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Dilutive Effects on Capital Increase: Empirical Analysis of Carige Bank Case

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Introduction

Capital increase allow the achievement of one the stock market's fundamental objectives: the raising of risk capital for companies. The latter, with pre-emptive rights, is the main way of raising capital on the Italian secondary market.

During capital increases, with the issue of new shares at a discount price compared to current prices, the pre-emptive right allows shareholder's interest protection through the preservation of shareholding's value.

In recent years, also due to the deterioration of the economic situation, there has been a spread of highly dilutive capital increases, characterized by the issue of new shares at heavily discounted prices, which have generated significant distortions in share prices.

In the dissertation, the objective is to empirically analyze the path that Banca Carige has faced, interpreting judgments of the Courts and behaviors of the stakeholders involved, after the capital increase approved in September 2019, which resulted in an important dilution of the company's shareholdings with consequent loss of control by the Malacalza family.

To provide a wide view of the facts that influenced the Court of Genoa's decisions (November 2021), the thesis is structured in three chapters:

In chapter one, a **theoretical analysis** is carried out deeply analyzing, from an economical and juridical point of view, Joint Stock Companies, the share capital and its main categories, characteristics, uses, and the capital increase process. Finally, the main capital markets used by companies will also be

described, including Equity Capital Markets and Debt Capital Markets. The aim of the chapter is to provide a better understanding of the topics addressed in the case analyzed through a specific theory outlook.

In chapter two, an **empirical analysis** is implemented investigating the external administration and subsequent rescue operation of Banca Carige, in which the majority shareholder, the Malacalza family, chose to protect itself from the capital increase resolution through the instrument of art. 2377, paragraph 4, asking to restore the situation prior to the highly dilutive increase of its share. Delving into this issue, a necessary step will be to examine in detail the capital increase resolution of September 2019, as it was carried out with the exclusion of the option right, pursuant to art. 2441, paragraphs 5 and 6: the analysis of Malacalza's action will therefore pass through the contrast and composition between the company's interest and the interest of the shareholders, looking at the various theories in support, and for a broad view on the issue of new shares according to the price fairness's criterion.

In chapter three, a **benchmark analysis** is conducted through the study of seven Italian Public Companies that have implemented right issue below-par over the last ten years. These operations, also called highly dilutive capital increases, are characterized by a high ratio between the number of shares to be issued and the number of outstanding shares, with a strong difference between the subscription price of the new shares and the market share price before the increase's date. The chapter's objective is to analyze different types of capital increases conducted by Carige Bank's peers, in order to reach highly consistent conclusions.

Chapter 1

1. Share Capital

1.1 Joint-stock Companies

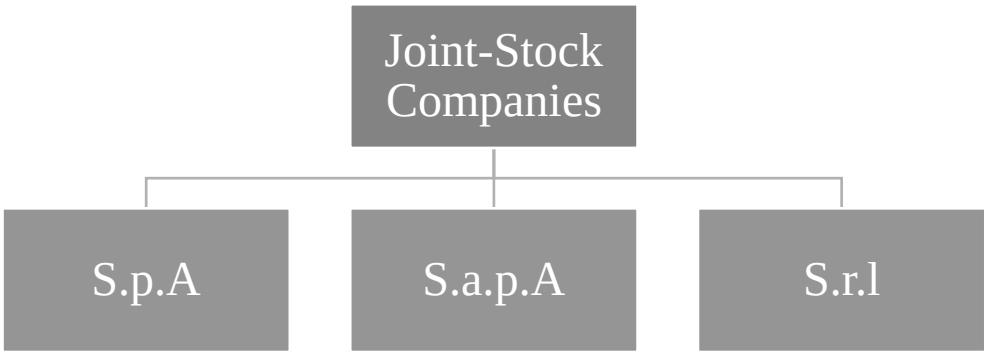
In Italy, joint-stock companies are denominated S.p.A. (joint-stock company), S.a.p.A. (limited partnership limited by shares), S.r.l. (limited liability company) and S.r.l.s. (simplified limited liability company). These are legal forms taken by medium and large-sized companies operating in the various production sectors. In these companies the element of capital has a conceptual and normative prevalence over the subjective element represented by the partners. The participation of shareholders in the share capital can be represented by shares or stake depending on the specific type of company.

The main characteristics of the joint-stock companies are:

- Legal personality and perfect patrimonial autonomy (the company is liable for social obligations only with its own equity). An exception to this is the S.a.p.A., where, for the debts of the company, the limited partners are obliged only within the limits of the share capital subscribed, while the general partners are liable without limitation.
- Limited liability of partners for corporate liabilities: partners are liable for the obligations assumed by the company within the limits of the shares subscribed; in the event of the company's insolvency, creditors cannot claim against the personal assets of individual partners. Obviously, in the different hypothesis in which the shareholder signs guarantee in the loans

of the company, the creditor can claim against the personal assets of the shareholder-guarantor.

- Power of management which is not linked to the status of shareholder: the shareholder can only exercise functions of control and participation in profits and losses, and contribute, with his vote proportional to the shareholding stake, to the choice of directors.
- Shareholders' decisions with majority approach: Shareholders' decisions are taken jointly, with voting rights based on the size of the participation in the share capital.



1.2 Share Capital

Share capital represents the total value of the funds and assets allocated by the shareholders, as risk capital, at the time the company is set up; it is divided into shares, each of equal value. The quotas are assigned to the partners in proportion to the amount paid in by each of them.

Regarding the accounting books, the share capital is shown in the balance sheet, in the liabilities section, as it represents a sort of "debt" of the company towards its shareholders. The Italian Civil Code states that joint stock companies and limited partnerships must have a minimum initial capital of €100,000, while for limited liability companies the initial capital is €10,000 or €1 for a simplified limited liability company.

The share capital has two fundamental purposes: a binding function (as a guarantee for the company's creditors) since it identifies the value of the assets that cannot be misappropriated; an organizational purpose, as a benchmark to periodically assess whether the company has made profits or suffered losses and as an instrument to measure the shareholders' reciprocal positions in the company, both from an administrative nature (right to vote) and from a financial nature (right to profits and liquidation share).

The law allows the shareholders to pay the capital at several stages and not immediately, at the time of incorporation of the company. In any event, for limited companies it is mandatory to pay in at least 25% of the share capital at the time of incorporation of the company. The payments still to be paid in are shown in the balance sheet as a receivable from shareholders. This leads

to a division of the capital into nominal (or subscribed) capital and paid-up capital. Nominal capital is the capital defined in the certificate of constitution and is equal to the product of the number of shares (quotas) subscribed by the shareholders and their nominal value.

The option to provide 25% of the subscribed capital is not allowed for:

- One-person (single shareholder) companies. In this case, in fact, the share capital must always be fully paid up.
- S.r.l. with share capital of less than 10,000 euros (S.r.l.s).

Moreover, in these cases, companies must only make payments in cash (contributions in kind, receivables, etc. are not permitted) and set aside a portion of net income as legal reserve equal to 20% instead of 5% until the reserve itself has reached, together with the capital, the threshold of 10,000 euros.

The share capital can be subject to changes, both upwards and downwards, during the life of a company (for instance, the company can resolve on a capital increase or on a capital reduction); any resolution concerning a change in the share capital must be approved by the extraordinary shareholders' meeting, thus constituting an amendment to the constitution act of the company. The need for a resolution by the extraordinary shareholders' meeting is in line with the function of share capital. In fact, it constitutes a guarantee for the company's creditors, and it is for this reason that the law establishes norms that protect its integrity (for example, it is obligatory to set aside 5% of the year's profits as a reserve until it reaches at least 1/5 of the share capital).

1.3 Types of Share Capital

In the Italian legislation we can identify different types of companies which, depending on the case, require a greater or lesser contribution of capital by the shareholders or limitations to the types of assets contributed.

In Joint-stock Companies (S.p.A.), the status of shareholder is acquired by conferring the funds necessary to enable the company to carry out the predefined economic activity.

- Unless provided differently in the constitution act of the company, contributions must be made in cash (art. 2342, paragraph 1[1]).
- The constitution act may allow the contribution of receivables or assets in kind (art. 2342, paragraph 3)
- Contributions may not include the provision of work or services (art. 2342, paragraph 5)
- Regarding contributions in cash, there are further obligations on the shareholders:
- The obligation to pay 25% of their amount at a credit institution upon the incorporation of the entity.
- The obligation to provide the remaining part of the promised amount at the request of the managers who may demand it at any time following the incorporation of the company.

In Limited Liability Companies (S.r.l.), the size of the shareholdings could be, in the presence of a specific provision in the constitution act, not

[1] Italian Civil Code

proportional to the contributions made (art. 2468, paragraph 2). In fact, the constitution act can establish the assignment of particular rights concerning the administration or the distribution of profits. Finally, all the elements susceptible of economic evaluation can be conferred.

In the case we are going to analyze, Carige Bank represents an unlisted S.p.A. that, using Equity Capital Markets, in 2017 has chosen to sell its shares on the market by listing itself.

Finally, we can distinguish share capital in two main categories: equity share capital, preference share capital.

1.3.1 Equity shares

Represent the company's common stock that are required to be issued by law. They provide shareholders the ability to vote and attend business meetings.

The main advantages are that with Equity Shares, there is no sense of commitment or accountability to pay a fixed dividend rate and can be disseminated without imposing any further charges on a company's assets. Moreover, it is a never-ending source of capital that the company must repay, except for the case of being in the liquidation process. Equity shareholders are the company's true owners, and they have voting rights.

The main disadvantages are that when trading on equity, the company cannot take credit or gain an advantage because only equity shares are offered. Moreover, because equity money cannot be retrieved, there is a risk or obligation associated with overcapitalization. By providing instruction and systematizing themselves, management can overcome obstacles posed by

equity shareholders. Finally, when a company makes more money, it must pay bigger dividends, which leads to a rise in the value of its stock in the market, as well as the possibility of speculation.

1.3.2 Preference share capital

This type of share has priority over equity share capital in terms of dividends and return of the amount invested if the firm goes bankrupt. Preference shareholders do not have the right to vote or attend meetings of the corporation. This tool represents a long-term source of financing for a company. They are treated as shares by the law, yet they have features of both equity and debt. As a result, they're also known as “hybrid finance instruments”. The main characteristics are that the interest is paid at a fixed annual rate but only if the company generates profits high enough to support the dividend payment, and that the share is perpetual. There are several types of preference shares that are used as a source of funding:

Convertible	Convertible shares give to the holder the right to convert it into an ordinary equity share based on some upfront agreed terms and condition.
Redeemable	Are shares that will be redeemed at a future period, or that might be redeemed at a future date at the company's or preference shareholders' discretion. The shares are redeemed at par value or at a premium.

Participating	Have increased dividend rights. In addition to receiving their predetermined dividend, holders of participating preference shares are entitled to a portion of the company's surplus earnings. This additional participation dividend is normally fixed at a proportion of the ordinary shares' dividend.
Cumulative	Entitle their bearer to a set rate of dividend, and if any dividend is not paid on time, the arrears will accumulate it. Prior to any ordinary share dividend being paid to equity owners, preference shareholders must get their dividend arrears. Unless the firm is in significant financial trouble, it is uncommon for such shares to not receive a dividend.
With Callable Option	Company has a right to redeem preference share in between. Such shares will be redeemed at a premium, if redeemed in between.

The main advantage of preference shares is that they could be sell easily to investors that prefers fixed return and safety investments. Moreover, a company is not obliged to pay dividends to the preference shareholders if the profits are not sufficient and could raise capital without dilution of control.

Preference shares are very flexible because it adapts to the needs of the investors, and the company does not risk over-capitalization issues maintaining an elastic capital structure. The main disadvantage of preference shares is that they generally don't have voting rights, and do not participate in the prosperity of the company because of the fixed dividend.

1.3.3 Differences between equity shares and preference shares

Equity Shares	Preference Shares
Company's ordinary common stock	Unique preferred rights over the company's equity shares
No requirement to receive dividends	Every year dividends are paid on preference shares
Voting rights	No voting rights
Voting rights on the company's management	No voting rights in the company's management
Cannot be converted on preference shares	Possible to convert into equity shares
Big, medium, and small investors	Big and medium investors

1.4 Debt Capital Markets (DCM) and Equity Capital Market (ECM)

1.4.1 Debt Capital Markets (DCM)

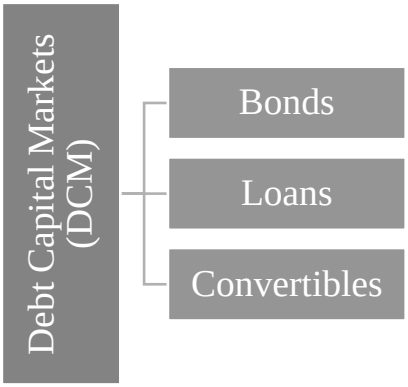
The DCM (Debt capital market) is a spectrum of financial alternatives used for raising money into the market for funding capex plans or investments by corporation. The main instruments used for debt are bonds and loans. There are some instruments in the middle such as the convertible bond. The difference between public bonds and private placement is that in the former case the bond is issued in a public base, while in the other the subscription is reserved to some individuals. In the latter, you can understand easier in advance how many investors will buy the bonds.

However, the public bonds always have some benefits: it is a standardized process and guarantee a faster access to the market. In terms of costs, the public placement has usually a higher cost due to higher discount rate and coupon. This is because in the public placement the price is determined by the bid-ask law, while in the private placement there is a negotiation procedure which allows to lower the overall cost of the financing. In a nutshell, if your priority is market timing you will prefer a public bond, while if you are looking for a lower cost of financing you will prefer the private placement. For what concerns the convertible bond, the underwriter of the latter has the right to convert the bond in shares of the issuer at maturity at a pre-established strike price. However, in some cases we may talk of mandatory convertible bond: the investors have no right but the obligation to convert at maturity.

Convertible bonds usually have a lower coupon since you have a potential higher return by doing the conversion. The loans might have a repayment profile in a bullet way such as the bonds that could be amortized in bullet; the difference is that when we talk about bullet repayment, we mean that the nominal value is repaid at maturity. On the other hand, on the amortized profile the nominal value is repaid every year in a certain portion. Moreover, loans are normally secured, meaning that the cost of a debt security is mainly determined by borrower's rating through the relative degree of credit risk, which is established by the rating agencies and the recovery rate of the transaction. A factor impacting on the credit risk is the company's leverage.

Regarding the recovery rate, the latter is the portion of principal on the defaulted debt that could be recovered. When talking of straight debt, the deal structure might be in several currencies and with several maturities, behind which is embedded the cash flow profile: the goal is to match the asset and liabilities maturities. Therefore, they usually choose long term maturities so to be able of covering it with the generated revenues. These streams of revenues might be clearer in regulated sector, such as utilities, because the price is determined by the government, but harder to predict for private companies cause subject to volatility, which is why they might raise debt with a shorter perspective.

One of the most relevant trends in the market is the use of financial products and services in sustainable projects. In the last years, investors are taking in consideration ESG factors in investment decisions; following this approach the issuer might have some disclosure obligation on sustainable activity. However, the currently arising trend implies that the pricing level will be strictly linked to the ability of the borrower to achieve ESG goals.



1.4.2 Equity Capital Markets (ECM)

Why do a company need to raise capital? It should be used to reduce debt level, or to finance a project or an investment. The equity component might be represented by the issuance of stock in favor of the shareholders of the acquiring entity in case of an M&A transaction. In case of monetization of a stake in a listed subsidiary, it should be do that for raising financing or to focus more on core business in order to reduce the holding discount (discount due to an overly diversified business), which means making sure the company's trading at the closest possible level in line with my net asset value.

More in general, the company could redeploy capital in something else, by taking advantage of a high valuation of my subsidiaries due to their high performance.

Moreover, there are other possible alternative, indeed, a company might issue shares in favor of existing investors (right issues or pre-emptive investors) or in favor of new shareholder (non-pre-emptive capital increase). There may be

constraints for existing shareholders in participating in capital increases; in these cases, they would suffer a capital dilution.

When a company gets first listed, we talk about an IPO. In this context, existing shareholders may keep the majority, and then may decide to place their participation on the market on a secondary placement, named follow-on offering. Another way is represented by the equity-linked securities, which implies the issuance of convertible bonds, or bonds with warrant. Moreover, another instrument is represented by derivative transactions, which represent a tailor-made approach able of protecting investors from price volatility, both downside and upside exposure.

In Italy, most of capital increases are executed as right issues (often highly dilutive). If an investor does not want to take use of her right, then she can send it on the market and monetize it. For what concerns cases in which right issues are excluded, capital increases can only be done up to 20% of the existing share capital. Of course, the transaction must be priced at a level consistent with the market, considering the average price of shares of the previous 6 months. This provision aims at protecting the existing shareholders from an excessive dilution. For what concerns timing, there might be faster and flexible ways, such as the accelerated capital increase, which is done through an undocumented transaction without focus on the marketing and have a very limited involvement of the company management. This capital increase could be executed in maximum 2 weeks.

Moreover, the fully marketed capital increase is based on the offering of Company's shares via open priced bookbuild (non pre-emptive). It could be executed in approximately 3 months, with marketing roadshow in which the company should "sell a story" of itself to the investors.

Finally, there are other ways to sell shares of a subsidiary: companies may want to issue shares at a premium at a certain maturity, and this is done through convertible bonds. A similar aim is achieved through an exchangeable bond, which is a bond converting in shares of a subsidiary of the issuer. They are both monetization tool for issue shares at a premium at a certain maturity, but the entity to which the shares obtained are referred to is different.

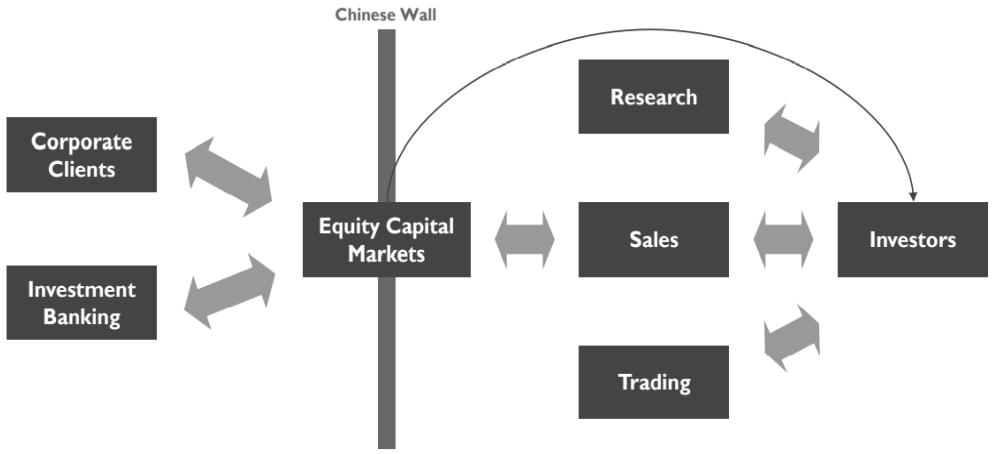
In the following points, the product range of the Equity Capital Markets will be explained:

- ***IPO:*** it is based on the sale of a private company to institutional investors through the listing on the market. During this process there is no existing reference price and the valuation methodology chosen, and the research credibility are key in during the preparation process. Marketing strategy including pre-marketing phase and roadshow are undertaken.
- ***Follow-on Offering:*** consist of the sale of share to investors (including the capital increase). The stocks of a company are already listed and

traded on a recognized stock exchange, this led to an easier pricing decision due to the existence of a reference price. The marketing strategies range between roadshow and complete pre-marketing.

- ***Equity-linked securities:*** the sale of securities is contingent and linked to a fixed income or preferred security. It is a highly tailored and structured solution. The marketing process length is about 1 or 2 weeks.
- ***Derivative transaction:*** structured products used to hedge or dispose of stake discreetly. It is a tailor-made solution with material tax advantages possible, but only possible on listed stock.

In a nutshell, Equity Capital Markets serves as a link between issuers and investors, facilitating communication and activity between our corporate and institutional customers.



2. Capital Increase

2.1 What is a Capital Increase?

Capital increases achieve one of the fundamental goals of a stock market: collection of risk capital for companies. It is for this reason that such operations are given a decisive role in corporate finance.

Almost all US recapitalizations are carried out by public offering, which in no way means that pre-emptive capital increase are prohibited in the United States; what is certain is that the elimination of pre-emptive right, when applicable, is normally permitted by most state laws through an amendment to the bylaws approved by the shareholders' meeting. In Europe, on the other hand, the majority of recapitalization operations are pre-emptive capital increase.

The paid issued capital, in a limited liability company, is a "species del genus" of amendments to the constitution act, which the legislator regulates in Section V of Chapter VII of the Italian Civil Code. Generally speaking, amendments to the constitution act could be defined as all those variations, subsequent to the constitution of a limited company, which take the form of the introduction of new clauses, the modification of those originally agreed. It is also possible to distinguish between modifications in the strict sense (so-called modifications of the objective content) and modifications in the broad sense (so-called modifications of the subjective content) of the memorandum of association.

The strict-sense modification are amendments relating to the "objective" content of the company contract (i.e. of the organizational structure of the company) which for their adoption require a shareholders' meeting resolution subject to the control by the notary and to the deposition in companies register; the broad-sense modification are amendments relating to subjective elements of the company contract (i.e. changes related to the identification data of the shareholders or to the amount of their shareholdings) and are not subject to the procedure required for amendments to the memorandum of association.

The operation of increasing the share capital against payment is an operation that belongs to the so-called strict-sense type of modification of the constitution act and is therefore subject to the regulation provided by the art. 2480[2].

A capital increase implies a modification of the constitution act and, therefore, it must be agreed in an extraordinary meeting, regularly constituted "with the presence of as many shareholders equal to at least half of the share capital or the higher percentage provided by the bylaws and approved by the favorable vote of at least two thirds of the capital represented at the meeting".

On second convocation, the quorum is reduced to one third of the share capital, and further convocations with a constitutive quorum of one fifth of

[2] Art. 2480: «Amendments to the Constitution Act shall be resolved by the General Meeting of Shareholders in accordance with Article 2479 bis. The report shall be drawn up by a notary and Article 2436 shall apply». The article states that decisions to amend the Constitution Act must be taken by the shareholders' meeting in accordance with art. 2479-bis.

the share capital are envisaged only for companies that have access to the risk capital market.

The law also provides that the capital increase "may not be carried out until the previously issued shares are fully paid up" and that limited voting shares "may not be issued for more than half the share capital".

2.2 Types of Capital Increase

It is important to briefly describe the various types of capital increase, which will be dealt with later in this section and in the study of the practical case, highlighting the more strictly economic and financial aspects:

- ***paid capital increase:*** this is the classic form of capital increase, the one whose regulatory aspects have also been studied above, which provides the issue of new shares, of the categories already existing or through the creation of new categories, at a value that normally also includes a share premium. The incomes from the latter are accrued in a specific fund;
- ***free capital increase:*** can be carried out through the free issue of new shares or an increase in the nominal value of existing shares, allocating available reserves and/or special funds to share capital;
- ***mixed capital increase***: is the simple combination of a paid capital increase and a free capital increase;
- ***delegated capital increase:*** this is a particular way of carrying out the capital increase, which basically consists in the delegation by the extraordinary shareholders' meeting to the directors of the power to "increase the capital one or more times, up to a determined amount and for a maximum period of five years from the date of the resolution".
- ***capital increase with issue of convertible bonds or warrants***: when the shareholders' meeting resolves to issue convertible bonds, it must also resolve to increase the capital by an amount corresponding to the nominal value of the shares to be allocated. The increase is actually only statutory because, even if not all the bonds will actually be converted into shares,

the issuing company must conform its structure to the hypothesis that all the subscribers of convertible bonds decide to convert them into shares.

2.3 Types of Emission

Newly issued shares can be distributed in different ways, in one of the four forms mentioned below:

- ***pre-emptive offering***: this occurs when the new shares are offered to the old shareholders in proportion to those already held;
- ***public offering***: it takes place in cases where the right of option is excluded or limited, and is particularly important in IPOs, when companies need to acquire the minimum free float necessary and open up, therefore, to the market;
- ***assignment****:* takes place when the new securities are assigned to predetermined parties, as occurs in capital increases through contributions in kind or in those carried out following extraordinary merger or demerger operations.

2.3.1 Public Offering

The public offering is the instrument through which a company offers investors newly issued shares following a capital increase operation. If the latter is aimed at listing, it is called an "Initial Public Offering" (IPO). This offer can take on different configurations depending on the target of the offer itself:

- ***public offers***, intended for the general public of investors;
- ***institutional offerings***, addressed only to institutional investors;
- ***private placements***, reserved for a limited number of selected parties.

If the target audience of the public offer are retail investors, a solicitation of investment is triggered; therefore, therefore the issuing company must give prior notice to Consob, delivering at the same time the prospectus of the operation and carrying out this operation in compliance with the obligations provided for by the "Testo Unico della Finanza" (Legislative Decree 58/1998). In the framework of a retail target investors, tranches reserved to special categories of investors (for example, company employees, or other categories of stakeholders in the company) may be encouraged.

In the other two types of offers, on the other hand, the company is not obliged to comply with particularly restrictive rules in terms of disclosure and transparency since it is supposed that the categories of receivers need less protection because of their expertise. The activity of placement among the public and institutional investors can only be carried out by authorized intermediaries, therefore, if the targets of the public offer are these categories, the company will have to avail itself of the help of a global coordinator.

2.3.2 Pre-emptive Capital Increase

Newly issued shares and convertible bonds must be offered as options to shareholders in proportion to the number of shares held based on the exchange ratio. This rule, set out in article 2441 of the Italian Civil Code, protects the interest of the shareholder in maintaining his share of the company's capital. This interest is particularly relevant in the Italian entrepreneurial system, which is characterized by a vast network of small and medium-sized enterprises transmitted from father to son. This reality is, in many ways, the backbone of the Italian productive structure. The behavior of

American companies is different, whose main objective is to "become big" and arrive at the stock market listing.

It is no coincidence that the venture capital market is much more developed in America than in Italy, where companies often remain small, because the majority shareholder has more interest in maintaining control of the company than in listing it. Returning to the regulatory aspects, it has been said that the increase in capital allows the shareholders to maintain their share in the capital of the company unchanged, even though there are some mandatory exceptions.

First of all, there is an exclusion of pre-emptive rights for newly issued shares that have to be freed up by means of a contribution in kind (provided that this has been approved by the Shareholders' Meeting), in this case the shares are due to the contributing shareholder. However, for the greater protection of the excluded shareholders, the directors must include a report in the proposal for the exclusion of the option right, which must explain the reasons for this operation, and, in any case, the criteria adopted for determining the price. This report must be made available in advance to the Board of Statutory Auditors and, in the case of listed companies, also to the auditing firm, so that they can express their opinion on the fairness of the share issue price. All documents must be available at the company's registered office during the fifteen days before the meeting.

"The resolution determines the issue price of the shares on the basis of the value of shareholders' equity, taking into account, for listed companies, also the performance of the share price in the last six months" it being clear that

"in companies with shares listed on regulated markets, the articles of association may exclude the right within the limit of ten percent of the pre-existing capital, on condition that the issue price corresponds to the market value"[3].

This rule aims at realizing the strategic interests of the company, providing it with a certain degree of flexibility. "The pre-emptive right may still be excluded limited to one-fourth of the newly issued shares (or to a greater extent if approved by the vote of as many shareholders as represent more than half of the share capital) if the shares are offered for subscription to employees of the company or its subsidiaries." Finally, an even more general clause provides that the pre-emptive right may be excluded or limited, by a resolution approved by as many shareholders as represent more than half of the share capital, if the interest of the company so requires, which normally occurs in two circumstances:

- when the company wants to be listed on the Stock Exchange and therefore must have the minimum free float required;
- in order to include a new shareholder in the shareholding structure, whose entry is strategically important for the company;

If these circumstances do not exist, the issue is offered as an option to shareholders, who have thirty days from the publication of the offer. For listed companies, whose regulations are included in the T.U.F. (Testo Unico della Finanza), this term is reduced to fifteen days[4].

[3] Art. 2441 Italian Civil Code
[4] Art. 134, D. Lgs. n. 58 del 24/02/98 - T.U.F

2.4 Documents Needed

The control of legality, which before the reform of company law was the exclusive responsibility of the Court, is now carried out in the first instance by the notary, who is also responsible for drawing up the appropriate reports. In fact, if the notary does not consider that the conditions laid down by law have been fulfilled, he must give timely notice, and in any case no later than thirty days, to the administrators, who may:

i. to call the Shareholders' Meeting for the appropriate measures, so as to remove, replace or integrate those parts of the resolution assessed as not complying with the law and therefore assessed by the Notary as being in contrast with the registration.
ii. if they do not agree with the Notary's negative assessment, to appeal to the Court by filing a petition for homologation.

In the latter case the Court, having carried out a legality check and, if necessary, ascertained that the conditions required by law have been met, orders the registration of the shareholders' meeting resolution in the Company Register by means of a decree that is subject to appeal. The notary who drew up the minutes of the resolution to amend the deed of incorporation, having checked that the conditions required by law have been met, must also deposit the shareholders' resolution with the Company Register within thirty days for subsequent registration; the same requirement must also be met following the Court's approval.

Registration in the Companies Register will only take place following the formal check that the same Office will carry out on the documentation produced by the Notary; moreover, such registration will render the resolution modifying the deed of incorporation adopted by the shareholders fully effective.

Therefore, prior to registration in the Companies Register, the resolution is temporarily ineffective and will also become definitively ineffective either in the event that the Court rejects the application for homologation made by the directors, or if the shareholders' meeting, convened for this purpose by the directors, has not adopted the initiatives aimed at removing the causes preventing registration highlighted by the control of legality carried out by the notary, within the term provided for by law.

3. Dilutive Effect of a Capital Increase

3.1 Understanding Dilutive Effect

Starting from 2009, the worsening of the subprime financial crisis began to show its effects also on European markets, where the volatility of share prices made it extremely difficult for companies to raise new risk capital. Motivated by the need to deal with this market scenario, a number of Italian listed companies began to implement capital increases with pre-emptive rights, characterized, as we have seen:

- high ratio between the number of newly issued shares and the number of shares already in circulation
- strong discount on the subscription price compared to the market value recorded during the last trading day before the offer.

The specific features of these capital increases entail for the shareholders who do not intend to exercise the option rights granted by art. 2441, first paragraph of the Italian Civil Code a significant weakening of their stake in the company's capital and equity: hence, among other things, the qualification of these transactions as "dilutive".

In this regard, it is usual to measure the intensity with which the dilutive effects are manifested on the shareholding through the so-called K factor, or dilution coefficient. The latter, expresses the ratio between the theoretical value of the share after the implementation of the capital increase (so-called theoretical ex-right share price) and the price recorded on the trading day on

which the final conditions of the transaction are disclosed to the market (so-called cum price): in other words, the K factor represents the ratio between the price that the shares should assume after the implementation of the capital increase - i.e. following the occurrence of the dilutive effects connected with the transaction - and the current price. This coefficient, calculated with reference to the issue price of the new shares and to the total number of securities offered, is inversely proportional to the "degree of dilution" resulting from the issue of the new shares.

Due to the ability of the K factor to measure the dilutive effects connected with each recapitalization operation, operations whose K factor is less than or equal to 0.3 constitute highly dilutive capital increases - and are therefore subject to the special regulations reserved for them[5]. The phenomenon of dilutive capital increases is constantly growing, thus demonstrating the extreme relevance of this phenomenon within the Italian financial system. From 2009 to date, many hyper dilutive operations have been carried out, which have also involved:

- an average dilution of the shareholding of 90.9%[6], with an average subscription ratio of thirty new shares for every security previously held
- an average discount of 88.8% on the issue price of the new shares compared with the last cum price.

The peculiar characteristics of hyper dilutive capital increases (the significant quantity of new shares issued and the discount at which they are offered for

[5] art. 1.3 of the "Regolamento dei mercati organizzati e gestiti da Borsa italiana"
[6] Calculated as the ratio of the number of shares before and after the execution of the capital increase.

subscription) lead to a profound change in the financial "composition" of the investment initially made by the shareholder. As in fact happens in every capital increase with option rights, on the first day of the offer period, the shares begin to be quoted ex (= without) rights, since the latter have been " separated " from the share and assigned to the shareholders: these instruments therefore experience a corresponding reduction in their value, the extent of which is linked to the intensity with which the above-mentioned dilutive effects occur.

The lower value of the shares should, however, be compensated for by the assignment to shareholders of the related option rights, the theoretical value of which is calculated precisely as the difference between the last price recorded by the shares before the start of the capital increase and the theoretical ex-right share price.

3.1.1 Anomalies in the formation of market prices

All in all, the creation of an efficient market for pre-emptive rights, which allows shareholders to sell these financial instruments at a price close to their fair value, becomes a necessary precondition for ensuring effective shareholder protection, protecting the capital value of their investment. In these operations, however, throughout the period of the offer of the new shares, the Supervisory Authority has found frequent anomalies in the formation of the market prices of the shares and of the option rights highlighting, on several occasions, the need to prepare adequate regulation of the matter, in order to eliminate these distorting effects connected with the hyper-dilutive operations of capital increase.

As a result of a complicated procedure, Consob ordered the introduction of some technical amendments to the Regulations of markets organized and managed by Borsa Italiana in those sections that deal with the execution of capital increases with pre-emptive rights.

From a different perspective, comparing the average performance recorded by companies that have deliberated a capital increase under normal conditions with that obtained by companies that have, instead, carried out hyper diluting increases, it emerges that the latter have had returns that are systematically and significantly worse than the former, also recording higher levels of indebtedness and lower profitability ratios.

Nevertheless, it can be seen that all hyper dilutive capital increases have been almost fully subscribed: this leads to the question of the reasons which may have encouraged shareholders to invest further resources in operations which, from a financial viewpoint, can be considered "loss-making" investments.

As already mentioned, in such operations, during the period of offering of the new shares, there are frequent anomalies in the trading of the shares, which are traded at a price much higher than their theoretical value, only to realign with it during the last two trading days. These anomalies in the formation of prices seem to be caused by various factors, due to the interaction of certain technical rules on the functioning of the markets with the typical characteristics of hyper dilutive capital increases. In this regard, it should be pointed out that, at the end of the last open market day before the beginning of the offer period, Borsa Italiana decides on the admission to trading of the

option rights and consequently calculates the theoretical price of the ex-right shares.

At the same time, Borsa Italiana also makes all adjustments to the economic and regulatory conditions of derivative financial instruments that have as their underlying the shares of the company that has approved the capital increase, modifying - according to the K coefficient - the price and the number of underlying shares. In the event that the security is also part of a stock exchange index, the manager is required to modify its composition. However, in line with international best practice, the new shares are issued by the company and delivered to the shareholders who have subscribed to them only at the end of the offer period, which usually lasts three weeks.

The described technical methods with which recapitalization operations with option rights are managed, combined with the highly dilutive effects that characterize some of them, seem to be at the origin of an anomalous increase in the demand for shares during recapitalization operations. There are several causes that may give rise to this unusual phenomenon. Frequent, first of all, is the reference to the lower unit value of the securities already in circulation, which makes it necessary, in order to invest the same sum, to purchase a considerably greater number of securities, thus artificially increasing the demand for shares (artificial since it derives from an operation on shares that is "neutral" with respect to their value).

These anomalies are also usually attributed to the cognitive limits of retail investors, who are unable to fully grasp the dynamics that characterize these operations, thus behaving in an often-irrational manner: significantly, during

the execution of hyper dilutive capital increases, Consob noted a reduction in the trading activity of institutional investors, compensated, however, by a strong increase in transactions between retail investors. Certainly, speculation too - especially given the repetitiveness and relative predictability of such anomalies in price formation - contributes to aggravating the distorting effects generated by the execution of hyper dilutive capital increases.

It has also been empirically demonstrated that there is a reciprocal and damaging influence between the dynamics of the derivatives market and share prices. In fact, it should be recalled that the Italian Stock Exchange adjusts the price of option contracts and the number of shares underlying them before the start of the offer period, thus forcing the seller of a call option to deliver to the buyer who requests it a significantly higher number of shares, calculated as if the capital increase had already been fully executed. All these factors combine to create an abnormal increase in the demand for shares. However, since newly issued securities are delivered to subscribers only at the end of the offer period, the number of shares available on the market is likely to be extremely limited during the offer period: this leads to a sharp contraction in supply, which in turn causes an artificial rise in share prices.

The theoretical analysis we have carried out so far, leads to an important conclusion, namely that the described market dynamics, combined with the typical features of hyper dilutive capital increases, entail an "emptying" - in fact - of the content and function of the option right, at least intended as an instrument to protect the patrimonial interest of shareholders in keeping unchanged the extent of their shareholding.

3.2 Rolling Method

Starting on December 2016, extremely dilutive rights offerings initiated by Italian stock issuers listed on Borsa Italiana's regulated markets will be managed using a new rolling model.

Following a series of consultations, Consob endorsed the implementation of the rolling model with the goal of minimizing price anomalies on the affected shares during highly dilutive rights offerings. From 2009 to 2016, price discrepancies occurred in all major highly dilutive rights transactions.

The rolling solution consists in making the new shares resulting from the exercise of option rights available on each day of the offer period, rather than only at the end of it. This aimed at allowing arbitrage between the shares and the pre-emptive rights during the pre-emptive period. In particular, in the presence of an unusual upward trend in the price of the ex-right shares, the arbitrageur should be able to:

i. buy the option rights;
ii. sell the shares; the sale of the shares makes it possible to realign the market price with the theoretical value, thus resolving price anomalies;
iii. exercise the rights and receive the newly issued shares;
iv. settle the sales made with the newly issued shares.

Arbitrage activity is already carried out in the last three days of the offer period and empirical experience shows that it has proved very effective in resolving price anomalies, bringing the market price back into line with the theoretical value. Among other things, arbitrage activity similar to that

underlying the rolling hypothesis is already carried out by operators with reference to American-style call options. The main difference between the two lies in the fact that, with the rolling model, the sales made would be settled with the new shares resulting from the exercise of the option rights, whereas in the case of call options, the sales must be settled with shares that have already been issued.

The sale of shares in the market made by the arbitrageur on the first day of the offer period enables the adjustment of the share price to correct values. The possibility of receiving newly issued securities during the offer period eliminates the need to use the securities loan market, which, in the case of a highly dilutive increase, is not able to cope with the enormous increase in demand. The rolling model represents therefore the more effective solution to the problem and is indeed the only one potentially able to resolve completely the anomalies of price. As a result of the theoretical research conducted, however, five disadvantages have been identified that penalize the rolling solution, including:

- implementation costs;
- implementation times;
- doubts as to the possibility of carrying out arbitrage activity on the first day of the option period;
- legal problems regarding disclosure to shareholders;
- misalignment with European standards on corporate actions.

In a nutshell, the main steps of this new method are:

i. The concerned issuer must notify the parameters of the capital increase two working days prior to the start of the rights issuance.

ii. Borsa Italiana determines whether the rights issuance must be considered substantially dilutive based on objective criteria established by Consob and stated in "Borsa Italiana's Market Rules".

iii. If the rights issue is highly dilutive, Borsa Italiana notifies the market with a Written statement that the rights issue will be handled using the rolling model; if the rights issue is not highly dilutive, the capital increase is controlled using the standard model (not rolling); Consob, shortly before the start of the highly dilutive rights issue, publishes a specific Warning on its website, whereby it announces the imminent launch of the highly dilutive rights issue to be managed with the rolling model;

iv. Consob issues a special Warning on its website shortly before the commencement of the highly dilutive rights issue, in which it announces the impending start of the highly dilutive rights issue to be handled using the rolling model;

v. Starting on the third day of the capital increase, it is possible to exercise the subscription rights in each day of the capital increase; the newly issued shares resulting from such "early" exercise are made immediately available; the early exercise must be carried out in accordance with the procedures and time limits set out, as well as the contractual conditions agreed on a case-by-case basis.

vi. As stated in Consob Communication[7], the early delivery of newly issued shares is intended to allow arbitrage activity among shares and subscription rights beginning during the first day of the rights issue; as a result, the arbitrage activity should reduce the risk of price anomalies.

vii. Subscription rights can also be exercised in the traditional manner, with the distribution of newly issued shares at the conclusion of the rights issue.

Finally, it is important to remark that only rights issues are subject to the rolling model. The latter is never used for other types of capital increases (for example, bond conversions or capital increases without the issuance of subscription rights).

[7] no. 88305 of 5 October 2016

Chapter 2

1. Carige Bank Overview

1.1 Introduction

Banca Carige, also known as Cassa di Risparmio di Genova e Imperia, was founded in 1846 by Royal Decree of King Carlo Alberto but began its banking activities separate from the social activities of the Cassa di Risparmio in 1991, following the privatization of the institution, through the separation of the banking business into the newly established Banca Carige S.p.A.. In 1992, together with Columbus Leasing, Factoring and Domestic, it formed the Carige Multifunctional Group, becoming in 1994 a universal bank, operating in the short, medium and long term. In 1995 it was listed on the stock exchange and the group grew further: in 2000 it acquired Cassa di Risparmio di Savona S.p.a and Banca del Monte di Lucca S.p.a, between 2000 and 2002 it bought 124 branches from other banks and in 2004 it acquired Cassa di Risparmio di Carrara S.p.a and Banca Cesare Ponti[8]. In 2000 and then in 2003, Giovanni Berneschi, who had been at Carige since 1957, became first Managing Director and then Chairman[9], thus beginning a new era for the bank: under his management, Carige acquired a large number of new branches and, above all, began to operate in the insurance sector.

[8] Il Gruppo - Gruppo Banca Carige (gruppocarige.it)
[9] https://www.lastampa.it/economia/2014/05/23/news/la-caduta-di-giovanni-berneschi-1.35757338

It will be precisely the latter that will negatively affect the overall management of Carige both economically and legally, effects that propagate their consequences still on the current management. In 2015, the negative effects of the management of the insurance sector and of the credit portfolio were felt[10], forcing Fondazione Carige to dilute its participation by 40%: the Malacalza family entered the capital of Banca Carige with Malacalza Investments, a company owned by the industrialists originally from Bobbio. The Malacalza family concluded a preliminary contract with the Carige Foundation, acquiring from the latter a 10.5% stake in the bank's capital for 66.19 million euros, at a price of 0.062 euros per share[11].

Thus began the management of the Malacalza family, whose face was Vittorio Malacalza, a central figure in recent vicissitudes. The shareholding increases further, going from 14.9% to 17.6%, and is added to over time in various capital increases carried out[12]. Regarding the stability situation of the Ligurian intermediary, the family of investors is optimistic and confident, for example declaring at the time of the resolution of the capital increase in March 2016: "the concrete implementation of the restructuring measures and actions identified by the management of the subsidiary in the update of the strategic plan 2016-2020, of February 28, 2017 "may" allow in the foreseeable future the removal of the factors that led to the loss of value, determining its

[10] Critical issues that emerged following investigations carried out by Bankitalia: https://www.wallstreetitalia.com/stress-test-equita-bocciate-non-solo-mps-e-banca-carige/
[11] https://www.adnkronos.com/soldi/finanza/2015/03/02/malacalza-entra-banca-carige-rileva-dalla-fondazione_UdJOsdGr8Jw4h4479HC39J.htm
[12] We refer to an increase of 560 million euros in March 2016. This results in a series of investments by the Malacalza in the bank up to an amount of 260 million as of March 2016: https://it.businessinsider.com/quanto-ha-guadagnato-e-perso-la-famiglia-malacalza-tra-lacciaio-pirelli-e-banca-carige/

reabsorption". Meanwhile, for the choices in the insurance sector, the lack of confidence in the previous directors also entails a change of direction at top management, with the appointment of Tesauro as chairman and Bastianini (later Fiorentino) in the role of managing director.

1.2 Crisis and external administration

The deterioration of relations between Tesauro, who then resigned, and Fiorentino, the new CEO, marked another period of uncertainty in Carige: the main event was the administrator's visit to the ECB to communicate the situation in which the institution finds itself. The institution will order the continuation of the recovery plan and the fulfilment of the prefixed agenda; but this is not enough to stabilize the situation of Carige that - after a series of notable resignations among the various directors - sees the Malacalza's investment suffer a loss: "The earthquake [...] at the moment is costing 220 million and has almost "burned" the capital gain of 237.5 million euro collected last year with the sale of 6.98% of Pirelli".

The forfeiture of the entire board of directors and the attainment of shares equal to 23.9%, finally allow Malacalza[13] to consolidate control in the board, with the new figures of Innocenzi as managing director and Modiano as president. The two adopted a recovery plan amounting to 400 million euros, through the involvement of FITD[14]. Malacalza's abstention from the vote on 22 December

[13] With the appointment by the Shareholders' Meeting by an absolute majority of 52.68%, which saw the triumph of the majority list proposed by Malacalza
[14] Fondo Interbancario di Tutela dei Depositi

makes it impossible to reach the necessary quorum, with only 41% of the votes present, indicating Modiano's and Innocenzi's[15] opposition to the operation: this throws the bank into a situation of further difficulty and the ECB orders the receivership, placing Carige in extraordinary administration. The ECB appoints Pietro Modiano, Fabio Innocenzi and Raffaele Lener as extraordinary commissioners and we have the composition of a Supervisory Committee; furthermore, Consob orders the suspension of the listing of Carige shares on the stock exchange as of 2 January 2019: the economic picture therefore appears particularly critical[16].

[15] https://www.ilsole24ore.com/art/carige-malacalza-si-astiene-salta-l-aumento-capitale-400-milioni-AEDylR4G

[16] Commissioner Innocenzi describes the situation as follows: since January 2014, the bank has lost 98.3% of the approximately 2.2 billion in recapitalizations made with the three capital increases of 850, 800 and 560 million respectively

1.3 The resolution of September 2019 – 2019/2023 Strategic Plan.

The government then issues Law Decree 1/2019 (so-called "Salva Carige Decree) that: in Chapter I, regulates the concession of the State guarantee on the newly issued liabilities of Banca Carige S.p.A. and on the financings granted to the same by the Bank of Italy to face serious liquidity crises (emergency liquidity assistance - ELA); in Chapter II, it authorizes the Ministry of Economy and Finance (MEF) to subscribe or purchase shares of Banca Carige S.p.A., defining the modalities of such interventions; in Chapter III, it establishes appropriate financial resources (1.3 billion intended to cover the charges deriving from the share subscription operations carried out to strengthen capital, up to a maximum of 1 billion, moreover it establishes the appropriate financial resources (1.3 billion euros) to cover charges deriving from share subscription transactions carried out to strengthen capital up to a maximum of 1 billion euros and from guarantees granted by the State on newly issued liabilities and on the provision of emergency liquidity assistance to Banca Carige S.p.A.[17].

It thus looks very similar to Decree Law 237/2016, adopted by the Gentiloni government to rescue Monte dei Paschi di Siena[18]. Inside the bank, however, the commissioners design the so-called Strategic Plan 2019/2023, entitled "Let's take back the future", which, in compliance with the ECB supervisory

[17] https://temi.camera.it/leg18/provvedimento/il-decreto-legge-sul-risanamento-di-banca-carige.html
[18] https://www.ilsole24ore.com/art/carige-decreto-lega-m5s-fotocopia-quello-gentiloni-garanzie-statali-3-miliardi-bond-AEqmzUBH

guidelines, outlines the various steps necessary to restore Carige to the stability it seeks. The plan is divided into three phases:

i. strengthening the capital structure and endowment in 2019;
ii. achievement of a balanced budget in 2020, based on short-term commercial/operating levers;
iii. return to profitability from 2021, building on the recovery of previous years.

Focusing on the first phase, capital strengthening, an essential step is the capital increase (in 2018 planned for an original amount of € 400 million) defined, at the time of the operation, in the range of € 630 million.

With regard to the modalities, an initial attempt to intervene was made with the investment fund of the US company BlackRock: the fund then did not go ahead with the operation, due to the decision of the investment team, mainly due to the return of the rescue operation[19]; the doubt mainly revolved around the complexity of the operation, but the actual reasons for the withdrawal of the offer were not clarified. Given the failure of the operation, the extraordinary commissioners adopted another strategy, with the Voluntary Intervention Scheme (SVI) of the Interbank Deposit Protection Fund (FITD) and Cassa Centrale Banca (CCB).

The plan outlined in this way for the capital strengthening, again increased to 700 million Euros, sees the intervention of these two important players, towards the recapitalization of Carige, following "4 tranches":

[19] https://www.ilsole24ore.com/art/carige-perche-cordata-blackrock-si-e-dissolta-pochi-metri-traguardo-ACXYcBB

Issue of 313,200,000,000 ordinary shares, at a total price of € 313,200,000, to be allocated to the Voluntary Intervention Scheme of the Interbank Deposit Protection Fund, to be released by offsetting the credit deriving from the subordinated bonds denominated "Banca Carige S.p.A. 2018-2028 Tasso Fisso Tier II" held by the same for a corresponding nominal amount;

Issue of 63,000,000,000 ordinary shares, at a total price of € 63,000,000, to Cassa Centrale Bank;

Issue of 85,000,000,000 ordinary shares, at a total price of Euro 85,000,000, to be offered for subscription and in pre-emption to those shareholders (ordinary and savings) of the Bank prior to the launch of the capital increase, in proportion to the percentage of capital held prior to the launch of the offer, with the right to also subscribe any shares not subscribed by other shareholders;

Issue of 238,800,000,000 ordinary shares, at a total price of € 238,800,000, destined for the Interbank Deposit Protection Fund.

On September 2019, an Extraordinary Shareholders' Meeting is convened with as its agenda the resolution to increase the share capital, with the exclusion of shareholders' option rights pursuant to Article 2441, paragraphs 5 and 6, and also the issue and free assignment of 21,250,000,000 warrants to Carige S.p.A. shareholders, other than SVI, FITD and CCB, who have subscribed to shares following the issue referred to in point iii) above, at a ratio of one warrant for every four shares subscribed.

In order to stimulate greater participation and maintain shareholders' equity without excessive dilution, it is envisaged, following an agreement with SVI - FITD, that in the event of full execution of the capital increase and successful completion of the Bank's overall capital strengthening operation, SVI would make available to the Bank's shareholders no. 10,000,000,000 (ten billion) CARIGE shares subscribed by it (for a total value of € 10 million based on the issue price of the Capital Increase of € 0.001 for each new share of the Bank) (the "Free Shares") to be allocated free of charge to shareholders.

During the resolution, the plan was successful, also thanks to the absence of Malacalza, obtaining the approval of 91.04% of those present (equal to 43.39% of the Share Capital): SVI - FITD and CCB, now holders of stakes in Carige, holding 79.9% and 8.34% respectively, against a dilution of the Malacalza stake to around 2%[20].

On January 2020, the penultimate day for challenging the resolution, Malacalza announced that it had filed a claim with the Court of Milan for damages, pursuant to art. 2377, paragraph 441, in the amount of € 482 million, against Carige, FITD and CCB. The reasons given are[21]:

i. The exclusion of shareholders' option rights pursuant to Article 2441, paragraph 5, in the capital increase resolution of September 2019;
ii. The violation of the principle of accounting parity in the determination of the issue price of the new ordinary shares;

[20] http://www.ansa.it/liguria/notizie/2020/01/16/carige-causa-malacalza-da-480-mln-anche-a-fitd-e-ccb_e9984a37-7de8-4c7d-a4f5-a7ae3dcd3a
[21] https://www.ilsecoloxix.it/economia/2020/01/17/news/carige-la-causa-dei-malacalza-contro-il-trasferimentoforzoso-di-ricchezza-1.38343953

iii. The inconsistency of the issue price of the shares, required by art. 2441, paragraph 6.

The following chapters will focus on the analysis of the exclusion of the option right, the compensation protection requested by the Malacalza and how these interrelate with a broader issue, that of the balancing of the various corporate interests, in the context of the conflict or correspondence with the company's interest. The aim of our discussion will be, in fact, to outline the social (so-called internal) interest typical of an intermediary such as Carige, having regard to the main theories between contractualism and corporate institutionalism, in the light of a stronger external interest brought forward by the supervisory structures; to observe how these interests can conflict with those of the individual shareholders, with a look at the functioning of art. 2441, paragraphs 5 and 6; and finally to look at their composition and coordination, both in respect of the safeguards of art. 2441, as well as, in a pathological hypothesis such as the one under examination, through the instrument of compensation pursuant to art. 2377, paragraph 4, with respect to the protection against a flawed shareholders' meeting resolution.

2. Capital Increase pursuant art. 2241, par. 5

2.1 The exclusion of option right

The first essential step in analyzing the Carige case becomes, therefore, observing the content of the shareholders' resolution of September 2019 to increase the bank's share capital. The discipline that governs the decision belongs fully to the provision of art. 2441, paragraphs 5 and 6 (the resolution of capital increase with exclusion of the option right). The option right is the right benefiting the current shareholders of the company who, when subscribing to the paid capital increase, are preferred to third parties[22]: this allows the shareholders to keep their shareholding unchanged, both in the proportion in which each shareholder participates and for its real value in the presence of accumulated reserves. This seems necessary, as the issue of new shares affects, and possibly alters, the majority and minority relationships between shareholders: "if the choice [...] were left to the total discretion of the directors, abuses could easily occur to the detriment of the previous shareholders, or some of them".

In the definition of the nature of the option right, a tendency to equate it with a right of pre-emption is opposed by a separate conception of the two institutions, which separates pre-emption, the right to be preferred in the circulation of the shares, and the option, seen as in art. 1331, it being sufficient that the party accepts the proposal subject to the option and the contract for the subscription of the shares will be immediately concluded.

[22] G.F. Campobasso, Diritto Commerciale 2, Diritto delle Società, pag. 509

Otherwise, the pre-emption does not operate as an automatic conclusion of the relationship, since the acceptance will then be followed by the conclusion of the other contract subject to the pre-emption. The option is thus classified as a clause attached to the contractual relationship existing with the shareholder, proper to the executive phase, thus being able to separate itself from the "parity of conditions" with which it would operate; the right pursuant to art. 2441 allows the current shareholders to be preferred in the offer of newly issued shares to third parties, under the same conditions offered.

This right is granted to each shareholder, in proportion to the number of shares held (or bonds convertible into shares[23]). In this way, he will receive shares of the same category of those held, with priority, in case the increase is divided into several different categories.

However, the option right is not a mandatory right, since it can be appropriately excluded in some cases:

As stated in the first sentence of Article 2441, paragraph 4, it is excluded in the case of newly issued shares that must be released by means of contributions in kind;

The second sentence of paragraph 4 introduces exclusion by statutory provision for companies listed on regulated markets, but only limited to ten percent of the pre-existing share capital;

[23] With the aim of allowing the exchange ratio to remain unchanged: otherwise this could affect the possibility of assigning shares to those who have not yet converted their bonds. G. Bianchi, Le operazioni sul capitale sociale, 2007 and F. Platania, Società per Azioni, 2003, p. 478.

"When the interest of the company requires it", and in this case it is excluded or limited with the same resolution of capital increase, pursuant to paragraph 5;

By resolution passed by the shareholders' meeting, by a majority vote of the extraordinary shareholders' meeting, if the shares are offered for subscription to employees of the company, pursuant to subsection 8.

2.2 The explanatory report and other disclosure obligations of directors

Analyzing the first document, the Explanatory Report, from art. 2441, paragraph 6, it is clear that its content must indicate "the reasons for the exclusion or limitation [...] and, in any case, the criteria adopted to determine the issue price". This is a fundamental step, since it is necessary both for the Board of Statutory Auditors to express its opinion and for the Shareholders' Meeting to make its decision. The price estimate report should be drawn up prior to the resolution to increase the capital, thus guaranteeing greater and full disclosure to the shareholders involved.

As regards the reasons for the exclusion or limitation of the option right, we identify a necessary contrast between the contractual instances of preservation of the individual shareholding position protected by the option right and the issuer's aspiration to access the financing deriving from the offer of investment opportunities according to more economically efficient and flexible forms " , where the second position is strengthened by the option right and by the procedures that must be adopted. Whilst in the resolution adopted in compliance with the provision of the statutory clause pursuant to paragraph 4, this motivation is, in fact, very limited, in the case referred to in art. 2441, paragraph 5, it will be necessary to demonstrate these mandatory requirements: the company interest, here, has not yet been typified by the By-laws and it will be necessary to indicate the reason for the exclusion, case by case, of this right. Specifically, it will be necessary to demonstrate the instrumental link between the exclusion, or the limitation, of the option right, and the project to be carried

out during the resolution of the increase, in an "effective, recognizable and relevant" manner.

With regard to the motivation, the exclusion of the option right only motivated by the reconstitution of the share capital demolished for losses, according to the hypothesis of art. 2447, carried out with prejudice to the absent shareholders, does not seem sufficient: in the absence of an explicit motivation, the option right can therefore be freely exercised by the shareholders.

Once the protected interest has been identified, the administrators, since they are the ones who have to prepare the report in which the reason behind the exclusion of the option right is indicated, shall indicate it in the document pursuant to art. 2441, paragraph 6, filed at the registered office. While the prevailing opinion is that the lack of a motivation integrating the requirements of effectiveness, recognizability and relevance leads to its annulment, the classification as nullity of the resolution of the "failure or omission to deposit the relevant documentation at the registered office" is unequivocal.: This is due to the lack of an essential prerequisite for the formation of the meeting's will and, therefore, an irregularity in the procedure itself, to no avail the subsequent integrations through communications between shareholders.

The report must then be communicated to the board of statutory auditors or other equivalent body and to the subject in charge of the accounting control, within thirty days, who, pursuant to paragraph 6, will have fifteen days to supplement the documentation with their own opinion on the congruity of the issue price. These documents must then be filed and kept available for free

consultation by the shareholders, for the fifteen days prior to the Shareholders' Meeting and until it has passed a resolution, under penalty of nullity.

This integrates, in listed companies, the right of the shareholders to more information on the content of the resolution, on the agenda and on any supporting documentary evidence, and to ask for more transparency: art. 125bis TUF identifies the general obligation to provide a report on each item on the agenda; art. 127bis TUF identifies the right to ask questions, even before the meeting, and the duty to disclose through the company's website the documents required by the regulations. These two hypotheses, which apply in this case to Carige, identify the entire information and disclosure system, in compliance with transparency, from which shareholders are entitled to benefit before attending and expressing their consent (or dissent) at the meeting.

In this way, with a more conscious formation of the shareholders' opinion on the operation, the merit of the capital increase operation with exclusion of the option right ex art. 2441, paragraph 5 is evaluated by the shareholders, who will be able to adopt or reject it through the law of numbers, recalling the mechanism of the majority, in the formation of the corporate will: the majority required by paragraph 5, in its previous formulation, was more than half of the share capital, even in second or third call; today, given the abolition of the regulatory provision, the ordinary quorum provided for the resolutions of the extraordinary shareholders' meeting is required.

This exemplified mechanism allows an effective and more incisive control by the majority of the merits of the exclusion of the option right, thus being able

to block the capital increase, both by abstention and by voting, should they deem the exclusion of their right to be "unreasonable".

In concrete terms, Malacalza (holder of a 27.7% stake prior to the dilutive increase24) could have easily blocked the capital increase resolution, if it had considered it unreasonable and not capable of pursuing the interest in question or excessively detrimental to its own, since it had all the instruments at its disposal. Malacalza's preference for abstention to the demolition remedy and the consequent use of the compensation protection pursuant to art. 2377, paragraph 4, would constitute, in my opinion, both greater respect for the merits of the operation and the reasonableness of the exclusion, and also a censure of the method and implementation of the institution.

Whether they are reflected in a protection of a contestatory nature of the resolution, in the form of a liability action against the directors for violation of the diligence required, or in a compensation action pursuant to art. 2043, the instruments for the protection of shareholders and their interests will, in any case, require the presence of these documentary results, as a basis for assessing the actual damage to the interest pursued and evaluating the presence of reasonable alternatives, without having to lead to the definition of a state of necessity.

Naturally, the principle of the Business Judgement Rule remains unchanged, which will preclude the judge from reviewing the merits of the management activity of the directors, "forgiving" errors committed in the diligent and

[24] http://www.ansa.it/liguria/notizie/2020/01/16/carige-causa-malacalza-da-480-mln-anche-a-fitd-e-ccb_e9984a37-7de8-4c7d-a4f5-a7ae3dcd3a73.html

conflict-free exercise of their discretionary powers; what is not forgiven, on the other hand, is when the directors have acted negligently or in violation of other obligations imposed on them, a system of liability which, in the case in point, given the preceptive nature of the provisions of art. 2441, paragraph 6, is fully applicable.

2.3 The issue price

The second step is the determination of the issue price, which is first submitted to the control of the Board of Statutory Auditors (or its equivalent) according to fairness parameters. For listed companies, a specific procedure shall be followed: the proposal shall be notified to the auditing firm, together with the explanatory report, at least 45 days before the meeting; within 30 days, the firm shall express its opinion.

Finally, the issue price of the shares will be formalized by the resolution for the capital increase, in proportion to the value of the shareholders' equity, and considering, if listed, the price performance of the last six months.

The fairness opinion, drawn up for the purposes of art. 2441, paragraph 6 and 158, paragraph 1 TUF, aims at further strengthening the information in favor of shareholders who saw their option right excluded or limited. Specifically, it indicates "the methods followed by the directors to determine the issue price [...] and any difficulties encountered"[25], focusing on these profiles, which fully summarize the concept of "fairness" as its components:

i. Adequacy;
ii. Reasonableness
iii. Non-arbitrariness;
iv. Correct application.

There are many methods that we can observe and, for each of them, the auditing firm, possibly supported by an external Advisor, assesses their

[25] Deloitte's report for the resolution to increase the capital pursuant to 2441, paragraph 4 of BPER Banca SpA in July 2019, p. 3.

application profiles, especially their characteristics and implicit limits, on the basis of the "professional valuation practice normally followed in the financial services sector". In order to calculate the economic value attributable to the company, and in our case a bank, it is necessary to consider the characteristics of the intermediary, the type of activity and the market in which it is carried out.

- The Dividend Discount Model (or DDM);
- The Gordon Model;
- The Stock Market Price method;
- The Target Price analysis.

2.4 The Commissioners' Explanatory Report

Let us now deeply analyze the content of the Illustrative Report of the Extraordinary Commissioners in the Carige case, in order to verify the reasons given in favor of the limitation of shareholders' option rights, at the time of the capital increase resolution of September 2019.

The rescue operation is described as a private operation to save the Bank (in order to protect all stakeholders: customers, employees, shareholders) in order to prevent a situation of irreversible crisis, which would lead to its liquidation with total loss of value, placing already at the beginning the definition of the social interests at stake.

It is aimed at obtaining the financial and economic resources necessary for the adoption of the Strategic Plan "Riprendiamoci il Futuro" (Let's take back the future), naturally placing significant emphasis on the protection of other stakeholders[26], whose protection is in accordance with the principle of "sound and prudent management" and "explicit constitutional guarantee".

Therefore, the Report concludes the analysis of the reasons justifying the exclusion of the option right by stating that "the conditions that make a private market solution possible in order to save the Bank make it necessary to submit to the Shareholders' Meeting the proposal to proceed with a reserved capital increase with consequent exclusion of the option right, pursuant to art. 2441,

[26] Referring to the Strategic Plan itself, great importance is given to the relationship with clients both in the Wealth Management and Commercial Bank 4.0 sections, in favor of a more streamlined and client-first interface and a greater rooting in the territory. This last point is also directed towards the community, both local and financial, aimed at mutual development and collaboration with technological partners and the business ecosystem. Again, the containment of the risk profile (NPE ratio and capital ratios) and the promise of a break-even by 2019 and a ROE of 7%, are aimed at satisfying the demands of investors, but also the need for prudence that we have seen are those of the supervisory authorities.

paragraph 6, of the Italian Civil Code, without prejudice to the fact that a part of the same [...] is destined to the current shareholders of the Bank", thus mentioning the third tranche of share issues and the plan for the allocation of warrants as instruments to protect the otherwise prejudiced interests of the shareholders.

The second part of the report dwells on the calculation of the correct issue price, which complies with the congruity requirement of art. 2441, paragraph 6. Referring to established practice in the field of capital increases, in assessing these elements, the rapporteurs acknowledge the thesis of the sufficient "presence of serious and rigorous market exploration conditions", thus resuming the method of analysis of merit reported above.

The market exploration conducted would present such connotations of seriousness and rigor, in these respects:

i. The width of the time period in which it is conducted, in order to evaluate multiple possible options, beginning in Fall 2018;
ii. The protracted presence of a primary advisor, such as UBS;
iii. The strong public echo that the press has given to the operation, allowing a stimulus to potential investors;
iv. The visibility and professionalism shown by the Board of Directors and the commissioner's management;

The capital amount of the increase is deemed to have been determined in compliance with the " recovery of capital requirements" and in realization of

the de risking policies required by the ECB[27], which better comply with the balancing of multiple interests involved in this operation.

The presence of this strengthening plan includes, for its full implementation, agreements aimed at its successful completion, among which is a framework agreement with Cassa Centrale Banca and the Interbank Fund: this agreement, whose validity and content have been questioned many times during the shareholders' meeting, will be essential especially for the exercise of the call option by the CCB of the share subscribed in the first tranche by SVI - FITD.

This framework agreement, in its effectiveness, is subject to the occurrence of certain conditions:

i. Obtaining the authorizations from the Supervisory Authorities, including any antitrust authorizations;
ii. The Bank's obligation to comply with all the commitments and carry out all the checks requested by the FITD in relation to its intervention, in accordance with the provisions of the Framework Agreement;
iii. Confirmation by Consob of the existence of the requirements for exemption from the obligation to promote a takeover bid provided for "rescue" transactions by art. 106, paragraph 5, letter a), TUF;
iv. That no competent authority has adopted or issued any measure suitable to limit, exclude or divert the effects of the transaction;

[27] The ECB's requirements are implemented through the SREP (Supervisory Review and Evaluation Process), which, with the 2018 Letter, indicated a minimum capital adequacy requirement of 10.25% for Primary Capital Class 1. About SREP: https://www.bankingsupervision.europa.eu/about/ssmexplained/html/srep.en.html

v. The issue of the Subordinated Tier 2 Bonds, after ensuring that there are no impediments.

The issue price of the new shares, according to what has been established by the commissioners, is set at an amount equal to 0.001 Euro per share; with reference to the calculation methods, a pre-money form was used, corresponding to the total capital of the institution of 55.2 million Euro. In determining the issue price, the commissioners stated that they had taken into account the difference between the market value and the intrinsic value of the bank and, given the instability of Carige's future, they had taken into account a value as close as possible to the former. Due to the impossibility of defining the value of the Bank from market quotations, once the quotation has been suspended by Consob order, making it impossible to forecast such parameters, there is nothing left for the Commissioners but to approximate the price to the values prior to the suspension.

Can this provision be detrimental to the value held by the shareholders prior to the resolution, entailing a strong dilution of their shareholdings?

This is therefore the subject of the different interests to be pursued and how to reach a settlement in the event of conflict: Carige gives great weight to its stakeholders, especially in view of the formation and choice of the company policies to be adopted. Naturally, given the very particular role played by a bank, it seems almost taken for granted that the social interest pursued lies in the protection of customers and savers, of the banking system itself and of the very delicate relationships of trust that a banking entity in a pre-crisis phase can only put to the test; if we take these "very important interests", those of the

shareholders will necessarily take a back seat: the dilution of the share of capital held therefore becomes an obligatory measure, in order to carry out this rescue operation in the best possible way. If we embrace a moderate contractualistic thesis of the social interest, which not only contrasts the social interest with the interest of the shareholders as an external limit, but places on the same level as the interest of the investors that of other categories deserving protection, thus being able to manage with more flexibility the compression or not of one with respect to the guarantee of the others, an operation of capital reinforcement, if necessary according to parameters of "need for the social interest", can and must take place.

A different issue is how it takes place. Let us therefore analyze the central point of this chapter, that is, the claim made by Malacalza of incongruity of the issue price and failure to effectively respect the principle of accounting parity, in the issue of shares without nominal value. In order for a price to be fair, it must follow these steps in its formation:

- Determination of the necessary capital increase in accordance with the operation to be carried out (in our case a strengthening for the purpose of getting out of a pre-crisis situation);
- Calculation of the equity or market value of the company from a pre-money perspective
- Determination of the issue price of the new shares.

Firstly, the reasons put forward by the Commissioners as to why the method deliberately departed from the equity value of Carige, even if poorly used,

rather than the intrinsic value of the shares, constitutes not only a serious logical fallacy, but is also in broad contrast with established practice.

It constitutes a logical fallacy, first of all, insofar as the commissioners themselves state that they departed from a valuation method based on the accounting net equity, because "scarcely relevant for the purposes of the notion of intrinsic value", and then abandoned the same intrinsic value of the shares, in favor of a value based on a mere intersection of supply and demand.

In contrast to the practice precisely following the suspension of shares from listing on regulated markets: the impossibility of using the market quotation method need not necessarily entail the net abandonment of the equity method. On the contrary, all the more reason why it should lead back to this method prescribed by the regulations, as established by art. 2441, paragraph 6.

An example of this method can be found in the Complex Balance Sheet Method, reported above: in fact, I believe that a method, such as the DDM method, which, through estimates, assumes profits to be distributed in the future, is unsuitable; a company in a pre-crisis situation such as Carige would see a possible distribution of profits to its shareholders as difficult or, in any case, distant in the time horizon, since this method is unsuitable for calculating the value of companies that are not in a phase of constant growth.

Secondly, I believe that the valuation of the transaction is in contrast with the criterion of determining the value of the shares according to fairness: in fact, Notari himself defines as obvious and indisputable that, when defining the issue price of the shares during the increase with the exclusion of accounting

parity, pursuant to art. 2441, paragraph 6 the price of the newly issued shares must meet two criteria:

i. It must be at least equal to the accounting parity of the increase;
ii. It must be "congruous", i.e. at least equal to the actual value of the pre-existing shares, calculated on the basis of the company's value, taking into account market exchanges.

Precisely with regard to the application of the second point, I believe it is necessary to criticize the methods adopted when issuing the new shares. In fact, in the determination of the issue price, then assumed by FITD and CCB at the time of the purchase of the stake in Carige, it was decided to apply a value per share of €0.001, in full respect of the accounting parity of the increase carried out: in fact, against a capital increase of €700 million, 700 billion ordinary shares were issued, whose accounting parity corresponds to the figure of €0.001/share. Therefore, in the application of the first step, there is nothing wrong, considering that the accounting parity may be different with respect to that represented by the pre-deliberation shares (0.033 €/share) and still different with respect to that after the issue (about 0.02 €/share).

But these assumptions are true if the capital increase has been carried out in such a way as to guarantee the old shareholders the right to exercise the option attributed to them by Art. 2441. But since the recapitalization of Carige has provided for the exclusion of this option right, since "the interest of the company requires it" pursuant to Art. 2441, paragraph 5, we have seen how further and necessary safeguards are put in place to protect shareholders. Leaving aside any determination concerning the share premium, I choose to

focus on the issue price of the new shares which, although in compliance with the accounting parity of the new increase, cannot be defined as "congruous". In order to comply with congruity, it is argued that the new shares must be issued at a price that is representative of and "at least equal" to the intrinsic value of the pre-existing shares, i.e. their market value, where intrinsic or actual value means "calculated on the basis of the company's assets".

But, as the auditing firm itself states, what has been done is a deviation from the intrinsic value of the shares: in fact, choosing not to observe the market value because of the suspension from listing ordered by CONSOB, has no updated values to refer to, one must look at Carige's equity entity which could be said to be significantly lower than the value of 1.845 billion euros. Banking regulations no longer provide the concept of regulatory capital, but for the more general concept of own funds.

Art. 72 of the CRR regulation identifies the following as components of CET1, or "on going concern" capital (capital capable of absorbing losses on a going concern basis): capital instruments and related share premiums, retained earnings and other accumulated income statement items, reserves and provisions for general banking risks.

The correct calculation of the balance sheet result will not be able to disregard the amount of equity in the various CET1 components, as it is in my opinion necessary to use it in order to determine the real value of the company, since it is representative of its actual economic situation, amounting to € 1.056 billion as at June 2019, the calculation of which is made by subtracting losses

from the capital. Whereas the calculation made at the time of the increase values the capital before the losses recorded.

On the basis of this analysis, the capital valuation used to establish the issue price (0.001 €/share) will in any case be significantly lower than the **actual value held by the pre-existing shares of 0.0192 €/share** - 10.8 times their proposed value. If the issue had been carried out in compliance with this value, the capital increase would not have caused an enormous dilution of the shares held by the pre-existing shareholders, since the total amount of the operation would have consisted of 36,458,333 new shares issued, a fraction of the pre-existing shares. In this way, Malacalza would have held a 15% share of the capital, against the entry of FITD and CCB at 39%.

Another difficulty I encounter in the way the issue price is determined lies in the lack of disclosure at the time of the meeting's resolution of the expert's report relating to the criteria used to determine the price. We know that this information is part of the disclosure mechanism necessary for shareholders to form their will at the meeting, allowing them to block the resolution, should they "not agree from the outset with the valuations and values attributed to the contributions, expressing their dissent at the meeting". The absence of this report prevents a concrete definition of the assent/disagreement at the time of the resolution, thus preventing shareholders from effectively protecting their interests.

Finally, analyzing the part dedicated to the assignment of free shares to Carige shareholders by SVI-FITD, which should operate for the purpose of compensating the dilutive increase in the share capital held, together with the

assignment of warrants, the assignment criteria would conceal the objective of preventing the possible exercise of appeals against the resolution.

The shares will be assigned under these conditions:

i. Allocation to each shareholder holding a stake equal to or lower than 0.1% of the share capital;
ii. If the Shareholders Attending the Meeting jointly represent at least 20%, the shares will be allocated to the Attendees, maximum 500,000 per shareholder; none will be allocated to those not present at the time of voting;
iii. If the Participants do not reach 20%, the allocation will privilege these according to the formula indicated and the remaining shares will be allocated to the others according to the above-mentioned criterion.

In my opinion, this mechanism needs to be examined in greater depth in connection with the majority mechanism: in order for the capital increase resolution to reach the deliberative quorum, the favorable vote (expressed) of 2/3 of the capital present was necessary. Having said this, in order for Malacalza, holder of 27.7% to benefit from this supplementary compensation mechanism, the following situations would have occurred:

i. Malacalza attends the meeting, votes in favor of the resolution, benefits from the Free Shares, but does not meet the requirements of Art. 2377, paragraph 2, and cannot appeal;

ii. Malacalza attends the meeting, abstains or votes against the resolution for the increase, the resolution does not pass[28], not reaching the quorum required by art. 2369. The above-mentioned conditions do not apply, since the assignment is subject to the positive outcome of the capital increase;

iii. Malacalza absents himself from the vote; the resolution reaches the quorum of 2/3 of those present. Since he is absent, he can appeal, but he has no access to the compensatory forms of the Free Shares (if 20% of the capital is present) or they are assigned to him as if he held 0.1%.

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[28] I believe it is unlikely that the borderline situation of a shareholding very close to 100% will occur, also because we are dealing with a listed company and therefore with a very fragmented shareholding: the phenomenon of rational apathy on the part of shareholders would lead me to consider more reasonable the case of a more consolidated absenteeism. On this hypothesis, reference is made to the Annual Report on Corporate Governance of 2012, drawn up by the Italian Corporate Governance Committee.

since the assignment is subject to the positive outcome of the capital increase.

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In none of the aforementioned hypotheses is there a peaceful coexistence of the right to appeal with the successful completion of the operation and access to this compensatory form of response to the dilutive nature of the resolution.

Malacalza chooses the third hypothesis, since it is the only one that can allow him to challenge the resolution and obtain the objective set, which, in my opinion, cannot be found in the will to demolish the assembly resolution vitiated for being contrary to the law. In the next chapter I will go into the merit behind the action taken by Malacalza pursuant to art. 2377, paragraph 4, and how it achieves a composition between the need to safeguard itself from the harmfulness of the resolution adopted without negatively affecting the rescue operation of Carige.

On the basis of the reasoning set out above, therefore, while supporting the merits to all intents and purposes of the resolution for the increase, in that the company's interest in the transaction being carried out exists within the required margins, the manner in which it was carried out entails an unfair and disproportionate compression of the rights and interests of the shareholders, well beyond the safeguards to compensate for the exclusion or limitation of option rights.

3. Malacalza reaction

3.1 Challenge to the resolution pursuant to art. 2377 of the Italian Civil Code.

On the basis of the assumptions discussed in the previous chapter, the Malacalza expressed their disagreement with the way in which this capital increase was carried out, challenging the relative resolution through the instrument made available by art. 237729.

Before analyzing the reasons for this appeal and the legal aspects that may derive from it, it is advisable to take a closer look at the regulations and the institution it describes.

Art. 2377 regulates, together with the following articles 2378, 2379, 2379bis and 2379ter, the procedures for challenging shareholders' meeting resolutions, in order to ask for their annulment (2377) or nullity (2379) caused by flaws in the resolution itself, dictating the so-called "invalidity regime of the shareholders' meeting resolution". Leaving aside the "introductory remark" in paragraph 1, the second paragraph of Art. 2377 establishes first of all the general possibility of challenging resolutions that are contrary to the law or the Articles of Association: this therefore indicates that the violation of the law or the provisions of the Articles of Association entitles the persons interested indicated in the following sentence to challenge the resolution in order to have it declared invalid. Invalidity is thus the rule for flawed shareholders' meeting

[29] https://www.ilsecoloxix.it/economia/2020/01/17/news/carige-la-causa-dei-malacalza-contro-il-trasferimento-forzoso-di-ricchezza-1.38343953

resolutions, relegating the penalty of nullity to a more residual role, limited to the cases strictly provided for by art. 2379.

From this it follows that all the violations of the law or of the articles of association that affect the meeting procedure, and that do not fall within the list of flaws that can determine, pursuant to art. 2379 of the Italian Civil Code, the nullity of the resolution, translate into causes of annulment[30].

The following period describes in an exhaustive list the subjects entitled to appeal; these are:

i. the absent, dissenting or abstaining shareholders;
ii. the directors
iii. the Supervisory Board;
iv. the Board of Statutory Auditors.

On the other hand, the company itself is not included among those entitled to act. In this regard, the Civil Supreme Court (Cassazione Civile), Section I, sentence no. 17060 of 5 October 2012, intervenes, which states that "[...] the company has passive legitimacy in the appeal proceedings, precisely because it is the source of the manifestation of will that is the subject of the appeal, and it would therefore be inadmissible to attribute to it the legitimacy to take legal action against its own will"; in addition, the company itself chooses to act through the management and control bodies, with which it has a relationship of organic representation: In this way, it will be the same organs that will represent any interest in challenging and removing the invalid resolution, and

[30] Commentary on the Civil Code, a cura di P. Cendon, pag. 262.

it is therefore understandable why the company is not expressly included among those entitled to act.

The special legislation also includes public bodies, such as CONSOB, the Bank of Italy and IVASS, among those entitled to take legal action, but limited to cases involving significant shareholdings[31], voting and blocking syndicates and the challenge of the financial statements of listed companies.

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Only in these exhaustive cases an extended term of 180 days is granted to propose the relative action. The indication of the Supervisory Board is fully in line with the ordinary attributions of the same body, given the task of "supervising the resolutions of the Shareholders' Meetings", in the event that a dualistic system is adopted, pursuant to Art. 2409-ter, paragraph 1, letter c).

In this way it is equated in these competences with the Board of Statutory Auditors. In the event of adoption of the traditional system, the Board of Statutory Auditors will also be vested with this power to audit the resolutions of the Shareholders' Meeting; however, the reform redefines this attribution of power, no longer legitimizing the individual auditor, but giving a collegial nature to this audit.

[31] G. F. Campobasso, Diritto Commerciale 2. Il diritto delle società, 2015, pagg. 253 e ss.

It is no longer possible for the contestation to be carried out by the auditors individually and autonomously with respect to the board, since it is unequivocally an act devolved by the regulatory provisions to the body and not to its individual members. The decision to deprive the individual auditors of the legitimacy to act has been criticized, even though it is consistent with the issue of challenging the resolution of the Board of Directors, pursuant to art. 2388 - where the attribution is collective - and with the will to avoid possible abuses that the individual auditor could carry out if he/she is not the expression of the majority formed by the board.

The Board of Directors is subject to a similar condition: although the provision of art. 2377 expressly indicates "directors" as the addressees of the power of appeal, legal theory and jurisprudence are oriented towards acknowledging this power to the collegial body and not to its individual members; in the case of a single-member body, on the other hand, the legitimacy will lie with the single director.

This view appears to be confirmed by comparison with art. 2479ter, paragraph 1, which explicitly refers to the legitimation of each director, which makes individual legitimation evident there, rather than in the above-mentioned article. There is no explicit reference to the Management Board, its counterpart in the dualistic system pursuant to Article 2409novies, which is not mentioned in Article 2377, paragraph 2.

This omission has no real justification, except "because almost all the provisions of the traditional model of the Board of Directors apply to the Management Board", as the government report states. The doctrine here refers

to Art. 223septies where it is pointed out that, unless otherwise provided, the rules of the Civil Code that refer to directors and auditors are applied, insofar as compatible, also to the members of the management board and the supervisory board, for companies that have adopted the two-tier system, and to the members of the board of directors and the members of the management control committee, for companies that have adopted the one-tier system.

Focusing on those entitled to act, the Board of Directors, the Board of Statutory Auditors and their fees in the one-tier and two-tier systems, an important issue concerns the question of whether the administrative and supervisory bodies of the joint-stock company have not only the power but also the obligation to challenge an invalid resolution of the General Meeting.

Jurisprudence on this issue has agreed in favor of the second thesis, the obligation, considering that in the case of resolutions adopted against the law or against statutory provisions, a "legal obligation" is classifiable on the part of said bodies. The Court of Naples, April 1999, attributes to the directors a "duty to contest the invalid resolutions of the Shareholders' Meeting, if contrary to the company's interest or prejudicial to the company's creditors or to the integrity of its assets", then reiterated for the Board of Auditors.

This interpretation is supported by Article 2407, paragraph 2, which establishes liability profiles for Auditors as "culpa in vigilando", as a basis for qualifying a duty, under penalty of assuming joint and several liability in the event of failure to act.

The opposite thesis, which affirms the absence of such an obligation, therefore classifying this intervention as a mere faculty, defines this "legitimacy to

challenge cancellable resolutions [...] a discretionary power which directors, auditors and supervisory board members may, or may not, avail themselves of in the performance of their duties". This choice must be made by looking at the concrete interest of the company and the good performance of the management, in relation to "the prejudice that the company would suffer or not from the annulment or not of the resolution" - that is, a "comparative assessment".

At the moment, the first thesis is preferred, claiming this obligation as a consequence of the duty to pursue the company's interest, since directors and auditors have no interest of their own to pursue in exercising such actions.

Obligation is therefore to be observed in concrete rather than abstract terms, having to identify the company's interest on a case-by-case basis, as a "general concept of reference to which the prejudicial nature of the meeting's resolution is to be compared: that is, depending on whether that interest is identified by the common interest of the shareholders or by the interest, subordinate to the first, of the company or of the company itself, in accordance with the distinct conclusions of the never-ending dispute between the supporters of the contractual theory and the advocates of the institutional theory".

If we uphold a moderate view of contractualism, it will appear necessary to place the interest of the shareholders as an external limit to that of the company, and when the shareholders' meeting expresses itself in a manner contrary to the law or the statute, there will be a duty on the part of the directors to act.

In this way, the exclusion of the company itself from the list of those entitled to act, made by the Civil Supreme Court, Section I, sentence no. 17060 of October 5, 2012, is more understandable: in fact, precisely in accordance with the contractualist theory, the company cannot be de-legitimized from being an essential actor on the basis of the justification that the voice of the shareholders' meeting is the voice of the company. The company will have the right to act and remove the effects caused by a defective resolution, even if it is expressive of that external limit which is the interest of the shareholders, through its organs, representative of the predominant social interest.

On the other hand, the company itself cannot take legal action simply because it is not endowed with such power: as a legal entity, it needs these powers to be exercised by the person who holds the power of representation, specifically legal representation. The expression of the company's will resides, instead, in the statutory provisions inherent to the company's object, to which precisely the directors must conform their actions, according to the criterion of direct or indirect instrumentality of the act with respect to the company's object, understood as the specific economic activity (production or exchange of goods or services) agreed upon by the shareholders in the deed of incorporation in view of the pursuit of the entity's own profit-making purpose. When the resolution goes against this path, the directors will have this duty, and will be the expression of the social will.

Other legitimated parties are the shareholders, the central object of our analysis. In this case, in order to have access to this remedy, two requirements must be met by the shareholders with an interest in contesting the resolution:

first of all, the quantitative dimension, which requires the holding, at the time of the contested shareholders' meeting resolution, of a given share of the capital; the other requirement relates instead to the relationship that the shareholder has with the contested resolution, of a purely qualitative nature, which requires that the shareholder has not in any way contributed to the formation of the will of the shareholders' meeting.

As regards the first requirement, Art. 2377, paragraph 3, requires that the shareholder holds one per thousand of the share capital, if the company is listed, or five per cent in other companies, without prejudice to the possibility of derogation by statutory provision. From this it follows that the right of appeal does not belong to the shareholders as such, as was the case under art. 2377 of the Civil Code according to the pre-reform text, but to a qualified minority of them, selected on the basis of the voting right determined by the size of the shareholding. This required percentage, pursuant to the last sentence, shall refer to the percentages represented by the shares of the category in the case of special meetings. This percentage is intended to avoid abuse of the instrument by single shareholders or scattered groups: an excessive extension of this protection would give uncertainty and little solidity to the meeting's resolutions, which could see their effects removed.

The second requirement is that the shareholders must be absent, dissenting or abstaining, (they did not take part in the formation of the meeting's resolution). In this regard, reference is made to the ruling of the Supreme Court which was the first to define the perimeter of its application, forming an orientation that has been repeated several times as a mere negative assumption that the

shareholder did not participate, with his own will, in the formation of the invalid resolution.

The absent shareholder is the shareholder who did not show up at the meeting to express his or her right to vote, whether voluntarily or involuntarily; the dissenting shareholder, on the other hand, has seen the jurisprudence depart from a more literal meaning of the term (whoever voted against the adopted resolution), adopting a broader vision, that of the shareholder who, with his or her vote, did not take part in the formation of the company's will. This more extensive interpretation of the wording of Article 2377, paragraph 2, before the reform, is part of the jurisprudential production aimed at extending its application also to the third category, previously not regulated, of abstainers. The same Supreme Court will argue: "the meaning of the adjective "dissenting" is confirmed, literally referring to the shareholders who have expressed a contrary vote as well as to those who, although attending the meeting and called to express their will regarding a specific object in deliberation, have intended to abstain from voting (for any and irrelevant reason, as is irrelevant the reason for absence) and thus have not consented to the majority resolution".

Regardless of the reasons for one's dissent, having greater regard to the manifestation in itself, whether direct and explicit, or implicit as in abstention, the abstainer is in no way comparable to those who have voted in favor; on the contrary, he has "maintained a neutral behavior" that legitimizes him, like those who have voted against, to appeal.

This jurisprudence will then be included in the new art. 2377, paragraph 2, which will add among the shareholders entitled to appeal also those who "abstained when voting on the resolution". The operation of art. 127-bis of the Consolidated Law on Finance and the record date system should also be clarified. For listed companies, this institution is envisaged as part of the procedural rights of voice, in order to determine, on the basis of the date of registration of the transfer to the new acquirer of the relevant shareholding, who is entitled to participate in the meeting and exercise the vote, pursuant to art. 83sexies, paragraph 2 of the Consolidated Law on Finance: if the relevant communication was made after the seventh trading day prior to the date set for the meeting, it is not relevant for the purposes of the legitimacy to exercise the right to vote at the meeting. Similarly, pursuant to art. 127-bis of the Consolidated Law on Finance, those who made the above-mentioned registration after the date set out in art. 83sexies, paragraph 2, and before the Shareholders' Meeting, will be considered absent, for the purposes of art. 2377.

3.2 Considerations on the solution pursuant to art. 2377, paragraph 4

Let us now look at the more concrete profile of this discussion, analyzing the action of the Malacalza family for compensation for damages pursuant to art. 2377, paragraph 4, against the shareholders' meeting resolution for a capital increase with exclusion of option rights pursuant to art. 2441, paragraphs 5 and 6, of September 2019.

The content of the action, even if not yet officially disclosed, appears, according to journalistic sources, to be a compensation action for an amount of 482 million euros, against Carige, FITD and CCB, on the following grounds:

i. The exclusion of shareholders' option rights pursuant to Article 2441, paragraph 5, in the capital increase resolution of September 2019;
ii. The violation of the principle of accounting parity in the determination of the issue price of the new ordinary shares;
iii. The incongruity of the issue price of the shares, required by art. 2441, paragraph 6.

Before looking at the merits of the censures proposed, it would certainly be useful to examine the advisability or otherwise of exercising this action, compared with the alternative instrument of protection.

With regard to the alternative of a demolition remedy (i.e. annulment) with consequent removal of the effects produced, except for third parties acting in good faith - pursuant to art. 2377, paragraph 2, what was analyzed in the previous paragraph is taken up here. The capital strengthening operation has

solid justifications for its implementation and, given the pre-crisis situation in which Carige finds itself, if it were to fail, the bank would find itself in a crisis situation, with the consequent possibility for it and the group it heads to also be subjected to measures decided by the competent Authorities, which could determine either the compulsory administrative liquidation of the bank, or the application, among others, of the bank resolution instruments. The importance of the institution, the protection of savers and the need to comply with the measures required by the supervisory system, but also the need to be accountable to the financial community, take this capital strengthening operation necessary.

Therefore, it is evident that the use of the demolition remedy, even in an evaluation of mere opportunity of the acting shareholder, would bring above all, if not only, negative effects.

In my opinion, this choice left to the individual shareholder, rather than a regime imposed by the regulations, should not be seen as a shortcoming, but rather linked to a specific reason. Faced with a resolution contrary to the law or the articles of association, the minority shareholder who cannot claim a percentage of votes such as to reject the resolution, enjoys both the demolition remedy when he/she wishes to eliminate the defective resolution, as well as the compensatory remedy, both supplementary and alternative, when he/she wishes to save the resolution.

The interest in saving an operation, which, even if badly done, proves to be critical for the continuation of the business activity, remains an integral part of the free choice and full availability of the shareholder: as his right, within the

limits of legality, the shareholder is free to exercise it at his discretion, since it is not subordinated to any feeling of respect for the law and safeguard of the statutory dictate, but servile to the interest in his own investment. However, I do not wish to censure any shareholder who, in the face of certain errors, does not simply choose to "pull the plug" on the operation, regardless of the weight that resolution may bring to the continuation of the business activity.

This reasoning, consistently with what has been said above, will then be fully applicable to the majority or controlling shareholder unable to freely express his decisive vote, and therefore prone to abuse in the same way as a minority shareholder. I believe that in Art. 2377, paragraph 4, we are faced with a wide-ranging rule which deliberately leaves the shareholder free to choose which remedy to adopt, when the conditions exist:

i. Liability action against the majority shareholder(s), for breach of the general principles of good faith and fairness, pursuant to articles 1175 and 1375 of the Italian Civil Code, or for abuse of power;
ii. Action pursuant to art. 2497 of the Italian Civil Code, against a company exercising management and coordination, in the event of violation of the principles of correct corporate and entrepreneurial management;
iii. Liability action against the administrators ex art. 2395, being able to obtain compensation exclusively for direct damages.

Without dwelling on the specifics of these actions, a superficial analysis allows us to observe the undeniable advantages that art. 2377 has over these instruments: first and foremost, the consistent reduction of the "onus probandi" on the part of the agent. He will not have to demonstrate the further

requirements required by these rules, but rather limit himself to demonstrating the defect of the resolution, the damage suffered and the causal link between the two. Secondly, each of the following actions has profiles of incompatibility with the situation which is the object of our reflections: let us remember that Malacalza himself holds the majority of the shares at the time of the resolution of September, before the dilutive increase in his share of capital, which would allow him to have sufficient instruments in the shareholders' meeting to prevent this abuse to his detriment, making the first hypothesis inapplicable.

Furthermore, there is no evidence of companies or bodies exercising management and coordination activities, since the entry of FITD and CCB is subsequent to this resolution, and therefore not a pre-existing element of the damage caused to the plaintiff. Finally, the discipline of the action for compensation pursuant to art. 2395 (subject to authorization pursuant to art. 72, paragraph 9, TUB) requires more detailed analysis.

In the face of a more complex formation of the probatory structure, which sees the individual shareholder having to demonstrate the intentional or negligent conduct attributable to the directors against whom he proposes the action, with the relative "selection of the recoverable damages [...], once the admissibility of the action has been admitted", there is no effective benefit in terms of protection, which does not cover indirect and consequential damages.

Worthy of note, however, is the jurisprudential production inherent to the case history of actions ex art. 2395, which includes a hypothesis similar to our

case: we are talking about the recognition of the right to compensation of minority shareholders for damages suffered due to incorrect determination of the exchange ratio, during mergers by incorporation between companies, brought forward by two elaborate sentences, a hypothesis which is often analogically extended for the adoption of specific criteria for the determination of a congruous issue price, during the capital increase with exclusion of the option right pursuant to art. 2441, paragraph 6.

This pair of sentences typifies the possibility for shareholders to obtain compensation in the event of errors committed at the time of the exchange ratio, as this can be reviewed by the damaged shareholders and by the judge, both on the basis of art. 2395, in the event of responsibility attributable to the directors, and on the basis of art. 2504quater, independently of these, for responsibility attributable to the company as a whole.

Returning to the hypothesis pursuant to art. 2395, it is clear that, although the Malacalza is entitled to bring this action, precisely because of the erroneous nature of the fairness of the price, if the directors cannot be held responsible for willful or negligent conduct (which already sufficiently extends the burden of proof) it considerably limits the compensation protection that can be accessed, as compensation is not extended to the indirect damage caused by this flawed resolution.

Precisely because of the particular situation, therefore, the compensation action appears to be the most suitable and least invasive means for the protection of Malacalza's own interests, always on condition that the right of access to this form of protection is recognized, rather than the obligation to

exercise exclusively the demolition protection, where the indemnity nature of the institution is recognized. This would allow the plaintiff to restore the entirety of its investment in Carige, removing the dilutive effects caused by this unreasonable price, without endangering the institution itself, which was in a critical situation, now more stable.

With regard to the merits of the request itself, even though we agree with the need to exclude the option right for the successful completion of the transaction and the exhaustiveness of the reasons given, the position taken in the chapters on the numerous errors made when the price was defined remains unchanged. Without assuming any decisional power, it is however understandable the necessity to protect one's own investment from actions in open violation of the normative dictate, placed just to protect such interests, without adopting demolishing forms of the difficult path carried out. In this lies the merit of the instrument ex art. 2377, paragraph 4.

4. Sentence of the Court of Genova

In the 77-page sentence, issued on November 2021, of the Genova judges, it is reported that "the defensive argument offered by Carige to support the inadmissibility of the action of Malacalza Investiment s.r.l. for violation of the prohibition of coming 'contra factum proprium', (the prohibition of assuming behaviors and asserting claims irreconcilable with the obligation of consistency and with the rule of self-responsibility) is acceptable".

Translated into simple words, the rationale is: the Malacalza did not participate in the 2019 meeting by not depositing their shares, but if they were against the reorganization they could have participated by voting against, thus blowing up the operation as it needed the consent of two thirds of those present in the meeting.

On the option right, the judges mention many of the information provided by the commissioners in the documentation for the contested meeting and after pointing out that the option right was not actually excluded but limited, they recall, on the part of Carige, how for "the social interest, it is necessary to consider the unity of the overall operation of securing the bank, which envisaged, on the one hand, the realization of a capital increase functional to the restoration of capital requirements, also in relation to the de risking requests of the ECB, and on the other hand, the sale of a portfolio of impaired loans to Sga, whose offer was, in turn, subordinate to the execution of the capital reinforcement".

Among other things, they underline how it is "in terms of reasonableness that the choice of the commissioners regarding the limitation of the option right of the ordinary shareholders must be assessed and, in this regard, the college considers it relevant to underline that the proposals resolved by the special commissioners on 29.8.2019 found support in the congruity opinion of 30.8.2019 of the auditing company". Also pointing out a decision of the Supreme Court of Cassation of 1970 "according to which in order to exclude or limit the option right" it is sufficient that the corporate interest is "serious and consistent, such as to justify that, in the choice of the way to implement the capital increase, it is considered preferable, because reasonably more convenient, the total or partial sacrifice of the option right of the shareholders". It follows that from the point of view of the limitation of the option right for the reasons explained above, the resolution of September 2019 must be considered legitimate. It was also established the validity and full legitimacy of the capital increase resolution and the actions of the bank's bodies.

"The decision of the Court is an important element of clarity in view of the upcoming strategic and managerial commitments that await the group". This is what Banca Carige states in a note in which it confirms that the Court of Genoa has rejected all claims for damages on the challenge of the shareholders' resolution of the capital increase of September 2019 promoted by Malacalza Investment, combined with the challenges promoted by other small shareholders and the common representative of the savings shareholders, "with total rejection of the large claims for damages and condemnation of the plaintiffs to pay court costs".

Chapter 3

1. Carige Bank peer's hyper-dilutive Capital Increase

1.1 Popolare di Milano Bank S.c.r.l.

- Year of execution: 2011
- Amount raised (Eur mln): 799

Popolare di Milano Bank Group S.c.r.l. was the eighth largest banking group in Italy by capitalization (the fifth largest among popular institutions) until January 1, 2017, when it merged with Banco Popolare to form Banco BPM.

As of December 2016, Banca Popolare di Milano group could count on a workforce of 7,673 employees, more than 1,400,000 customers (almost 89% of whom were private individuals) and direct and indirect deposits of 36,471 and 32,625 million euros, respectively.

In June 2011, the Extraordinary Shareholders' Meeting of Banca Popolare di Milano resolved to:

- eliminate the disclosure of the par value of the shares;
- grant the Board of Directors the power to increase the share capital within a period of 12 months from the date of the resolution, up to a total amount of EUR 1,200,000.000 by issuing ordinary shares to be offered as an option to shareholders and bondholders of the "Convertendo BPM

2009/2013 - 6.75%"[32] bond loan, giving the Board of Directors the power to define the terms and conditions of the transaction, including the issue price of the new shares.

Both the Prospectus and the Report of the Shareholders' Meeting show how the capital increase operation constituted an intervention to strengthen and re-qualify the bank's assets; in particular, at the Shareholders' Meeting the Chairman represented to the shareholders that "in order to take into account the higher capital requirements temporarily requested by the Supervisory Authority and to consolidate the strategic and industrial prospects in the current market situation, the Board of Directors proposes a capital increase that would allow BPM to have a Core Tier 1 Capital ratio of 8.6% in 2011, a ratio that, with the removal of the additional capital requirements due to the absence of the aforementioned critical points highlighted by the Bank of Italy, would stand at 10.4% in 2013".

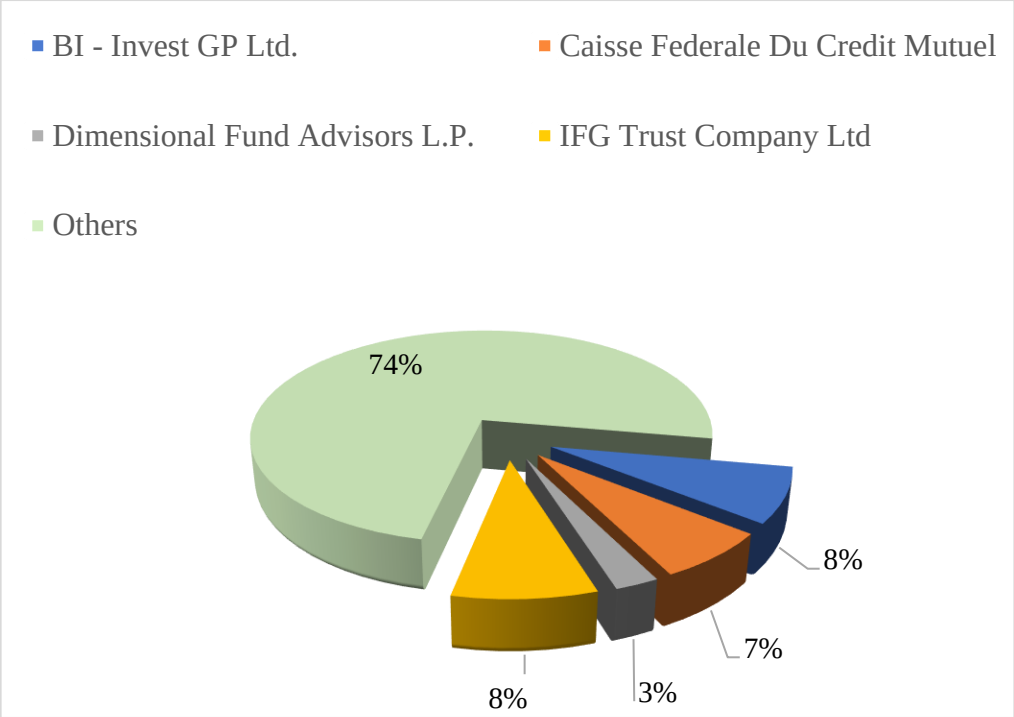
The Explanatory Report of the Extraordinary Shareholders' Meeting mentioned above shows that under the power conferred to the Board of Directors, the latter would have been given the power to determine the issue price of the shares, including any share premium, "taking into account, among other things, the market conditions prevailing at the time of the actual launch of the operation, the stock market price of BPM ordinary shares, the income, operating, capital and financial performance of the Company and the Group it heads, as well as market practice for similar operations".

[32] To the subscriber of "Convertendo BPM 2009/2013-6.75%" bond, during the Public Offer, is also offered a Warrant option (to subscribe BPM shares).

The Explanatory Report of the Extraordinary Shareholders' Meeting mentioned above shows that under the power conferred to the Board of Directors, the latter would have been given the power to determine the issue price of the shares, including any share premium, "taking into account, among other things, the market conditions prevailing at the time of the actual launch of the operation, the stock market price of BPM ordinary shares, the income, operating, capital and financial performance of the Company and the Group it heads, as well as market practice for similar operations". With a resolution of August 2011, the Board of Directors then partially exercised the power conferred on it by the Shareholders' Meeting, but postponed the definition of the terms and conditions of the offer to a future decision; in continuity with this resolution, in October 2011 the, in the meantime transformed into, Management Board resolved to, among other things:

i. set the issue price of each of the ordinary shares at 0.30 euro;
ii. set the option allocation ratio at 138 new ordinary shares for every 25 ordinary shares held and 92 new ordinary shares for every 1 bond of the "Convertendo BPM 2009/2013 - 6.75%" loan;
iii. establish that the capital increase would take place for a maximum of 799 euros.
iv. to establish that the capital increase would take place for a maximum of 799,421,014.20 euros, to be entirely allocated to share capital with the issue of a maximum of 2,664,736,714 ordinary shares with no par value.

As of 31/12/2011, after the capital increase, the new shareholding is divided as following:



After

1.2 Monte dei Paschi di Siena Bank S.p.A.

- Year of Execution: 2014
- Amount raised (eur mln): 5.000

The Montepaschi Group is the banking hub led by Banca Monte dei Paschi di Siena, with operations mainly in Italy and focused on traditional retail & commercial banking services (approximately 77% of total revenues). The Group integrates traditional models of offer, operating through the network of branches and specialized centers, with an innovative system of digital and self-service services, enriched by the skills of the network of MPS financial advisors. Foreign operations are focused on supporting the internationalization processes of Italian corporate clients and involve the main foreign financial markets and some of the emerging countries that have relations with Italy.

Employees	25.961
Branches (Italy)	2.186
Clients (mln eur.)	5.3
Shareholders Equity (mln eur.)	5.965
Revenues (mln eur.)	4.228

In May 2014, the Extraordinary Shareholders' Meeting of Banca Monte dei Paschi di Siena S.p.A. resolved to:

1. increase the share capital for a maximum total amount of EUR 5,000,000,000, divisible, by means of the issue of ordinary shares, with

regular dividend entitlement, to be offered as an option to the company's shareholders;

2. grant the Board of Directors the power to establish the terms and conditions of the offer "taking into account, among other things, for the purpose of determining the issue price, the market conditions and the performance of the stock, as well as the economic and financial performance of the Company and considering the market practice for similar transactions and without prejudice to the provisions of art. 2346, paragraph 5 of the Italian Civil Code[33]", also specifying that the issue price "will be determined, close to the start of the offer period by applying, according to market practices for similar transactions, a discount on the theoretical ex-right price (the so-called Theoretical Ex Right Price "TERP") of ordinary shares, calculated according to current methods, based on the official stock exchange price on the trading day prior to that determination date".

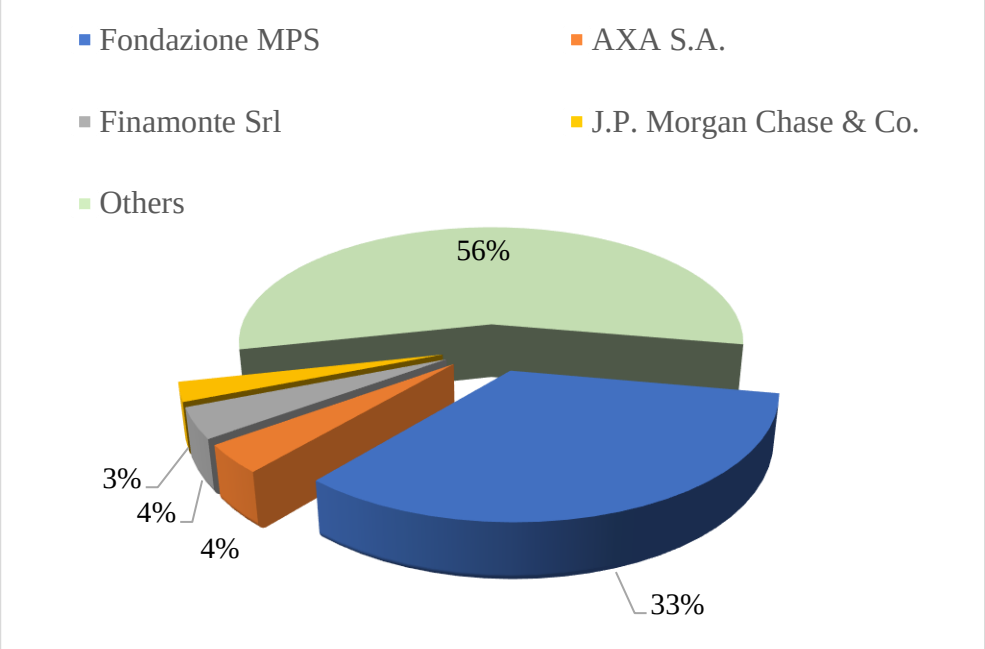
The reason for the proposed recapitalization was the opportunity to "provide BMPS with a functional safety buffer to absorb the negative impacts that will reasonably be expected to result from the Comprehensive Assessment[34] and thus allow BMPS to meet, as best as possible, the commitments it has undertaken in the Restructuring Plan, as well as the need "to align with the best market practice in Italy in terms of Common Equity Tier 1 Ratio, which

[33] In no case may the value of the contributions be less than the total amount of the share capital

[34] The Comprehensive Assessment ("CA") concluded that Banca Monte dei Paschi di Siena's ("BMPS" or the "Bank") capital structure is solid and capable of resisting the impact of the Asset Quality Review ("AQR"). This outcome was reached as a result of the June 2014 capital increase, which was adequately proportioned. Indeed, the exercise revealed a post-AQR Common Equity Tier 1 ("CET1") of 9.5 percent as of December 31, 2013, compared to an 8.0 percent criterion.

should stand at December 2013, as a result of the New Capital Increase and the repayment of Euro 3 billion of New Financial Instruments.

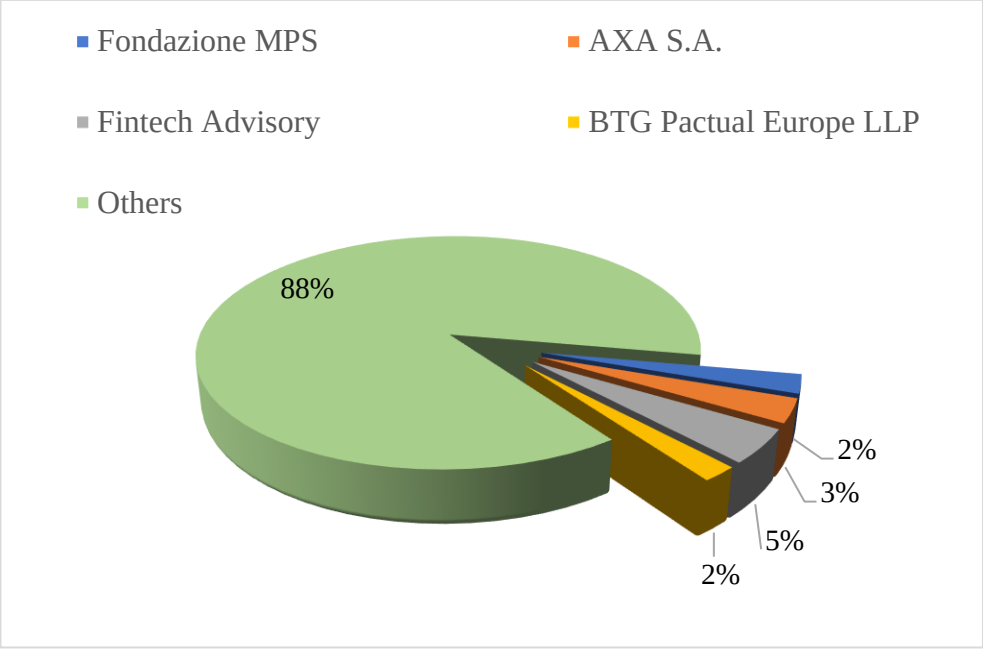
The Board of Directors also specified, in its report to the Shareholders' Meeting, that the transaction was "also consistent with similar operations to strengthen capital or, in any case, to prepare the financial statements in advance for the impact of the asset quality review recently carried out or planned by other competitors". The Board of Directors, with a resolution passed on June 2014, exercising the powers granted to it by the Shareholders' Meeting and therefore referring to the criteria established therein and reported above, decided to issue a maximum of 4,999,698,478 new shares at a price of 1.00 euros per share, at a ratio of 214 new shares for every 5 ordinary shares held - implying a discount of approximately 35.5% on the so-called Theoretical Ex Right Price (TERP). Before the capital increase, the shareholding capital was divided as represented in the graph below:



Before

To conclude, following the capital increase operation of approximately EUR 5 billion, concluded on 4 July 2014, the Bank's share capital stood at EUR 12,484,206,649 for a number of ordinary shares of 5,116,513,875. As of 31/12/2014, the Bank's largest shareholders (holding more than 2% of the capital) owned a total of 12.17% of the capital are:

Compared to the composition of the capital at the end of the year 2013, it is worth noting the decrease in the share held by the MPS Foundation, from 33.5% to 2.50%, and the entry of important institutional investors; in particular, Fintech Advisory Inc and BTG Pactual Europe LLP, which have defined a shareholders' agreement with the MPS Foundation.



After

1.3 Carige Bank S.p.A.

- Year of Execution: 2014
- Amount raised (eur mln): 800

In April 2013, the Extraordinary Shareholders' Meeting of Banca Carige S.p.A. decided to

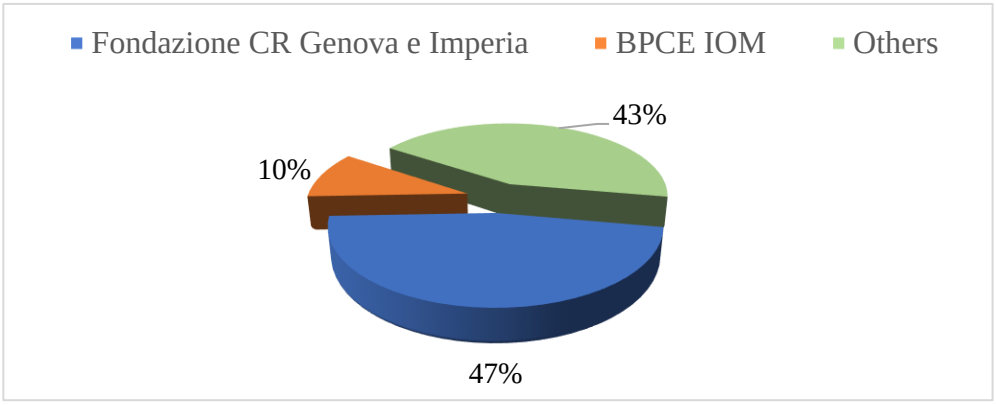
- grant the Board of Directors the power to exercise, by March 2014, the authorization to increase the share capital, on one or more occasions and also in divisible form, by a maximum total amount of EUR 800,000,000, including any share premium, through the issue of ordinary shares to be offered with pre-emptive rights to those entitled
- grant the Board of Directors the power to establish the terms and conditions of the transaction, including the issue price of the shares.

The recapitalization was part of a context of overall strengthening of the bank's capital controls, and was specifically motivated by the desire to "achieve a capital structure that fully complies with the higher ratios required by the new regulatory framework, also taking into account the fact that Banca Carige is one of the banks that will be subject to European supervision", as well as to "provide the Group with the most suitable resources to face the difficult macroeconomic context, preparing to seize market opportunities at the time of recovery", in particular by creating the conditions to be able to "support the necessary investments for technological innovation and the distribution network". With regard to the criteria for determining the issue price, the Board of Directors' Report to the Shareholders' Meeting specified

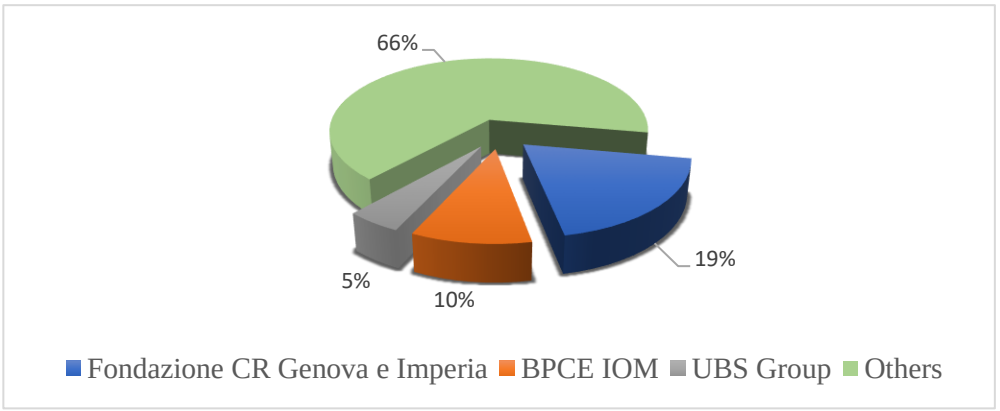
that the same would be determined considering "market conditions in general and the performance of Carige stock, as well as the Bank's and the Group's economic, equity and financial performance, also considering market practice for similar transactions".

On June 2014, in execution of the shareholders' resolution, the Board of Directors of the bank then determined, on the basis of the criteria outlined in the above Report, to issue a maximum of 7,992,888,534 new shares at a price of EUR 0.10 per share, of which EUR 0.05 by way of share premium, at a ratio of 93 new shares for every 25 ordinary and/or savings shares held - implying this price a discount of approximately 40% on the so-called Theoretical Ex Right Price - TERP.

The changing of the shareholders' capital, before and after the dilutive capital increase, is represented, respectively, in the graphs below:



Before



After

1.4 Popolare di Vicenza Bank S.p.A.

- Year of Execution: 2016
- Amount raised (eur mln): 1.500

Banca Popolare di Vicenza, founded in Vicenza in 1866, is the first popular bank to be established in the Veneto region. Since the 1980s, the network of branches of Banca Popolare di Vicenza has gradually expanded from the original province of Vicenza to the entire Northeast and then to the North of Italy. In the 2000s the bank, through a development action that continued until 2007, acquired many other banks. Between 2008 and 2014, the Bank doubled the number of its members from 60 thousand to 116 thousand. This result was achieved in particular through two capital increase operations, launched between 2013 and 2014, through which almost 2 billion were raised.

The aforementioned operations are consequent to an important reorganization of regulatory and supervisory regulations, starting in 2013, represented by the beginning of the application of the so-called "Basel 3" body of rules, which provided, among other things, for a strengthening of capital adequacy by banks.

In 2015 the bank was included among the popular banks with assets in excess of 8 billion euro that, in accordance with the provisions of Law Decree no. 3/2015 (converted by Law no. 33 of 24 March 2015, which made amendments to Articles 28 et subsequent of the Consolidated Banking Act on "popular banks"), had to be transformed into a joint-stock company. In March 2016,

the Extraordinary Shareholders' Meeting of Banca Popolare di Vicenza S.c.p.a. resolved to:

- approve the transformation of Banca Popolare di Vicenza from a joint-stock cooperative company to a joint-stock company;
- delegate and grant the Board of Directors the power to increase the share capital for cash, also in divisible form, on one or more occasions, with the exclusion or limitation of option rights, for a maximum total amount of Euro 1.500.000.000 by means of the issue of ordinary shares with no nominal value;
- to authorize the Board of Directors to define the terms and conditions of the above-mentioned capital increase, inter alia, by determining the issue price "by means of the so-called book building method and application of the open price criterion, in accordance with market practice for transactions with the same characteristics.

On the same date, the Ordinary Shareholders' Meeting resolved, as a continuation of the recapitalization transaction, to approve the proposal for the listing of the bank's shares on the MTA market organized and managed by Borsa Italiana S.p.A., and to grant the Board of Directors any power necessary or appropriate to define the terms of the above-mentioned listing and capital increase.

The proposal to grant the proxy to increase the capital was part of the transaction required by:

- the entry into force of Art. 1 of Law Decree 24 January 2015 (coordinated with Conversion Law 24 March 2015, no. 33) which obliges popular

banks whose assets exceed 8 billion euros to transform themselves into S.p.A. within one year (or to reduce their assets within the aforementioned threshold);

- the need to strengthen the Bank's capital

In March 2016, the Board of Directors of the issuer, in exercise of the above-mentioned proxy, resolved to carry out the capital increase inseparably and by splitting it into two offers:

i. a "public offer", equal to 25% of the amount of the global offer, addressed to shareholders and the general public in Italy; and
ii. a simultaneous "institutional placement", equal to 75% of the amount of the global offer, reserved to institutional investors in Italy and abroad.

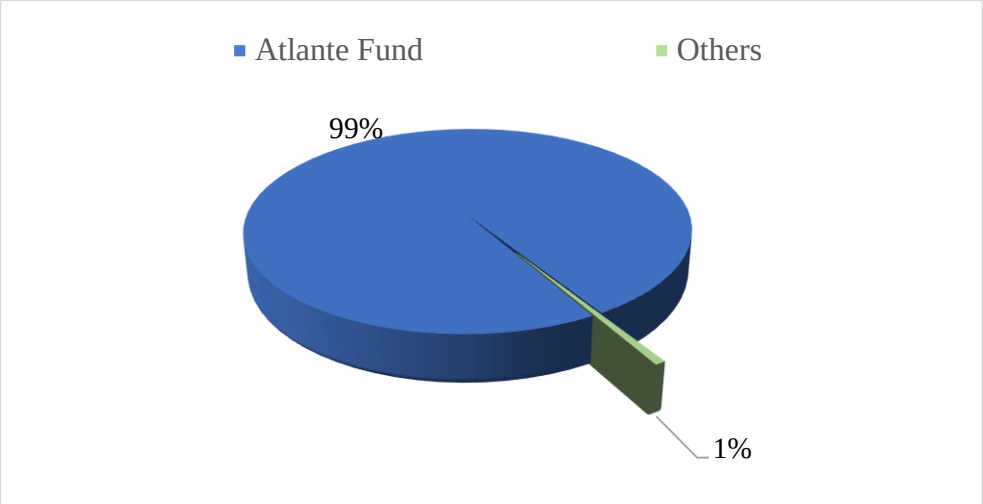
With regard to the issue price of the new shares, the method chosen for its identification was that of the so-called book building applied in conjunction with the so-called open price criterion, according to which, in this specific case the bank would have identified, in agreement with the coordinators of the global offer, an indicative valuation range, binding in its maximum but not in its minimum, communicated before the start of the offer period, determined considering, among other things, market conditions, the bank's prospects and the results of the pre-marketing activity that will be previously conducted with institutional investors of primary international standing; moreover, the precise value would have been "identified, and communicated to the public, at the end of the market offer period, taking into account:

a) domestic and international securities market conditions;
b) the quantity and quality of demand received from institutional investors;

c) the quantity of demand received from shareholders and retail investors

The choice of this methodology was due to the belief that it represents a criterion for the determination of the issue price based on the market's concrete appreciation, founded on an articulated process and carried out according to the best practice and which is therefore, also in function of the Bank's primary and irrevocable interest in strengthening its capital and in the context of a transaction that, due to its size and purpose, must necessarily be addressed to the market, consistent with the provisions of art. 2441, paragraph 6, of the Italian Civil Code since, by the way it is formed, it reflects the market's reasonable appreciation of the economic value of the shares in the specific context of the transaction. Against the initial determination of the indicative valuation range between EUR 0.10 and EUR 3.00 per share, on April 2016, and on the same day as the end of the offer, the Board of Directors set the share price at EUR 0.10, therefore equal to the minimum value of the range.

The global offer ended with subscriptions for a total amount equal to 7.66% of the total countervalue, resulting in the denial by Borsa Italiana of the



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measure to start trading the bank's shares, with consequent ineffectiveness of the subscriptions collected during the offer period; the Atlante Fund[35], by means of the underwriting agreement between the issuer and Unicredit as well as the sub-underwriting agreement concluded between Unicredit and Quaestio Capital Management SGR S.p.A., then subscribed the entire capital increase at the offer price of EUR 0.10 per share. As of 31/12/2016, after the capital increase, the new shareholding is divided as following:

[35] Atlante Fund is a formally private alternative investment fund, created under the impetus of the Italian government to intervene in banking crises, caused by the large amount of impaired loans held by institutions, supporting their recapitalization and taking over non-performing loans.

1.5 Veneto Bank S.p.A.

- Year of Execution: 2016
- Amount raised (eur mln): 1.000

Veneto Banca was a credit institution headquartered in Montebelluna, in the province of Treviso, in compulsory administrative liquidation since June 2017 as a result of Decree-Law No. 99/2017.

As a result of the business transfer deed signed on June 2017, the bank's hundreds of branches were acquired by Intesa Sanpaolo for a total price of 50 cents; many branches were then closed starting in December 2017

In December 2015, the Extraordinary Shareholders' Meeting of the then Veneto Bank S.c.p.a. resolved to:

- approve the transformation of Veneto Bank from a joint-stock cooperative company to a joint-stock company;
- grant the Directors the power to resolve, on one or more occasions, a divisible capital increase, for a maximum total amount of € 1.000.000.000, to be paid up in cash;
- grant the Board of Directors the power to establish the terms and conditions of the said recapitalization, providing that, with regard to the determination of the issue price, if the intervention of a guarantee consortium is envisaged, the Directors shall have the power to fix it during the delegated resolution only in the minimum and maximum amounts, providing that the final identical price for all subscribers will be determined by the outcome of the placement.

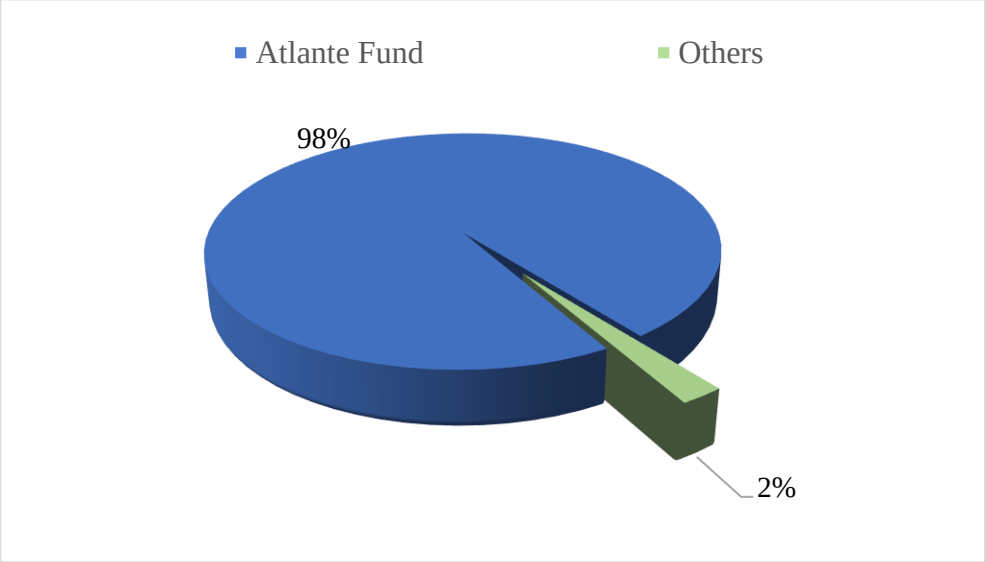
On the same date, the Ordinary Shareholders' Meeting resolved, as a continuation of the recapitalization transaction, to approve the proposal for the listing of the bank's shares on the MTA market organized and managed by Borsa Italiana S.p.A.. The operation as a whole was deemed necessary for the issuer in order to restore compliance with the capital requirements demanded by the ECB, as well as to provide itself with the financial resources to pursue the strategies set out in the Business Plan; Moreover, the same capital increase should have allowed the bank to acquire the status of a listed company so as to allow the shareholders to trade their shares directly on the market and thus monetize their investment. The Board of Directors of the bank, in execution of the proxy granted by the Shareholders' Meeting, then structured the recapitalization operation by dividing it into:

a) an option offer to the shareholders of the issuer in proportion to the number of shares held by each of them;
b) if the capital increase was not fully subscribed by the shareholders as part of the option offer mentioned above, an offer to qualified Italian and foreign investors as part of the "institutional placement".

With regard to the issue price of the New Shares, the same Board, meeting on May 2016, in agreement with the global coordinator, the co-global coordinators and having consulted the joint bookrunners, established in Euro 0.10 the minimum subscription price and in Euro 0, 50 the maximum subscription price for the New Shares, both of which are binding, also specifying that "in the event that the New Shares of the Capital Increase, in

whole or in part, are subscribed by the Sub-Guarantor (Atlante Fund), the Offer Price will be equal to the Minimum Price".

As of 31/12/2016, after the capital increase, the new shareholding is divided as following:



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1.6 Monte dei Paschi di Siena S.p.A.

- Year of Execution: 2016
- Amount raised (eur mln): 1.000

In November 2016, the Extraordinary Shareholders' Meeting of Banca Monte dei Paschi di Siena S.p.A. resolved to:

i. approve the coverage of the total loss of Euro 1,636,082.770.63 by reducing the share capital by a corresponding amount;

ii. approve the regrouping of the bank's ordinary shares, in the ratio of 1 new ordinary share with regular dividend entitlement for every 100 ordinary shares existing at that time, to this end granting the Board of Directors the power to proceed with the cancellation of a maximum of 64 ordinary shares;

iii. grant the Board of Directors the power to increase the share capital, in one or more tranches, with the exclusion or limitation of pre-emption rights, for a maximum total amount of EUR 5.000.000.000, if necessary by carrying out this recapitalization also by means of transactions for the purchase by the bank of financial instruments issued or guaranteed by it and the conversion of convertible financial instruments into shares;

iv. grant the Board of Directors the power to establish the terms and conditions of the above-mentioned capital increase, specifying that the issue price of the shares deriving from the latter should have been determined on the basis of the following criteria:

a. quantity and quality of the demand collected from institutional and/or qualified investors and, possibly, from cornerstone investors and/or anchor investors;
b. quantity of the demand received from the general public if a dedicated tranche was planned, all by means of the so-called book-building method and application of the open price criterion, with the Board also being able, where deemed appropriate in the primary interest of the company, to take into account the conditions of the domestic and international securities market, and the equity, economic and financial situation of the Bank and of the Group it heads and the related income trend.

The Board of Directors, in the Explanatory Report of the Shareholders' Meeting, specified that the recapitalization operation was aimed at strengthening the Bank's capital as part of a broader operation which contemplates, among other things, the de-consolidation of the group's portfolio of non-performing loans, then emphasizing that the launch and overall implementation of the operation and, therefore, of each of the measures it envisages including the Capital Increase, responds to the primary need to meet the requirements and requests indicated by the competent Supervisory Authority (ECB), which, in particular, has pointed out the absolute necessity, for the future of the Bank, to prepare and announce a credible and structural solution to resolve the problem of non-performing loans of the group".

The Board, also in execution of the aforementioned delegation of powers by the Shareholders' Meeting and, in general, in pursuit of the broader recovery plan of the Group, therefore resolved to implement a complex operation, consisting of four inseparable and functionally interconnected phases:

i. de-consolidation of the non-performing loans in the portfolio of the bank and its subsidiaries, for approximately 27.100.000.000 of value gross of provisions;
ii. promotion of a liability management exercise, aimed at the repurchase of some subordinated liabilities of the bank against a consideration that would not be collected in cash as it would be linked to the subscription of new shares of the bank itself;
iii. inseparable capital increase with exclusion of the option right, but with a pre-emption right in favor of the existing shareholders, for a countervalue of euro 5.000.000;
iv. average coverage of 40% of receivables classified as "probable non-performing loans" and "expired loans position".

More specifically, the capital increase referred to in point (iii) was divided into two distinct portions, the first of which was at the service of the offer relating to the liability management exercise and the second at the service of an offer to shareholders, the general public and institutional investors. With regard to the issue price of the new shares, the method chosen for its identification was that of the so-called book building applied jointly with the so-called open price criterion, considered "a methodological approach".

Open price, which is considered a method of determining the issue price based on the market's concrete appreciation, founded on an articulated process and conducted according to best practice, and as such determining the formation of a price that reflects the market's fair appreciation of the economic value of the shares in the specific context of the transaction.

With reference to the adoption of this method, the bank's independent auditors also issued their report pursuant to art. 2441, paragraph 6, of the Italian Civil Code, considering that the criterion adopted by the Directors is appropriate, since in the circumstances it is reasonable and not arbitrary, for the purposes of determining the issue price. Against the initial determination of the indicative valuation range, established on December 2016 by the Board of Directors, between EUR 1.00 and EUR 24.9 per share, the same Board did not then proceed to set the exact price at the end of the offer period.

Based on the subjection of the offer to the condition constituted by the successful outcome of the recapitalization and in light of the inseparability of the capital increase, in fact, all the subscriptions collected lost their effectiveness as they were not such as to cover the offer in its entirety, thus determining the impossibility of completing the overall capital strengthening operation.

1.7 Unicredit S.p.A.

- Year of Execution: 2017
- Amount raised (eur mln): 13.000

On January 12, 2017, the Extraordinary Shareholders' Meeting of UniCredit S.p.A. resolved to:

i. approve the reverse stock split of the ordinary and savings shares at a ratio of 1 new share for every 10 shares held at that time, granting the Board of Directors the power to proceed to the cancellation of a maximum of 9 ordinary shares and a maximum of 6 savings shares;

ii. approve a paid capital increase for a maximum total amount of €13.000.000.000, to be carried out in one or more tranches and in separable form.

iii. with respect to the ordinary UniCredit shares to be issued against payment following the exercise of stock options by the beneficiaries of the incentive plans, to approve a capital increase in addition to the previous one, to be carried out in one or more tranches and in separable form, through the issue of a maximum number of ordinary shares resulting from the application of the adjustment criterion represented by the so-called factor K compared with the previous recapitalization, it being understood that the increase could not have exceeded 1% of the existing share capital;

The right-issue capital increase to UniCredit shareholders constituted, as stated in the Explanatory Report to the Shareholders' Meeting, "one of the pillars of the Strategic Plan 2016-2019", aimed at:

- increase the capital ratios of the banking group;
- face a proactive reduction of the risk of capital assets, in particular related to the Italian portfolio through the recognition of net adjustments to loans deriving from the change of approach regarding the new strategy for the management of impaired loans and from the expected sale of a portfolio of impaired loans through a securitization transaction, estimated at 8.1 billion euros;
- absorb the recognition of integration costs for a total amount of approximately 1.7 billion euros net of tax effects, aimed at financing the exit from the Group of about 5. 600 employees through a combination of pre-retirement plans and incentive schemes;
- deal with some further write-downs on balance sheet assets for a total estimated amount of 1.4 billion euros.

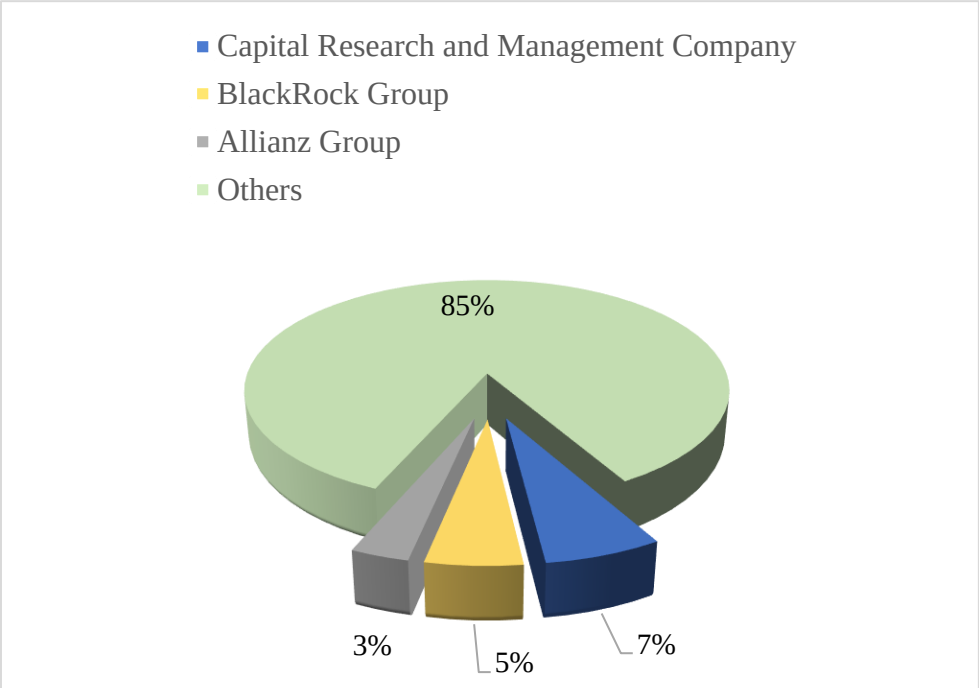
With specific reference to the subscription price of the new ordinary shares, it was expected that it would be determined by the Board in proximity to the launch of the transaction, taking into account the economic and financial situation of the Company, the market conditions in general and the market practice for similar transactions, by applying a discount compared to the so-called Theoretical Ex Right Price "TERP" of the ordinary shares, calculated on the basis of the official stock exchange price of the day in which the

subscription price will be determined, or if not available, on the previous trading day.

On February 2017, in execution of the Shareholders' Meeting resolution, the Board of Directors, based on the criteria outlined in the above-mentioned Report, to issue a maximum of 1,606,876,817 new shares at a price of EUR 8.09 per share, of which EUR 8.08 as share premium, at a ratio of 13 new shares for every 5 ordinary or savings shares held (implying this price a discount of approximately 38% on the so-called Theoretical Ex Right Price - TERP).

As of today, UniCredit has a free float equal to 100% of the shares outstanding and there are no controlling shareholders or shareholders' agreements.

The major shareholders (above 3%) collectively represent only 15% of the share capital.



After

Conclusions

The aim of the dissertation has been to thoroughly explain what companies face when they decide to conduct a dilutive capital increase. To make the topic clear and understandable to the whole audience, the dissertation firstly focuses on a key theoretical analysis, then deep dives on the Carige Bank case, and ends with an analysis of seven dilutive capital increases conducted by Italian banks.

Following what we covered in the empirical analysis, Banca Carige has blown from January 2014 to December 2018 almost all of the approximately 2.210 billion euros in recapitalizations implemented, losing 98.3%. Specifically, there have been three capital increases over these years, for 850 million, 800 million, and 560 million, respectively.

From 2018 to 2021 it faced several problems and, on the edge of bankruptcy, conducted several board changes and was in extraordinary administration due to the will of the ECB. As it has been seen, on September 2019, 91.04% of the shareholders present, representing 47.6% of the bank's total capital, approved the rescue plan presented by three extraordinary commissioners.

Malacalza Investiments, the institution's majority shareholder with 27.5% of the shares, did not attend the extraordinary meeting, thus favoring the rescue plan. The family that owns the Genoese bank filed an appeal in 2019, seeking the annulment of the shareholders' meeting resolution due to a strong dilution of share capital.

The Court of Genoa, however, clearly ruled against the appeal filed by the former majority shareholders, with the following sentence:

i. "Declares inadmissible the request for the annulment of the capital increase resolution adopted by Carige S.P.A. on 9/20/2019 contested by Michele Petrera in his capacity as the Common Representative of the Savings Shareholders of Banca Carige."
ii. "Rejects the claim for damages compensation brought by Michele Petrera in his capacity as Common Representative of the savings shareholders of Banca Carige."
iii. "Declares inadmissible the claims for damages compensation brought against Banca Carige spa, Fondo Interbancario di Tutela dei Depositi, Schema Volontario di Intervento del Fondo Interbancario di Tutela dei Depositi and Cassa Centrale Banca e Credito Cooperativo Italiano S.p.A. by Malacalza Investiments srl and Vittorio Malacalza."

The shareholders of Carige Bank, during the 2021 meeting, approved the accounts, already reviewed by the Board of Directors, which shows a liability of "only" 90 million euros compared to 251 million that in 2020 stands out, due to a progressive cost control that, together with a strong commercial growth, has contributed to the recovery of the bank's profitability.

The Genoese credit institution will now look to its BPER Bank-branded future. After the €530 million capital strengthening intervention by the Fondo Interbancario di Tutela dei Depositi, that represent the current majority shareholder, the transfer of the Fund's shares to BPER is in fact expected to

be completed by the 30 of June 2022[36]. The Emilian group will then proceed with the appointment of a new Board of Directors.

After the analysis conducted in the dissertation, the position of the Court of Genoa is clear and followed a correct interpretation of the main articles of the Italian Civil Code concerning the contested case, ruled decisively in favor of the Ligurian Bank which, even with some formal defects, was consistent and in good faith during the capital increase process. Besides this, the Malacalza family:

i. Allowed the favorable resolution by the shareholders' meeting, not participating in it and yet being able alone, given his own shareholding, to prevent its resolution;
ii. Left the effects to be consolidated by not appealing suddenly the Court for an interlocutory suspension[37] prior to the registration of the nullity's preclusive certificate[38] or annulment for companies that make use of the risk capital market[39].

Finally, is extremely important that the troubled years of Banca Carige will culminate thanks to the merger with BPER rather than with the intervention of large Groups, especially foreign ones, such as Credit Agricole or BNP Paribas could have been.

[36] Press Release: https://www.gruppocarige.it/grpwps/wcm/connect/5e2b37ba-0fad-4159-b6fc-b058a45973a5/Binding+Offer+BPER_ITA.pdf?MOD=AJPERES&CACHEID=ROOTWORKSPACE-5e2b37ba-0fad-4159-b6fc-b058a45973a5-nXV-Y9D
[37] Art. 2378, c. 3, c.c.
[38] Art. 2444 c.c.
[39] Art. 2379-ter, c. 2, c.c.

The reason is very simple: the giants, from beyond the Alps but on closer inspection even our own, whether they are called Intesa or Unicredit, move according to logics that aim at the cancellation of what is acquired, totally diluted in the larger entity. That would have been the end of Carige's very long history.

With BPER, on the other hand, things will be different for the reasons the acquirer itself explains in a press release[40]: "The strong strategic and industrial value of the transaction will allow the group to grow in territories that are today limitedly covered, consolidating its competitive positioning and strengthening the prospect of creating value for stakeholders."

With the latter, Banca Popolare dell'Emilia Romagna captures what will be Carige's destiny: to continue to be the point of reference for the Genoese and Ligurians, territories limitedly presided over by BPER.

So, there is every reason to imagine that Carige's darkest period can be brought to a happy conclusion.

[40] https://istituzionale.bper.it/-/sottoscritto-il-contratto-di-acquisizione-della-partecipazione-di-controllo-di-carige-detenuta-dal-fondo-interbancario-di-tutela-dei-depositi-e-dallo-

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Summary

Dilutive Effects on Capital Increase: Empirical Analysis of Carige Bank Case

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Introduction

Capital increase allow the achievement of one of the stock market's fundamental objectives: the raising of risk capital for companies. The latter, with preemptive rights, is the main way of raising capital on the Italian secondary market. During capital increases, with the issue of new shares at a discount price compared to current prices, the pre-emptive right allows shareholder's interest protection through the preservation of shareholding's value.

In recent years, also due to the deterioration of the economic situation, there has been a spread of highly dilutive capital increases, characterized by the issue of new shares at heavily discounted prices, which have generated significant distortions in share prices. In the dissertation, the objective is to empirically analyze the path that Banca Carige has faced, interpreting judgments of the Courts and behaviors of the stakeholders involved, after the capital increase approved in September 2019, which resulted in an important dilution of the company's shareholdings with consequent loss of control by the Malacalza family.

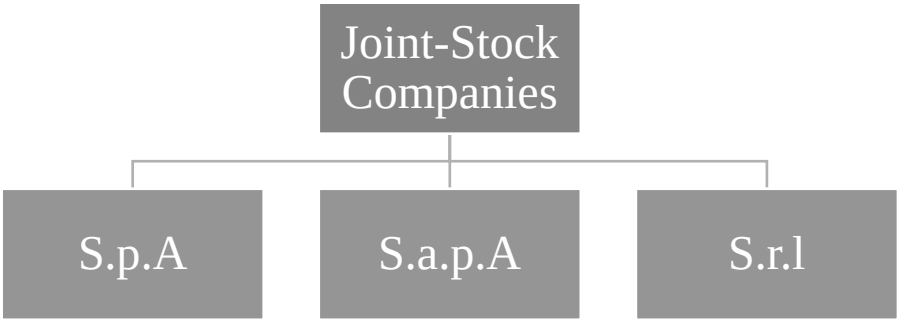
To provide a broad understanding of the facts that influenced the Court of Genoa's decisions (November 2021), the thesis is structured in three chapters.

Summary

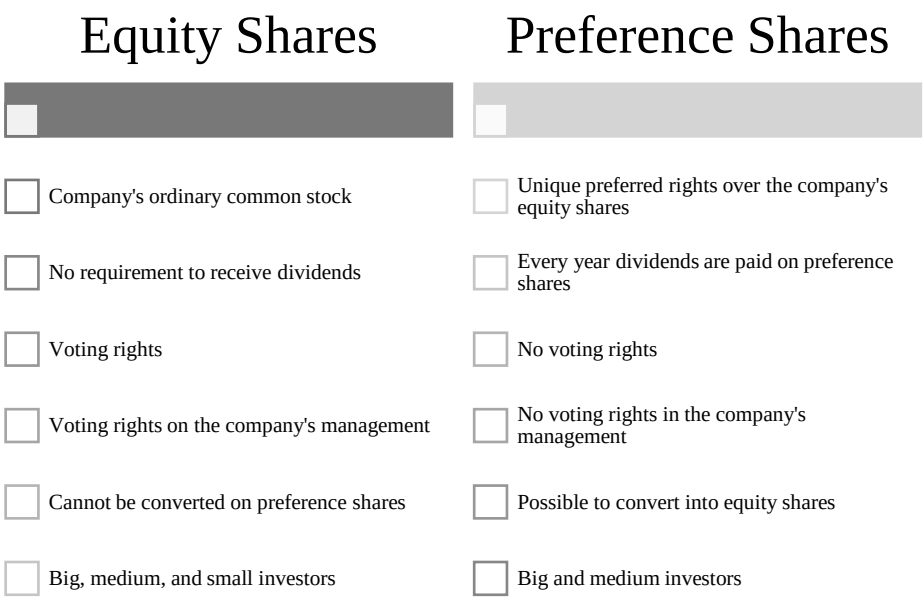
In chapter one, a theoretical analysis is carried out deeply analyzing, from an economical and juridical point of view, Joint Stock Companies, the share capital and its main categories, characteristics, uses, and the capital increase process. Moreover, the main capital markets used by companies will also be described, including Equity Capital Markets and Debt Capital Markets.

The aim of the chapter is to provide a better understanding of the topics addressed in the case analyzed through a specific theoretical outlook.

The joint-stock companies, in Italy, are denominated S.p.A. (joint-stock company), S.a.p.A. (limited partnership limited by shares), S.r.l. (limited liability company) and S.r.l.s. (simplified limited liability company). These are legal forms taken by medium and large-sized companies operating in the various production sectors. In these companies the element of capital has a conceptual and normative prevalence over the subjective element represented by the partners. The participation of shareholders in the share capital can be represented by shares or stakes depending on the specific type of company.



Share capital represents the total value of the funds and assets allocated by the shareholders, as risk capital, at the time the company is set up; it is divided into shares, each of equal value. We can divide the latter in two main categories:



The quotas are assigned to the partners in proportion to the amount paid-in by each of them. In the Italian legislation we can identify different types of companies which, depending on the case, require a greater or lesser contribution of capital by the shareholders or limitations to the types of assets contributed.

Newly issued shares can be distributed in different ways, in one of the three forms mentioned below:

- *pre-emptive offering:* this occurs when the new shares are offered to the old shareholders in proportion to those already held;
- *public offering:* it takes place in cases where the right of option is excluded or limited, and is particularly important in IPOs, when companies need to

acquire the minimum free float necessary and open up, therefore, to the market;

- *assignment*: takes place when the new securities are assigned to predetermined parties, as it occurs in capital increases through contributions in kind or in those carried out following extraordinary merger or demerger operations.

Almost all US recapitalizations are carried out by public offering, which in no way means that pre-emptive capital increase are prohibited in the United States; what is certain is that the elimination of pre-emptive rights, when applicable, is normally permitted by most state laws through an amendment to the bylaws approved by the shareholders' meeting. In Europe, on the other hand, the majority of recapitalization operations are pre-emptive capital increases.

From a wide perspective, companies could collect money from two specific markets:

I. Debt capital market (DCM), is a spectrum of financial alternatives used for raising money into the market for funding capex plans or investments by corporations. The main instruments used for debt are bonds and loans. There are some instruments in the middle such as the convertible bond. The difference between public bonds and private placement is that in the former case the bond is issued in a public base, while in the other the subscription is reserved to some individuals. In the latter, you can understand in advance how many investors will buy the bonds.

II. Equity Capital Markets (ECM), serves as a link between issuers and investors, facilitating communication and activity between corporate and institutional customers. Through this type of market, capital Increases could be pursued to achieve one of the fundamental goals of a stock market: collection of risk capital for companies. It is for this reason that such operations are given a decisive role in corporate finance.

Furthermore, in this chapter, an important focus is given to the "Dilutive Capital Increases", representing the core problem discussed during the empirical analysis of Carige Bank.

Starting from 2009, indeed, the worsening of the subprime financial crisis began to show its effects also on European markets, where the volatility of share prices made it extremely difficult for companies to raise new risk capital. Motivated by the need to deal with this market scenario, a number of Italian listed companies began to implement capital increases with pre-emptive rights, characterized by:

- high ratio between the number of newly issued shares and the number of shares already in circulation;
- strong discount on the subscription price compared to the market value recorded during the last trading day before the offer.

The specific features of these capital increases entail, for the shareholders who do not intend to exercise the option rights granted by art. 2441 first paragraph of the Italian Civil Code, a significant weakening of their stake in the company's

capital and equity: hence, among other things, the qualification of these transactions as "dilutive".

In chapter two, an empirical analysis is implemented investigating the external administration and subsequent rescue operation of Banca Carige, in which the majority shareholder, the Malacalza family, chose to protect itself from the capital increase resolution through the instrument of art. 2377, paragraph 4, asking to restore the situation prior to the highly dilutive increase of its share. Delving into this issue, a necessary step will be to examine in detail the capital increase resolution of September 2019, as it was carried out with the exclusion of the option right, pursuant to art. 2441, paragraphs 5 and 6: the analysis of Malacalza's action will therefore pass through the contrast and composition between the company's interest and the interest of the shareholders.

Banca Carige has blown from January 2014 to December 2018 almost all of the approximately 2.210 billion euros in recapitalizations implemented, losing 98.3% of the capital. Specifically, there have been three capital increases over these years, for 850 million, 800 million, and 560 million, respectively.

From 2018 to 2021 it faced several problems and, on the edge of bankruptcy, conducted several board changes and was in extraordinary administration due to the will of the ECB. As it has been seen, on September 2019, 91.04% of the shareholders present, representing 47.6% of the bank's total capital, approved the rescue plan presented by three extraordinary commissioners.

Malacalza Investments, the institution's majority shareholder with 27.5% of the shares, did not attend the extraordinary meeting, thus favoring the rescue plan. The family that owns the Genoese bank filed an appeal in 2019, seeking the annulment of the shareholders' meeting resolution due to a strong dilution of share capital.

The Court of Genoa, however, clearly ruled against the appeal filed by the former majority shareholders, with the following sentence:

i. "Declares inadmissible the request for the annulment of the capital increase resolution adopted by Carige S.p.A. on 9/20/2019 contested by Michele Petrera in his capacity as the Common Representative of the Savings Shareholders of Banca Carige."
ii. "Rejects the claim for damages compensation brought by Michele Petrera in his capacity as Common Representative of the savings shareholders of Banca Carige."
iii. "Declares inadmissible the claims for damages compensation brought against Banca Carige spa, Fondo Interbancario di Tutela dei Depositi, Schema Volontario di Intervento del Fondo Interbancario di Tutela dei Depositi and Cassa Centrale Banca e Credito Cooperativo Italiano S.p.A. by Malacalza Investiments srl and Vittorio Malacalza."

The shareholders of Carige Bank, during the 2021 meeting, approved the accounts, already reviewed by the Board of Directors, which showed a liability of "only" 90 million euros compared to 251 million that in 2020 stood out, due

to a progressive cost control that, together with a strong commercial growth, has contributed to the recovery of the bank's profitability.

The Genoese credit institution will now look to its BPER Bank-branded future. After the €530 million capital strengthening intervention by the Fondo Interbancario di Tutela dei Depositi, that represents the current majority shareholder, the transfer of the Fund's shares to BPER is in fact expected to be completed by the 30 of June 2022[1].

The latter party will then proceed with the appointment of a new Board of Directors.

After the analysis conducted in the dissertation, the position of the Court of Genoa is clear and followed a correct interpretation of the main articles of the Italian Civil Code concerning the contested case, ruled decisively in favor of the Ligurian Bank which, even with some formal defects, was consistent and in good faith during the capital increase process. Besides this, the Malacalza family:

i. Allowed the favorable resolution by the shareholders' meeting, not participating in it and yet being able alone, given his own shareholding, to prevent its resolution;
ii. Left the effects to be consolidated by not appealing suddenly the Court for an interlocutory suspension[2] prior to the registration of the nullity's

[1] Press Release: https://www.gruppocarige.it/grpwps/wcm/connect/5e2b37ba-0fad-4159-b6fc-b058a45973a5/Binding+Offer+BPER_ITA.pdf?MOD=AJPERES&CACHEID=ROOTWORKSPACE-5e2b37ba-0fad-4159-b6fc-b058a45973a5-nXV-Y9D
[2] Art. 2378, c. 3, c.c.

preclusive certificate[3] or annulment for companies that make use of the risk capital market[4].

The third chapter's objective is to analyze different types of capital increases conducted by Carige Bank's peers, in order to reach highly consistent conclusions. To do this, in-dept benchmark analysis is conducted through the study of seven Italian Public Companies that have implemented right issue below-par over the last ten years, from which:

I. **Popolare di Milano Bank S.c.r.l.:** In June 2011, the Extraordinary Shareholders' Meeting of Banca Popolare di Milano resolved to:
   i. eliminate the disclosure of the par value of the shares;
   ii. grant the Board of Directors the power to increase the share capital within a period of 12 months from the date of the resolution, up to a total amount of EUR 1,200,000.000 by issuing ordinary shares to be offered as an option to shareholders and bondholders of a specific bond loan[5], giving the Board of Directors the power to define the terms and conditions of the transaction, including the issue price of the new shares.

II. **Monte dei Paschi di Siena Bank S.p.A**.: In May 2014, the Extraordinary Shareholders' Meeting of Banca Monte dei Paschi di Siena S.p.A. resolved to:

[3] Art. 2444 c.c.
[4] Art. 2379-ter, c. 2, c.c.
[5] "Convertendo BPM 2009/2013 - 6.75%"

i. increase the share capital for a maximum total amount of EUR 5,000,000,000, divisible, by means of the issue of ordinary shares, with regular dividend entitlement, to be offered as an option to the company's shareholders;

ii. grant the Board of Directors the power to establish the terms and conditions of the offer "taking into account, among other things, for the purpose of determining the issue price, the market conditions and the performance of the stock, as well as the economic and financial performance of the Company and considering the market practice for similar transactions and without prejudice to the provisions of art. 2346, paragraph 5 of the Italian Civil Code[6]", also specifying that the issue price "will be determined, close to the start of the offer period by applying, according to market practices for similar transactions, a discount on the theoretical ex-right price (the so-called Theoretical Ex Right Price "TERP") of ordinary shares, calculated according to current methods, based on the official stock exchange price on the trading day prior to that determination date".

III. Carige Bank S.p.A.: In April 2013, the Extraordinary Shareholders' Meeting of Banca Carige S.p.A. decided to:

i. grant the Board of Directors the power to exercise the authorization to increase the share capital, on one or more occasions and also in divisible

[6] In no case may the value of the contributions be less than the total amount of the share capital

form, by a maximum total amount of EUR 800,000,000, including any share premium, through the issue of ordinary shares to be offered with pre-emptive rights to those entitled

ii. grant the Board of Directors the power to establish the terms and conditions of the transaction, including the issue price of the shares.

IV. **Popolare di Vicenza Bank S.p.A.**: In March 2016, the Extraordinary Shareholders' Meeting of Banca Popolare di Vicenza S.c.p.a. resolved to:

i. delegate and grant the Board of Directors the power to increase the share capital for cash, also in divisible form, on one or more occasions, with the exclusion or limitation of option rights, for a maximum total amount of Euro 1.500.000.000 by means of the issue of ordinary shares with no nominal value;

ii. to authorize the Board of Directors to define the terms and conditions of the above-mentioned capital increase, by determining the issue price "by means of the so-called book building method and application of the open price criterion, in accordance with market practice for transactions with the same characteristics.

V. **Veneto Bank S.p.A.**: In December 2015, the Extraordinary Shareholders' Meeting of the then Veneto Bank S.c.p.a. resolved to:

i. grant the Directors the power to resolve, on one or more occasions, a divisible capital increase, for a maximum total amount of € 1.000.000.000, to be paid up in cash;

ii. grant the Board of Directors the power to establish the terms and conditions of the said recapitalization, providing that, with regard to the determination of the issue price, if the intervention of a guarantee consortium is envisaged, the Directors shall have the power to fix it during the delegated resolution only in the minimum and maximum amounts, providing that the final identical price for all subscribers will be determined by the outcome of the placement.

VI. **Monte dei Paschi di Siena S.p.A.**: In November 2016, the Extraordinary Shareholders' Meeting of Banca Monte dei Paschi di Siena S.p.A. resolved to:

i. approve the coverage of the total loss of Euro 1,636,082.770.63 by reducing the share capital by a corresponding amount;

ii. approve the regrouping of the bank's ordinary shares, in the ratio of 1 new ordinary share with regular dividend entitlement for every 100 ordinary shares existing at that time, to this end granting the Board of Directors the power to proceed with the cancellation of a maximum of 64 ordinary shares;

iii. grant the Board of Directors the power to increase the share capital, in one or more tranches, with the exclusion or limitation of pre-emption

rights, for a maximum total amount of EUR 5.000.000.000, if necessary by carrying out this recapitalization also by means of transactions for the purchase by the bank of financial instruments issued or guaranteed by it and the conversion of convertible financial instruments into shares;

iv. grant the Board of Directors the power to establish the terms and conditions of the above-mentioned capital increase

VII. Unicredit S.p.A.: On January 12, 2017, the Extraordinary Shareholders' Meeting of UniCredit S.p.A. resolved to:

i. approve the reverse stock split of the ordinary and savings shares at a ratio of 1 new share for every 10 shares held at that time, granting the Board of Directors the power to proceed to the cancellation of a maximum of 9 ordinary shares and a maximum of 6 savings shares;

ii. approve a paid capital increase for a maximum total amount of €13.000.000.000, to be carried out in one or more tranches and in separable form.

All these operations, also called highly dilutive capital increases, are characterized, as we have seen, by a high ratio between the number of shares to be issued and the number of outstanding shares, with a strong difference between the subscription price of the new shares and the market share price before the increase's date.

Conclusions

To conclude, it is extremely important to highlight that the troubled years of Banca Carige will culminate thanks to the merger with BPER rather than with the intervention of large Groups, especially foreign ones, such as Credit Agricole or BNP Paribas.

The reason is very simple: the giants, from beyond the Alps but on closer inspection even our own big players, whether they are called Intesa or Unicredit, move according to logics that aim at the cancellation of what is acquired, totally diluted in the larger entity. That would have been the end of Carige's very long history.

With BPER, on the other hand, things will be different for the reasons the acquirer itself explains in a press release[7]: "The strong strategic and industrial value of the transaction will allow the group to grow in territories that are today limitedly covered, consolidating its competitive positioning and strengthening the prospect of creating value for stakeholders."

With the latter, Banca Popolare dell'Emilia Romagna captures what will be Carige's destiny: to continue to be the point of reference for the Genoese and Ligurians, territories limitedly presided over by BPER.

Therefore, there is every reason to imagine that Carige's darkest period can be brought to a happy conclusion.

[7] https://istituzionale.bper.it/-/sottoscritto-il-contratto-di-acquisizione-della-partecipazione-di-controllo-di-carige-detenuta-dal-fondo-interbancario-di-tutela-dei-depositi-e-dallo-