJIMA T., *Japan set for record number of takeover offers from foreign firms*, in *The Japan Times*, September 8, 2025, available at: https://www.japantimes.co.jp/business/2025/09/08/companies/japan-set-for-record-takeover-offers-by-foreign-firms/; J.P. MORGAN, *M&A rebound signals a new era for corporate dealmaking in Japan*, August 22, 2024, available at: https://www.jpmorgan.com/insights/banking/mergers-and-acquisitions/japan-mergers-and-acquisitions-rebound. Also, in the METI Guidelines is said that "Japan's economy, as expected to accelerate optimization of resource allocation, industry restructuring and healthy economic metabolism of capital markets through M&A transactions, is aiming to have a market functioning soundly in acquisition transactions involving transfer of corporate control, and welcoming active acquisitions that contribute both to enhance corporate value and secure the interests of shareholders" METI, *Guidelines for Corporate Takeovers. Enhancing Corporate Value and Securing Shareholders' Interests*, August 31, 2023, available at: https://www.meti.go.jp/press/2023/08/20230831003/20230831003-b.pdf.

It is now time to present the specific rules relating to squeeze-outs and going-private transactions that have been the subject of this narrative. This will provide an idea of how these principles have been translated into legislation in a unique cultural, economic, and regulatory context that differs from the one prevailing in the EU.

4.2.1. Peculiarity of Japan's interpretation of the *ratio iuris*. Post-takeover norms

The debate on introducing the squeeze-out right into Japanese law began in 2005, together with the enactment of the Companies Act. The special controlling shareholder's squeeze-out regime[418] was, however, only introduced with the Companies Act Reform in 2014, as it was preceded by several controversies. Despite the debate that took place at the 16th meeting of the 186th Diet of Japan's House of Councillors Committee on Judicial Affairs held on 20 May 2014 on the constitutionality of the shareholder's right of squeeze-out regime[419], the bill was approved. However, the debate continued even after the approval. The legislation is presented below in order to proceed with the analysis.

First of all the Companies Act applies to all the *Kabushiki Kaisha* (株式会社), and the distinction between listed and unlisted companies is not made, which is typical of the FIEA which applies only to the former. Article 179 of the Companies Act[420] regulates the "Demand for Sale of Shares by Special Controlling Shareholder" (*Tokubetsu Shihai Kabunushi no Kabushiki-to Uritashi Seikyu* – 特別支配株主の株式等売渡請求). If, following the tender offer, the bidder holds (by itself and/or through its 100% direct or indirect subsidiaries) 90% or more of the total number of voting rights, thus becoming a Special Controlling Shareholder, can force all other holders of voting securities and securities conferring the right to voting securities to transfer their securities to it subject to the approval of the board of the target company. Any of the security holders who are dissatisfied with the price offered by the Special Controlling Shareholder are entitled to statutory appraisal rights. This specifically concerns a request that can be made to the court

418 See *infra*.

419 Conflicting opinions saw, on the one hand, the law's potential to oppress minorities and its privatized nature; on the other, an increase in the speed and flexibility of corporate management. KOH A.K. of TAKAHASHI E., *Squeeze-out of Minority Shareholders. The Constitutionality Question*, in *ZJapanR / J.Japan.L.*, 41, 2016, p. 81. The author explains that the debate on the constitutionality is based on Article 29 of the Constitution of Japan (*Nihon-koku kenpō* – 日本国憲法) which guarantees the protection of property rights: in this perspective, shares are the embodiment of shareholders' respective interests in the company, and these membership rights are a variant of rights of ownership. The Supreme Court (*Saikō-Saibansho* – 最高裁判所) reviews the constitutionality of laws relating to property rights according to the following principles, in application of Art. 29(2): the regulation is clearly inconsistent with public welfare or the means of the regulation are unnecessary or irrational for the purposes pursued; to determine the preceding points, the Court "will balance the purpose, necessity, and content of the regulatory measure with the type and nature of the property right to be restricted under the regulatory measure, and the extent of the restriction", p. 83.

420 See para. 4.2.

to determine the price if the shareholders are dissatisfied with the bidder's proposed price[421]. This is based on the German model[422], which provides for judicial proceedings to determine a fair price if the parties are unable to reach an agreement. In details:

> *A shareholder who owns either directly or indirectly 90% or more of a stock company's shares ('special controlling shareholder') may make demand on the company's other [minority] shareholders for the sale of all of their shares for cash consideration (Article 179(1)). When making the demand, the special controlling shareholder must specify the quantum of cash consideration, the time of acquisition of the shares of the shareholders to be squeezed out ('selling shareholders'), and other conditions of acquisition (Article 179-2(1)). The demand must be approved by the directors of the company (or in the case of a company with a board of directors, the board of directors) (Article 179-3(1), (3)). Where approval is given, the company must give notice or public notice to the selling shareholders (Article 179-4, Companies Act; Article 161(2), Book Entry Transfer of Bonds and Shares Act[423]). For the period beginning on the date of notice or public notice and ending six months after the date of acquisition, the company must make available at its registered headquarters for inspection by selling shareholders during business hours a document specifying the special controlling shareholder's identity and other information (Article 179-5, Companies Act). After acquisition of the shares, the company must without delay make available at its registered headquarters for inspection by selling shareholders during business hours a document specifying the number of shares acquired and other information (Article 179-10). The time of notice or public notice to selling shareholders is deemed to be the time of demand for sale (Article 179-4(3)). The date of acquisition is the date specified in the conditions of acquisition (Article 179-9(1)). Selling shareholders may apply for an injunction restraining the acquisition where the demand is in violation of statute or regulation, or where the consideration is significantly inadequate and there is a risk that selling shareholders would be prejudiced (Article 179-7(1)). Selling shareholders may apply for judicial appraisal of the acquisition price during the period beginning twenty days before date of acquisition and ending on the day before date of acquisition (Article 179-8(1)). Shareholders and corporate officers[424] of the company at the date of acquisition may apply for a declaration of nullity of the acquisition within six months after the date of acquisition (Article 846-2)*[425].

If the bidder fails to obtain 90% of the voting rights, but controls more than two-thirds of the total number of voting rights, there are alternative methods of implementing the squeeze-out, pre-existing to

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421 Article 179-8 of the Companies Act.

422 See para. 1.3.2.

423 Law No. 75 of 27 June 2001.

424 This term includes directors, statutory auditors, and other officers.

425 This the translation proposed by KOH A.K. of TAKAHASHI E., *Squeeze-out of Minority Shareholders. The Constitutionality Question*, in *ZJapan*R / *J.Japan.L.*, 41, 2016, cit. pp. 79-80; BOHRER S.D., NODA M., *New Way to Squeeze Out Minority Shareholders in Japan – a Step Forward but a Generation Behind*, in *The Corporate Counselor – Insights into Japanese Corporate Law*, No. 14, 2014, Nishimura & Asahi.

the 2014 squeeze-out amendments[426], that require shareholder approval and a court order, thus becoming more lengthy and complex procedures.

i) According to Articles 180-182 of the Companies Act, share consolidation[427] squeeze-out can take place. This can be implemented by a special resolution of the target's shareholders at a shareholders' meeting, adopted by a two-thirds majority vote of the shareholders present at the meeting. With this scheme the target will conduct the stock consolidation at such a consolidation ratio that the number of shares held by each of the minority shareholders – other than the bidder – is reduced to less than one whole share, i.e., fractional shares. Thereafter, pursuant to the Companies Act, the target shareholders, on behalf of the minority, may sell all such fractional shares to the bidder at the market price, the fairness of which must be endorsed by a court order[428].

ii) Articles 171-174 of the Companies Act regulate the case of call option squeeze-out[429]. Even in this case, implementation is foreseen by means of a special resolution and the target will convert all its shares into class shares subject to a call option by amending its articles of incorporation. The target will exercise such call option and issue new shares of a different class at an exchange ratio so that the number of shares newly issued to each minority shareholder – other than the bidder – in exchange of the existing shares is reduced to less than one whole share, i.e., fractional shares. At this point, as in the previous case of cash consolidation, the target will sell all of such fractional shares to the bidder at the market price, the fairness of which must be endorsed by a court order[430].

The result of both procedures described above is that the bidder will remain the sole shareholder of the company, while minority shareholders will be paid in cash equivalents, with the possibility of appealing to the court if they deem the price unfair.

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[426] Cfr. MATSUNAMI N., BOHRER S.D., *Squeezing Out Minority Shareholders – A New Beginning To An End? (Update)*, in *The Corporate Counselor – Insights into Japanese Corporate Law*, No. 5-2, 2011, Nishimura & Asahi; MATSUNAMI N., BOHRER S.D., *Squeezing Out Minority Shareholders – Who is really being squeezed?*, in *The Corporate Counselor – Insights into Japanese Corporate Law*, No. 5, 2011, Nishimura & Asahi; MATSUNAMI N., BOHRER S.D., *Squeezing Out Minority Shareholders – A New Beginning To An End?*, in *The Corporate Counselor – Insights into Japanese Corporate Law*, No. 1, 2010, Nishimura & Asahi.

[427] 株式の併合。

[428] See https://resourcehub.bakermckenzie.com/en/resources/global-public-ma-guide/asia-pacific/japan/topics/squeeze-out-of-minority-shareholders-after-completion-of-the-takeover and https://www.japaneselawtranslation.go.jp/en/laws/view/4481.

[429] 取得条項付株式。

[430] *Ibidem.*

Ultimately, the squeeze-out can also be achieved with a cash-out reorganization[431]. These operations take place between the bidder and the target with a special resolution by the shareholders of the target or if the bidder is already a Special Controlling Shareholder, with the resolution of the board of directors of the target. In practice, the cash-out reorganization benefited from the 2017 tax reform[432], establishing itself as a widely used squeeze-out methodology, along with the squeeze-out by special controlling shareholder or the squeeze-out by shareholder consolidation, which guarantee a high degree of legal certainty. In contrast, the call option squeeze-out does not enjoy the same level of use.

Despite the doctrinal debate on the squeeze-out regime in relation to Article 179 of the Companies Act, no motion of unconstitutionality has ever been raised. However, there are many interesting insights that could be explored[433]. Indeed, also in the wake of the European rationale, the squeeze-out is a useful means to eliminate minority shareholders, allowing management flexibility and a long-term vision thanks to the speed of decision-making given that, being an owned subsidiary, the company no longer requires decisions to be made by shareholder resolution. There are also savings in costs otherwise associated with shareholder meeting procedures. It is therefore reasonable to assume that the interests of the company as a whole are protected and enhanced by the regulation.

It should be noted that the squeeze-out right only requires board approval and does not call for a shareholder resolution[434]. This is similar to what happens in Italy, where the squeeze-out *ex* art.111 of the TUF is a potestative right held by the controlling shareholder and a shareholders' resolution is not required. What is missing from these models, and which is instead provided for by German law as a general right pursuant to Section 131 of the AktG, is the right of minority shareholders to ask questions at the meeting, where the squeeze-out resolution takes place. Formally, this is a procedural difference, as minority shareholders remain protected in terms of compensation thanks to the ability to challenge the price proposed by the majority shareholder according to the procedures established by their respective laws. However, the difference also takes on a substantial nature, considering that the business landscape of both Italy and Japan is predominantly composed of small and medium-sized businesses, often family-run, for which this would represent a foregone conclusion.

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431 This term includes a variety of methods that provide for corporate reorganization in the Companies Act, including: Articles 748–756 govern the case of merger (合併); Articles 757–768 provide for company split (会社分割); Articles 767–771 govern share exchange (株式交換); finally, Articles 772–775 govern share Transfer (株式移転).

432 Prior to the tax reform implemented in 2017 (for an overview, see https://www.fsa.go.jp/en/news/2018/20180709/2017.pdf), if cash consideration was used in a cash-out reorganization the reorganization was automatically treated as tax-disqualified resulting in a recognition of built-in gain/loss of assets owned by the target.

433 See KOH A.K. of TAKAHASHI E., *Squeeze-out of Minority Shareholders. The Constitutionality Question*, in *ZJapanR / J.Japan.L.*, 41, 2016, p. 83-85.

434 Pursuant to Article 179-3(1), (3) of the Companies Act.

Moreover, the German model does not only provide for the possibility of challenging the squeeze-out price but also for a preliminary technical assessment of the same by an independent expert appointed by the court (*gerichtlich bestellter Prüfer*)[435]. Again, neither Japanese nor Italian law provides for such a provision. Price adequacy is monitored *ex ante* by Consob in Italy and, if necessary, *ex post* through judicial review. In Japan, this is only possible in the event of dissatisfaction. This raises the question of the adequacy of judicial authority – and, in the Italian case, also supervisory authority – to conduct an adequate economic assessment, especially in the case of unlisted companies.

Furthermore, there are three points that Japanese law does not provide. First, a shareholder who acquires control has no disclosure obligation regarding his intention to exercise the squeeze-out. This could result, for example, in the possibility of the shares being sold at a discounted price, as this would not reflect any potential developments resulting from the change of control. The squeeze-out regulations in Japan do not provide a guarantee of the solvency of the controlling shareholder, a risk that therefore falls on minority shareholders[436]. Moreover, in Japanese law, the majority shareholder's right to squeeze out is not counterbalanced by the right to sell out[437] in favour of minority shareholders who wish to sell their shares following the 90% threshold being exceeded and, therefore, the loss of liquidity of the stock – as envisaged by Italy and Germany for example. There are certain cases provided for by law in which minority shareholders can exercise appraisal rights (the right to demand a purchase at a fair price), specifically in the event of a merger, share exchange, or company split[438], but this does not result in an actual regulation dedicated to sell-out.

Finally, Japan's Industrial Competitiveness Enhancement Act, effective since 2018, is worth mentioning. This introduces the possibility for a shareholder, or a consortium of several shareholders, to trigger a cash squeeze-out upon holding 66.2/3% of the outstanding voting rights in a target company, hence the name Enhanced Squeeze-Out Amendments. There is no European equivalent to this instrument, and it is interesting to note a different interpretation of the same regulatory clause to achieve specific objectives. Indeed, this type of squeeze-out fits within an industrial policy rationale, as the operation is conditional on the submission and approval of a business restructuring plan aimed at demonstrating a financial and innovative improvement of the business over the following three years, as well as the submission of a report on the appropriateness of the consideration. The state therefore assumes an active role in filtering

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435 Pursuant to AktG Section 327a et seq.

436 In this regard, Article 5 of the Takeover Directive establishes that the offeror must ensure the availability of the resources necessary to fully pay the consideration, indirectly including the squeeze-out.

437 セル・アウト権。

438 Respectively, pursuant to articles 785, 797, 806 of the Companies Act, available at: https://www.japaneselawtranslation.go.jp/en/laws/view/4482. Essentially, the provisions indicate that a shareholder who opposes the transaction can ask the company to purchase his or her shares at a "fair price," with the possibility of judicial determination of the price in the event of disagreement.

and directing, although it does not participate in the economic evaluation of the price. This constitutes an administrative intervention, using the squeeze-out also as a lever to promote strategic industrial reorganizations[439].

With reference to the rules governing the delisting of companies in Japan, listed companies in Japan may be privatized or delisted by way of a tender offer followed by a squeeze-out of all the remaining shares. Stock exchange rules establish the delisting criteria and whether the implementation of any of the above squeeze-out methods satisfies those delisting criteria. The rules are dictated in the regulations of the stock exchanges, among which the Tokyo Stock Exchange occupies a prominent position, having promulgated the Securities Listing Regulations (*Yūka Shōken Jōjō Kitei* – 有価証券上場規程)[440]. Rule 601, Section 1, Chapter 6 entitled "Delisting", states the delisting criteria for listed domestic companies. Beyond regulatory violations or behaviours that require delisting, there are techniques for voluntary delisting, including those related to the various squeeze-out techniques analysed in paragraphs 13, 16, 17, and 18. In Japan, too, delisting is a phenomenon that is influencing the capital market and is being unequivocally identified[441].

4.3. Final thoughts on the Japanese model. Eastern and Western conceptions

The special controlling shareholder's right to squeeze out minority shareholders, as outlined in Articles 179 et seq. of the Companies Act in Japan, suffers from the absence of a direct counterpart, such as the squeeze-out provided by the Takeover Directive. The literature argues that the model is "clearly biased in favour of majority shareholder interests and fails to give sufficient regard to the interests of minority shareholders expropriated under the regime"[442]. However, this position will ultimately be confirmed or denied by national practice, which will ultimately decide whether to integrate an identical, similar, or completely different instrument to better address the need to safeguard minority shareholders. As discussed at the beginning of this chapter, it is inappropriate to evaluate a regulatory and cultural system as different as Japan's with purely Western logic.

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[439] See BOHRER S.D., TABATA K., *New Method to Squeeze-out Minority Shareholders in Japan – a Twist on an Earlier Approach*, in *The Corporate Counselor – Insights into Japanese Corporate Law*, No. 26, 2018, Nishimura & Asahi.

[440] Available at: https://www.jpx.co.jp/english/rules-participants/rules/regulations/tvdivq0000001vyt-att/listing_regs_20251208.pdf.

[441] Cfr. SPARX ASSET MANAGEMENT, *Increasing Delisting: The New Metabolism of the Japanese Stock Market*, August 2024, available at: https://www.sparx.co.jp/ins/insights/detail/1523.html; TSUTSUMI K., *Japan firms exit Tokyo exchange at record pace in delisting rush*, in The Japan Times, June 19, 2025, available at: https://www.japantimes.co.jp/business/2025/06/19/companies/japan-firms-tse-exit/.

[442] KOH A.K. of TAKAHASHI E., *Squeeze-out of Minority Shareholders. The Constitutionality Question*, in *ZJapanR / J.Japan.L.*, 41, 2016, cit. p. 85.

The framework outlined reveals several similarities as well as notable differences between the EU Takeover Directive model and the squeeze-out regulation in the Japanese Companies Act. There are also differences between individual countries such as Italy and Germany, which, given the scope of the Directive's discretion, continue to have partially aligned regulations, and Japan.

First, a consideration that must be made beforehand is that the different regulatory framework is clearly evident in a comparative analysis. When looking at European Union countries, one must consider the provisions deriving from the EU-level regulation – in this case, the Takeover Directive – but then one must evaluate the manner in which it is implemented in national legal systems and the *ratio* behind this process.

Second, regarding the squeeze-out, this is a tool officially introduced for all EU countries by the Takeover Directive and has therefore been implemented in national law and incorporated into previous legislative acts according to different logics. Taking the Italian case as an example, the squeeze-out of the Takeover Directive was implemented in the TUF, thus in the consolidated law on markets, and concerns the squeeze-out following or resulting from a takeover bid. In the Japanese case, the squeeze-out concerns corporate law and appears in the Companies Act; moreover, it does not presuppose a tender offer[443], making it even more of a structural instrument for ownership reorganization.

Furthermore, it is noteworthy how market demands are incorporated into both legal systems with considerable effort, a characteristic of countries with long-standing and distinctive jurisprudential traditions that must therefore adapt to external pressures without losing their regulatory identity. In Italy, the squeeze-out was introduced in the first version of the TUF in 1998, when takeovers were already a widespread phenomenon throughout Europe and this clause was already included in the UK Companies Act of 1985. In Japan, it was introduced more recently given the typical ownership structures with stable shareholder bases that were difficult to accommodate sudden changes in control and the constitutional issues that preoccupied legislators. Here too, globalization, the pressures of a market increasingly operating through cross-border transactions, and the search for methods that increase corporate value to the benefit of the company have put pressure on the introduction of a tool like the squeeze-out, which responds to new, previously unexisting demands.

Furthermore, the growing trend of delisting occurring in both Italy and Japan, and which has affected the USA and UK, and the growing exposure to M&A transactions, including cross-border ones, will provide clearer evidence of the purposes of delisting themselves and how the regulations relating to takeovers will need to be updated.

[443] Even though the two-step process is very widespread in application.

Conclusion

The project for a European single financial market is today one of the main priorities in Europe. The Capital Markets Union project, launched in 2015, seemed to have stalled until the Savings and Investments Union stepped in to revitalize and strengthen the objectives of integration, innovation, and efficiency in capital markets. This reform is part of a regulatory context torn between a strong push for harmonization and persistent divergences between national laws, which impede the creation of a fully level playing field.

This dissertation examined the regulatory framework of takeover bids with respect to the single financial market project and the delisting issue that is emerging in European markets, focusing on the Italian market of corporate control through an analysis of all 102 public offers made between 2020 and 2025 on ordinary shares.

Regarding the Takeover Directive presented, and the various implementation methods to which it has been subjected in different Member States, what has emerged is that takeover bids are often used as a tool for going private; this occurs primarily through the implementation of right to squeeze-out and obligation to sell-out clauses, thus creating the category of delisting takeover bids. The tendency to exit the market has been vehemently noted, raising the question of how counterproductive this is to the objective of the single market and how regulation can incentivize permanence in the markets.

In Italy, specifically, not only does empirical data reveal an increasingly common choice to delist – 77% of transactions completed between 2020 and 2025 resulted in a company exit from the market – but it is also evident that this choice to use the public tender offer as a tool for going private is associated with a regulatory gap, as the national legal system does not specifically allow pure delisting. The delisting option remains legitimized only by the specific provisions of Articles 133 of the TUF and 2437-*quinques* of the Civil Code or, with extreme generosity, by a joint liberal reading of the above-mentioned provisions that would allow for the admissibility of a shareholders' resolution to implement delisting, with the subsequent possibility of withdrawal by dissenting shareholders. Therefore, from a regulatory perspective, rules aimed at clarifying and improving the existing situation could be envisaged. On the one hand, the introduction of a targeted rule for pure delisting would free the takeover bid from being identified as a substitute instrument; on the other, clauses could be introduced to monitor the motivations behind such a choice, thus supporting the single market objective.

Furthermore, data shows a growing participation of foreign bidders (EU and non-EU) in the national corporate control market, representing approximately 35% of its geographic composition. This suggests a consistent and encouraging trend toward opening the national market system.

Moreover, it will be interesting to analyse how the proposed reform of the TUF will evolve, which in any case entails a revision of the capital market regulatory model and raises an innovative theme: while delisting in itself is not a beneficial phenomenon for incentivizing recourse to the capital market, on the other hand,

investments are being made to develop alternative methods of raising risk capital, such as private equity, for which the reform proposal has created numerous incentives.

In this regard, a comparative analysis of the Japanese model is also thought-provoking. Despite being the world's third most developed market, it lacks a tradition of takeover transactions, and only recently has it gained momentum. This suggests that it is possible to develop the capital market, also with regard to foreign investors, without resorting to the corporate control market. Nonetheless, delisting has also been widely applied in the Japanese market, similarly by resorting to a tender offer followed by a squeeze-out of minority shareholders, suggesting that this trend is not limited to the domestic or European market alone, but is also affecting the real economy of several countries, precisely because of market innovation.

In conclusion, while innovation is desirable and is achieving internationalization goals, the emergence of new investment opportunities seems to be distracting attention from listing. Therefore, a twofold challenge lies ahead: to strongly incentivize the use of the capital market by encouraging listing, improving conditions for permanence, and creating a supportive system for both entry and exit; and to continue supporting the growth of alternative methods of capital collection. The SIU proposal appears to support these aspects.

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