Department of Business and Management

Master's Degree Thesis in Corporate Finance

Chair of Cases in Business Law

Extraordinary transactions between corporate benefits and shareholders' protection: the Unipol-FondiariaSai case

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Introduction

Extraordinary transactions have always been a topic that arouses great interest, given their importance, *inter alia*, in the redesign of corporate or group structures.

Transactions such as the sale - direct or indirect - of the company or its branches, the transfer of assets, corporate transformation and liquidation, mergers and demergers represent alternative methods for achieving the strategic objectives set by the governance, interested in exploiting the potential that each of them allows to realize (Corsi and Farinon, 2018).

Among extraordinary transactions, the reader will be provided with an in-depth overview of the merger and its discipline, with the opportunity to delve into a practical case, that of UnipolSai.

A merger is a form of business combination that results in the economic and legal unification of the participating entities.

From an economic standpoint, the merger makes it possible to expand the size and the competitiveness of the enterprises involved; from a legal point of view, it causes a plurality of companies to be replaced by a single corporate body, resulting in amendments to the bylaws of the participating companies (Campobasso, 2015) and giving rise to multiple effects on shareholders and their assets. It follows that the merger entails important implications for minorities, and, in general, for shareholders.

The thesis aims to highlight, on the one hand, the benefits that mergers can bring to companies, and, on the other hand, the potential costs related to the envisaged transaction. The case under analysis is an important example of how these two aspects coexist.

More precisely, the thesis will be structured as follows:

The first chapter will essentially analyze the merger from a legal point of view.

After reporting on the main theories of scholars who have explored the legal nature of the phenomenon over the years, the process and the structure of the merger transaction envisaged by the Italian Civil Code will be properly described; in particular, the reader will understand the characteristics of three essential moments, namely the merger plan, the merger resolution, and the merger deed.

The reader will be then provided with an explanation of the main protection instruments available to minorities and shareholders in general, one of the most hotly debated topic under the company law reformed by Legislative Decree No. 6/2003. In particular, there will be a focus on the withdrawal right, the veto power, and the Consob Regulation on related parties' transactions, mainly aimed at avoiding opportunistic and absolutist behavior of majority shareholders, ensuring so-called

"shareholder democracy" that is, balancing the majority principle and the interests of shareholders outside the controlling group (Barachini, 2018).
In addition, given that the increase in share capital is to be considered as one of the essential phases of the merger project under analysis, the author also found it functional to dwell on the option right.

The purpose of the **second chapter** is to analyze and explore the merger by incorporation of Unipol Assicurazioni S.p.A ("Unipol Assicurazioni"), Premafin S.p.A ("Premafin") and Milano Assicurazioni S.p.A ("Milano Assicurazioni") into FondiariaSAI S.p.A ("Fonsai").
In this section it will be possible to review all the main phases that characterized the merger transaction as well as all the potential reasons behind it.
In order to gain a better understanding of the whole picture, a historical, economic, and financial overview of each company involved in the merger will be presented. Then, the reader will be able to understand some of the likely factors, both endogenous and exogenous, that caused the incorporating firm to experience a distress to the point where the integration project was planned.

The third chapter contains some final considerations about the transaction under analysis. The purpose of this last part is to provide evidence of how extraordinary finance transactions can create value for companies, making them grow both qualitatively and quantitatively.
In this regard, the successes achieved by the company resulting from the merger by incorporation, namely UnipolSai, will be illustrated.
In addition, the main legal principles and issues related to this specific business case will then be explained with the intention of finding application to the theoretical concepts contained in the first chapter.
Finally, the reader will be provided with an evaluation of the most relevant risk factors or uncertainties arising from M&A deals and concerning all the participating companies as well as the sectors in which they operate. Thus, the critical points of the merger in question will be assessed, with particular reference to the exchange ratio and the methodology applied to determine it.

Chapter 1: Legal issues and shareholder protection in extraordinary transactions

Extraordinary transactions, although motivated by the intent to pursue an interest of the company understood as different and other than that of individual investors, may change the financial structure of the company to the detriment of those who financed it (Barachini, 2018).

In light of this, this chapter aims to analyze what tools are available to protect shareholders, particularly minorities, in the event that such transactions are implemented.

More precisely, for the purpose of better understanding the Unipol- FondiariaSai case analyzed in the next chapter, an in-depth analysis of merger transactions and their implications in the context of Italian joint-stock companies will follow.

The discipline of the merger between companies is contained in Articles 2501-2505-*quater* of the Italian Civil Code, while, outside the Civil Code, specific mergers are regulated, such as those between banks (articles 31, 36 and 57 of the TUB) and insurance companies (articles 201 and 202 Private Insurance Code), as well as mergers between companies incorporated under the law of different countries or cross-border mergers (Directive EU 2019/2121 of 27 November 2019).

1. The legal nature of mergers for the Italian doctrine

As stated by Article 2501 of the Italian Civil Code, "the merger of several companies can be achieved through the establishment of a new entity, or through the incorporation of one or more companies".

According to what stated above, a merger, on the basis of its economic nature, can be implemented in two ways: by union or by incorporation.

In the first case, all the participating entities cease their legal existence and devolve their assets to the new enterprise, also known as newco.

With regard the second type of merger, namely merger by incorporation, it occurs when one or more companies transfer the entire assets to an existing company that incorporates them. In this case, therefore, only the incorporated companies lose their legal identity.

However, in the aforementioned article, there is not a specific definition of a merger, but there is a mere explanation of how such a transaction can be accomplished.

The absence of a clear regulatory definition has divided the doctrine regarding the legal nature of the phenomenon, and numerous disputes and debates that have arisen on the matter.

In particular, there are two main lines of interpretation.

The first approach (Graziani, Cottino, Guerra, Pettarin and others), the more traditional one, frames the merger in the context of universal succession, comparable, by analogy, to the succession *mortis* *causa* of natural persons, and considers it as an transaction that determines the extinction of the participating/incorporated entities and their simultaneous replacement, in the ownership of active and passive legal relationships, including procedural ones, with the incorporating company.

Thus, as a result of the universal succession of assets, all companies, with the exception of the incorporating ones, face the devolutive-extinctive effect.

The most recent thesis (Simonetto, Serra, Morera; Galgano, Ferrara, Di Sabato and others), on the other hand, considers the merger as one of the modifying events of the bylaws of the participating entities, which, far from extinguishing, continue to exist even after the consequent change in their structure or in the number of members.

From this point of view, the merger is considered an instrument of growth, and certainly not a source of weakening or extinction for the company, and it is functional to strengthen the social organism and create "companies of increasing size, with a conspicuous grouping of people and capital" (Simonetto,1965).

In this perspective, through the merger resolutions, the shareholders of each incorporated company do not give life to a new social contract but introduce the necessary variations and amendments in the relative bylaws.

The national Legislator has intervened over the years, making significant changes to the provisions, facilitating the implementation of the transactions, in consideration of the fact that these can be, in most of the cases, a valid tool for the growth of the company.

The first substantial intervention in the matter of company mergers and divisions was carried out by the Legislator with the Legislative Decree of 16 January 1991, n. 22: with this provision, an organic and systematic discipline of mergers and demergers was introduced into the Italian legal system for the first time.

More specifically, the 1991 Legislator introduced Article 2504-*bis* of the Italian Civil Code, according to which "the company resulting from the merger or the incorporating one assumes the rights and obligations of the extinguished companies".

This article has essentially maintained the orientation outlined in 1942[1] regarding the extinction of the original companies. In this way, the Legislator expressed its deliberate agnosticism on the subject, declaring that "the task of the Legislator is to regulate the merger procedure, rather than to define the legal nature of the institution".

With the Reform introduced by Legislative Decree no. 6 of 2003 there was a significant turning point for the doctrine. The Legislator, reformulating the content of Article 2504-*bis* by replacing the

[1] In its original formulation, art. 2502, paragraph 4, of the Civil Code provided that "the incorporating company or the one resulting from the merger assumes the rights and obligations of the extinguished companies"

expression "extinguished companies" with that of "companies participating in the merger" and by adding the specification “continuing all relations, including procedural ones, prior to the merger", clearly expressed his theoretical preference on the topic.
Following the new provision, the traditional position considering the merger as a “succession on death” has been abandoned by most of the doctrine, which prefers to define, instead, the merger as an “evolution-modification” of the corporation.
It therefore becomes a widespread point of view that the incorporated entity or the participating companies survive in all their relations, albeit with a new modified organizational structure, in the incorporating company or in the newco.
The Italian Supreme Court, with ordinance no. 2637 of February 8, 2006, contradicted the traditional position of the case law on the nature of the merger, in support of the second school of thought.
Some legal experts (Ferrucci, Ferrentino and others) are in favor of the Court’s judgment, stressing that the merger, with its peculiar and autonomous nature, can allow the corporate integration, without having to go through the formal extinction of the participating entities.
The United Sections of the Supreme Court with judgement no. 21970 of 30 July 2021, have recently returned to deal with the issue of company mergers, recognizing the legal principle according to which "the merger by incorporation extinguishes the incorporated company", thus overcoming its previous ruling.
This last judgment, although revolutionary, cannot be considered definitive and without criticism, highlighting how the legal nature of the merger is still the subject of debate.

The regulation of mergers has been the subject of numerous studies and interventions also by the European Legislator since the 1960s.
To encourage the implementation of merger transactions between companies incorporated under the law of different countries and the related exercise of the freedom of establishment, it was necessary to intervene on the regulations relating to cross-border transactions: with Directives 2005/56, 2009/101, 2011/35, 2012/30 and 2017/1132 the European Legislator dealt with this issue, giving life to a discipline that to date was still too unclear and incomplete.

2. Merger transactions: structure and process

The merger, defined as "the combination of two or more companies into one" (Di Sabato) as well as "a legal instrument to create a union of people or assets" (Buttaro), can be carried out between companies of the same type (homogeneous merger) or between entities of different types (heterogeneous merger).

It should be noticed that heterogeneous mergers imply the transformation[2] of one or more participating companies. In this case, therefore, entities are subject to the limits envisaged for the transformation procedure, sanctioned by Articles 2498-2500-*novies* of the Italian Civil Code.
As better specified below and during the analysis of the UnipolSai case, corporate transformation is one of the reasons that can lead a shareholder to exercise the right of withdrawal, as it is a transaction that can lead to a significant change in corporate purpose.
Another important limitation envisaged by article 2501 of the Civil Code is that the " participation in the merger is not permitted for companies in liquidation that have begun the distribution of assets": it follows that all companies interested in participating in the transaction must proceed in advance with the revocation of the liquidation status.
With this regard, it is important to specify that the generality of the proposition concerning the concept of liquidation has aroused a wide debate.
The prevailing doctrine (Di Sarli, Demuro, Bertolotti, Vicari and others) makes a literal interpretation of the provision in question, stating that a company in liquidation can participate in a merger until the shareholders have begun to perceive what is left in the corporate assets after the full satisfaction of the creditors; other authors (Santagata and Magliulo), instead, believe that no company can participate in a merger when it is in very advanced stages of the liquidation procedure because the newly established company, resulting from the merger, cannot be created already in liquidation. But still, another theory (Guerrera) proposes a detached interpretation from the Law, stating that participation in a merger would be precluded to companies in liquidation that have approved the final liquidation financial statements.

A merger represents an important phase in the life of the company and is often associated with delicate moments of transition. For these reasons, it is characterized by specific structure and process.
More specifically, a merger, results from three essential moments: 1) the merger plan, 2) the merger resolution and 3) the deed of merger.

The first phase in one of the most significant innovations introduced by the Legislative Decree of 16 January 1991, reconfirmed also by the 2003 Legislator.
The preliminary or planning phase constitutes the central and most significant moment of the entire merger process as it not only prepares the basis for the transaction, but also allows the correct disclosure of information to all shareholders and third parties involved.

[2] Transformation is defined as the transaction through which a company, during its life, assumes an organizational structure different from the original one. This can be associated with a change in the legal status of a company (Causa and Dell’Agnello 2021)

It is expressly provided for by Article 2501-*ter* that the directors of the companies participating in the merger must prepare the merger plan which must then be presented and accepted by the shareholders' meeting.
This document must contain 1) the type, denomination or company name, and the registered office of the companies concerned; 2) the deed of incorporation of the new resulting company or the incorporating one, with any amendments resulting from the merger; 3) the exchange ratio of the shares or quotas; 4) the procedures for assigning the shares or quotas; 5) the date from which such shares or quotas participate in the profits; 6) the effective date of the effects of the merger; 7) any treatment reserved to categories of shareholders and holders of securities other than shares and 8) any advantages offered a favor to the directors of the companies.
One of the most delicate and problematic aspects is the exchange ratio (for further details on the calculation methods adopted in the case at hand, please read chapter 3 paragraph 3): the conversion factor which determines the number of shares of the incorporating or resulting company to be attributed to the shareholders of the incorporated o merged companies in exchange for their holdings.
The exchange ratio depends on the discretion of the directors, as it is not a parameter that can only be obtained through economic evaluations and the mathematical relationship existing between the equity units belonging to the two companies. Intangible factors such as the quality of the organization or the corporate prestige and reputation assume a fundamental importance that cannot be determined through scientific criteria.
This discretion, however, must comply with some principles of company law, such as the right to equal treatment, to be understood both with reference to the shareholders of each company participating in the merger, as well as between the various companies involved in the merger.
In the case of a merger by union between two joint stock companies, the exchange ratio establishes how many shares of the resulting company will be due respectively to the shareholders of the two combining entities.
Even in the context of a merger by incorporation, the shareholders are entitled to obtain a certain number of shares of the new company resulting from the merger, but, in the event that there are different classes of shareholders (as in the case analyzed in the following chapter) it is possible that there will be two exchange ratios: one for ordinary shares and one for special shares, taking into account the particular rights of the category.
In this regard, the Italian Supreme Court recently ruled, stating that "in the case of merger by incorporation, the exchange ratio between savings shares of the incorporated company and ordinary shares of the incorporating company must be calculated taking into account that the value of the former is not necessarily coinciding with that of the ordinary shares, since the value of the savings

shares, which can be deduced from the market prices of the securities, is a function of the rights, not only of a financial nature, but also of an administrative nature, conferred by the shares in question" (Italian Supreme Court, judgement n. 7920 of 20 April 2020).

In other words, the value of the shares depends, *inter alia*, on all the rights that are conferred on them, but since these rights can have both a financial and administrative nature, the diversification - at the time of the exchange - of the values of the shares is considered admissible.

Furthermore, it is important to highlight that fact that if in a merger transaction the exchange ratio should result to be incongruous, the shareholder who has suffered the unfavorable exchange is entitled to compensation for the damage suffered (Italian Supreme Court, 21 July 2016, no. 15025).

To avoid problems of this nature, it is required that for each company participating in the merger one or more experts, typically chosen from independent auditing companies, must prepare a report on the fairness of the exchange ratio and express an opinion on the adequacy of the procedures adopted by the directors for determining the conversion factor.

The appointment of the expert is reserved to the Court when the acquiring company or the company resulting from the merger is a joint stock company, while the expert is chosen from among the auditing firms subject to Consob supervision in the case of listed companies (Article 2501-*sexies* of the Civil Code).

This document is aimed exclusively at meeting the information needs of shareholders or, in general, holders of financial instruments with voting rights. It follows that any negative opinion of the experts does not affect the execution of the merger, and this explains the reason why the law excludes the need for such a report in the event of a waiver resolved unanimously by the shareholders.

The report of the experts is attached to the to the merger plan together with other two fundamental documents, namely the balance sheet (Article 2501-*quarter* of the Italian Civil Code) and the report of the administrative body (Article 2501-*quinquies* of the Italian Civil Code).

A copy of these documents, together with the financial statements of the last three financial years, must remain deposited at the offices of the individual companies participating in the merger in the thirty days preceding the resolution of the transaction and until the approval of the merger.

The merger plan must be registered in the register of companies of the place where the companies participating in the merger are based, or alternatively on the company's website. In particular, at least thirty days must elapse between the date of registration of the project (or of publication on the website) and that set for merger resolution, except in the case in which the shareholders renounce this term with unanimous consent.

Once the preparatory phase described so far has been completed, the merger resolution is reached.

The transaction is decided by each of the participating companies through the "approval of the related project" (Article 2502 of the Italian Civil Code).

In general, the resolutions, to be approved, must obtain the favorable vote of the majority of the shareholders[3] provided for by the by-laws and, once approved by the majority, they are binding on all shareholders, even if they are absent or dissenting.

However, the discipline of the shareholders'meeting majorities, through highly technical procedural rules, seeks to find a balance between the need to facilitate resolutions and adequately protect minorities.

Hence the need to diversify the *quorum* for ordinary and extraordinary shareholders' meeting and to provide for subsequent calls of the meeting, if the first has been deserted, with progressively lower *quorums* (Campobasso, 2015).

In joint stock companies, the *quorum* necessary to resolve on the approval of the merger plan is reached according to the rules envisaged for amendments to the by-laws, unless otherwise specified. Amendments to the bylaws as well as extraordinary finance transactions, such as mergers, are transactions outside the normal management, and therefore fall within the competence of the shareholders' meeting in an extraordinary session.

For extraordinary shareholders' meetings, on first call, the constitutive *quorum* (to convene a meeting)[4] is not expressly provided for, but the favorable vote of more than half of the share capital is required in order for the resolution to be adopted.

For the second call, the 2003 Reform introduced the constitutive *quorum*, establishing that an extraordinary meeting is duly constituted with the participation of more than one third of the share capital and resolves with the favorable vote of at least two thirds of the capital represented at the meeting (Article 2369 of the Italian Civil Code).

Furthermore, always in relation to joint stock companies, it is important to specify that the bylaws may provide for higher *quorums* for resolutions of particular importance and may also provide for further calls, to which the provisions of the second call apply. The merger resolutions of each individual enterprise must be registered in the commercial register, after the legality control made by the notary, if the company resulting from the transaction is a joint stock company.

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[3] The concept of majority will be analyzed in more detail later (chapter 1, paragraph 3)

[4] The constitutive *quorum* is the part of the share capital that must be represented at the meeting in order for it to be duly constituted and for the discussion to start. It differs from the deliberative *quorum*, which refers to the share capital which must be in favor of a specific resolution for its approval.

The merger process ends with the signing of the merger deed by the legal representatives of the companies involved (Article 2504 of the Italian Civil Code). This document has a legal nature and the structure of a real contract. It must always be drawn up in the form of a public act *ad substantiam.* It must be registered, within thirty days, in the commercial register of the places where the registered offices of the companies participating in the merger, of the resulting one or of the acquiring company are located. The deposit obligation is incumbent upon the notary and the directors, or the actors responsible for the administration of the new company and the incorporating one.

The merger deed completes the procedure, so that the transaction becomes effective also towards third parties. In this phase, all rights and obligations of the companies participating in the merger are assumed by the acquiring company or by the *newco*.

As established by Article 2504-*bis*, "the merger is effective when the last of the registrations prescribed by article 2504 has been made". However, the same rule allows, in some specific cases, to postdate or backdate the effects of the merger with respect to the date of the last registration of the deed.

Postdating is possible only in the hypothesis of merger by incorporation and can concern any effect of the merger.

On the contrary, backdating is possible for both forms of merger and can only concern the accounting effects. Hence the concept of accounting backdating.

The provision of this faculty is dictated by practical reasons. In this way, it is intended to give the companies the possibility of avoiding that the passage of an excessive period of time between the merger decision and its implementation could alter, among other things, the accounting circumstances on which the exchange was established (Moro Visconti, 2015).

Once the registration of the deed of merger has been made and the relative effects produced, the invalidity of the deed of merger can no longer be pronounced, without exception.

From that moment on, shareholders or third parties have recourse only to the right to compensation for damages (Article 2504-*quarter*).

In this context, it should be noted that the merger, by modifying the equity conditions of the participating companies, may jeopardize the position of corporate creditors.

Consequently, Italian company law has established that the merger can only be carried out after sixty days have elapsed from the last of the registrations envisaged by article 2502-*bis.*

Within this period, creditors can file an objection. The opposition to the merger produces *ex lege and erga omnes* suspensive effects, until a final decision is reached on the same (Galardo, 2022).

However, there are two cases in which the merger transaction is allowed to take place despite the opposition of creditors. The first occurs when the Court deems the danger of prejudice unfounded: the opposing creditor has therefore to demonstrate that the resulting company does not have sufficient resources to guarantee the payment of its claim, proving the existence of a prejudice and its nature.
The second hypothesis occurs when the company has given a suitable guarantee.
Please note that not all the creditors of the individual companies can oppose, but only those prior to the registration of the merger plan in the company register or to its publication on the website.
What are the facts and the circumstances that can legitimize the opposition is not specified by the law.

2.1 Mergers between insurance companies

As will be described in detail in the next chapter, the Unipol-FondiariaSai merger was a transaction that also involved insurance companies and, for this reason, after an analysis of the structure and process of the merger between companies, a general description of the discipline applied to insurance companies will be the subject of this paragraph.

In accordance with the provisions of Article 201 of the Private Insurance Code (Legislative Decree No. 105 of 7th September 2005), all mergers involving at least one insurance company based in the Italian territory must necessarily be authorized by IVASS's [5] and be published in its Bulletin, provided that these transactions comply with the principles of sound and prudent management
In case of merger by incorporation, the acquiring insurance company must demonstrate that it has the eligible own funds necessary to cover the Solvency Capital Requirement referred to in article 45-*bis* of the Code.
In the scenario of a merger by union, the newco, or the company resulting from the transaction, must be in possession of the authorization to carry out the insurance business and demonstrate that it is able to meet the required solvency margin.

3. Shareholders' protection

In the international language currently most used, the problems of joint-stock companies are illustrated by resorting to the notion of agency problems. This term can indicate relationships between shareholders and managers, shareholders, and creditors and/or majority and minority shareholders.

[5] IVASS, or the Insurance Supervisory Institute, is the body which, since 2012, has been assigned the task of ensuring the stability of the insurance market.

In all these cases there is typically a misalignment between the interests of the agent and those of the principal, that is, of the actor who is subjected to the action of the former.
Before focusing on the potential conflict of interests that may arise between different categories of shareholders, it is important to explain what is meant by majority. The majority of the shareholders' meeting can be represented by a single shareholder who has 51% of the share capital, or by several shareholders who, acting in concert, reach the same percentage. It can also be represented by shareholders (individuals or groups) who have capital percentages much lower than 51% but who still manage to systematically prevail because the other shares are dispersed among a large number of small shareholders.
Having the majority necessary to influence the resolutions of the ordinary shareholders' meeting is one of the prerequisites for achieving control. More specifically, according to Article 2359 of the Italian Civil Code, there are three different types of control and, therefore, three different assumptions for its existence.
The de *iure* control which, as mentioned above, exists when the shareholders hold the majority of the votes that can be exercised in the ordinary meeting; the internal *de facto* control, instead, occurs when a subject holds a stake in the issuer's voting share capital lower than 50% but having a size such as to grant him/her the majority of votes for at least two consecutive annual meetings, and therefore granting him/her a dominant influence[6] in the ordinary shareholders' meeting; the external *de facto* control, also referred to as external *contractual* control, arises when a company is under the dominant influence of another entity due to specific contractual agreements granting the controlling company such a power over the subsidiary.

As already mentioned in the previous paragraphs, in joint-stock companies the minority cannot prevent changes, even radical ones, as the majority principle applies. It follows that the majority plays a key role: it alone can affect, through the appointment of directors, the management of the company, and it is almost exclusively responsible for all the most relevant corporate decisions. In this way a potential conflict of interest is created between the shareholders, the regulation of which is one of the central problems of the law of joint-stock companies (Jeager, Denozza and Toffoletto, 2019).
Nonetheless, it is necessary to ensure that the principles of correctness and good faith, as well as that of equal treatment of shareholders, are never violated.

[6] The concept of dominant influence, recurrent in every notion of corporate control, has posed numerous interpretative problems to scholars. However, it is to be considered that the dominant influence is represented by the power to appoint the majority of the board of directors, and to approve the annual financial statements.

The protection of minority shareholders is a crucial issue especially[7] in listed companies, as demonstrated by the fact that Legislators and Consob have, over time, introduced numerous protection mechanisms to counterbalance the power of controlling shareholders.
In this perspective, starting from 1974 (Law 7-6-1974, n.216), the Legislator has adopted a new orientation of legislative policy, marking a substantial turning point with respect to the Civil Code of 1942, by intervening, for the first time in a significant way, on minorities in Italian listed companies. Since then, numerous legislative interventions have been carried out to improve and strengthen the self-protection tools available to minorities, including, in particular, the 1998 reform that introduced the Consolidated Law on Finance, and the organic Reform of joint-stock companies of 2003.
In light of the progress made in this area, it is still debated whether the minority shareholders of an Italian listed company are sufficiently protected or not.
Some scholars argued that the level of minority protection established by Italian law is adequate and in line with the best international standards, as demonstrated by the powers conferred on minorities, including, among the others, the right to exit and the power of veto (Campobasso, 2014).
The opposite line of thought, on the other hand, aware of the fact that there is an important difference between the “law in the books” and the “law in action”, has realized that the effective use of these protection mechanisms is scarce, or even absent. In other words, some authors, while acknowledging that the Civil Code guarantees certain rights to minority shareholders, believe that these privileges are not always sufficient to adequately protect them, and, in any case, they are unable to avoid the arising of a conflict with the other shareholders (Pandolfini, 2021).
It could therefore be argued that the real tool for protecting minority shareholders lies in the "contract", that is, in the possibility of inserting appropriate clauses in the articles of association or in a shareholders' agreement (Maugeri, 2021).

In the specific case in which an enterprise is involved into an extraordinary transaction it is key to investigate the nature of certain potential costs, such us, among others, the triggering of the withdrawal right, the veto power of the meeting of the holders of special class of shares, and the right issue (Sacco Ginevri, 2020).
The following paragraphs will analyze the aforementioned issues with the intention of placing them in the context of the Italian corporate law and creating a solid basis for the Unipol-FondiariaSai merger, with its main principles and issues, which will be properly explained in the following chapters.

[7] Please note that this is a problem also found in unlisted companies, but, for the purposes of the thesis, there will be a focus on listed companies.

3.1 The withdrawal right

Under the Italian legislation, the withdrawal right is defined as the possibility granted to minority shareholders to exit from the company's share capital, at a fair value, in specific circumstances (Article 2437 and seq. of the Italian Civil Code).

The right of withdrawal is recognized to non-consenting shareholders, that is, more specifically, to shareholders who are absent, dissenting or abstained from a series of resolutions which have as their common denominator that of profoundly altering the risk conditions present at the time of joining the partner to the company (Manni, 2020).

Withdrawal has always been one of the most debated issues due to the opposing interests to be protected: on the one hand there is the interest of the withdrawing shareholder in obtaining the reimbursement of the capital invested in his shareholding, on the other hand, instead, there is the interest of the "surviving" shareholders in continuing to manage the company and in maintaining the integrity of the share capital which, among other things, constitutes a source of guarantee for creditors.

As already discussed above, although in joint-stock companies the minority cannot prevent changes in the corporate structure, even radical ones, as the majority principle applies, it is necessary to ensure that the principles of correctness and good faith are never violated, as well as that of equal treatment of shareholders.

The majority principle does not exclude the possible existence of decisions whose legality depends on the consent of *all* the shareholders: some resolutions considered particularly important, indeed, require higher majorities, and for some of them the right of withdrawal is also provided.

As a demonstration of the above, with the reform implemented with Legislative Decree no. 6 of 2003, the discipline of withdrawal in joint stock companies has been profoundly modified, passing from a version more favorable to the company, to one more oriented towards the protection of the withdrawing shareholder.

The institution in force before the 2003 reform was common for both joint-stock companies and limited liability companies and presented multiple critical issues which resulted in its scarce use in practice. The standard of reference was contained in Article 2437 of the Civil Code, and in its original version provided for only three causes for withdrawal, namely the change of the corporate purpose, transformation, or transfer of the registered office abroad.

Furthermore, this article, specifying that shareholders "have the right to withdraw from the company and to obtain the reimbursement of their shares, according to the average price of the last semester, if these are listed on the stock exchange, or, otherwise, in proportion to the share capital resulting from the financial statements of the last year", appeared to be too much in favor of the company, the surviving shareholders and the corporate creditors to the detriment of the withdrawn shareholder as it was based only on historical and non-prospective data (Rordorf, 2003).

The excessive strictness of the causes determining the withdrawal, together with the criticized criteria for determining the value of the share and the procedure to be followed for its reimbursement, led, *inter alia*, the Legislator to undertake the path of the overall reform of the institution in question.

Specifically, with the 2003 reform three macro categories of causes for withdrawal were introduced: mandatory causes, default causes and statutory causes.

In the event that the withdrawing shareholder is part of a company subject to direction and coordination activities, more specific clauses are applied, as provided for by Article 2497-*quarter* of the Italian Civil Code.

Mandatory causes are those that the by-laws cannot modify and represent the most conspicuous category of causes.

Pursuant to Article 2437, par.1 of the Civil Code, shareholders have the right to withdraw if they have not participated, because they were absent, dissenting or abstained, in the following resolutions:

a) the amendment of the corporate purpose, when it allows a significant change in the activity of the company

b) the transformation of the company

c) the transfer of the registered office abroad

d) the revocation of the liquidation status

e) the elimination of one or more causes of withdrawal

f) modification of the criteria for determining the value of the share in the event of withdrawal

g) amendments to the Articles of Association concerning voting or participation rights

In all these circumstances, the right of withdrawal cannot be excluded by the bylaws and any agreement aimed at excluding it or making it more burdensome to exercise is null and void.

For the purposes of the thesis, it is interesting to underline the fact that letter b) of the article legitimizes the withdrawal in the event of transformation, excluding two other types of extraordinary transactions, namely merger and demerger[8], among the withdrawal hypotheses.

However, following a merger, shareholders may find themselves part of a different type of company. In fact, when these transactions involve subjects of different nature, a transformation can occur, which triggers the right of withdrawal (Magliulo, 2009).

From a legal point of view, a transaction that significantly modifies the corporate purpose or the risk conditions of a company must, at the same time, guarantee to shareholders who have not approved

[8] Please note that they constitute causes for withdrawal in limited liability companies pursuant to art. 2473 of the Italian Civil Code.

its execution the possibility of withdrawing. As detailed in Chapter 3, this is the form of protection granted to the shareholders of Premafin following the merger by incorporation into FondiariaSai.
Furthermore, as already written above, merger transactions can lead to withdrawal even when they do not involve a corporate transformation: pursuant to Article 2501-*ter*, this transaction may involve changes to the bylaws of the resulting company, thus constituting a legitimate reason for withdrawal.
The second category includes all those causes that, although provided for by law and contemplated by the article Article 2437, par. 2, can be eliminated.
Unless otherwise provided, shareholders who did not participate in the approval of the resolutions concerning a) the extension of the company's duration and b) the introduction or removal of restrictions on the circulation of shares, are entitled to exercise the right of withdrawal.
For both cases, it is important to highlight how the exclusion from the right of withdrawal can be envisaged at the time of establishment or subsequently. In the latter case, the resolution by which this right is eliminated from the statute could constitute itself a condition of withdrawal.
With regard the statutory causes (Article 2437, par. 4, of the Italian Civil Code), they are not recognized by the law, but they are eventually introduced by the bylaws on the basis of shareholders' resolutions.
In this context, the statute may provide for withdrawal for just cause, or withdrawal for the mere will of the shareholder (*ad nutum*). In the latter case, a notice of at least 180 days is required[9].
The corporate reform, by granting ample space to private autonomy with the *ad nutum* withdrawal, contradicts the prevailing doctrine and case law that excluded the admissibility of the statutory hypothesis as they could jeopardize the financial solidity of the company, with consequent prejudice for creditors (Bartolacelli and Cappiello, 2004).
It should be specified, however, that the possibility of introducing causes for withdrawal not envisaged by the law is allowed only to "closed"[10] companies.

Once described which are the causes determining the exit of a shareholder, some essential information on the methods and terms for exercising the right of withdrawal will follow.

The right of withdrawal must be exercised by means of a communication by registered letter to the company within a short period: fifteen days from the registration in the commercial register of the resolution that legitimizes it, or thirty days from the knowledge of the fact that it legitimizes the right, in the case of a fact other than a resolution (Article 2437-*bis* of the Civil Code).

[9] Consiglio Notarile di Milano - massima n. 74
[10] Closed companies are defined as companies that do not make use of the risk capital market

The shares for which the right of withdrawal is exercised automatically become non-transferable and must remain deposited at the registered office.
The rationale for non-transferability may appear apparently unclear, as it can be affirmed that there are no reasons justifying the prohibition to the withdrawn shareholder to sell his shares. In this case, the purchaser would take over the position of the transferor and therefore would accrue the right to receive the equivalent value of the shares. However, a justification for this provision would be to be found in the desire to "avoid the risk of an acquisition by third parties of securities whose economic value is then subject to a change not foreseen at the contractual moment, by virtue of events unrelated to the will of the transferee" (Galletti, 2005).
It is important to note that the company can avoid the reimbursement of the shares if within ninety days it revokes the resolution that legitimized this right or if the dissolution of the company is resolved. In these circumstances, the withdrawal can no longer be exercised or loses its effectiveness (Article 2437-*bis* of the Italian Civil Code).
The Italian law expressly admits the possibility of a partial withdrawal, that is, relating only to some of the shares owned by the shareholder. Consequently, the withdrawing shareholders are entitled to the liquidation of the shares for which the withdrawal has been exercised.
The current regulations radically change the criterion for determining the value of the shares in case of withdrawal, abandoning for unlisted companies the approach whereby the liquidation was calculated in proportion to the share capital resulting from the financial statements of the last financial year. Although this was a prudential approach, it was considered a disincentive for shareholders.
Nevertheless, the determination of the liquidation quota due to the withdrawing shareholder in joint stock companies remains one of the issues still at the center of the controversy and debate: in fact, an incorrect determination of the liquidation quota could disrupt the internal relations of the corporate structure as, for example, a too high value would favor the outgoing shareholder, while a too low value would unjustifiably enrich the others.
Hence the need to identify criteria that make it possible to properly determine the real value of the shares.
The Civil Code provides for different approaches for determining the liquidation value, depending on whether it is a joint-stock company with shares listed on a regulated market or not.
The regulatory model envisaged in unlisted joint-stock companies has an elastic structure, as the value is determined not through a mere mathematical calculation, but through a complex activity of the directors, that must take into consideration, *inter alia*, the company’s balance sheet, its prospective income, and its possible market value (Jeager, Denozza and Toffoletto, 2019).

In this case, the Articles of association may envisage and introduce different criteria for the calculation of the liquidation value, as established by Article 2437-*ter*.

It is not yet clear what are the limits, if any, to this statutory autonomy: some authors (Rossi and others), in fact, are of the opinion that some calculation criteria could prove to be excessively penalizing for the withdrawing shareholder.

A possible solution to the doubts that emerged could be found in the phrase "market value of the shares", written in the Article 2437-*ter*, par 2 of the Italian Civil Code.

With this expression, the Legislator not only affirms that the identification of the real value of the shares is the main objective of the valuation, but also clarifies that it must not have a negative impact on the withdrawing shareholder.

The directors, therefore, are required to adopt criteria that make it possible to identify a value that reconciles the various interests involved: that of the withdrawing party to obtain a fair liquidation, that of the other shareholders to purchase the shares at a price no higher than the actual value, and that of creditors to avoid an impoverishment of company assets.

Some commentators came to the conclusion that the only truly suitable way to balance the numerous interests involved could be to attribute to the shareholders a liquidation value equal to the current economic result of the investment made (Maugeri,2014 and Ferri,1987).

In this way it was also possible to answer the problem of the discretion recognized to the directors in determining the amount to be paid to the withdrawing shareholder: in fact, they have a discretion that is not absolute, but limited since they can use any valuation method as long as it is able to ensure the divestment value.

With regard to shares listed on regulated markets, the method for establishing the liquidation value differs from the one described above.

The value of the shares is determined by referring exclusively to "the arithmetic average of the closing prices in the six months preceding the publication or receipt of the notice calling the meeting whose resolutions legitimize the withdrawal" (Article 2437-*ter,* par 3 of the Italian Civil Code).

Even in this case there are some interpretative and applicative doubts. In particular, even if it is established by the law that the six-month term starts from the publication or receipt of the notice of meeting to determine the value of the shares without taking into account any influences of the stock market price caused by the shareholder withdrawal, it has not been duly contemplated by the Legislator the fact that numerous possibilities can arise and create complications.

By way of example, consider the case in which a company has been admitted to listing on a regulated market for less than six months: in this case, shortening the calculation period of the arithmetic mean could generate speculative behavior that are not in line with the *ratio* of the rule.

It should also be noticed how a minority shareholder could adopt opportunistic behaviors based on his expectation on the value of the shares. In the event of a positive trend, the shareholder may decide to renounce the right to subsequently sell shares on the stock exchange. On the contrary, in the event of a future downward trend, the shareholder, exercising the right, could obtain a higher price and earn a profit.

This could lead to a misleading use of the withdrawal discipline as it tends to maximize the capital gain on sales on regulated markets.

Regarding the liquidation procedure in joint stock companies, the current discipline dictates a detailed regulation to avoid that, for example, the extension of the causes for withdrawal compromises the integrity of the share capital and the protection of corporate creditors (Campobasso, 2015).

Pursuant to article 2437-*quarter* of the Italian Civil Code, the redeemed shares shall first be offered to the other shareholders (or holders of convertible bonds) of the firm, in proportion to the number of shares held.

In the event in which these shares remain unsold, totally or partially, the directors can proceed with the placement of the shares with third parties.

The article in question also offers a further alternative, in the event that the shares are not placed with shareholders or third parties: the company shall purchase them using the available reserves.

Finally, in case the company does not have sufficient profits and reserves to support the purchase and reimburse the withdrawing shareholders, an extraordinary meeting must be called to resolve on the reduction of the share capital or on the dissolution of the company [11].

It is important to specify that the creditors can oppose the resolution to reduce the capital (Article 2445 of the Civil Code) and, if this opposition is upheld, the company is dissolved.

This structured process is the result of the need to coordinate the interests of the withdrawing shareholders with those of the corporate creditors. In fact, if the shares are not bought by external actors and if the company does not have the necessary resources to finance the acquisition of the same, then it will be necessary to proceed with the reduction of the share capital but guaranteeing the creditors to object as this event could represent a detriment to this category.

It is possible to conclude that the right of withdrawal represents a potential cost that a company can incur as the exit of the shareholders can be fully paid by the company with its own means. In this respect, to make the exercise of the withdrawal right sustainable by companies, it is a common practice to set a cap so that the price to be paid for the minority shareholders does not exceed a pre-defined threshold (Sacco Ginevri, 2020).

[11] According to Article 2437-*quarter* of the Italian Civil Code, the capital reduction follows the rules written in Article 2445 of the Italian Civil Code

In this context, the analysis and identification of the moment from which the withdrawing shareholder would lose the status of shareholder and, consequently, all his/her rights, is of particular interest. With reference to this question, two opposing currents of thought have arisen in the past.
According to the first hypothesis, once received the communication of withdrawal from the company, the shareholder would lose his *status*, acquiring the role of creditor of the company for the sum of money relating to the liquidation of the title (Presti, 1982 and Ferrara- Corsi, 2001).
According to the other line of thought, the loss of the quality of shareholder would have occurred following the liquidation of the withdrawing shareholder's stake: from this point of view, the shareholder would remain entitled to exercise the participation rights until the completion of the dissolution of his business relationship (Pescatore,1997 and Grippo,1999).

3.2 The shareholders' special meetings

In joint-stock companies, the most important decisions are taken through the shareholders' meeting, which, as mentioned above, can be ordinary or extraordinary. The two essentially differ in terms of competences, *quorum*, and composition (Jeager, Denozza and Toffoletto, 2019).
The functioning of the meeting is characterized by the majority principle and the weight of each shareholder in the meeting is proportionate to the share of capital subscribed and to the number of shares held: shareholders have, in principle, powers and advantages based on the economic significance of their contributions within the company, so that decisions are not made according to the democratic principle "one person, one vote" but according to the plutocratic principle "one share, one vote".
The decision-making power in the shareholders' meeting therefore is, or should be, in the hands of those who hold the majority of the share capital.
As a consequence, the will expressed by the majority shareholders is valid as the will of the company and binds *all* the shareholders, even if absent or dissenting, as long as the rules governing the shareholders'meeting are respected (Articles 2364-2365 of the Civil Code).
In joint-stock companies, the shareholdings are homogeneous and standardized as demonstrated by the fact that the shares are of equal value and give their holders equal rights. In this regard, the doctrine has deemed it appropriate to clarify the principle of equality: the equality of shares is relative and not absolute, objective and not subjective.
Equality is relative in that it is possible to create classes of shares with different rights. Hence the distinction between ordinary shares and special shares, which will be discussed in more detail shortly.

Equality is therefore objective because the rights that each share confers are of an equal nature, and not the rights that each shareholder has as a whole. And it is precisely from here that the so-called "subjective inequality of shareholders" arises; if it is true that every ordinary share confers the right to vote, it is equally true that the position of power within the company of those who own only one share (and one vote) compared to those who hold more shares (and more votes) is different.
However, this inequality between shareholders is legitimate because it perfectly expresses the founding principle of the joint stock company, according to which those who have contributed the most and are more exposed to risk can impose their will on the minority, always respecting the law (Campobasso, 2015).
As mentioned before, there are different classes of shares, depending on the nature of the rights they grant to the holder.
Special shares are those offering rights other than those typically conferred by ordinary shares.
They can be created at the time of the constitution of the bylaw, or by a subsequent amendment of the same.
The presence of special classes of shares automatically implies an internal evolution of the company, since different categories of shareholders, with different interests and objectives, will coexist.
In order to protect the interests of all types of shareholders, it is envisaged that if there are different categories of shares or financial instruments (Article 2436 of the Italian Civil Code) that confer administrative rights, "the resolutions of the shareholders' meeting, which affect the rights of one of them, must also be approved by the special meeting of those belonging to the category concerned" (Article 2376 of the Italian Civil Code).
In other words, holders of special classes of shares have the possibility of exercising the power of veto on the assumption that a resolution of the general meeting could negatively affect their special rights.
This provision submits the effectiveness of the resolution of the general shareholders' meeting to the approval of the special shareholders' meeting in order to grant these shareholders protection against resolutions that could affect their special rights.
From the wording of Article 2376 of the Italian civil code, a noteworthy concept emerges, still debated today. According to Italian scholars and case law, there are three different detriments that a transaction could generate: direct, *de facto*, and indirect (Mignoli,1960).
With direct prejudice, it is customary to identify any direct and *in peius* amendment to the bylaw's provisions attributed to a specific class. A direct detriment can arise, *inter alia*, from an amendment to the amount of the preferred dividend that could occur, for instance, in a merger by incorporation,

in which the preference rights attached to the shares of the incorporating company are lower than those attached to the shares of the absorbed entity.

The *de facto* prejudice arises from a transaction that, while not undermining the rights of the category, produces a detrimental effect on the economic expectations of the special shareholder. An example could be that of a merger by incorporation of a company that annually distribute dividends into an entity that typically experiences an annual loss. Assuming that special shares are issued by the incorporated company, special shareholders are factually affected because no annual dividend will be distributed by the absorbing company, even if without changes to either the articles of association or company law.

Lastly, the so-called indirect prejudice derives from events that (only) indirectly affect the special rights of the shareholders.

However, the content of the notion results to be ambiguous and is still under discussion: on the one hand, there are those who attribute importance only to the prejudice deriving from the introduction of categories of shares with greater rights, or to the increase in the rights attached to an already existing share class; on the other hand, there are those who affirm the need for the approval of the special meeting whenever a resolution could affect the position of shareholders belonging to the different categories in different ways or cause an alteration of the percentage ratio, in relation to the total share capital, between the different categories (Sacco Ginevri, 2015).

In response to the debate, it is common to adopt the theory of the prevailing doctrine (Costa ,1993 and others), according to which an indirect detriment can occurs whenever a resolution of the ordinary shareholders' meeting affects, albeit indirectly, the legal position of the special shareholders, and not only their interests and/or expectations.

This prejudice, therefore, while formally leaving the rights of the category unaltered, involves an indirect compression of the same, especially following corporate transactions, such as a capital increases, mergers, or demergers. This category of prejudice is closely related to the so-called "right to rank", or the right to maintain a fix ranking among the existing classes of shares.

Another topic debated among legal scholars, in addition to the very meaning of indirect prejudice, is whether this type of detriment could really jeopardize the special rights conferred on special shares and, therefore, whether, in such circumstances, the special shareholders' meeting has the power of veto.

Specifically, the concept of "resolution that damages the category" referred to in Article 2376 of the Civil Code has been interpreted by the majority doctrine in a restrictive sense: only direct and current prejudice, and therefore the resolution that directly relates to savings shares, requires the *placet* of the special meeting. Following and adopting the prevailing line of thought in legal literature, the exclusion of the veto power for special shareholders in the event of both *de facto* and indirect detriment is implicitly assumed.

In other words, a general meeting resolution requires the approval of the special meeting only if the object directly affects the discipline of special shares, and not even when it affects all shareholders. In this case, in fact, the damage is only indirect.

It is interesting to underline that there are, however, theories contrary to that shared by the majority of scholars, such as, for example, that supported by Costa, according to which any prejudice, even indirect, requires the approval of the special meeting of shareholders.

Special shareholders' meetings follow the rules provided for the extraordinary meetings of shareholders, if special shares are not listed; on the other hand, if the special shares are listed, the rules governing the organization of savings shareholders (that the reader will be able to better understand in the following lines) apply.

Among the special categories of shares, savings shares, introduced by Law 216/1974 and currently regulated by Articles 145-147 of the Consolidated Law on Financial (or TUF) deserve special attention.

Together with preferred shares[12], they were intended to encourage equity investment, offering savers tools that best suit their needs: investing and seeking profitable returns.

The lack of interest in the exercise of administrative rights and the importance, on the contrary, attributed economic privileges fully explain the distinction between entrepreneurs and savings shareholders and justify the fact that savings shares are associated with a total exclusion of the right to participate and vote in ordinary and extraordinary shareholders' meetings.

Since this class of shares does not provide for the right to vote, they are not taken into account for the calculation of the relative *quorums* nor for the calculation of the capital stakes required for the exercise of the rights attributed to minorities.

Furthermore, even if there is no evidence in the relevant regulation, it must be excluded that savings shareholders may be granted the right to participate in the meeting and the right to challenge resolutions that are not in accordance with the law or the bylaws, as the 2003 Reform has reserved these rights only for shareholders with voting rights.

These are some of the characteristics that have led, in the past, part of the commentators to associate these securities with debt instruments, thus comparing the nature of the savings share to the one underlying the loan agreements (Sacco Ginevri, 2015).

[12] Category of shares governed by art. 2350 of the civil code which gives the owners the right of pre-emption over ordinary shareholders in the distribution of profits and in the return of capital upon dissolution of the company, entailing, however, the limitation of administrative rights.

Savings shares can only be issued, either through a specific capital increase or through the conversion of other shares, by companies “whose ordinary shares are listed on regulated markets in Italy or in other European Union countries” and, differently from other classes of shares, they can be issued in bearer form[13], thus guaranteeing anonymity and encouraging subscription (Article 145 of the TUF).
The economic privileges recognized to savings shareholders were analytically defined by Law 216/1974, but with the 1998 Reform this rigid legislative discipline was modified, extended, and made more flexible: article 145, indeed, does not dictate a precise regulation of the privileges due to savings shares, but delegates to the bylaws of the issuing company the identification of the content of the privilege as well as the conditions, limits, methods and terms of its exercise.
This turning point arose from the need, which also inspired the Reform of joint stock companies in 2003, to accentuate statutory autonomy, removing as much as possible the rigid and imperative rules and giving corporates the possibility to configure their organization on the basis of their goals. With specific reference to savings shares, it was authoritatively written that the idea was to "allow the company to package the product with very wide margins of freedom, believing that the market will choose and reward the most attractive ones" (Ferro-Luzzi,1998).
However, it should be specified that the privileges to be attributed to the savings shares must always be compliant with the constraints of the statutory autonomy on the matter.
The discipline in question is then completed with the description of what is defined as the organization of savings shareholders which is divided into the special shareholders meeting and the common representative.
The functioning and responsibilities of the special meeting of savings shareholders are governed by Article 146 of the TUF, which derogates from certain principles enshrined in Article 2376 of the Civil Code.
In fact, the matters falling within the competence of the special meeting of holders of savings shares indicated in Article 146 are the following: a) appointment and revocation of the common representative and legal action for liability against such person; b) approval of the resolutions of the shareholders' meeting of the company that affect the rights of the category, with the favorable vote of shares representing at least twenty percent of the shares of the category; c) establishment of a fund for the expenses necessary for the protection of common interests; d) settlement of disputes with the company (for which a *quorum* of at least twenty percent of the shares of the category is envisaged) and e) other objects of common interest.

[13] Bearer shares, unlike registered shares, are securities that do not expressly indicate the name of the holder. Their transfer generally takes place without particular formalities, but only through the material delivery of the same.

Among those mentioned, the most relevant saving shareholders' meeting competence, also for the purposes of the thesis, is that concerning the approval of the resolutions of the general meeting that affect the rights of the category.
As anticipated, the group organization for the protection of common interests provides, alongside the special meeting, also the figure of the common representative of the savings shareholders.
The common representative has the obligations and powers provided for by article 2418 of the Civil Code, such as that of executing the resolutions of the special shareholders' meeting and protecting the common interests of the savings shareholders vis-à-vis the company.
The common representative can be chosen from outside the savings shareholders, and it is also possible to appoint legal persons authorized to exercise investment services.
The appointment of the common representative is neither automatic *ex-lege* nor necessary but is left to the discretion of the saving shareholders.
This actor remains in office for a period not exceeding three years and can be re-elected.
The compensation of the common representative must be considered to be paid by the members of special meeting, and not by the company.
Focusing again on the powers of the common representative, it is possible to recognize two distinct categories: executive and supervisory powers.
The powers of execution usually include that of calling the special meeting of the holders of savings shares[14] (setting the agenda) and executing the resolutions of the special meeting[15].
On the other hand, the supervisory activity of the common representative is guaranteed by a series of prerogatives, including that of being obligatorily informed on corporate transactions that may influence the trend in the price of savings shares, that of attending the meetings of the general shareholders' meeting (Article 147, paragraph 3, TUF), as well as that of examining the register of shareholders and the book of meetings and the resolutions of the shareholders' meetings (Article 2421 of the Civil Code).
In addition, the common representative has also the right to attend the general meetings of the company and to challenge the resolutions. In this regard, it is key to specify that "the appeal can be addressed both to the resolutions that prejudice the category of savings shareholders, and to any resolution, given that the interest of the Legislator is to give the possibility to the savings shareholders, through the common representative, to act to protect the correct execution of the company's decision-making processes" (Giampaolino, 2012)

[14] Article 146, paragraph 2, TUF
[15] Article 2418, 1st paragraph, of the Italian Civil Code

Finally, the discipline also provides that the deed of incorporation may grant the common representative as well as the special meeting "further powers" useful for protecting the savings shareholders. However, it should be specified that the statutory autonomy cannot be considered unlimited, since, instead, it is necessary to ensure that the extension of the prerogatives of the common representative does not interfere in any way with the legislation relating to the organizational structure and the structure of powers of the joint stock company.

3.3 The option right

Pursuant to Article 2441 of the Civil Code, in the event of a share capital increase, the shareholders are entitled to the exercise the option right, defined as the possibility, and not the obligation, to subscribe a portion of the newly issued shares on a *pro-rata* basis.

Considering the connection that exists between the option right and the share capital increase, it is functional to provide the reader with an overview of the regulations envisaged by the Legislator for the amendments to the bylaws relating to the capital increase.

It is important to highlight the fact that the option right is contemplated exclusively in the event of a real share capital increase[16], which takes place through the issue of new shares offered in subscription to existing shareholders who, as will be explained shortly, are granted the option right, or to third parties (Article 2438 of the Italian Civil Code).

In this way, through the new contributions in cash, kind, or credits[17] made by existing or future shareholders, there is an increase in both the nominal share capital and the net equity of the company.

In order to avoid the formation of the share capital represented mainly by receivables from shareholders, it is not allowed to proceed with a capital increase "until the previously issued shares they are not fully paid ", that is, until the shareholders have actually paid the contributions promised when subscribing the shares (Article 2438 of the Italian Civil Code).

However, the current regulations, while prohibiting the execution of the capital increase until the conditions are met, allows for its resolution.

The body competent to approve the share capital increase is the extraordinary shareholders' meeting, but the by-laws, or a subsequent amendment thereof, may attribute to the directors the power to increase the share capital one or more times up to a certain amount and for the maximum period of

[16] In addition to the real share capital increase, it is possible to also have a nominal capital increase, which takes place through the allocation to capital of reserves and available funds recorded in the balance sheet (Article 2442 of the Italian Civil Code)

[17] The rules on contributions applicable at the time of incorporation of the company are also referred to for the hypothesis of a capital increase (Article 2440),

five years from the date of registration of the company in the commercial register (Article 2443 of the Italian Civil Code).
The capital increase resolution must set the deadline, not less than 15 days from the publication of the offer, within which subscriptions must be collected.
In the specific case of a cash contribution, the shareholders must make a payment of at least 25% of the nominal value of the shares subscribed directly to the company and not to a bank, as is foreseen at the time of incorporation of the company.

The option right constitutes, in company law, the traditional mechanism for protecting the financial and administrative interests of the shareholders. It therefore responds with the aim of maintaining the stake of each shareholder in the share capital unchanged, and, therefore, of not altering the corporate will in which the shareholder participates through the vote.
In this way, existing shareholders as well as holders of convertible bonds are granted the right to subscribe, preferably with third parties, the newly issued shares.
It is important to underline the fact that exercising the option right is not mandatory; existing shareholders may, in fact, decide to exercise their rights and purchase the new underlying shares by paying the related issue price, or decide to sell their option rights on the market.
By exercising the right conferred on them, existing shareholders have the opportunity to benefit from the effects of this right.
On the contrary, by choosing to forgo this opportunity, the existing shareholders will suffer a reduction in their participation because new investors will now contribute to the share capital of the company by purchasing the newly issued shares.
This phenomenon is called the dilution effect, which affects not only the share price but also the company's earnings per share. The extent of such dilution strictly depends on both the number and the price of the new shares. However, this loss can, in whole or in part, recovered through the sale of the option right, which has its own economic value that the shareholder can monetize if he/she is unable or unwilling to participate in the share capital increase (Campobasso,2015).
For the exercise of the option right, the company must grant the shareholders a term of not less than fifteen days from the publication of the offer.
Article 2441 of the Civil Code also regulates the eventuality in which the shares remain unexercised. In private companies, these shares must be divided among the shareholders who have exercised the right and who have requested it[18]; in listed companies, on the other hand, directors must, on behalf of

[18] In this context, it is important to highlight the fact that, according to the prevailing doctrine and jurisprudence, the rule provides for a real right of pre-emption, that is autonomous and independent from the option right.

the company, offer rights not exercised on the regulated market. Only if the shares are again unsubscribed, then these can be freely offered both to shareholders and to third parties.

It is important to underline that right under analysis can be excluded or limited in specific circumstances.

More in detail, the option right can be excluded a) if the interest of the company requires it b) when the newly issued shares must be paid up by contribution in kind, c) in companies with listed shares, within the limits of 10% of the pre-existing share capital, provided that the issue price corresponds to the market value of the shares and this is confirmed in a specific report by an auditor or by a statutory auditing firm, and d) for newly issued shares, if these are offered for subscription to employees of the company or companies that control or are controlled by it (Article 2441 of the Civil Code).

With regard the first scenario a), it is possible to say that it is perhaps the most important hypothesis of exclusion of the option right, but also the most ambiguous one: in fact, its interpretation depends on the meaning that readers want to attribute to the notion of social interest. In this regard, it was established by law that the majority of shareholders must expressly justify the reasons for the exclusion of the option right, demonstrating that this decision is functional to achieving a final objective. In this way, minority shareholders can be (at least theoretically) protected from decisions motivated by *extra* social reasons.

The exclusion is justified by the need to achieve a result that would be difficult, or impossible, to achieve with the subscription of the shareholders: a share capital increase is not a valid reason for exclusion, as there would be no difference if the financing were from the shareholders or from third parties. It follows that the social interest must reside in the subscription by subjects with specific characteristics such as, for instance, the one of not yet being a shareholder. The interest in the subscription is obviously an interest of the company, but that of attracting new shareholders may not be. Hence the doubts and uncertainties about the choice of the final objective and the relationship that must exist between the end and the means. A compromise would be to place on the majority the burden of demonstrating the “abstract possibility" that the entry of new shareholders can satisfy the interest of the company, and therefore, can bring a common advantage.

As regards the exclusion of the right of option in the case of contribution in kind (b), most of the legal scholars agree that the company's interest in procuring certain assets from third parties by way of contribution prevails over to the individual interest of the shareholders in subscribing to the increase. In this regard, it is good to specify that the contribution in kind does not legitimize the exclusion of the right of option but must itself be justified by the pursuit of a social interest. In other words, the acquisition of the asset must be strictly necessary to satisfy the corporate interest and must be carried out only by excluding the right of option

The rationale behind the hypothesis of exclusion described in c) resides in the need, typical of listed companies, to have maximum flexibility in the collection of financial resources as well as to maintain an enlarged shareholder structure. Parameterizing the issue price at the market value should be understood as a constraint, a minimum limit, since it is possible to find, in accordance with the corporate interest and, a higher issue price (as explained shortly).
Finally, the exclusion of the option right in the event of an offer to employees (d) does not entail any obligation to justify the choice by the directors and the majority of the shareholders, but, at the same time, it presents problems relating to its theoretical justification and scope.
As regards the first problem, a solution can be found by assuming that the Legislator has assessed the entry of employees into the shareholding structure as a reason consistent with the corporate interest. With regard to the scope of application of the rule, however, the question arises whether the rule is addressed to all employees, or only to some appropriately selected categories. In the latter case, the more restrictive one, the majority shareholders should indicate the reasons why some employees were favored to the detriment of existing shareholders (Jeager, Denozza and Toffoletto, 2019).
It should be noted that when the option right is excluded because the company's interest requires it or because contributions in kind are required, the issue of the new shares must necessarily take place with a *premium*. The existence of the *premium* is linked to the eventuality of a discrepancy between the real value and the nominal value of the share. In this circumstance, the subscribers pay an amount that is greater than the one corresponding to the nominal value of the share to compensate for the damage suffered by the shareholders due to the reduction in the percentage of capital. Each company has a margin of discretion in determining the relative amount of the *premium*.

Provided that the option right belongs to all categories of shareholders, its recognition can prove to be problematic in companies where the financial structure is divided into a plurality of categories of shares: the complications derive from the placement of the newly issued shares between the different categories and from any potential protection mechanisms that can/must be applied (Jeager, Denozza and Toffoletto, 2019).
In general, the "proximity rule" operates: unless otherwise provided in the bylaws, in the event of a share capital increase for which the option right has not been excluded or limited, "the holders of savings shares have the option right on savings shares of the same category or, in lack or for the difference, in the order, on savings shares of another category, on preference shares or on ordinary shares" (Article 145 TUF).
These just described are the cardinal principles on which the discipline of the option right for joint stock companies dictated by Article 2441 is based: this rule, although it has remained unchanged

since the 2003 reform, has been amended several times in the past to reduce the possible abuses of the directors to the detriment of minority shareholders.

3.4 Related parties' transactions

The purpose of this section is to provide the reader with an introduction to the regulation of related party transactions, aimed at protecting minority shareholders of listed companies from any transfer of resources in favor of related parties at unfair conditions (Manni, 2020).

The corporate phenomenon is based on the coexistence of actors with often divergent interests; specifically, every shareholder, who should act for the well-being of the company, often seek to satisfy his or her own individual goals, which may, or may not, be in conflict with the societal interest. As a result, the mere association between individuals for the purpose of achieving a common objective determines the concrete risk that the personal interests are not entirely aligned, thereby causing a damage to the company itself, to minority shareholders and other stakeholders.

Faced with a corporate conflict of interest, the Legislator can adopt at least three different regulatory strategies: the prohibition, the indifference, or the implementation of a more stringent regulation (Prestamburgo, 2015).

The third strategy is the one most used today since, with a rigorous regulation of the corporate conflict of interest, the Legislator can avoid the undermining of the investor protection and, consequently, of the market confidence, without excessively limiting commercial exchanges, as in the hypothesis of prohibition, and relying on the laws of the market to regulate a complex phenomenon, as could happen in the case in which the second strategy is implemented.

It is in this context and on these assumptions that the discipline of transactions with related parties is developed, which aims at protecting minorities, but without condemning *a priori* the transaction carried out between a listed company with its related party whose execution can involve the extraction of the so-called “private benefits" by the controlling shareholder of the company, but not necessarily damage to the same.

In other words, according to authoritative doctrine (Vigo, 1997 and others), the Legislator of the 2003 reform, expanding the scope of statutory autonomy and taking into account the different needs for the protection of the various interests involved, considered “the phenomenon of the shareholders' personal profits and allowed them to perceive the interest in acquiring private benefits”, as stated in the law of delegation.

To limit any abuses of majority shareholders and ensure the transparency and independence of decision-making processes, the Legislator of the 2003 reform not only amended Article 2391 of the

Italian Civil Code expanding its scope but, with express reference to listed companies, introduced Article 2391-*bis* of the Italian Civil Code which confers on Consob the regulatory power aimed at creating a complete regulatory framework for transactions carried out by listed companies with related parties.

Consob Regulation on related parties' transactions was first adopted with resolution n. 17221 of 12th March 2010, and then amended by resolutions n. 21624 of 10 December 2020 to implement the relative Directive (EU) 2017/828 and encourage the long-term commitment of shareholders[19].

The underlying rationale of the entire Regulation is to guarantee the substantial and procedural correctness of the transactions in which the controlling shareholders have a personal interest that could oppose, to the point of damaging it, the corporate interest and/or the interest of the remaining part of the corporate structure.

The structure of the Regulation seems to have been created to be "self-referencing" both with respect to the provisions of the Italian Civil Code and the international accounting standard no. 24 (hereinafter "IAS 24") which the Regulation is inspired by the definitory point of view: more precisely, Article 3 of Consob Regulation, referring to the notion expressed in the IAS 24, defines the concepts of "related parties" and "related party transactions".

A related party is a person or entity that controls or exercises a significant influence on the operational/financial decisions taken by the entity that draws up the financial statements, the so-called "reporting entity".

More specifically, the following subject can be identified as being related parties (Manni, 2020):

(a) a person or a close family member of that person if that person:

(i) has control[20] or joint control[21] over the reporting entity; or

(ii) exercises a significant influence[22] over the reporting entity; or

(iii) is a manager with strategic responsibilities of the reporting entity

(b) an entity if any of the following conditions apply:

(i) the entity and reporting entity are part of the same group;

(ii) the entity is an associated company[23] of the reporting entity;

[19] Shareholders' Rights Directive II o "SHRD II"

[20] Pursuant to IFRS 10, "an investor controls an investee entity when it is exposed to variable returns, or has rights to such returns, and at the same time has the ability to affect these returns by exercising the own power over that entity "

[21] Pursuant to IFRS 11 "joint control is the sharing, on a contractual basis, of the control of an agreement, which exists only when decisions relating to significant activities require the unanimous consent of all parties sharing control ".

[22] Pursuant to IAS 28 "Significant influence is the power of participating in the determination of the financial and management policies of the investee without having control or joint control ".

[23] Pursuant to IAS 28, paragraph 3 "an associate entity is an entity over which the investor exercises significant influence".

(iii) the entity is a joint venture[24] in which reporting entity is a participant;
(iv) the entity is an associated company or a joint venture which is part of a group of which the other entity belongs;
(v) both entities are joint ventures of the same third party;
(vi) the entity is a joint venture of a third entity and reporting entity is an associate of the third entity;
(vii) the entity is represented by a post-employment benefit plan in favor of employees of either the reporting entity or of a company related to it;
(viii) the entity is controlled or jointly controlled by a person referred to in the previous point (a);
(ix) a person identified in the previous point (a) (i) has a significant influence on the entity or is one of the executives with strategic responsibilities of the entity (or one of its parent companies);
(x) the entity or any member of a group to which it belongs, provides management services with strategic responsibilities to the reporting entity or to subjects who, even jointly, the they control.

In addition, Consob Regulation offers both qualitative and quantitative parameters for identifying "transactions" with related parties.
From a qualitative point of view, Annex 1 of the Regulations classifies as a transaction with related parties "any transfer of resources, services or obligations between related parties, regardless of whether a consideration has been agreed"
Although this definition is generic to prevent that the legislation from being bypassed, they are still considered to fall within the scope of application of the Regulation, if carried out with related parties: (i) extraordinary merger and demerger transactions; and (ii) any resolution concerning the assignment of remuneration and economic benefits, in any form, to the members of the management and control bodies and executives with strategic responsibilities.
On the subject of remuneration, it is important to specify that the aforementioned provision is counterbalanced by the faculty of exemption pursuant to Article 13 of the Consob Regulation, which allows the procedures not to be applied when the shareholders' meeting determines an overall amount for the remuneration of all directors, including those vested with particular offices pursuant to Article 2389, paragraph 3 of the Italian Civil Code.
By adopting the supervision referred to in the aforementioned article, it should be possible to avoid extraction of private benefits linked to the payment of remuneration, such as those found in the

[24] Under IAS 28, paragraph 3, "a joint venture is a joint control agreement on an entity under which the parties that hold joint control have rights to the net assets of the entity itself".

FondiariaSai case, in which an outsized remuneration was awarded to members of the Board of Directors, as well as the stipulation of a series of *ad hoc* consultancy mandates paid beyond the normal market thresholds.

As regards the quantitative criteria, Annex 3 of the Regulation identifies some indices whose ratio, if higher than 5%[25], indicates that the transaction is to be classified as a transaction of greater importance[26], therefore subject of the discipline referred to in Article 8 of the Regulation.

The first index, also known as equivalent-value relevance ratio[27], is linked to the value of the transaction to be carried out, to be considered in relation to the company's net equity or, in the case of a listed company, to the market capitalization.

The second criterion, or asset relevance ratio, refers to the ratio between the total assets of the entity involved in the transaction and the total assets of the issuer.

Finally, the liability relevance ratio is obtained from the ratio between the total liabilities of the acquired entity and the total assets of the issuer.

Furthermore, Consob Regulation assigns a central role to a special internal board committee composed of independent directors that must issue an opinion on the convenience, the substantial correctness and compliance with corporate interests of the transaction.

The independent committee may request the assistance, at the company's expense, of one or more advisors whose independence, being a crucial matter, must be a *conditio sine qua non*, as specified by Article 7 of Consob Regulation; independent advisors not only represent an opportunity to assess the fairness of the overall transaction, but also to provide a legal protection and, as a result, the lack of their independence can undermine the purpose of the regulation, leading to the approval of a transaction that is substantially unfair, even if it is correct from a procedural standpoint (Sacchetti, 2020).

Compared to transactions of lesser importance (Article 7 of the Regulation), those of greater importance (Article 8 of the Regulation) require stronger involvement of the committee of independent directors, which translates into an increase in the disclosure obligations for the parties who operationally implement the transaction. In this regard, it is important to specify the fact that, exclusively in the case of greater importance transactions, the committee's opinion is binding: if the advice is negative, the board of directors cannot execute the transactions, unless the internal codes

[25] Please note that the threshold is reduced to 2,5% for intra-group transactions, i.e., those carried out by a company with the listed parent company or with subjects related to the latter which are in turn related to the company.

[26] Note that there are no quantitative criteria for transactions of lesser importance which, therefore, will be identified only on the basis of the existence of a related party as a counterparty and on the basis of the qualitative criterion.

[27] In the case of transactions carried out by banks, the relationship to be considered is between the value of the transaction and the regulatory capital.

and the by-laws provide for it to be authorized by the favourable vote of the majority of the unrelated shareholders, starting the so-called “whitewash mechanism”.

The first commentators (Foschini, 2009) of the Regulation, even before its enactment, argued that the Consob regulation was excessively detailed and that this implied an "excess of delegation" compared to the provisions of Article 2391-*bis* of the Italian Civil Code. However, according to another current of thought (Prestamburgo, 2015), the law in question shows the will of the Legislator to entrust entirely Consob the task of managing the phenomenon of transactions with related parties. Such a decision is perhaps to be qualified as a "non-choice" of the Legislator with respect to the regulation of a complex and articulated discipline such as that of related parties in listed companies.

Chapter 2: Unipol-FondiariaSai case

After having analyzed the discipline and theoretical foundations of the merger in the previous chapter, a concrete case of an extraordinary transaction will be presented in the following pages; specifically, the case chosen is that relating to the merger which provided for the incorporation of Unipol Assicurazioni, Premafin and Milano Assicurazioni into Fonsai.
The author's choice is to first provide the reader with a detailed presentation of all the participating entities, so as to grasp their *pre*-merger economic and financial situation. Then, there will be a focus on the external and internal factors that led to Fonsai's crisis, considered as one of the reasons why the merger by incorporation was implemented. The purpose is, therefore, to give evidence of the difficult situation experienced by the company in those years, and to highlight the role of mergers in that scenario, often referred to as a “rescue” transaction.
After these basic premises, a description of the main facts and dynamics that characterized the merger will follow.

1. Unipol-FondiariaSai merger: the parties involved

In the following paragraphs, all the companies involved in the transaction will be described to better understand not only their history and their corporate structure, but also what their financial and equity situation was before the merger by incorporation.
To this end, the main financial and economic information at 31 December 2011 will be analyzed; by highlighting the key indicators of each company, the reader will be able to fully understand why this was defined as a rescue transaction, and, therefore, the reasons behind the decision to undertake this extraordinary transaction.
Before proceeding with the elaborate, it is good to reiterate that the Unipol Group is headed by a holding company, Unipol Gruppo Finanziario S.p.A., which, pursuant to Article 2497 and following of the Civil Code, carries out direction and coordination activities on all the other subsidiaries, including those belonging to the former Fondiaria-Unipol Group, incorporated, as a result of the merger, during 2012.

1.1 Unipol Assicurazioni

Unipol Assicurazioni S.p.A. was founded in 1962 when Giulio Cerreti, then president of the Lega Nazionale delle Cooperative e Mutue, and the major leaders of Federcoop of Bologna, decided to bring together in a single structure the vast portfolio that they had distributed in various insurance companies. The opportunity presents itself with the proposal to purchase a small insurance company, namely Unipol Assicurazioni, then belonging to the Buglione family, owner of Lancia, whose trademark came from the slogan "Unica Polizza"[28].

Unipol Assicurazioni was a company with sole shareholder, namely Unipol Gruppo Finanziario SpA, with registered office in Bologna.

The first significant turning point in Unipol Assicurazioni's history occurred in the first half of the 1970s when the confederal trade unions, namely CGIL, CISL and UIL, entered the company, highlighting, in this way, its nature as an insurance company particularly active in the labor sector.

Even then, Unipol Assicurazioni was among the top 10 Italian insurance groups and was listed on the stock exchange, with preference shares in 1986 and subsequently with ordinary shares (Centro Unipol Bologna, 2017).

Starting in the 1990s, the business began to experience strong expansion and diversification: new companies were set up such as UniSalute, specialized in healthcare, Linear Assicurazioni, which operates in the telephone sales of auto insurance policies, and Quadrifoglio Vita, active in the bancassurance sector.

The most recent years were characterized by a series of corporate transactions that led to a reorganization of the company: starting from 2000s, Unipol Assicurazioni acquired, among the others, Aurora Assicurazioni, Navale Assicurazioni, and obtained control of Meie Assicurazioni and Meie Vita from Telecom Italia.

On 1 September 2007, from the merger by incorporation of Unipol Assicurazioni and Aurora Assicurazioni, Unipol Gruppo Finanziario (or Unipol Group or "the Group") was created, which operated in the insurance sector especially through the Unipol Assicurazioni commercial division.

Unipol Assicurazioni's corporate purpose mainly consisted in the exercise, both in Italy and abroad, of all the insurance, reinsurance, and capitalization branches, within the limits set by the legislation governing the exercise of insurance business.

More specifically, its key activities were concentrated in the insurance sector, with significant results in the non-life and life branches: it used to distribute its insurance products using a network which, in 2012, was made up of 1,428 agencies as well as through the bank offices of Unipol Banca and financial promoters of Simgest S.p.A. and Credit Suisse Italy S.p.A (Centro Unipol Bologna, 2017).

As part of business activities, the company could also manage the forms of supplementary pension as well as initiate, set up and manage pension funds[29].

[28]Source:"Museo del marchio italiano", last accessed on May 23rd, 2022, https://www.museodelmarchioitaliano.it/

[29] In compliance with the provisions of Legislative Decree 21 April 1993 no. 124 and by Legislative Decree 5 December 2005, n. 252, as subsequently amended and supplemented.

Furthermore, Unipol Assicurazioni could, through participation in other companies, carry out all transactions on movable and immovable property as well as all financial transactions deemed necessary or useful for achieving the corporate purpose; it could also acquire, both directly and indirectly, shareholdings in other companies, grant loans and provide guarantees in favor of group companies or third parties[30].

As anticipated, Unipol Assicurazioni was one of the main national operators, boasting an excellent performance: more specifically, before the merger by incorporation, the company and its subsidiaries (please see Figure 1 to better understand the Group structure and the consolidation area) closed the 2011 with satisfactory results, confirming a positive business trend, despite the negative effects caused by the sovereign debt crisis that, in that period, affected the weaker States of the Euro zone, including Italy[31].

The positive results recorded by Unipol Group especially evident in the life sector since, in a market context that continued to be affected by the consequences of the economic crisis on the saving capacity of Italian households, it recorded total direct premiums of €4,446 million (+ 2.1% compared to 2010).

The technical reserves, a key indicator of the financial stability of insurance companies represented by the provisions that insurance companies make to meet the commitments made to policyholders, as of 31 December 2011 amounted to a total of 22.039, of which € 7.372 million relating to the non-life sector and € 14.667 million relating to the life business.

A further guarantee of the company's financial stability is represented by the solvency margin, 1.4 times the regulatory requirements, producing a positive surplus of €337million; these numbers show that Unipol Assicurazioni was able to ensure coverage of all risks assumed and settlement in the event of claims[32].

Furthermore, an important performance indicator, namely the combined ratio[33], which was equal to 95,5% that year, demonstrates that the company was profitable and was using its resources efficiently to drive revenue growth.

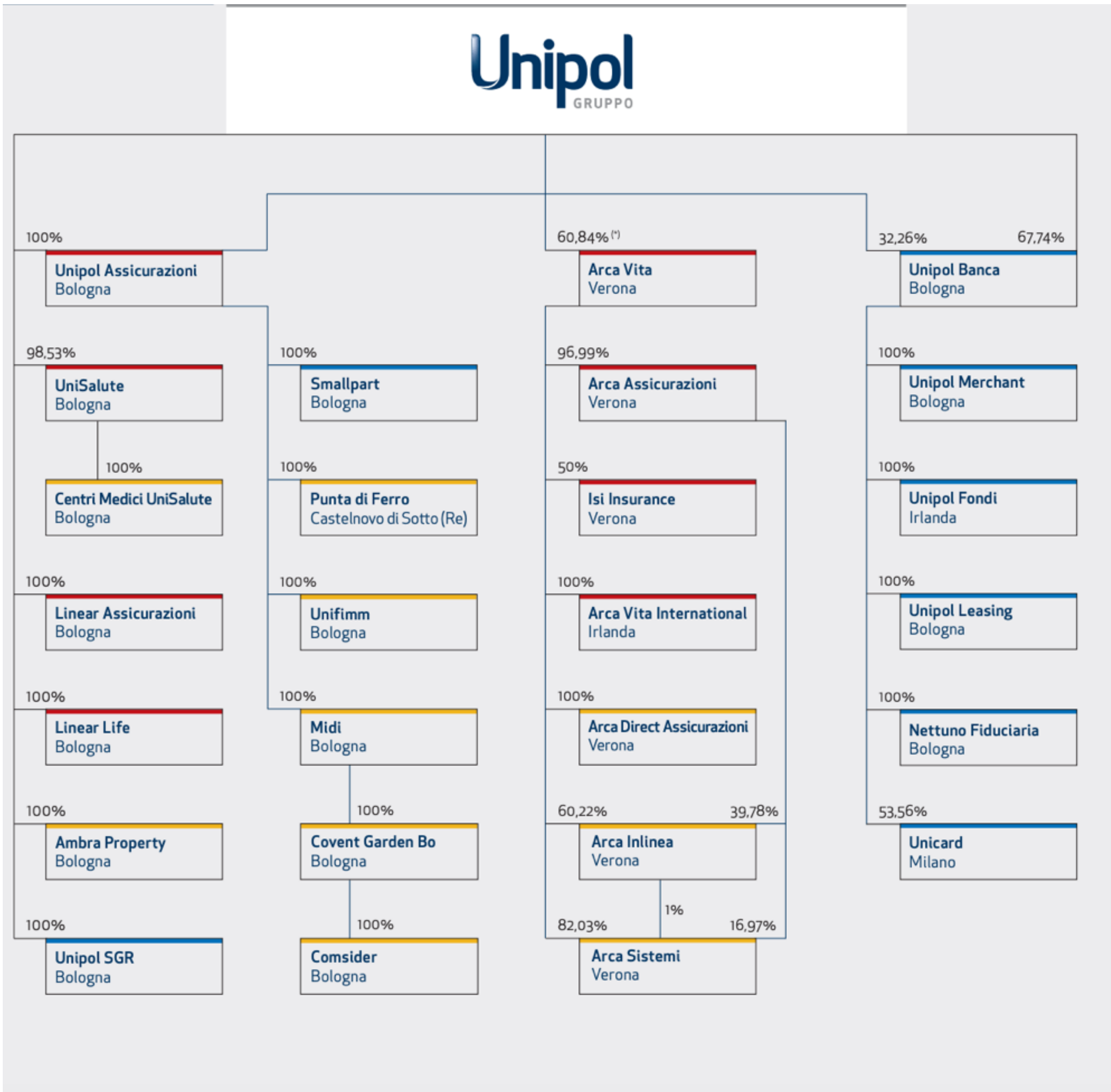
[30]Source: "Allegati al documento informativo aggiornato", last accessed May 23rd, 2022, https://www.unipol.it/sites/corporate/files/document_attachments/allegati_al_documento_informativo_aggiornato_ugf_24-12-2013.pdf

[31] Source: Unipol Assicurazioni - Bilancio Civilistico 2011

[32] Source: Unipol Assicurazioni - Bilancio Civilistico 2011

[33] The combined ratio is an indicator that measures the result on the non-life underwriting account and is calculated as the sum of the loss ratio and the expense ratio. When the combined ratio is less than one, the technical-insurance management is in profit, and any profit is fully enjoyed by the shareholders.

Figure 1: Consolidation scope



Source: Unipol Assicurazioni Consolidated Financial Statements 2011

As far as the share capital is concerned, it was equal to € 259,056,000.00, divided into no. 259,056,000 ordinary registered shares with a par value of € 1.00 each[34].

It is important to specify that, at that date, Unipol Assicurazioni did not hold any of its own shares or shares of other companies participating in the merger.

[34]Source: "Allegati al documento informativo aggiornato", last accessed May 23rd, 2022, https://www.unipol.it/sites/corporate/files/document_attachments/allegati_al_documento_informativo_aggiornato_ugf_24-12-2013.pdf

1.2 Premafin

Established in 1986 and controlled until 2012 by the Ligresti family through the two vehicle companies Sinergia and Im.Co, Premafin was a joint stock companies having shares issued and listed on the Mercato Telematico Azionario.

With its registered office in Bologna, Premafin was a "mixed" financial holding, that is, it had a corporate purpose based on both real estate and holding activities.

More specifically, Premafin had as its objects the acquisition of shareholdings in businesses, companies, bodies, consortia, and associations both in Italy and abroad; the sale, exchange, and possession of both public and private securities; the promotion and development of real estate activities including, among the others, licensing, management, renting, leasing, and maintenance[35].

Premafin operated as a holding company which, after having performed important investments and activities in the real estate sector, in recent years has mainly concentrated its activities in the insurance sector, through the participation in the share capital of Fonsai (32.8%, directly and 4.1% indirectly through Finadin) and Milano Assicurazioni (indirectly, with a share of the relative ordinary capital equal to 63.6%).

Nevertheless, a quick analysis of the company's financial statements immediately shows how substantially its real main business was to hold the shareholding in Fonsai; the fact that the investment in Fonsai accounted for almost 90% (€ 458,5 million) of the assets is not surprising, since Premafin was a holding company[36].

What made the company vulnerable was, once again, the systematic recourse to debt: as of 31 December 2011, payables to banks reached € 323,1 million, and the book value of the investment in Fonsai was systematically higher than 130% of the equity, meaning that, on average, almost a quarter of the stake was financed by bank debt [37].

The main cost item of the company was made up of interest payable on bank loans, the amount of which has never been less than € 15 million, reaching, specifically, € 30 million in 2011[38].

The only source of revenue to meet this charge is represented by income from equity investments, primarily represented by dividends paid by the subsidiary Fonsai; in the event that the latter does not distribute dividend, as occurred in 2011, to meet the debt obligations, the company experience a loss. If from an economic point of view this situation can also be sustained for more than one year, the

[35]Source: “Allegati al documento informativo aggiornato”, last accessed May 23rd, 2022, https://www.unipol.it/sites/corporate/files/document_attachments/allegati_al_documento_informativo_aggiornato_ugf_24-12-2013.pdf
[36] Source: Consolidated financial statements at 31 December 2011
[37] Source: Premafin - Bilancio Civilistico 2011
[38] Source: Premafin - Bilancio Civilistico 2011

same cannot be said from the financial point of view. In fact, interest expense are monetary costs, and the absence of revenue in the form of dividends can lead to liquidity crises.
Dependence on the subsidiary constitutes a risk also from an equity point of view; in the circumnstance in which Fonsai, being a business which a cyclical trend, shows particularly negative results, which actually occurred starting from 2009, the market value of the subsidiary can be drastically reduced.
As regard Premafin' s share capital (€ 410.340.220 as of 31 December 2011), it was exclusively made up of ordinary shares, some of which are unlisted.
Moreover, Premafin did not hold own ordinary shares, but it held n. 340,889,164 ordinary shares of the Fonsai, equal to 37.03% of the share capital[39].

1.3 Milano Assicurazioni

Milano Assicurazioni is one of the oldest joint stock companies in Italy: founded in Milan on 24 July 1825 on the initiative of Giuseppe Marietti, who was its first president, the company came, at the beginning of the 20th century, to have a territorial organization of 75 agencies in Italy and over 23 beyond the territorial borders of that time, also reaching Constantinople and Beirut.[40]
In the first years of its activity, Milano Assicurazioni mainly operated in the fire and in the life sectors, responding to a deeply felt need and revealing a significant propensity to business risk, given the absence, in many cities, of effective prevention measures against fires and precise statistical methodologies for assessing risks and related rates.
With the new century, Milano Assicurazioni began to operate in other branches, such as, among many others, accidents, thefts and transport, and was listed on the main Italian stock exchanges in 1961.
Since 1990 Milano Assicurazioni has undertaken a lively action of acquisitions, incorporations, and corporate collaborations: among the others, it acquired control of Italia Assicurazioni, it incorporated La Previdente Assicurazioni and La Previdente Vita, and it signed an agreement to distribute its products through the offices of Banca San Paolo in Turin (Centro Unipol Bologna, 2017).
The company offered a wide range of insurance solutions and products for the defense and protection of individuals and companies in all risk sectors, also dealing with savings and supplementary pensions.

[39]Source: "Allegati al documento informativo aggiornato", last accessed May 23rd, 2022, https://www.unipol.it/sites/corporate/files/document_attachments/allegati_al_documento_informativo_aggiornato_ugf_24-12-2013.pdf
[40] Source: "Milano Assicurazioni-RC Auto", last accessed May 23, 2022, https://www.assicurazione.it

However, starting from 2010, the company began to show the first signs of the crisis, recording a loss for the year of € 783.3 million in 2011, with a decline in performance in both the life (€ -57,6 million) and non-life (€ -373,3 million) sectors[41].

With its registered office in Milan, the company issued both ordinary and savings shares: in particular, in December 2011, the share capital of Milano Assicurazioni was equal to €373,682,600.42 fully paid up, divided into a total number of 1,944,800,842 shares, of which 1,842,334,571 were ordinary shares and 102,466,271 were savings shares[42].

It is important to highlight the fact that Milano Assicurazioni, in addition to directly holding 0.3% of its ordinary share capital, also held the ordinary shares of Fonsai (2.72% in 2011) and Premafin (2,23% in 2011).

1.4 Fonsai

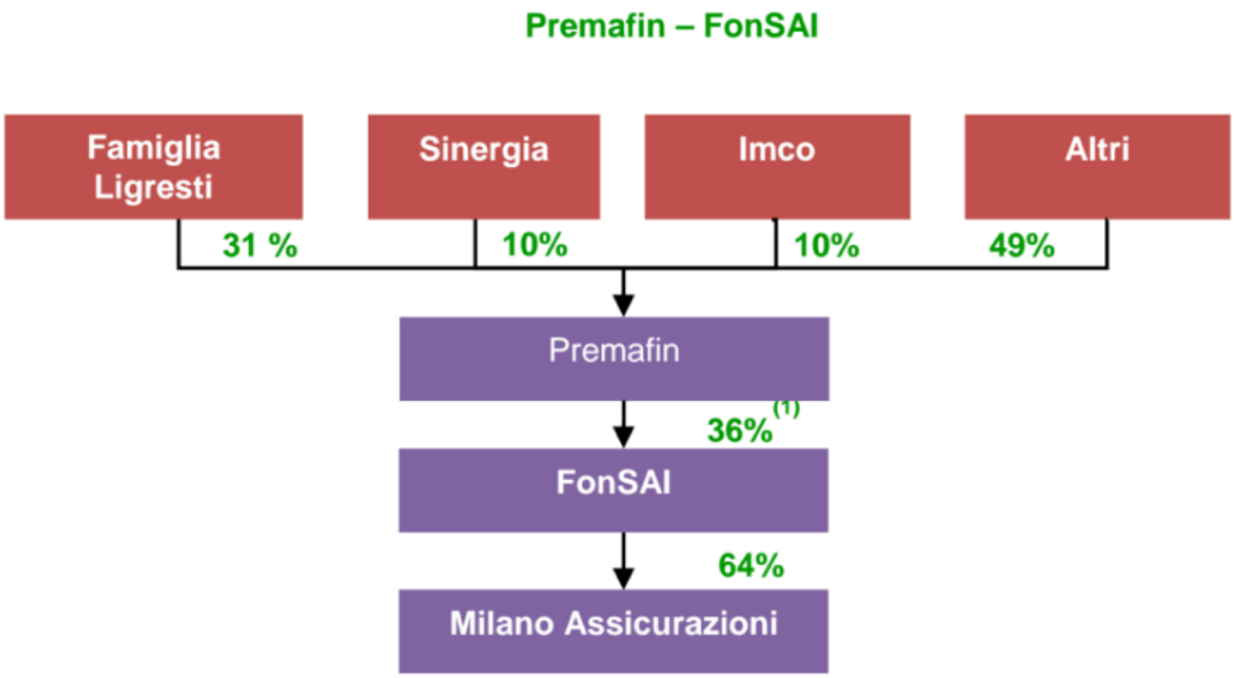
Fonsai was an insurance company listed on the Italian electronic share market, born in 2002 from the merger between Fondiaria Assicurazioni S.p.A, founded in 1879 and controlling shareholder of Milano Assicurazioni, and SAI - Società Assicuratrice Industriale S.p.A, founded in Turin in 1921 (Centro Unipol Bologna, 2017).

As a result of the transaction, the Ligresti family, formerly the main shareholder of SAI, acquired control of the Fonsai, leader in the Motor branch, by means of the holding company Premafin, that held a controlling stake in SAI and the 29% of the share capital of Fondiaria Assicurazioni (Figure 2).

[41] Source: Milano Assicurazioni - Bilancio Consolidato e Civilistico 2011

[42] Source: “Allegati al documento informativo aggiornato”, last accessed May 23rd, 2022, https://www.unipol.it/sites/corporate/files/document_attachments/allegati_al_documento_informativo_aggiornato_ugf_24-12-2013.pdf

Figure 2: Fonsai's corporate structure *ex-ante*



Source: Fondiaria-SAI S.p.A

More precisely, until 2012, the Ligresti family controlled Premafin for almost half of the capital through Sinergia and Imco, declared bankrupt with a €400 million crash (Massaro, 2012), and the Luxembourg companies Canoe, Hike and Limbo, attributable to Jonella, Giulia and Paolo Ligresti.
In the 1980s, after the acquisition of Sai, the Ligresti family began to accumulate a portfolio of small but significant strategic investments, including Cir, Pirelli, Italmobiliare, Italcementi and Agricola Finanziaria; these holdings allowed Salvatore Ligresti, the major exponent of the family, to sit on the boards of directors and influence the governance of some of the most important listed companies, weaving a dense network of relationships and alliances (Stefanoni, 2014).
Fonsai, with its registered office in Turin, operated throughout the country with over 1,200 agencies, offering its customers a complete range of retail and corporate insurance solutions both in the life and non-life sectors.
Being a multi-branch insurance company, Fonsai, through BancaSai S.p.A., also focused on traditional banking, on portfolio management and on the provision of services, such as personal and consumer credit, provided through the subsidiary Finitalia S.p.A. Furthermore, the company offers legal protection products and leasing services for enterprises and professionals[43].

[43] Source: "PolizzaAssicurazione.it"

Until 2006, Fonsai has recorded excellent results, reaching almost €5 billion of capitalization. However, in the following years, precisely from 2009 to 2012, the company experienced catastrophic losses. As a result, it was forced to a double recapitalization: in 2011 for €450 million, and in 2012 for €1.100 million. The latter occurred in conjunction with the capital increase, already mentioned above, of the same amount of Unipol Group, that became the new parent company.

However, the recapitalization program was not enough and, in fact, at the end of 2011, the solvency margin of the company was well below the minimum threshold of 90% and the authorities threaten the commissioner.

Just before the execution of the integration project, the company recorded a negative result, with significant losses in both the non-life (€ 428 million) and life (€ 283 million) sectors as of 31 December 2011[44].

In addition, Fonsai was exposed to Mediobanca for almost € 1 billion of subordinated loans; the purpose of these loans was not so much the financing of the technical management, but the achievement of a sufficient solvency margin to satisfy the regulatory requirements.

In the years following the 2002 merger, the newly formed Fonsai group experienced a lack of equity compared to the prudential supervisory requirements; the Ligresti family did not have the necessary financial resources to recapitalize the company, but at the same time, they were unwilling to reduce their stake. Consequently, in order to avoid the capital increase that would lead to more dilutive results for the controlling shareholder, it resorted to a subordinated loan exceeding €1 billion in value (Galvagni,2011).

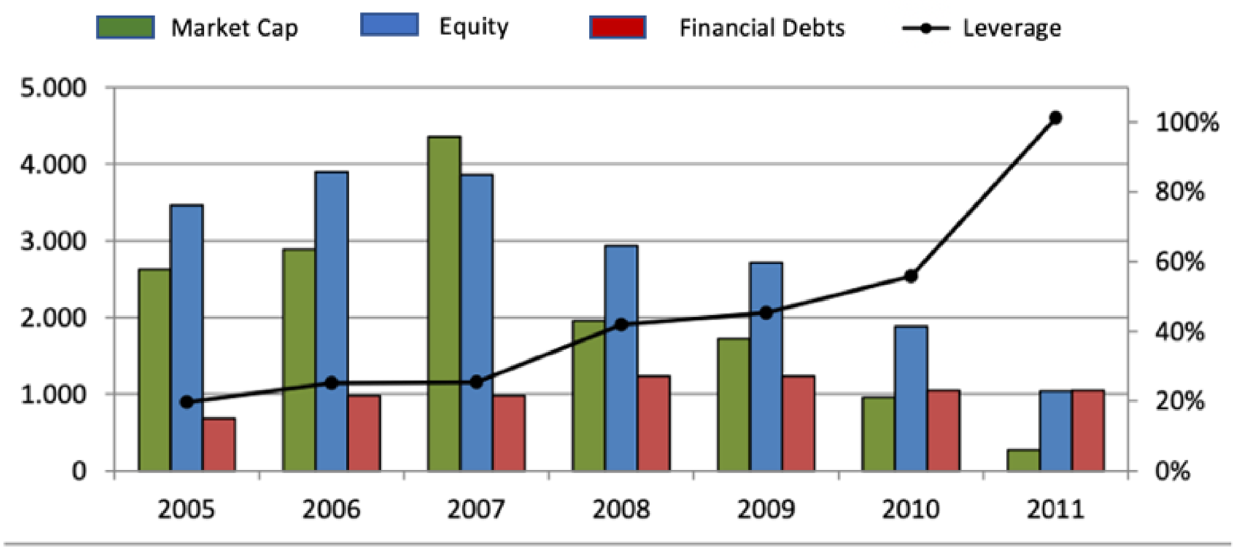
It is worth noting that the use of subordinated loans made it possible to avoid capital increases over the years, with pro-quota savings for Premafin of approximately €400 million, but this choice exposed FonSai and Milano Assicurazioni to the risks deriving from an unusually high level of leverage for the sector and steadily increasing over the years (Figure 3).

The company not only had a significant level of indebtedness and low profitability, as confirmed by the combined ratio of over 100%[45], but also had a precarious solidity and stability, starting to lose, among other things, its competitive advantage.

[44] Source: Fondiaria-SAI - Bilancio Civilistico 2011

[45] Source: Fondiaria-SAI - Bilancio Civilistico 2011

Figure 3: FondiariaSAI Group’s financial debt



Source: FondiariaSAI consolidated financial statements

For the purposes the thesis, it is important to specify that Fonsai’s share capital, before the implementation and execution of the integration project, was equal to €1,194,572,973.80, fully paid-up, divided into a total of 1,243,605,430 shares, of which 920,565,922 were ordinary shares, 1,276,836 were Category “A” savings shares and 321,762,672 were Category “B” savings shares. Moreover, Fonsai, at that date, directly owned (a) 32,000 ordinary shares, representing 0.0034% of the ordinary share capital, (b) 1,125,636,310 ordinary shares of Milano Assicurazioni, representing 61.0983% of the ordinary share capital and (c) 18,340,027 ordinary shares of Premafin, representing 0.8524 of the ordinary share capital[46].

1.5 Fonsai's crisis as one of the reasons behind the merger

This paragraph deals with the causes of the crisis of the Fonsai, namely the set of macroeconomic and structural factors that have had an impact on the insurance sector as a whole and, consequently, also on the company.

[46]Source: “Allegati al documento informativo aggiornato”, last accessed May 23rd, 2022, https://www.unipol.it/sites/corporate/files/document_attachments/allegati_al_documento_informativo_aggiornato_ugf_24-12-2013.pdf

Firstly, it will be explained what the global economic and financial situation was in the years preceding the merger by integration. It will therefore be analyzed how the sector of interest, the insurance one, has been impacted by adverse scenarios, such as the subprime crisis of 2007.
Then, the reader will have a focus on the problems encountered within the company, many of which have become media cases, alerting the supervisory authorities.
The endogenous reasons have undoubtedly led the group controlled by the Ligresti family to weaken from various points of view, not allowing it to effectively face threats coming from outside.

It is important to highlight the fact that the threats coming from the external environment have occurred in the context of a company whose economic and financial situation already appeared weakened due to internal criticalities (1.2, 1.3 and 1.4 of the chapter 2).
In other words, in a moment of general crisis, the Group was already dealing with internal shortcomings and difficulties; therefore, its downfall it is not attributable only to internal or external causes but is the result of a combination of them. As already anticipated at the beginning of this chapter, the rationale behind describing these internal and external factors is to make the reader understand the importance of extraordinary transactions for a company in crisis, as they can serve as a land of "last resort".

1.5.1 The external causes

The global financial crises that characterized the years from 2007 to 2011 - first the subprime crisis and then the sovereign debt crises[47] - has undoubtedly hit banks and financial markets worldwide.
However, another major intermediary may have felt the effects of that crisis: insurance companies.
Most insurance companies' investment portfolios, in fact, have been the primary source of exposure to the severe downturn in global financial markets since their assets are primarily held in bonds and stocks, both of which face significant valuation pressures during period of trouble.
It is important to note that there are differing perspectives on the role of the insurance industry in the context of the recent financial crises.
According to a current of thought shared by several representatives of the insurance sector, the insurance sector has shown resilience in the face of adverse market conditions and has been able to absorb market volatility as an institutional investor with a long-term perspective. In this way, the insurance industry has helped to stabilize the global financial system during a period of great stress (Eling and Schmeriser, 2010).

[47] For further details: https://www.consob.it/web/investor-education/le-crisi-finanziarrie

The opposite view, on the other hand, states that the financial crisis has significantly damaged the insurance sector, leading, among other things, to a plenty of exposures to credit and market risks, especially in mortgage and financial guarantee insurance companies, as well as “in insurance-dominated financial groups and in large reinsurance companies that took on significant amounts of credit risk” (Schich, 2009).

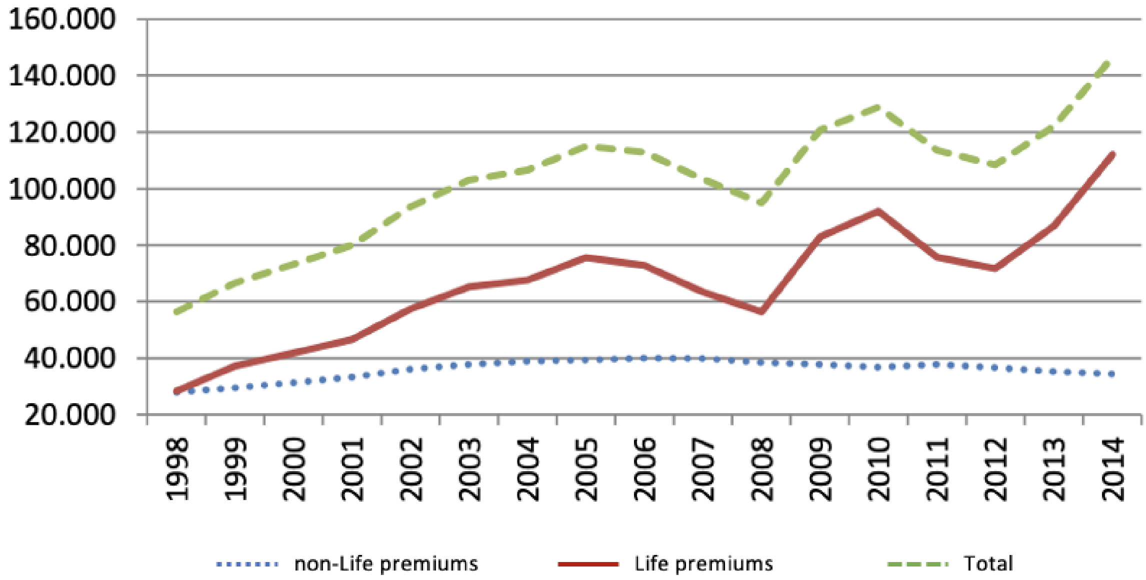
Despite the different versions, it is clear that the financial crisis has had a visible impact on the financial statements of many insurance companies, including those under analysis, as explained in the previous paragraphs.

In this regard, it is good to distinguish the effect of the financial crisis between the non-life and life sectors.

The consequences on the non-life sector were ambivalent; more precisely, premium income and claims trends are scarcely correlated with the economic trend, as they are linked to the peculiarities of the sector itself. For example, in some non-life classes the slowdown in economic activity could have reduced the incidence of claims (Impavido and Tower, 2009), while in others it could have increased the number of frauds (Schich, 2010). As a consequence, the non-life sector was found to be resilient and stable in that period (Figure 4).

On the other hand, as regards the life branch, the high financial content of many products meant that performance and results were more visibly influenced by the reduction in disposable income, purchasing power and, consequently, the ability to save. In other words, the years of the recession have progressively led the life sector to experience a decline in main revenue component, that is premiums.

Figure 4: Trend of Italian premiums



Source: IVASS, Quaderno n°4

In the historical period under examination, another factor that could be placed among the possible causes of further deterioration of a business is represented by the risk of a rating downgrade.

Assessing the creditworthiness of insurance companies has become a prominent business of rating agencies[48] in those years, due to financial difficulties of the insurance industry and over-publicized bankruptcies of several large insurers such as Ethias, the American International Group and London Pacific Life & Annuity Company (Brown and Balasingham, 2013).

The ratings issued by these agencies represent their opinion on the financial situation of insurers and their ability to meet their obligations towards policyholders.

In 2011, Standard & Poor's agency downgraded from BBB to BBB- the creditworthiness of the insurance companies controlled by the Ligresti family, Fonsai and its subsidiary Milano Assicurazioni, due to a worsening of the Group's financial position and an insufficient level of capitalization.

Downgraded ratings are closely monitored and can have a significant impact on an insurer's capacity to recruit and keep customers; hence, this can be one of the factors that made the Fondiaria Group appear less stable and enticing.

Another noteworthy issue is that of new and pervasive rules for the insurance market.

[48] The big three credit rating agencies are Standard & Poor's Global Ratings, Moody's, and Fitch Group

It is undeniable that the financial crisis of 2007 produced structural effects that changed the future of the sector, causing a wave of new regulation that also affected the insurance world. The analysis of the causes of the crisis, in fact, highlighted that much of what happened was linked to poor control of financial products, which were inappropriately allocated to people with inadequate risk profiles and economic capabilities (Consob).

In this regard, two important projects have been approved at the European level a few years before the execution of the merger by incorporation, namely the Solvency II[49] and the IFRS 4[50] that, albeit referring to different areas, can all be traced back to the same framework, that is the shared need to avoid repeating what happened in the 2008 crisis, introducing common rules in the EU countries to protection of the final customer.

These paradigms have considerably revolutionized the insurance sector by introducing, among other things, more stringent (and difficult) parameters to be respected; in this sense, the Italian legal system has neither promoted nor encouraged the insurance activity, but, on the contrary, has actively placed constraints or restrictions.

Thus, while the new regulations have created a more solid financial system and increased trust in consumers, at the same time they have induced insurance companies to undertake a long process of reviewing their internal organization to ensure solidity and solvency, as well as tools for intercepting any critical issues and remedying them.

In addition to the phenomena directly related to the economic-financial crisis, other circumstances, again of an exogenous nature, can be reported to complete the picture.

In this regard, it is good to emphasize the fact that the insurance world, historically slow to change, is evolving since, like all the other sectors, has been significantly affected by human and social progress; in particular, insurance companies have undergone significant changes following the advent of new technologies that have revolutionized the world, such as the internet.

Through digitalization and technological innovation processes, the sector has progressively improved the efficiency of products and services offered to customers (IVASS Report)[51].

However, digital innovation, although, among the other things, it considerably simplifies processes and often reduces costs, can also prove to be a threat: the activity of historic insurance companies, such as those belonging to the Fondiaria Group, can be compromised not only by tech giants entering the market, but also by start-ups that are harnessing the power of technology to innovate

[49] Solvency II is a European Union directive (Directive 2009/138/EC) whose purpose is to harmonize insurance regulations, mainly in terms of capital that insurance companies must hold to reduce the risk of insolvency.
[50]IFRS 4-Insurance Contracts provides guidance on the accounting treatment of all insurance contracts
[51] For further details: https://www.ivass.it/media/comunicati/documenti/2022/ivcs534.pdf

their way of gaining market share. More precisely, the use of insurance artificial intelligence in the insurance sector and the consequent ever-increasing penetration of alternative distribution channels represent an opportunity but can, on the other hand, compromise market confidence, increase discrimination and inequalities, hinder inclusiveness in the offer.

Each of these events had an impact on the sector, but its magnitude, both of an operational and financial nature, varies according to the features of national marketplaces and individual organizations, in particular the branches in which they are active, as well as their ability to leverage their own resources and skills to anticipate and neutralize changes.
The insurance sector, and, consequently, also the companies under analysis, are affected the alternation of economic cycles and the technological changes, phenomena with an impact, *inter alia*, on income expectations and investment activity.

1.5.2 The internal causes

Within the insurance sector, the performance of individual players can differ significantly from each other, depending on the ability of individual companies to seize opportunities and deal with hostile situations, through the implementation of precise strategies and action plans.
Specifically, almost all companies suffer losses as a result of adverse environmental dynamics during a crisis, but the negative results are more contained in the more solid and profitable firms, and the recession phase is overcome by using capital reserves accumulated during the positive phase of the cycle.
On the contrary, in companies characterized by specific vulnerabilities, losses tend to consume their resources to the point that, for the continuation of the activity, the contribution of new financial resources is necessary, without which there is a risk of bankruptcy (Grosso, 2014).
The Fondiaria Group undoubtedly belongs to the second group of companies, as it has faced the financial crisis burdened by numerous internal weaknesses, which are, at least in part, the result of managerial and organizational problems.
In this regard, to get a general picture of the main issues that characterize the governance of the group, it is useful to refer to the findings raised by IVASS at the end of the inspections launched in October 2010, which highlighted critical issues regarding "the participatory chain, the governance and the internal control system, the organization and activity of the corporate bodies, the control functions and transactions with related parties".
Following the investigations conducted by the competent authority, it emerged that Fonsai had significant shortcomings in the operating procedures of the Board of Directors, lacking the necessary

formalities and preliminary activities. It should also be noted that even the resolutions concerning the decision of strategic importance were, sometimes, taken by the board of directors in the absence of planning activities, which, on the other hand, are fundamental[52].

As far as the Internal Control Committee is concerned, IVASS revealed that it had never carried out monitoring activities on related parties, nor had it ever expressed an opinion on the correctness and lawfulness of related parties' transactions[53], although the transfers of resources between Fonsai, Milano Assicurazioni and the other companies of the group have always been numerous and of a significant amount (for further details about related parties' transactions, please read chapter 3, paragraph 3).

In this regard, an aggravating factor is that the compliance, risk management and internal audit departments called upon to validate the adequacy of these transactions did not enjoy great autonomy and independence, thus jeopardizing the reliability and integrity of their judgments.

Furthermore, IVASS also discovered that the remuneration policy adopted by Fonsai was not completely adequate, highlighting the need to "determine the fixed remuneration in favor of the members of the administrative body taking into account, also in consideration of the patrimonial situation of this company, of a criterion of proportionality between the office assumed and amount of remuneration" (IVASS, 2012).

The issue, raised by the Amber Fund[54], laid in the fact that, with the exception of the Chief Executive Officer, whose remuneration appears to be in line with the sector average, most of the wages and bonuses were considerably high, despite the company's economic conditions not allowing it, and all the favor of the members of the Ligresti family.

The Group also presented some critical issues in terms of transparency: IVASS, as a result of the inspections carried out at Fonsai, noted the inadequacy of the management and reserving procedures in the Motor Class, as well as irregularities in the determination of the claims reserve for the 2010 financial year, which was found to be insufficient by an amount of not less than €314 million[55]. More precisely, if Fonsai had actually adopted all procedures to ensure the reliability of accounting information in the 2010 accounting period, the company would have recorded a significant negative net profit.

In this regard, Consob informed Fonsai that it had reached the conclusion that the representation of the reserve in question in its Consolidated Financial Statements of the 2010 accounting period "was false and capable of giving false and misleading indications in relation to the shares issued by the

[52] Source: Fondiaria-SAI - Bilancio Civilistico 2011

[53] Source: Fondiaria-SAI - Bilancio Civilistico 2011

[54] FondiariaSai shareholder with 1.65% of the share capital

[55] Source: "Allegati al documento informativo aggiornato", last accessed May 23rd, 2022, https://www.unipol.it/sites/corporate/files/document_attachments/allegati_al_documento_informativo_aggiornato_ugf_24-12-2013.pdf

company, hence representing the offence of market manipulation for the shares issued by the company by means of the publication of false information capable of providing false and misleading indications".[56]

Therefore, pursuant to Article 187-*septies* of the TUF, Consob charged some members of the Ligresti family and of the Executive Committee, for the positions they held in Fonsai at the time of the facts, with the infringement defined under Article 187-*ter* of the TUF[57].

It is also important to note that criminal proceedings were underway at the Turin Public Prosecutor's Office, the outcomes of which, including in relation to possible civil liability profiles, could have had consequences for the Company Resulting from the Merger.

These are just some of the major problems encountered in the corporate governance of the Fondiaria Group, but they are sufficient to make the reader understand how they derive, at least in part, from policies implemented by the majority shareholder to extrapolate as much benefits as possible from the group.

These practices and actions have often been carried out to the detriment of minority shareholders and other stakeholders and have compromised, in the long run, the business of Fonsai.

The identification of these weaknesses by the external and internal control bodies would have made it possible to identify in advance the operational criticalities, perhaps avoiding the business crisis.

In this regard, many controversies have been raised by experts in the sector, such as the delegate of the savings shareholders of Fonsai, regarding the role of Consob and IVASS in this specific case; the question has been raised as to why for a decade the supervising authorities have been so indulgent towards the company, which was objectively in economic difficulties and, narrowing the field to the last three years before the integration project, why the IVASS , despite having learned of the criticality in the determination of the claims reserve since 2009, it ordered the inspection only in 2011, following multiple solicitations (Parodi, 2014).

2. Key facts of the merger

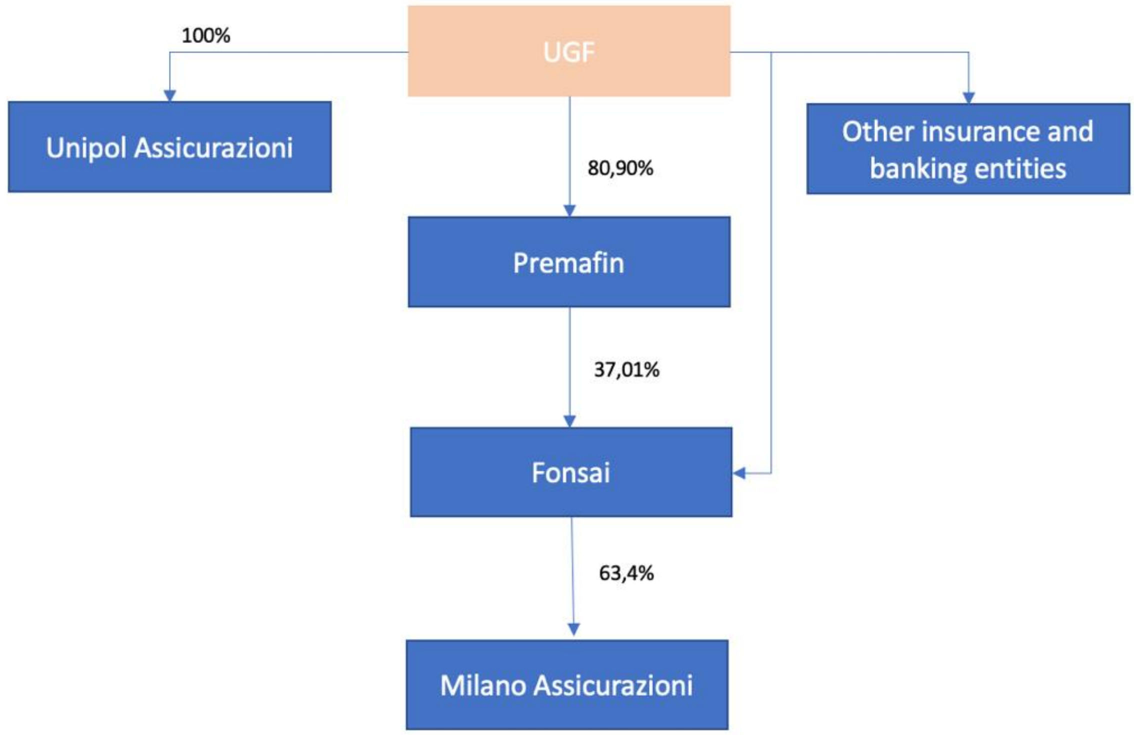
At the beginning of 2012, the insurance group Fondiaria-SAI was facing a period of severe financial and economic crisis (as anticipated above) and, in order to safeguard current and future solvency and to create, at the same time, a leading national operator in the insurance sector capable of competing with the main national and European competitors, the merger by incorporation of

[56] Resolution no. 18430 of 21 December 2012

[57]Source: "Allegati al documento informativo aggiornato", last accessed May 23rd, 2022, https://www.unipol.it/sites/corporate/files/document_attachments/allegati_al_documento_informativo_aggiornato_ugf_24-12-2013.pdf

Premafin, Unipol Assicurazioni and Milano Assicurazioni (the incorporated companies) into FondiariaSAI (the incorporating entity) has been planned and implemented (Manni, 2020).
The transaction has been considered as being an integral part of a broader integration project between the Unipol Group and the Premafin Group: indeed, Unipol Group was the sole shareholder of Unipol Assicurazioni, while Premafin was the controlling shareholder of FondiariaSAI, which, in turn, was the controlling shareholder of Milano Assicurazioni (Figure 5).

Figure 5: Structure *ex-ante*



Source: Personal elaboration based on “Annex on updated Information Document on the Merger” [58]

As part of the integration project, various related activities, in addition to the merger aggregation, have been envisaged, all to be considered essential and inseparable phases of the project[59]:

[58]Website:https://www.unipol.it/sites/corporate/files/document_attachments/allegati_documento_informativo_fusione_ugf_01-10-2013.pdf
[59]Source: “Allegati al documento informativo aggiornato”, last accessed May 23rd, 2022, https://www.unipol.it/sites/corporate/files/document_attachments/allegati_al_documento_informativo_aggiornato_ugf_24-12-2013.pdf

a) the approval by the extraordinary shareholders' meeting of Fonsai of a share capital increase of €1,100 million, functional to its capital strengthening;
b) the preparation by Premafin of a recovery plan for its debt exposure and, consequently, the recapitalization of Premafin through a capital increase reserved to Unipol Group;
c) the approval by the extraordinary shareholders' meeting of the Unipol Group of a share capital increase of € 1,100 million, aimed at providing the Group with the necessary resources (i) to subscribe to the Premafin share capital increase and (ii) to provide Unipol with the resources necessary to compete, as part of the transaction, to strengthen Fonsai's assets.
In addition, the Unipol Group has subscribed to a capital increase of Unipol Assicurazioni for a total of € 600 million, aimed at strengthening the capital of the incorporating company after the merger, with a view to maintaining the capital requirements envisaged by the law in force on a stable basis. To this end, the board of directors of Unipol Assicurazioni resolved to submit to the extraordinary shareholders' meeting the proposal for the execution of the real capital increase, to be carried out by issuing ordinary shares with a nominal value of €1 to be assigned in option to the single shareholder Unipol Group.
As a result of the completion of the integration project, Unipol Group would find itself exceeding the participation thresholds relevant for the purposes of the mandatory takeover bid pursuant to Article 106 and following of the TUF.
More specifically, due to the subscription of the Premafin capital increase, the Group would find itself *directly* holding a shareholding with voting rights greater than 50% in Premafin as well as, *indirectly*, a share of the capital with voting rights in Fonsai higher than 30% and in Milano Assicurazioni higher than 60%.
Furthermore, as a consequence of the implementation of the merger and of the exchange ratios that would be determined, the Unipol Group could find itself holding in the company resulting from the merger, and therefore in Fonsai as the incorporating company, an equity investment of more than 50%, or, in any case, increase its holding beyond the 5% per year relevant threshold for the purposes of takeover bids.
According to Consob[60], Unipol Group's acquisition of direct control of Premafin and indirect control (*de facto*) of Fonsai and (*de iure*) of Milano Assicurazioni, on the one hand, and the increase in the shareholding that the Group itself would hold in the resulting company, on the other hand, would only constitute distinct profiles from a temporal point of view, but to be treated as phases of a single procedure aimed "at restoring the correct solvency situation and ensuring future solvency", as required by IVASS.

[60] Communication n. DCG/DIE/CLE/12044042 of 24-5-2012

In addition, the exceeding of the relevant threshold as a result of the consolidation of Unipol Group's shareholding position would not be relevant for the purposes of the takeover bid because the acquisition of the significant shareholding in Premafin will take place exclusively through the subscription of the Premafin capital increase reserved for Unipol Group, without the latter having made, or even just agreed, in the twelve months preceding any purchase of Premafin shares.
This would involve the activation of exemption mechanisms that would exempt the Group from the obligations under Article 106 and following of the TUF.
As Consob has specified in its Communication, "the *ratio* of the provision is to be found in the fact that if the exceeding of the relevant threshold takes place by subscribing a capital increase with the exclusion of the option right, the dual consequence is achieved whereby: i) the funds invested by the shareholder who acquires the control are aimed at increasing the assets of the company and not that of the individual shareholders, who eventually sell their shareholding or their option rights; ii) full equality of treatment is guaranteed among all shareholders, who equally undergo the diluting effect deriving from the subscription of the capital increase by the new shareholder and do not benefit from the possibility of leaving the company".

The merger by incorporation of Premafin, Unipol Assicurazioni and Milano Assicurazioni into Fonsai was carried out pursuant to and for the purposes of Articles 2501 and following of the Civil Code.
Since Premafin, Milano Assicurazioni and Fonsai are issuers of financial instruments listed on an Italian regulated market, the merger was also subject to the provisions of the TUF and the Issuers' Regulation.
Furthermore, since Milano Assicurazioni, Fonsai and Unipol Assicurazioni were insurance companies, the merger was submitted for approval by IVASS pursuant to and for the purposes of articles 201 and following of the Private Insurance Code and Articles 23 and following of the IVASS Regulation[61].

On 20 December 2012, as disclosed to the market, the boards of directors of the companies involved in the transaction approved the merger plan pursuant to and for the purposes of Article 2501-*ter* of the Italian Civil Code, including the post-merger bylaws of the incorporating company and the reports of the administrative body concerning the transaction pursuant to and in accordance with Article 2501-*quinquies* of the Italian Civil Code; once approved by the board of directors, the merger plan was then filed at the registered office and published on the company's website, pursuant to and for the purposes of Article 2501-*quarter* of the Italian Civil Code.

[61] Regulation n. 14 of February 18, 2008.

In the same month, Unipol Group, Fonsai, Premafin, and Milano Assicurazioni published the relevant Updated Information Documents on the merger, a document containing estimates and calculations regarding the participating companies and their aggregate business after the merger has been completed[62].

In October 2013, the merger by incorporation was approved by resolutions adopted by the extraordinary shareholders' meetings of Fonsai, Premafin, Unipol Assicurazioni and Milano Assicurazioni[63].

As regards Milano Assicurazioni, it was envisaged that the merger was also subject to the approval of the special meeting of the company's savings shareholders as recipients, at the time of the exchange, of category "B" savings shares of Fondiaria-SAI, subordinated in the priority privilege to category "A" savings shares (Manni, 2020).

As part of the integration project, the merger of Unipol Assicurazioni and Premafin into Fonsai was considered "inseparably connected and mutually indispensable"[64] for the purposes of the transaction, while the non-approval of the project by the extraordinary meeting of the savings shareholders of Milano Assicurazioni, although precluding the execution of the merger of the latter into Fonsai, would not have compromised the incorporation of Unipol Assicurazioni and Premafin.

The graphs reported below illustrate what the Group's structure would have been like in the event that the special meeting of Milano Assicurazioni's shareholders had approved the merger plan, as it actually happened (Figure 6), and in the opposite scenario (Figure 7).

From 31 October 2013, date of the registration of the aforementioned shareholders' resolutions in the registers of the competent companies, both the fifteen-day deadline for exercising the right of withdrawal and the sixty-day deadline for creditors' opposition to the transaction have begun.

In January 2014, the deed of merger by incorporation, stipulated on 31 December 2013, was registered with the competent register of companies, as required by Article 2504 of the Civil Code.

From 6 January 2014, the merger by incorporation of Unipol Assicurazioni, Milano Assicurazioni and Premafin into Fonsai became effective: all the shares of the merged companies were canceled and exchanged for shares of the incorporating company, which took on the corporate name of

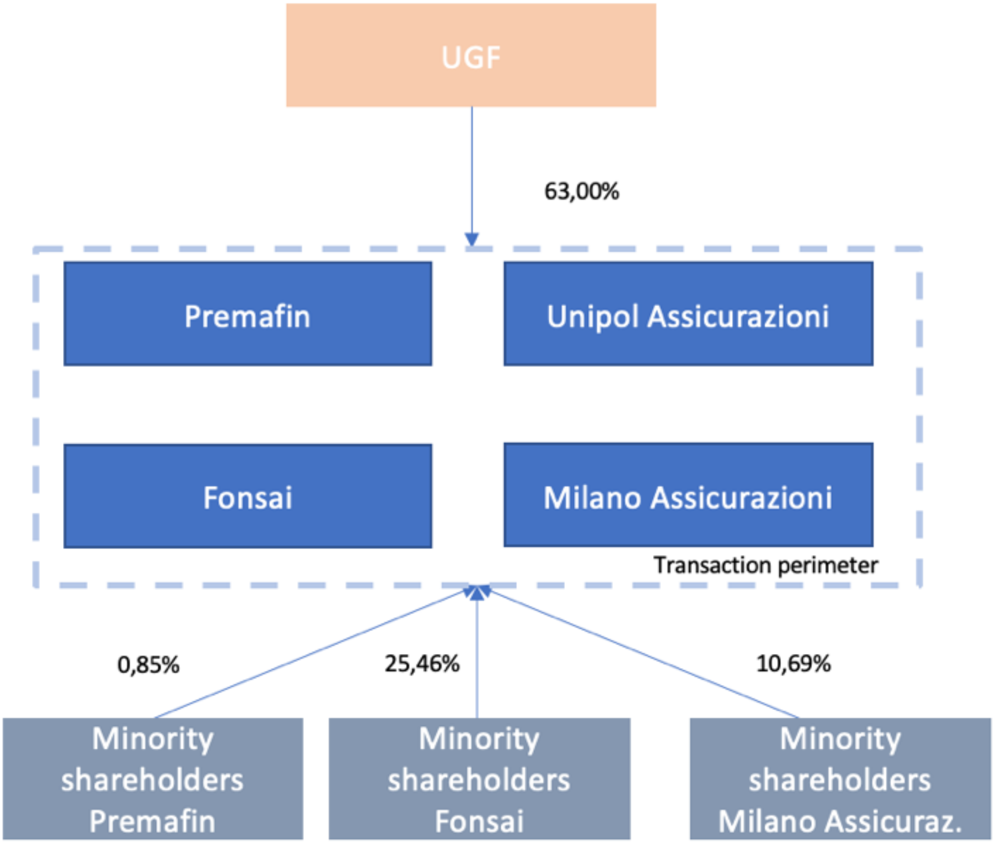
[62] On 9 October 2013, the Updated Information Document was made available to the public at the head offices of the companies and published on their websites.

[63]Source: "Allegati al documento informativo aggiornato", last accessed May 23rd, 2022, https://www.unipol.it/sites/corporate/files/document_attachments/allegati_al_documento_informativo_aggiornato_ugf_24-12-2013.pdf

[64]Source: "Allegati al documento informativo aggiornato", last accessed May 23rd, 2022, https://www.unipol.it/sites/corporate/files/document_attachments/allegati_al_documento_informativo_aggiornato_ugf_24-12-2013.pdf

"UnipolSai Assicurazioni S.p.A." or "UnipolSai S.p.A.", which maintained, even after the merger, the corporate purpose followed by Fonsai[65].

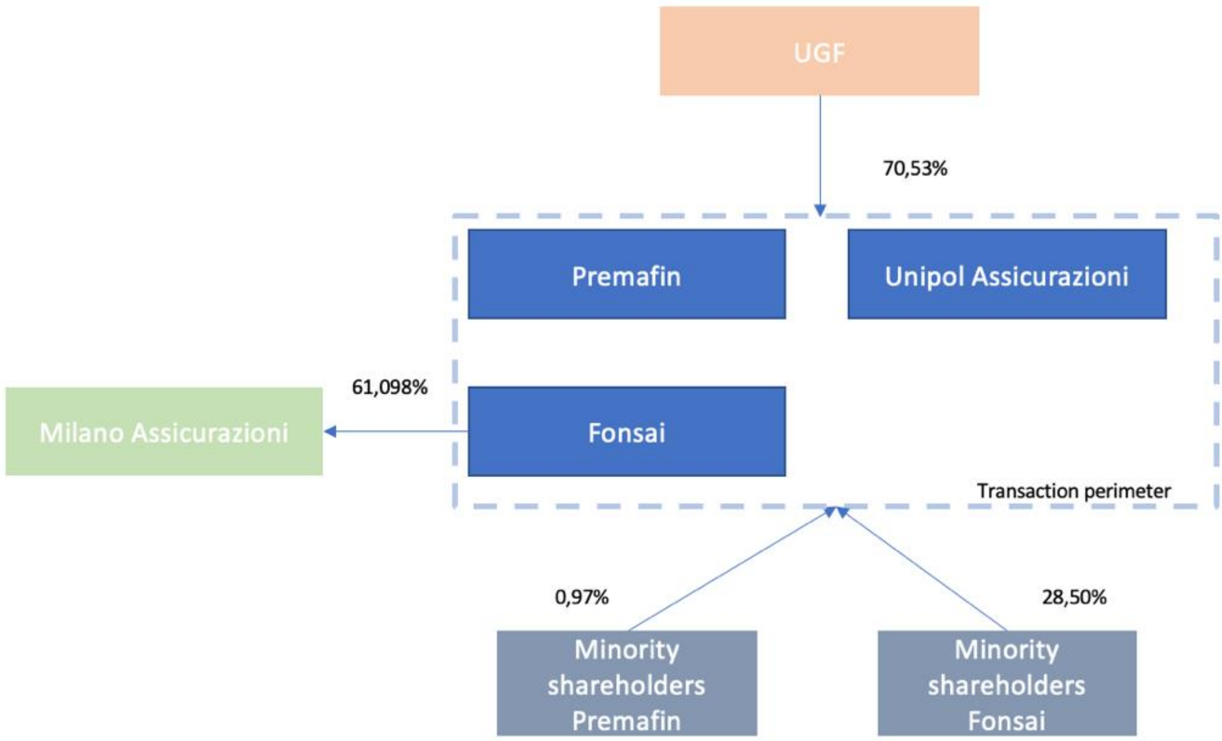
Figure 6: Structure *ex-post*, with Milano Assicurazioni



Source: Personal elaboration based on "Annex on updated Information Document on the Merger" [66]

[65] Source: "Allegati al documento informativo aggiornato", last accessed May 23rd, 2022, https://www.unipol.it/sites/corporate/files/document_attachments/allegati_al_documento_informativo_aggiornato_ugf_24-12-2013.pdf
[66]Website:https://www.unipol.it/sites/corporate/files/document_attachments/allegati_documento_informativo_fusione_ugf_01-10-2013.pdf

Figure 7: Structure *ex-post*, without Milano Assicurazioni



Source: Personal elaboration based on "Annex on updated Information Document on the Merger" [67]

In other words, upon completion of the merger integration project, the companies ceased to exist, and their shareholders became shareholders of UnipoSai, understood as the aggregation pole of important insurance companies, capable of effectively competing with the main national and European operators and generating value.

It should be noted that the circumstance that Fonsai incorporated its parent company Premafin, as well as its subsidiary Milano Assicurazioni, produced some repercussions on the methods of assigning the shares of the incorporating company.

More precisely, since both Premafin and Milano Assicurazioni held Fonsai shares, as better specified in paragraphs 1.2 and 1.4 of chapter 2, the incorporating company, as a result of the merger, would have to hold additional own shares pursuant to and by effect of the Article 2357-*bis* of the Italian Civil Code; in order to avoid an excessive increase in Fonsai's holding of its own shares, the merger plan provided that the shares held by the incorporated companies in Fonsai would be reallocated by

[67]Website:https://www.unipol.it/sites/corporate/files/document_attachments/allegati_documento_informativo_fusione_ugf_01-10-2013.pdf

way of exchange to the shareholders of the companies to be incorporated, without them ever being indicated as forming part of Fonsai's assets[68].

Once received the authorizations by the competent authorities[69] and subsequent approval by the respective shareholders' meetings, the merger by incorporation effectively took place and gave rise to the insurance company UnipolSai Assicurazioni S.p.A which officially became operational in January 2014.

The merger, and the resulting company, were a significant step in the rationalization and simplification of the Group in order to fully capture and exploit the synergies identified, and to allow the creation of value deriving from the alignment of productivity and the optimization of financial management.

Based on the approved exchange ratios, the share ownership of UnipolSai resulted to be as follows (Figure 8):

Figure 8: UnipolSai share ownership

	% Ordinary share	% share capital savings A	% share capital savings B	% total share capital
Unipol	63,00%		67,75%	63.66%
Ex Premafin	0,85%			0.73%
Ex Fondiaria-SAI	25,46%	100,00%	21.51%	24.92%
Ex Milano Assicurazioni	10,69%		10.74%	10.69%
Total	**100,00%**	**100,00%**	**100,00%**	**100,00%**

Source: Unipol Assicurazioni 2012 Consolidated Financial Statements

[68]Source: "Allegati al documento informativo aggiornato", last accessed May 23rd, 2022, https://www.unipol.it/sites/corporate/files/document_attachments/allegati_al_documento_informativo_aggiornato_ugf_24-12-2013.pdf

[69] AGCM, IVASS, Banca d'Italia, foreign supervisory authorities

Chapter 3: Transaction considerations

This third and final chapter will provide the reader with some final considerations relative to the M&A transactions and, in particular, to the Unipol-FondiariaSai case.

In the first place, the reader will be able to learn what are the advantages associated with extraordinary transactions, identifying what were the reasons that potentially led to the realization of the Unipol-Fondiaria Sai deal worth € 2.6 billion (Sole 24 ore, 2014).
Then, the reader will be able to have a clearer vision of the critical aspects and risks to which the companies involved in the merger by incorporation were exposed, thus finding a practical application to what was analyzed from a juridical point of view in the first chapter of this thesis.

Two important premises should be made: a) in the Anglo-Saxon countries the terms merger and acquisition are complementary, while in the Italian context these are legally kept distinct, as demonstrated in chapter 1, exclusively dedicated to the merger institution. However, regardless of any legal implications, some authors (Conca, 2010) believe that in practice the terms acquisition and merger can be used interchangeably, simply using the acronym M&A. So, for simplicity, in the following chapter the reader will often find the term M&A, but it is good to keep in mind that the transaction in question is a merger, the discipline of which was dealt with separately in the first chapter b) in the following chapter, only examples of M&A's advantages and disadvantages that, in the writer's opinion, can be applied to the case under analysis are reported. Therefore, a selection has been purposely made from the many interesting papers available on M&A.

1. M&A as an instrument to create value

Mergers & Acquisitions (or "M&A") have been part of business for a long time and represent a valid tool available to companies to activate growth processes and create added value for their shareholders by combining assets, capabilities, governance, and human resources from two or more companies (Gaughan, 2017).
They fall within the category of extraordinary finance transactions, although in recent decades they have gradually lost some of their extraordinary characteristics and have become increasingly important within the ordinary strategic planning of companies (Harding and Ohmstedt, 2022).
The reasons behind the decision to expand are several and range from the need to meet internal organizational requirements to incentives deriving from the external environment, which, in constant

evolution, may require sudden alignments with the potential needs of the community or the new economic and political balances (Potito, 2016).
The first two most important factors that explains why companies, and in the specific case the Premafin group and the Unipol Group, typically pursue M&A transactions have to do with external or inorganic growth[70] and synergies creation.
Firms have always shown an instinctive and physiological propensity for growth, responding to both endogenous and exogenous factors. In recent years, companies have increasingly felt the need to expand in order to sustain the increased competitive pressure, thus considering growth no longer just as a strategic option, but as a state of necessity to be fulfilled in order to survive; this consideration is particularly true for companies experiencing periods of distress or operating in stagnant markets (Dallocchio, 2020).
M&A transactions often results to be the only way to achieve a considerable increase in the size of the business, to acquire new resources and skills, and to enhance those already possessed; internal growth, in fact, requires much longer implementation times and there is also a strong awareness of how difficult it is to exploit all the internal resources and skills of a single company to be competitive and achieve a strong market position (Augusta, Baccarlino, Fabris and Greco, 2016).
As a result, growing through M&A results to be the preferred alternative as it a relatively fast process, and it allows companies to gain a competitive advantage by seizing opportunities that may otherwise be lost.

In this regard, it is important to highlight how one of the main objectives underlying the integration project in analysis is in line with the foregoing: in fact, the intention was to create, through the merger by incorporation of Unipol, Milano Assicurazioni and Premafin into Fonsai, a leading operator in the insurance sector, able to effectively compete with its main competitors[71].

The purpose, therefore, was to place the resulting company UnipolSai first in the non-life market, responding to a clear need for growth and expansion. More precisely, offering a wider range of products on the market and consolidating the competitive position in the insurance industry in terms of profitability, quality of service, and innovation are the distinctive signs that reflect the added value resulting from the integration project. It follows that growth is not usefully achievable unless accompanied by the possibility of creating new value (Guatri, 1993), which however is the result of

[70] The growth paths available to companies for the creation of value are essentially two: internal growth and external growth. The internal or organic growth occurs when a company uses its own tools and resources to expand.
[71] Source: "Documento Informativo Relativo ad Operazioni di Maggiore Rilevanza Con Parti Correlate", last accessed on May 21st, 2022, https://www.unipolsai.com/sites/corporate/files/document_attachments/Fonsai%20-%20Documento%20informativo%2027%20dic%202012.pdf

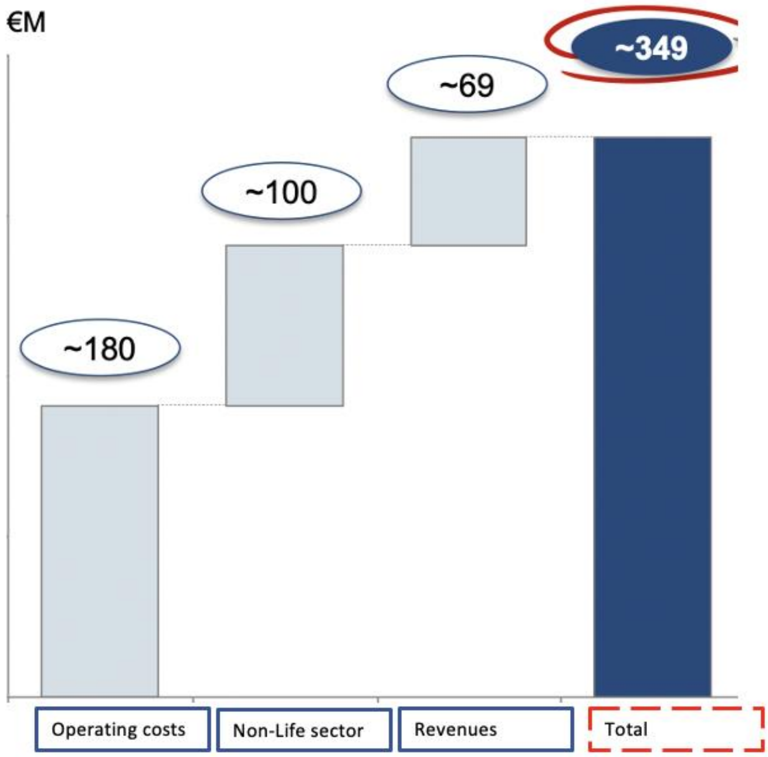
an accurate process (chapter 1, paragraph 2) that must necessarily consider all the potential issues and the timing required to the technical, cultural, and organizational integration of the realities involved in the deal. As far as synergies are concerned, they represent another strategic reason, if not one of the most important, which explain the importance of extraordinary transactions. Synergies can arise from the pooling of resources, that means eliminating useless and costly duplication of assets, and from the complementary presence of specialized skills, whose combined use increases both their usefulness and value (Vulpiani, 2021). Creating synergies correspond to obtaining an effect resulting from the business combination; if the value of the combined enterprises, as a result of the integration project, exceeds the sum of the values of the two individual firms, then a positive synergy is created (DePamphilis, 2017).

$$Wab > Wa + Wb$$ [72]

The higher value, which is intended to be obtained from the extraordinary transaction, may derive from a recovery of efficiency, and therefore from a reduction in costs or an increase in sales volumes. In this respect, it is worth pointing out that the merger transaction under analysis provided for the elimination of duplication of organizational processes and costs which, in this specific case, were particularly high given that the participating entities were listed and highly regulated. In particular, the advisors, on the occasion of the preparation of the 2013-2015 business plan, estimated *post*-merger synergies of approximately € 350 million, distributed as follows (Figure 9): € 180 millions of operating costs synergies , € 100 million in the non-Life sector, and approximately €70 million of revenues synergies[73].

[72] Where Wa and Wb are respectively the acquirer and the target stand-alone values.
[73] Source: "Comunicato Stampa Congiunto", last accessed on May 21st, 2022, https://www.unipolsai.com/sites/corporate/files/press_related_documents/pre_fondiariasai_2012_79.pdf,

Figure 9: *Post*-merger expected synergies



Source: Personal elaboration based on "Unipol, report analisti, comunicazioni ai mercati" (2012)

Another noteworthy point is that M&A transactions could represent a possible crisis resolution mechanism.

As the reader will recall from 1.5.1 and 1.5.2 of chapter 2, sometimes the combination of external and internal causes can lead the company towards its decline and, at times, its bankruptcy.

Among the various areas of intervention available to companies facing a period of distress, that of mergers and acquisitions deserves particular attention: "they can be relevant, beneficial and decisive in a time of potential crisis" (Tosi, 2021).

Through M&A deals it is possible to transfer the corporate assets of the company in crisis to a healthy one, which is in charge of its recovery, engaging in the continuation of the activity, of the working relationships and in the satisfaction of creditors; this means that even in the most serious crisis situations it is possible to recall alternative solutions to liquidation, such as to guarantee the continuation of the activity (Cecchini, 2019).

This is possible as a consequence of the corporate reform implemented in 2003 which, *inter alia*, removed the prohibition on participation in extraordinary transactions for corporations in insolvency proceedings[74].

The recourse to extraordinary corporate transactions is attributable to capital, corporate and financial reorganization project, which ranges from the readjustment of the structure to the new economic conditions up to the change of management; in this sense, it is possible to state that extraordinary transactions assumes importance not only as regards the restructuring of the debt, but also as regards the revitalization of the company, thus assuming a fundamental role in the corporate recovery plan which, however, must be framed within rational and adequately informed decision-making processes to protect the various interests involved, including those of the creditors and shareholders (Bestia and Brogi, 2016).

Furthermore, M&A deals often make it possible to overcome financial problems by allowing companies to leverage and take advantage of the larger size of the business complex resulting from the combination.

In a nutshell, extraordinary transactions provide tools for safeguarding the company, and, as in the case of Fonsai, they can be considered as "rescue transactions".

In this regard, it is recalled that the results of 2011 had highlighted a situation of *deficit* of Fonsai. Therefore, IVASS, pursuant to the applicable supervisory insurance regulations on solvency margin, asked the company to promptly present a recovery plan that would allow it to restore compliance with the necessary margins. With specific reference to the case at hand, the overall merger integration project represented the right solution to ensure the necessary and urgent the capital strengthening of Premafin and Fonsai and to restore correct solvency situation.

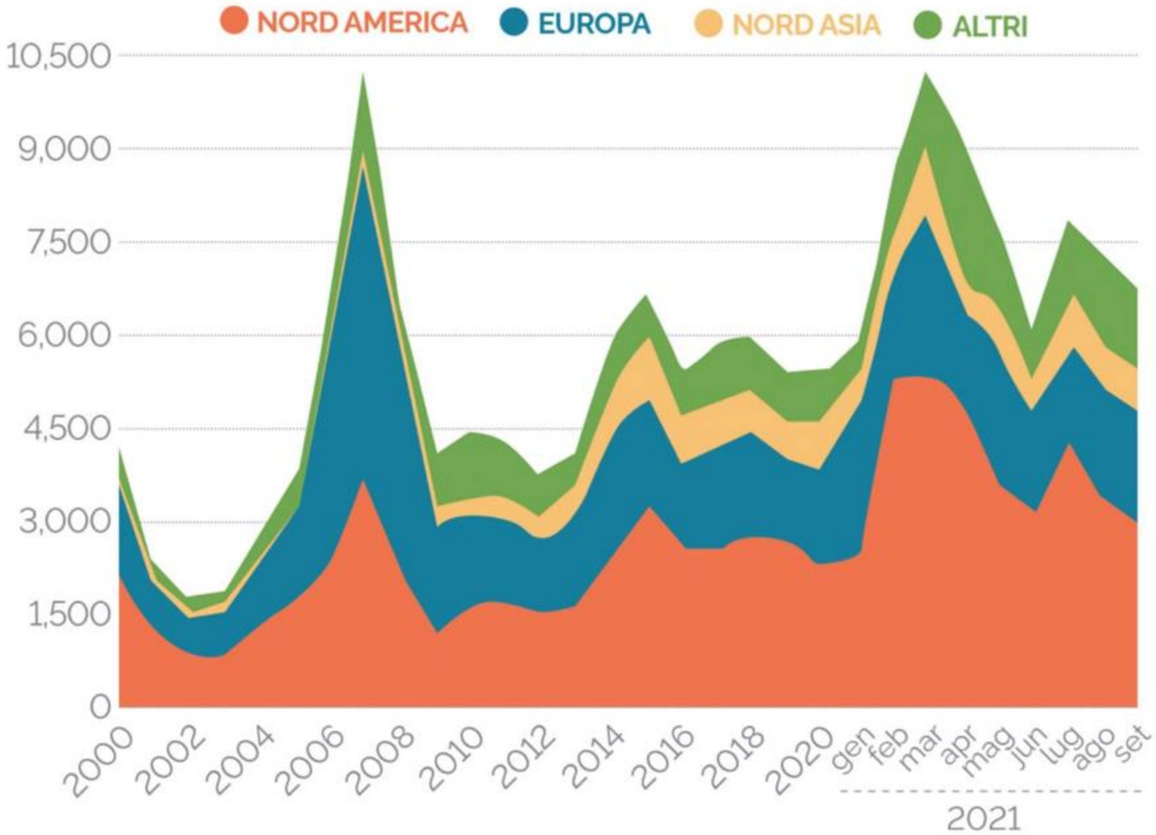
These are some of the most relevant factors that explain the importance and effectiveness of M&A transactions that, especially in recent years, are a milestone, and numbers provide supporting evidence.

In the following figure (Figure 10), the reader will be provided with the trend of corporate mergers and acquisitions that took place globally from 2000 to the present day.

It's worth mentioning that the number of business combinations in the first months of 2021, year affected by the Covid-19 pandemic, matched that of the financial crisis of 2007, supporting the thesis just reported: moments of crisis and distress call for such corporate transactions.

[74] Article 116 of the Crisis and Insolvency Code introduces the link between the rules of company law and the law of insolvency procedures.

Figure 10: M&A trend ($)



Source: ISPI (2021)

1.1 UnipolSai performance and success to date

On January 6th, 2014, the merger of Unipol Assicurazioni, Milano Assicurazioni and Premafin into Fonsai become effective.

From the effective date, the incorporating entity, or Fonsai, transferred its registered office in Bologna and changed its name to UnipolSai Assicurazioni SpA, assuming all rights and obligations of the subsidiary companies as well as the ownership of all insurance contracts of Milano Assicurazioni and Unipol Assicurazioni[75].

From the same date, the Fonsai share also changed its name to UnipolSai,while maintaining the same ISIN[76].

At this stage, it is good to reiterate that the shares of the incorporated companies were withdrawn from listing while the share capital of the incorporating company, at that date, was equal to €

[75] Source: "UnipolSai in borsa", last accessed on May 21st, 2022, https://www.unipolsai.com/it/investors/unipolsai-borsa
[76] The ISIN code is an international code that uniquely identifies financial instruments.

1,977,533,765.65, fully subscribed and paid up, consisting of n. 2,250,906,752 ordinary shares, n. 1,276,836 category “A” savings shares and n. 377.193.155 savings shares of category "B", all without indication of the nominal value[77].

However, on January 26th, 2015, the extraordinary shareholders' meeting of UnipolSai approved the conversion of category “A” and category “B” savings shares in newly issued ordinary shares, based on the following conversion ratios:

- 100 ordinary shares for each class “A” savings share;
- 1 ordinary share for each category “B” savings share.

The resolution regarding the conversion was approved also by the special meetings of the holders of category “A” and category “B” shares.

From June 29th, 2015, as an effect of the implementation of the aforementioned shareholders' resolutions and, therefore, of the conversion, the share capital of UnipolSai is made up exclusively of ordinary shares, traded on the Mercato Telematico Azionario of Borsa Italiana S.p.A.[78].

UnipolSai is controlled by Unipol Group S.p.A (or "the Group”), the fifth insurance group in Italy and the first in the non-life branch.

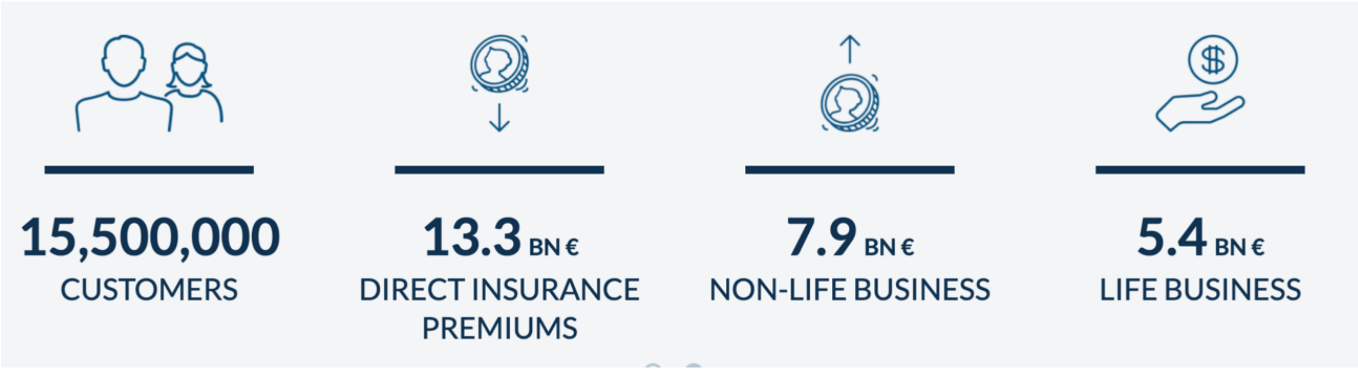
The Group, at 31 December 2021, has collected direct insurance deposits for € 13.3 billion, of which € 7.9 billion in the non-life business and € 5.4 billion in the life sector, summarized in Figure 11[79].

[77]Source: “Comunicato stampa congiunto”, last accessed on May 21st, 2022, https://www.unipol.it/sites/corporate/files/document_attachments/comunicato_stampa_congiunto_assemblee_straordinarie_di_fusione_ugf_26-10-2013.pdf

[78] Source: “Conversione obbligatoria delle azioni di risparmio in azioni ordinarie di UnipolSai Assicurazioni S.p.a.”, last accessed on May 21st, 2022, https://www.unipolsai.com/sites/corporate/files/document_attachments/PRE_UnipolSai_Esecuzione%20conversione_20150624_0.pdf

[79] Source: “Corporate profile”, last accessed on 21st May,2022, https://www.unipol.it/it/la-nostra-identita/corporate-profile

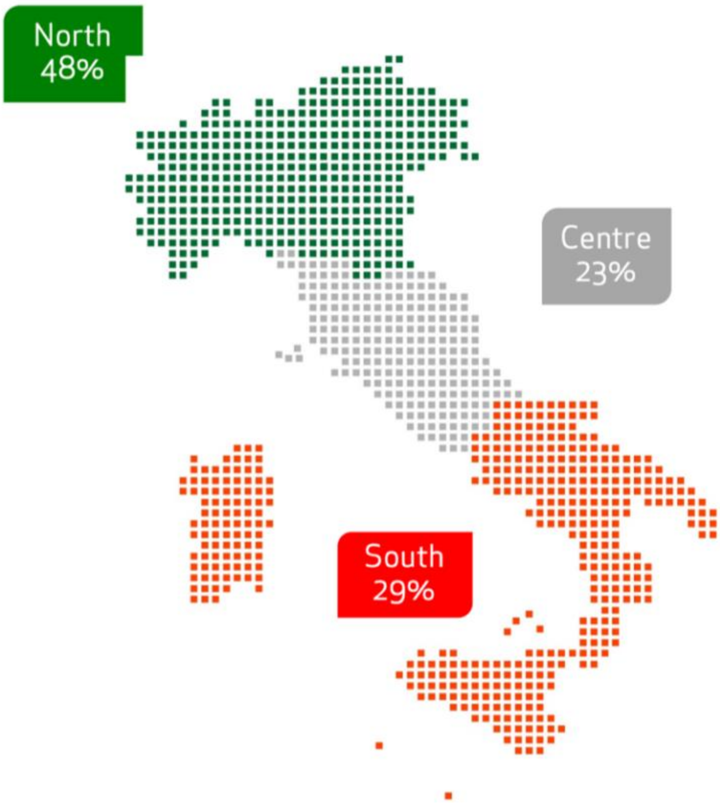
Figure 11: Highlights as at 31 December 2021



Source: Unipol Group website

The Parent company of the Group is UnipoSai, leader in the non-Life branch, in particular in Motor Vehicle TPL, which has quickly ascended to the top of the national insurance rankings with 2,300 insurance agencies and 6,000 sub-agencies distributed throughout the country (Figure 12), through which it offers a complete range of insurance solutions.

Figure 12: UnipolSai sales network



Source: Unipol Group - Company Profile - September 2021

The company is active in direct insurance through Linear Assicurazioni and in health protection with the specialized company UniSalute, but it also an important player in the Italian hotel sector thanks to the UNA Group, in the agricultural industry through Tenute del Cerro and in the port receptivity with Marina di Loano[80].
Over the years, the company has carried out numerous extraordinary finance transactions, in some cases to expand its business, through acquisitions, and in others to better focus corporate activities, through spin-offs. One of the latest transactions occurred in 2018, when the company Arca Vita was transferred under the direct control of UnipolSai; through this subsidiary and Arca Assicurazioni, UnipolaSai also oversees the bancassurance channel, distributing life and Non-life policies via Banca Popolare dell'Emilia Romagna, of which the Unipol Group and UnipolSai hold 18.89%,
Banca Popolare di Sondrio, of which UnipolSai holds 9.01%, and joint ventures created with leading Italian banking operators.
Outside the Italian borders, UnipolSai operates in Serbia through the subsidiary DDOR Novi Sad which, through a solid and widespread commercial network, provides services to more than half a million customers[81].
For greater completeness regarding UnipolSai's corporate structure, the corporate organization chart is shown in the appendix (Appendix 1).

2. Main legal principles and issues: the withdrawal right and the veto power

The purpose of this paragraph is to explain the several legal issues that arose in the context of the above-mentioned merger transaction, with particular reference to the protection tool available to Premafin's minority shareholders and the occurrence of a material prejudice for the Milano Assicurazioni saving shareholders.

As previously written, Premafin (1.2 of chapter 2) was a "mixed" financial holding, with a corporate purpose based on both real estate and holding activities. On the contrary, the incorporating company, or Fonsai (1.4 of chapter 2), had a corporate purpose limited by law to the exclusive exercise of the insurance business.
Notwithstanding the fact that the provisions of the by-laws concerning the respective corporate purposes were significantly different, it is important to specify that Premafin's only asset was represented by Fonsai shares. This means that, although, following the integration project, the clause

[80] Source: "Il Gruppo Unipol-UniSalute", last accessed on 21st May,2022, https://www.unisalute.it/chi-siamo/il-gruppo-unipol
[81]Source: "Corporate profile", last accessed on 21st May,2022, https://www.unipol.it/it/la-nostra-identita/corporate-profile

of Premafin's corporate purpose would have undergone a significant change, passing from a holding company to an insurance company, its level of risk would remain substantially unchanged even after the transaction.

In other words, since “the economic risk of Premafin was significantly linked from a financial point of view to the business results of Fonsai” (Manni, 2020), it was investigated the extent of the amendment in the corporate activity mentioned by Article 2437 of the Italian Civil Code.

In this regard, on the occasion of the call of the extraordinary meeting of Premafin on 25 October 2013, it was resolved that the shareholders of the company who did not participate in the merger resolutions, which, as mentioned, is an integral and essential part of the project of integration, have had the opportunity to exercise the right of withdrawal pursuant to and for the purposes of Article 2437 of the Civil Code.

The resolution of the shareholders' meeting on the right of withdrawal was based on the acknowledgment that the merger by incorporation would have deleted the flexibility of which Premafin was endowed; as a result of the merger, the company, starting from a situation in which it could operate in any financial and/or industrial sector, would have radically changed its corporate purpose, limiting its business to the insurance sector, under the rigid supervision of IVASS.

In addition, given that Premafin was a company listed on a regulated market, pursuant to and for the purposes of Article 2437-*ter* of the Civil Code, the liquidation value of the shares subject to withdrawal (€ 0.1747 per ordinary share) was determined by exclusively referring to the arithmetic average of the closing prices of the Premafin shares in the six months preceding the publication of the notice calling the meeting called to approve the merger plan.

It should be noted that the liquidation procedure of the Premafin shares for which the right of withdrawal has been exercised took place through a right issue pursuant to and for the purposes of Article 2437-*quarter* of the Italian Civil Code.

Another legal issue that emerged in the UnipolSai Assicurazioni case concerns the material prejudice to the saving shareholder of Milano Assicurazioni.

As mentioned in paragraph 2 of chapter 2, the merger by incorporation of Milano Assicurazioni into Fonsai has been submitted for the approval of the special meeting of savings shareholders of Milano Assicurazioni, convened pursuant to Articles 146 of the TUF and 2376 of the Italian Civil Code.

This was envisaged since, in the context of the exchange ratio of the merger, the savings shareholders of Milano Assicurazioni were offered class “B” savings shares of Fonsai, having preference rights lower than those attached to class “A” saving shares, causing that, upon completion of the merger, the shareholders of Milano Assicurazioni would receive their priority privilege only after the payment of the priority privilege in favor of the shareholders holding category "A" savings shares of Fonsai.

Provided that, as a consequence of this exchange, the saving shareholders of Milano Assicurazioni suffered a material detriment (3.2 of chapter 1), the aim was to understand and investigate the nature of the prejudice and the impact this could have on the special meeting of shareholders' resolution on the merger by incorporation.

In this regard, it should be noted that both categories of savings shares issued by Fonsai were characterized by higher privileges than those attributed to savings shares issued by Milano Assicurazioni (Manni, 2020).

Thus, since both class "A" and "B" saving shareholders of Fonsai had higher preference rights than Milano Assicurazioni' saving shareholders, it follows that the latter did not suffer a direct prejudice because they have in any case improved their *status* in terms of individual privileges.

However, the fact that in the share capital of Fonsai there were also class "A" shares and that they had not been offered to the savings shareholders of the subsidiary at the effective date of the merger, led to the occurrence of indirect prejudice.

In the light of above, the merger by incorporation of Milano Assicurazioni into Fonsai has been approved also by the saving meeting of shareholders of the company, with the possibility to the savings shareholders who did not participate in the resolutions on the merger to exercise the right of withdrawal pursuant to and for the purposes of Article 2437 of the Civil Code.

3. Other critical points

As previously stated, firms that want to continue their business in the long term often set themselves the goal of growing, both in terms of size and quality; however, this objective requires a "high sensitivity of the management to understand the need, times and ways of growing" (Potito, 2016), as this phase is extremely complex and, if badly managed, could destroy value rather than create it.

Therefore, "the performance of an acquisition or a merger is unavoidably characterized by uncertainty. There is no perfect analytical framework, there is no answer machine" (Faulkner, Teerikangas, and Joseph, 2012).

In light of the foregoing, in order to make an accurate assessment of the transaction, the reader will be provided with an evaluation of the most relevant risk factors or uncertainties arising from the merger and concerning all the participating companies as well as the sectors in which they operate.

Numerous studies have found that more than half of mergers (83%) fail to deliver the intended improvement in shareholder value (Cartwright and MacCarthy, 2005) and, according to some authors (De Bernardis and others), one of the main causes behind this percentage has to do with the cultural risk factor, typical of integration transactions. From a cultural standpoint, incompatible organizations may generate severe effects in the resulting company, such as diverging opinions between the different management areas, loss of company performance, a slow and disorganized process of integration and, in the worst-case scenario, bankruptcy.

It follows that a merger or an acquisition could unexpectedly reduce the value of companies, rather than increasing it, due to the so-called “culture clash” (Stafford and Mile, 2013).

In the specific case at hand, difficulties were encountered in a) the coordination of management and personnel; b) the integration between already existing IT systems, structures and services, and those of the newly incorporated companies; and c) the possible loss of customers by the participating companies[82].

With regard to the last point, it is important to emphasize that when companies merge, they often undertake seemingly minor changes that can have a significant impact on customers, forcing even the most devoted to reconsider their relationship with the company (Miles and Rouse, 2011).

Consequently, customer defections, which substantially contribute to that high failure rate, represent another risk that could compromise the outcome of business integrations, including the one under analysis. However, according to the data available (please go back to figure 11 to see the key information), it is possible to state that the Group was able to set ambitious goals for customer retention and adopt specific customer metrics to track performance.

Another relevant topic is that of related-party transactions, which, as the reader will recall, is also one of the possible internal causes of the Fonsai crisis.

At this point it is key to highlight the fact that Unipol Group controls, both directly and indirectly, not only Unipol Assicurazioni, but also Premafin, Fonsai and Milano Assicurazioni, as a result of the subscription of the Premafin capital increase. More precisely, the Group holds a stake:

(i) direct, equal to 100% of the ordinary share capital of Unipol Assicurazioni;

(ii) direct, equal to 80.93% of the ordinary share capital of Premafin;

(iii) direct and indirect, equal to 41.94% of the ordinary share capital of Fonsai; more precisely, the direct shareholding is equal to 4.9% and the indirect shareholding, for through Premafin, is equal to 37.02% (of which 4.17% held from Finadin);

(iv) indirect, through Fonsai, equal to 63.40% of the ordinary share capital of Milano Assicurazioni,

[82]Source; “Aggiornamento del documento informativo”, last accessed on May 22nd 2022, https://www.unipol.it/sites/corporate/files/document_attachments/documento_informativo_aggiornato_ugf_24-12-2013.pdf

Therefore, Premafin must be considered a related party of Fonsai since it directly and indirectly, also through subsidiaries, exercises the *de facto* control over Fonsai pursuant to Article 2359 of the Civil Code.

Likewise, Unipol Assicurazioni must deemed to be a related party of Fonsai since the both of them are subject to the common control of Group.

Lastly, Milano Assicurazioni must also be considered a related party of Fonsai as the latter exercises the *de iure* control over Milano Assicurazioni, in accordance with pursuant to Article 2359 of the Civil Code[83].

In the light of above, the merger by incorporation qualified as a transaction of greater relevance [84] as its nature was such that the relevance thresholds referred to in the first chapter (3.4 of chapter 1) were widely exceeded.

In this context, it is also worth mentioning the occurrence of related party transactions that took place prior to the merger under consideration, but which, involving some of the participating companies, posed a potential threat to the financial and economic situation of the resulting company.

It is good to premise that the fact that two companies belonging to the same group exchange goods and services against payment of a fee does not, on its own, constitute a circumstance that is neither rare nor prohibited, provided that, *inter alia*, the contractual terms are fair and comparable to those negotiated in similar contracts with independent third parties (Zingales, 2012).

However, although the intragroup transactions were intended “to ensure the rationalization of operational functions and the use of existing synergies in the Group, achieving greater overall cost effectiveness"[85], some of them, with particular regard to real estate transactions[86], have been investigated.

On June 15th, 2012, following inspections initiated since 2010, IVASS noted, in relation to the most relevant transactions, "violations of the directors' duties under Article 238 of the Insurance Code and under Articles 2391, 2391-*bis* and 2392 of the Civil Code with detrimental effects on the sound and prudent management of Fonsai and its subsidiaries"[87].

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83 Source: “Documento informativo relativo ad operazioni di maggiore rilevanza con parti correlate”, last accessed on May 22nd 2022, https://www.unipolsai.com/sites/corporate/files/document_attachments/Fonsai%20-%20Documento%20informativo%2027%20dic%202012.pdf

84 Source: “Documento informativo relativo ad operazioni di maggiore rilevanza con parti correlate”, last accessed on May 22nd 2022, https://www.unipolsai.com/sites/corporate/files/document_attachments/Fonsai%20-%20Documento%20informativo%2027%20dic%202012.pdf

85 Statutory financial statements Fondiaria-Sai, 2010

86 Describing the dynamics of these transactions is not within the scope of the thesis, as they are prior to the merger by incorporation under analysis. However, for more details, please consult the following site: https://www.unipolsai.com/sites/corporate/files/document_attachments/2012_Relazione%20Collegio%20Sindacale%20denuncia%20Amber.pdf

87 Source: “Relazione del collegio sindacale di Fondiaria-Sai S.p.A”, last accessed May 23rd, 2022, https://www.unipolsai.com/sites/corporate/files/document_attachments/2012_Relazione%20Collegio%20Sindacale%20denuncia%20Amber.pdf

Moreover, the competent authority instructed a Commissioner to (i) identify those responsible for the transactions carried out to the detriment of Fonsai and the companies belonging to the Fonsai Group, (ii) determine the damage suffered by them, (iii) promote any initiative, including judicial ones, necessary to safeguard and reintegrate the assets of said companies, and (iv) exercise the powers vested in Fonsai as parent company and shareholder in the shareholders' meetings of the subsidiaries. As a result of his investigations, the Commissioner concluded that all the transactions had been carried out directly with the members of the Ligresti family and that the activity of the Fonsai Group, with regard to the aforementioned transactions, was "hetero-directed" by the family, who had benefited to the detriment of the Fonsai Group itself.
The Commissioner therefore requested the boards of directors of Fonsai and Milano Assicurazioni, as well as of other companies of the Fonsai Group affected by the transactions, to call the ordinary shareholders' meetings to resolve the liability action against a series of subjects, including some directors and statutory auditors in office at Fonsai and Milano Assicurazioni in the period 2003-2011. On March 14, 2013, the ordinary meetings of Fonsai and Milano Assicurazioni, resolved to promote a corporate liability action, pursuant to Articles 2392, 2393 and 2407 of the Civil Code.
In light of this, Fonsai deemed it appropriate to intervene on its corporate governance structure in order to eliminate the criticalities regarding transactions with related parties.
In particular, the board of directors of Fonsai approved the establishment of a new and specific organizational unit, the so-called "Intragroup Activities". This unit, headed by the Chief Executive Officer, had the main task of evaluating and monitoring the procedures for fulfilling the requirements relating to transactions with related parties.
The second important intervention undertaken by the company in this regard was the introduction of new principles of conduct for the implementation of related parties' transactions, in compliance with the provisions of Consob resolution no. 12221/2010, subsequently amended[88].
As part of the aforementioned procedures for related parties' transactions, the related party committees set up by Fonsai, Milano Assicurazioni, Premafin and the Group, to the extent of their competence, expressed a favorable opinion regarding the interest of these companies in completing the transaction and the substantial convenience and correctness of the related terms and conditions.
Moreover, in the resolutions by which, on December 20th, 2012, the board of directors of Fonsai approved the merger project, some directors declared they had an interest pursuant to and for the purposes of Article 2391 of the Civil Code, as they also held positions on the boards of directors of the other companies involved in the merger.

[88] Source: "Relazione del collegio sindacale di Fondiaria-Sai S.p.A", last accessed May 23rd, 2022, https://www.unipolsai.com/sites/corporate/files/document_attachments/2012_Relazione%20Collegio%20Sindacale%20denuncia%20Amber.pdf

In is key to specify that, in view of the aforementioned shareholding relationships and the significant size of the transaction, Unipol Group, Fonsai, Premafin and Milano Assicurazioni have subjected, each to the extent of their competence, the determination of the exchange ratio (and any further legal and economic elements of the merger) to the regulations on transactions with related parties of greater importance[89]. The just mentioned exchange ratio is the last, but not least, important consideration about the merger.

The exchange ratio, or "the mathematical function for calculating the number of shares in the incorporating or resulting company to be allocated to each shareholder of the incorporated companies" (Serra and Spolidoro, 2016), represent an essential element during a merger process (1.2). This ratio affects the position of shareholders within the new corporate structure and, therefore, their rights; thus, it will be on the basis of the amount of the new shares that shareholders will decide whether the merger transaction is worthwhile or not.

According to Article 2501-*quinquies* of the Civil Code, the administrative body of the companies involved in the transaction must prepare a report, explaining and justifying, both in legal and economic terms, the approach adopted to determine the exchange ratio.

However, the Italian legal framework does not provide a specific method mathematical method but merely prescribes, in Article 2501- *sexies* of the Civil Code, that this ratio must be "congruous". It is possible to state that there is no unique, exact exchange ratio, but rather a plurality of possible parameters, all of which, within a reasonable range, are all satisfactory from a legislative point of view (Cascavilla, 2020).

The basic principle underlying the determination of exchange ratios consists in the homogeneity and methodological consistency: the results and calculation methods must be demonstrable, objective and easily understood so as to eliminate any kind of uncertainty or perplexity. In this regard, the Legislator specified that the above-mentioned report shall explain to shareholders how this result was arrived at, making explicit the reasons why that specific methodology was chosen and why it was deemed to be the most appropriate.

This accurate procedure required by the Legislator confirms the importance of the exchange ratio, which, however, could also presents some critical aspects.

Indeed, an unfair exchange rate would prevent shareholders from receiving a stake equivalent to that held before the merger, therefore damaging their *status*.

[89]Source: "Aggiornamento del documento informativo", last accessed May 23rd, 2022, https://www.unipol.it/sites/corporate/files/document_attachments/documento_informativo_aggiornato_ugf_24-12-2013.pdf

In addition, another important aspect that must be highlighted when assessing this criterion, is the presence of different categories of shares. In a merger by incorporation, it may happen (as in the case at hand) that the share capital of the participating companies is composed of shares belonging to different categories. In this hypothesis, since each shareholder will have to receive shares having the same value as those cancelled, the different categories of shares will be treated differently.
The complexity of the calculation is such in that both the so-called internal parity (i.e., the exchange ratio existing between different categories of shares) and the so-called external parity (i.e., the exchange ratio existing between the shares of the acquiring company and those of the merged company) must be taken into account (Foca, 2020).
In the specific case where the share capital consists of savings shares, as in the case in analysis, " the exchange ratio between savings shares and ordinary shares must be calculated taking into account that the value of the former is not necessarily coincident with that of the ordinary shares, since the value of the savings shares, which can be inferred from the market quotations of the securities, is a function of the rights, not only of an equity nature, but also of an administrative nature, conferred by the shares in question" (Italian Supreme Court, April 20, 2020, no. 7920).
In the specific case at hand, the board of directors of the companies involved in the transaction have agreed to adopt the following exchange rates[90]:

– 0.050 Fondiaria-SAI ordinary shares for each Premafin ordinary share;
– 1.497 Fondiaria-SAI ordinary shares for each Unipol Assicurazioni ordinary share;
– 0.339 Fondiaria-SAI ordinary shares for each Milano Assicurazioni ordinary share;
– 0.549 Fondiaria-SAI "B" saving shares for each Milano Assicurazioni savings share.

It is useful to specify that if the special meeting of Milano Assicurazioni had not approved the merger, the other exchange ratios would have remained unchanged.
The Dividend Discount Model ("DDM") was identified as the main valuation methodology," given its flexibility and ability to capture the specificities of each company in terms of profitability, growth, solvency margin, risk level and capital components"[91].
The DDM method assumes that the economic value of a company is equal to the sum of the present value of i) the future cash flows generated over the chosen time horizon and distributable

[90] Source: "Documento informativo", last accessed May 23rd, 2022
https://www.unipol.it/sites/corporate/files/document_attachments/allegati_documento_informativo_fusione_ugf_01-10-2013.pdf
[91] Source: "Allegati al documento informativo aggiornato", last accessed May 23rd, 2022, https://www.unipol.it/sites/corporate/files/document_attachments/allegati_al_documento_informativo_aggiornato_ugf_24-12-2013.pdf

to shareholders and ii) the Terminal Value (or TV)[92].

$$Value = \sum\nolimits_{t=1}^{N} \frac{CF_t}{(1+r)^t} + TV$$

where “N” is explicit forecast period, “CF” is the expected cash flow and “r” is the discount rate, estimated on the basis of the Capital Asset Pricing Model (or CAPM).

This evaluation methodology must be considered in light of certain limitations and difficulties, including the high volatility of financial markets in those years, which had an impact, *inter alia*, on the economic and financial magnitudes of the companies being assessed.

[92] the Terminal Value estimates the cash flows that will be produced after the time horizon taken as a reference in the business plan. In this specific case, this value was estimated by applying the Gordon Growth model.

Conclusion

This thesis shows how, sometimes, the combination of exogenous and endogenous factors can lead the company towards its decline and, at times, its crisis. Extraordinary transactions provide tools for safeguarding the company, representing one of the main "rescue alternative".
Therefore, mergers and acquisitions are nowadays carried out more and more assiduously, given the advantages that can derive *ex-post.*
However, they are, the same time, decidedly complex and articulated transactions that may result in a variety of implications and risks; the UnipolSai case provides evidence of this.

Research showed that the transaction under consideration implied several legal issues, which were explained throughout the thesis.
First of all, it was pointed out that, since the merger gave rise to an amendment of the corporate purpose of Premafin, shareholders who did not approve the incorporation into Fonsai, have been granted with right to exit from the company pursuant to Article 2437 of the Civil Code.
The right of withdrawal represented a balancing point between the shareholder's interest in not remaining a prisoner of a company that was completely different from the one in which he/she had initially invested, and the protection of the integrity of the share capital. In fact, by exercising the right of withdrawal, the shareholder gives rise, at the same time, to an extinction phenomenon, by leaving the company, and a transformative one, by switching his/her position as a shareholder to that of a creditor of the company for the repayment of his/her shareholding (Picone and Lavorano, 2019).
Thus, the exercise of the right of withdrawal represents one of potential cost that must be contemplated whenever a company is involved into an extraordinary transaction.
Secondly, it turned out that saving shareholders of Milano Assicurazione suffered a material prejudice as a consequence of the merger, in the context of which they received class "B" saving shares of Fonsai, subordinated to the priority privilege given to the category "A" saving shares.
In the light of above, it was established that saving shareholders of Milano Assicurazioni did suffer an indirect prejudice, because the transaction, while formally leaving the rights of the category unaltered, involved an indirect compression of the same.
In the previous chapters, reference was made to the debate over whether this kind of detriment could really jeopardize the special rights of shareholders and, therefore, whether the special meeting of shareholders has veto power in such a circumstance.
In the author's opinion, the answer lies in the fact that the special meeting of saving shareholders of Milano Assicurazioni was called to resolve about the merger by incorporation; as specified by Article

146 TUF, the special meeting of savings shareholders resolves on the approval of shareholders' meeting resolutions that affect the rights of the category, thus implying that the allocation of the class "B" shares could jeopardize the existing special rights and, therefore, trigger the veto power.
The special meeting of savings shareholders of Milano Assicurazioni approved the merger by incorporation with the favorable vote of 97.82%, while those saving shares who did not agree with the decision were entitled to exercise the right of withdraw pursuant to Article 2437 the Italian Civil Code, pursuant to the amendment of the shareholding rights following the merger.
Another minority protection tool investigated in this thesis is that introduced by the Consob Regulation on Related Parties' transactions, first adopted with resolution n. 17221 of 12th March 2010, and then amended by resolutions n. 21624 of 10 December 2020.
The regulation at hand aims, *inter alia*, at protecting the minorities of listed companies from the risk of extraction of the so-called "private benefit of control", which can cause a transfer of wealth in favor of a related party at unfair conditions. Clearly, this could represent a threat for minorities and their equity investments. It is it should be pointed out that the merger by incorporation into Fonsai qualified as a transaction with related parties of "greater importance".
From a legal standpoint, the exchange ratio is the last noteworthy aspect in this concluding section. It defines the post-merger shareholder balance and ensures the protection of the minority shareholders through an equitable distribution of the number of shares of the incorporating or resulting company among the different eligible parties, based on the value of the shares they held before the merger. In the case at hand, it was determined through the DDM model, considered as one of the most flexible and easy to use valuation technique.

These are the most important legal aspects that have emerged as a result of research and studies done on the business case under consideration, which led to the creation of UnipoSai, an insurance company that has recorded significant numbers and experienced exponential growth in recent years.
The case under analysis is an emblem of how extraordinary transactions create value and serve to get out of crisis situations but how, at the same time, they must take into account the needs of shareholders.

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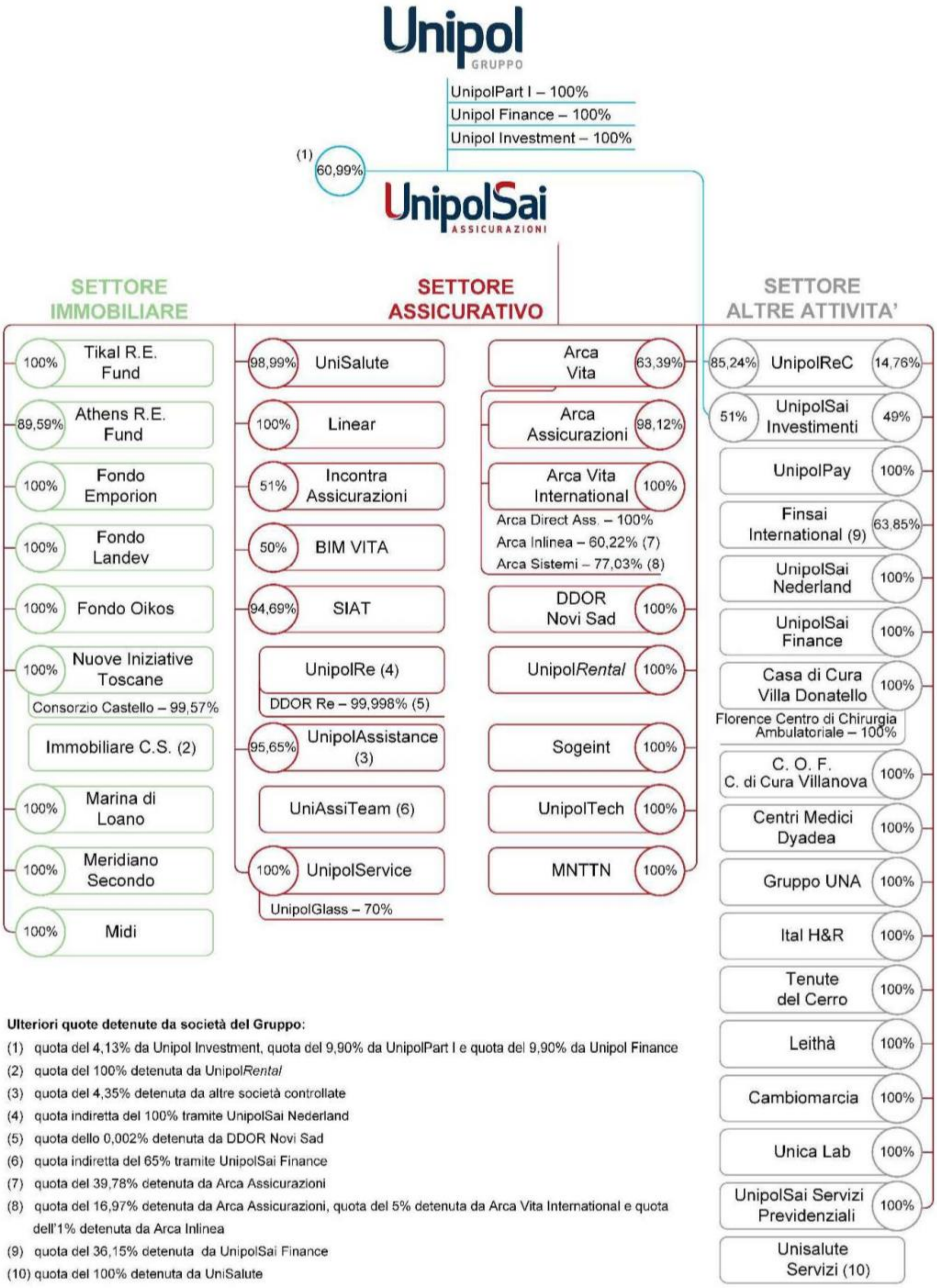
Appendix

Appendix 1: UnipolSai's organization chart



Source: Unipol Group website

Department of Business and Management

Master's Degree Thesis in Corporate Finance

Chair of Cases in Business Law

Extraordinary transactions between corporate benefits and shareholders' protection: the Unipol-FondiariaSai case

- Summary -

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Introduction

Extraordinary transactions have always been a topic that arouses great interest, given their importance, *inter alia*, in the redesign of corporate or group structures. Although motivated by the intent to pursue the interest of the company understood as different and other than that of individual investors, these transactions may change the financial structure of the company to the detriment of those who financed it (Barachini, 2018).

It follows that the merger entails important implications for minorities, and, in general, for shareholders.

The author's purpose is to highlight, on the one hand, the benefits that mergers can bring to companies, and, on the other hand, the potential costs related to the envisaged transaction. The case under analysis is an important example of how these two aspects coexist.

It is important to specify that this section provides the main topics discussed in the thesis.

The first chapter will essentially analyze the merger from a legal point of view.

There will be an explanation of the main protection instruments available to minorities and shareholders in general, one of the most hotly debated topic under the company law reformed by Legislative Decree No. 6/2003. In particular, there will be a focus on the withdrawal right, the veto power, and the Consob Regulation on related parties' transactions, mainly aimed at avoiding opportunistic and absolutist behavior of majority shareholders, ensuring so-called "shareholder democracy" that is, balancing the majority principle and the interests of shareholders outside the controlling group (Barachini, 2018).

In addition, given that the increase in share capital is to be considered as one of the essential phases of the merger project under analysis, the author also found it functional to dwell on the option right.

The purpose of the **second chapter** is to analyze and explore the merger by incorporation of Unipol Assicurazioni S.p.A ("Unipol Assicurazioni"), Premafin S.p.A ("Premafin") and Milano Assicurazioni S.p.A ("Milano Assicurazioni") into FondiariaSAI S.p.A ("Fonsai").

In this section it will be possible to review all the main phases that characterized the merger transaction as well as all the potential reasons behind it.

The third chapter contains some final considerations about the transaction under analysis. The purpose of this last part is to provide evidence of how extraordinary finance transactions can create value for companies, and, at the same time, highlight the main legal principles and issues related to this specific business case with the intention of finding application to the theoretical concepts contained in the first chapter.

Chapter 1: Legal issues and shareholder protection in extraordinary transactions

Transactions such as the sale - direct or indirect - of the company or its branches, the transfer of assets, corporate transformation and liquidation, mergers and demergers represent alternative methods for achieving the strategic objectives set by the governance, interested in exploiting the potential that each of them allows to realize (Corsi and Farinon, 2018).

Among these extraordinary transactions, mergers, and their implications in the context of Italian joint-stock companies, will be the subject of this chapter. The intent is to provide the reader with all the tools to better understand the Unipol-FondiariaSai case analyzed in the next chapter.

1. Merger transactions: structure and process

The discipline of the merger between companies is contained in Articles 2501-2505-*quater* of the Italian Civil Code, while, outside the Civil Code, specific mergers are regulated, such as those between banks (articles 31, 36 and 57 of the TUB) and insurance companies (articles 201 and 202 Private Insurance Code), as well as mergers between companies incorporated under the law of different countries or cross-border mergers (Directive EU 2019/2121 of 27 November 2019).

As stated by Article 2501 of the Italian Civil Code, "the merger of several companies can be achieved through the establishment of a new entity, or through the incorporation of one or more companies".

According to what stated above, a merger, on the basis of its economic nature, can be implemented in two ways: by union or by incorporation.

In the first case, all the participating entities cease their legal existence and devolve their assets to the new enterprise, also known as newco. The second type of merger, namely merger by incorporation, it occurs when one or more companies transfer the entire assets to an existing company that incorporates them; in this case, therefore, only the incorporated companies lose their legal identity.

It is important to specify that these transactions can be carried out between companies of the same type (homogeneous merger) or between entities of different types (heterogeneous merger).

Heterogeneous mergers imply the transformation of one or more participating companies; in this case, therefore, entities are subject to the limits envisaged for the transformation procedure, sanctioned by Articles 2498-2500-novies of the Italian Civil Code.

Regardless of its nature, a merger represents an important phase in the life of the company and is often associated with delicate moments of transition. For these reasons, it is characterized by specific structure and process.

More specifically, a merger, results from three essential moments: 1) the merger plan, 2) the merger resolution and 3) the deed of merger.

The first phase in one of the most significant innovations introduced by the Legislative Decree of 16 January 1991, reconfirmed also by the 2003 Legislator. It constitutes the central and most significant moment of the entire merger process as it not only prepares the basis for the transaction, but also allows the correct disclosure of information to all shareholders and third parties involved. It is expressly provided for by Article 2501-ter of the Civil Code that the directors of the companies participating in the merger must prepare the merger plan which must then be presented and accepted by the shareholders' meeting. The merger plan must be registered in the register of companies of the place where the companies participating in the merger are based, or alternatively on the company's website. In particular, at least thirty days must elapse between the date of registration of the project (or of publication on the website) and that set for merger resolution, except in the case in which the shareholders renounce this term with unanimous consent.

Once this preparatory phase has been completed, the merger resolution is reached: the transaction is decided by each of the participating companies through the "approval of the related project" (Article 2502 of the Italian Civil Code). In general, the resolutions, to be approved, must obtain the favorable vote of the majority of the shareholders[1] provided for by the by-laws and, once approved by the majority, they are binding on all shareholders, even if they are absent or dissenting.

However, the discipline of the shareholders 'meeting majorities, through highly technical procedural rules, seeks to find a balance between the need to facilitate resolutions and adequately protect minorities. Hence the need to diversify the *quorum* for ordinary and extraordinary shareholders' meeting and to provide for subsequent calls of the meeting, if the first has been deserted, with progressively lower *quorums* (Campobasso, 2015).

The merger process ends with the signing of the merger deed by the legal representatives of the companies involved (Article 2504 of the Italian Civil Code). This document has a legal nature and the structure of a real contract. It must always be drawn up in the form of a public act *ad substantiam*. The merger deed completes the procedure, so that the transaction becomes effective also towards third parties. In this phase, all rights and obligations of the companies participating in the merger are assumed by the acquiring company or by the newco. As established by Article 2504-bis, "the merger is effective when the last of the registrations prescribed by article 2504 has been made".

[1] The majority of the shareholders' meeting can be represented by a single shareholder who has 51% of the share capital, or by several shareholders who, acting in concert, reach the same percentage. It can also be represented by shareholders (individuals or groups) who have capital percentages much lower than 51% but who still manage to systematically prevail because the other shares are dispersed among a large number of small shareholders.

2. Shareholders' protection

The protection of minority shareholders is a crucial issue especially in listed companies, as demonstrated by the fact that Legislators and Consob have, over time, introduced numerous protection mechanisms to counterbalance the power of controlling shareholders.

In this perspective, starting from 1974 (Law 7-6-1974, n.216), the Legislator has adopted a new orientation of legislative policy, marking a substantial turning point with respect to the Civil Code of 1942, by intervening, for the first time in a significant way, on minorities in Italian listed companies. Since then, numerous legislative interventions have been carried out to improve and strengthen the self-protection tools available to minorities, including, in particular, the 1998 reform that introduced the Consolidated Law on Finance, and the organic Reform of joint-stock companies of 2003.

In the specific case in which an enterprise is involved into an extraordinary transaction it is key to investigate the nature of certain potential costs, such us, among others, the triggering of the withdrawal right, the veto power of the meeting of the holders of special class of shares, and the option right (Sacco Ginevri, 2020), which will be analyzed in the following paragraphs.

2.1 The withdrawal right

Under the Italian legislation, the withdrawal right is defined as the possibility granted to minority shareholders to exit from the company's share capital, at a fair value, in specific circumstances[2.] The right of withdrawal is recognized to non-consenting shareholders, that is, more specifically, to shareholders who are absent, dissenting or abstained from a series of resolutions which have as their common denominator that of profoundly altering the risk conditions present at the time of joining the partner to the company (Manni, 2020). Withdrawal has always been one of the most debated issues due to the opposing interests to be protected: on the one hand there is the interest of the withdrawing shareholder in obtaining the reimbursement of the capital invested in his shareholding, on the other hand, instead, there is the interest of the "surviving" shareholders in continuing to manage the company and in maintaining the integrity of the share capital which, among other things, constitutes a source of guarantee for creditors.

From a legal point of view, a transaction that significantly modifies the corporate purpose or the risk conditions of a company must, at the same time, guarantee to shareholders who have not approved its execution the possibility of withdrawing.

[2] Article 2437 and seq. of the Italian Civil Code

More precisely, pursuant to Article 2437, par.1 of the Civil Code, shareholders have the right to withdraw if they have not participated, because they were absent, dissenting or abstained, in the following resolutions:

a) the amendment of the corporate purpose, when it allows a significant change in the activity of the company

b) the transformation of the company

c) the transfer of the registered office abroad

d) the revocation of the liquidation status

e) the elimination of one or more causes of withdrawal

f) modification of the criteria for determining the value of the share in the event of withdrawal

g) amendments to the Articles of Association concerning voting or participation rights

In all these circumstances, the right of withdrawal cannot be excluded by the bylaws and any agreement aimed at excluding it or making it more burdensome to exercise is null and void.

The right of withdrawal must be exercised by means of a communication by registered letter to the company within a short period: fifteen days from the registration in the commercial register of the resolution that legitimizes it, or thirty days from the knowledge of the fact that it legitimizes the right, in the case of a fact other than a resolution (Article 2437-bis of the Civil Code).

The shares for which the right of withdrawal is exercised automatically become non-transferable and must remain deposited at the registered office. The Italian law expressly admits the possibility of a partial withdrawal, that is, relating only to some of the shares owned by the shareholder. Consequently, the withdrawing shareholders are entitled to the liquidation of the shares for which the withdrawal has been exercised.

With the reform implemented with Legislative Decree no. 6 of 2003, the discipline of withdrawal in joint stock companies has been profoundly modified, passing from a version more favorable to the company, to one more oriented towards the protection of the withdrawing shareholder.

Although in joint-stock companies the minority cannot prevent changes in the corporate structure, even radical ones, as the majority principle applies, it is necessary to ensure that the principles of correctness and good faith are never violated, as well as that of equal treatment of shareholders.

2.2 The shareholders' special meetings

In joint-stock companies, the most important decisions are taken through the shareholders' meeting, which, as mentioned above, can be ordinary or extraordinary.

The functioning of the meeting is characterized by the majority principle and the weight of each shareholder in the meeting is proportionate to the share of capital subscribed and to the number of shares held: shareholders have, in principle, powers and advantages based on the economic significance of their contributions within the company, so that decisions are not made according to the democratic principle "one person, one vote" but according to the plutocratic principle "one share, one vote". The decision-making power in the shareholders' meeting therefore is, or should be, in the hands of those who hold the majority of the share capital.

As a consequence, the will expressed by the majority shareholders is valid as the will of the company and binds all the shareholders, even if absent or dissenting, as long as the rules governing the shareholders'meeting are respected (Articles 2364-2365 of the Civil Code).

In order to protect the interests of all types of shareholders, it is envisaged that if there are different categories of shares or financial instruments (Article 2436 of the Italian Civil Code) that confer administrative rights, "the resolutions of the shareholders' meeting, which affect the rights of one of them, must also be approved by the special meeting of those belonging to the category concerned" (Article 2376 of the Italian Civil Code).

In other words, holders of special classes of shares have the possibility of exercising the power of veto on the assumption that a resolution of the general meeting could negatively affect their special rights. This provision submits the effectiveness of the resolution of the general shareholders' meeting to the approval of the special shareholders' meeting in order to grant these shareholders protection against resolutions that could affect their special rights.

According to Italian scholars and case law, there are three different detriments that a transaction could generate: direct, de facto, and indirect (Mignoli,1960).

With direct prejudice, it is customary to identify any direct and *in peius* amendment to the bylaw's provisions attributed to a specific class; the *de facto* prejudice arises from a transaction that, while not undermining the rights of the category, produces a detrimental effect on the economic expectations of the special shareholder; the so-called indirect prejudice derives from events that (only) indirectly affect the special rights of the shareholders.

While the direct prejudice is always relevant, and the *de facto* detriment never does, the third category is located into the so-called "grey area", generating a debate among legal scholars whether an indirect detriment could affect the rights attached to the special classes of shares, or not. In other words, there is a debate whether in such a circumstance the special meeting has the veto power (Manni, 2020).

Among the special categories of shares, savings shares, introduced by Law 216/1974 and currently regulated by Articles 145-147 of the Consolidated Law on Financial (or TUF) deserve special attention.

The functioning and responsibilities of the special meeting of savings shareholders are governed by Article 146 of the TUF, which derogates from certain principles enshrined in Article 2376 of the Civil Code.

2.3 The option right

Pursuant to Article 2441 of the Civil Code, in the event of a share capital increase, the shareholders are entitled to the exercise the option right, defined as the possibility, and not the obligation, to subscribe a portion of the newly issued shares on a pro-rata basis.

The option right constitutes, in company law, the traditional mechanism for protecting the financial and administrative interests of the shareholders. It therefore responds with the aim of maintaining the stake of each shareholder in the share capital unchanged, and, therefore, of not altering the corporate will in which the shareholder participates through the vote. In this way, existing shareholders as well as holders of convertible bonds are granted the right to subscribe, preferably with third parties, the newly issued shares. It is important to underline the fact that exercising the option right is not mandatory; existing shareholders may, in fact, decide to exercise their rights and purchase the new underlying shares by paying the related issue price, or decide to sell their option rights on the market. By exercising the right conferred on them, existing shareholders have the opportunity to benefit from the effects of this right. On the contrary, by choosing to forgo this opportunity, the existing shareholders will suffer a reduction in their participation because new investors will now contribute to the share capital of the company by purchasing the newly issued shares.
This phenomenon is called the dilution effect, which affects not only the share price but also the company's earnings per share. The extent of such dilution strictly depends on both the number and the price of the new shares. However, this loss can, in whole or in part, recovered through the sale of the option right, which has its own economic value that the shareholder can monetize if he/she is unable or unwilling to participate in the share capital increase (Campobasso,2015).

2.4 Related parties' transactions

Related parties' transactions are a corporate phenomenon is based on the coexistence of actors with often divergent interests; specifically, every shareholder, who should act for the well-being of the company, often seek to satisfy his or her own individual goals, which may, or may not, be in conflict with the societal interest.

As a result, the mere association between individuals for the purpose of achieving a common objective determines the concrete risk that the personal interests are not entirely aligned, thereby causing a damage to the company itself, to minority shareholders and other stakeholders.
Faced with a corporate conflict of interest, the Legislator can adopt at least three different regulatory strategies: the prohibition, the indifference, or the implementation of a more stringent regulation (Prestamburgo, 2015).
The third strategy is the one most used today since, with a rigorous regulation of the corporate conflict of interest, the Legislator can avoid the undermining of the investor protection and, consequently, of the market confidence, without excessively limiting commercial exchanges, as in the hypothesis of prohibition, and relying on the laws of the market to regulate a complex phenomenon, as could happen in the case in which the second strategy is implemented.
It is in this context and on these assumptions that the discipline of transactions with related parties is developed, which aims at protecting minorities, but without condemning *a priori* the transaction carried out between a listed company with its related party whose execution can involve the extraction of the so-called “private benefits" by the controlling shareholder of the company, but not necessarily damage to the same.
To limit any abuses of majority shareholders and ensure the transparency and independence of decision-making processes, the Legislator of the 2003 introduced Article 2391-*bis* of the Italian Civil Code which confers on Consob the regulatory power aimed at creating a complete regulatory framework for transactions carried out by listed companies with related parties.
Consob Regulation on related parties’ transactions was first adopted with resolution n. 17221 of 12th March 2010, and then amended by resolutions n. 21624 of 10 December 2020 to implement the relative Directive (EU) 2017/828 and encourage the long-term commitment of shareholders[3].
The underlying rationale of the entire Regulation is to guarantee the substantial and procedural correctness of the transactions in which the controlling shareholders have a personal interest that could oppose, to the point of damaging it, the corporate interest and/or the interest of the remaining part of the corporate structure.
Consob Regulation offers both qualitative and quantitative parameters for identifying “transactions” with related parties.
From a qualitative point of view, Annex 1 of the Regulations classifies as a transaction with related parties "any transfer of resources, services or obligations between related parties, regardless of whether a consideration has been agreed".

[3] Shareholders' Rights Directive II o "SHRD II"

As regards the quantitative criteria, Annex 3 of the Regulation identifies some indices whose ratio, if higher than 5%[4], indicates that the transaction is to be classified as a transaction of greater importance[5], therefore subject of the discipline referred to in Article 8 of the Regulation.

Chapter 2: Unipol-FondiariaSai case

After having analyzed the discipline and theoretical foundations of the merger in the previous chapter, the concrete case of merger by incorporation of Unipol Assicurazioni, Premafin and Milano Assicurazioni into Fonsai will be presented in the following pages.
The author's choice is to first provide the reader with an overview of the external and internal factors that led to Fonsai's crisis, considered as one of the reasons why the merger by incorporation was implemented. The purpose is, therefore, to give evidence of the difficult situation experienced by the company in those years, and to highlight the role of mergers in that scenario, often referred to as a "rescue" transaction. After these basic premises, a description of the main facts and dynamics that characterized the merger will follow.

1. Fonsai's crisis as one of the reasons behind the merger

This paragraph deals with the causes of Fonsai'crisis, namely the set of macroeconomic and structural factors that have had an impact on the insurance sector as a whole and, consequently, also on the company.

Starting from the exogenous factors, it is important to highlight that the global financial crises that characterized the years from 2007 to 2011 - first the subprime crisis and then the sovereign debt crises[6] - has undoubtedly hit banks and financial markets worldwide, causing severe consequences also to another major intermediary: insurance companies.
Most insurance companies' investment portfolios, in fact, have been the primary source of exposure to the severe downturn in global financial markets since their assets are primarily held in bonds and stocks, both of which face significant valuation pressures during period of trouble.
In the historical period under examination, another factor that could be placed among the possible causes of further deterioration of a business is represented by the risk of a rating downgrade.

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[4] Please note that the threshold is reduced to 2,5% for intra-group transactions, i.e., those carried out by a company with the listed parent company or with subjects related to the latter which are in turn related to the company.
[5] Note that there are no quantitative criteria for transactions of lesser importance which, therefore, will be identified only on the basis of the existence of a related party as a counterparty and on the basis of the qualitative criterion.
[6] For further details: https://www.consob.it/web/investor-education/le-crisi-finanziarrie

Assessing the creditworthiness of insurance companies has become a prominent business of rating agencies[7] in those years, due to financial difficulties of the insurance industry and over-publicized bankruptcies of several large insurers such as Ethias, the American International Group and London Pacific Life & Annuity Company (Brown and Balasingham, 2013).

In 2011, Standard & Poor's agency downgraded from BBB to BBB- the creditworthiness of the insurance companies controlled by the Ligresti family, Fonsai and its subsidiary Milano Assicurazioni, due to a worsening of the Group's financial position and an insufficient level of capitalization.

Another noteworthy issue is that of new and pervasive rules for the insurance market.

The analysis of the causes of the crisis, in fact, highlighted that much of what happened was linked to poor control of financial products, which were inappropriately allocated to people with inadequate risk profiles and economic capabilities (Consob).

In this regard, two important projects have been approved at the European level a few years before the execution of the merger by incorporation, namely the Solvency II[8] and the IFRS 4[9]: although referring to different areas, have considerably revolutionized the insurance sector by introducing, among other things, more stringent (and difficult) parameters to be respected; in this sense, the Italian legal system has neither promoted nor encouraged the insurance activity, but, on the contrary, has actively placed constraints or restrictions.

Thus, while the new regulations have created a more solid financial system and increased trust in consumers, at the same time they have induced insurance companies to undertake a long process of reviewing their internal organization to ensure solidity and solvency, as well as tools for intercepting any critical issues and remedying them.

In addition to the phenomena directly related to the economic-financial crisis, other circumstances, again of an exogenous nature, can be reported to complete the picture.

In this regard, it is good to emphasize the fact that through digitalization and technological innovation processes, the insurance sector has progressively improved the efficiency of products and services offered to customers (IVASS Report)[10].

However, digital innovation, although, among the other things, it considerably simplifies processes and often reduces costs, can also prove to be a threat: the activity of historic insurance companies, such as those belonging to the Fondiaria Group, can be compromised not only by tech giants entering the market, but also by start-ups that are harnessing the power of technology to innovate

[7] The big three credit rating agencies are Standard & Poor's Global Ratings, Moody's, and Fitch Group

[8] Solvency II is a European Union directive (Directive 2009/138/EC) whose purpose is to harmonize insurance regulations, mainly in terms of capital that insurance companies must hold to reduce the risk of insolvency.

[9]IFRS 4-Insurance Contracts provides guidance on the accounting treatment of all insurance contracts

[10] For further details: https://www.ivass.it/media/comunicati/documenti/2022/ivcs534.pdf

their way of gaining market share.

As far as the internal causes are concerned, it emerged that Fonsai had significant shortcomings in the operating procedures of the Board of Directors, lacking the necessary formalities and preliminary activities.

In this regard, it is useful to refer to the findings raised by IVASS at the end of the inspections launched in October 2010, which highlighted critical issues regarding "the participatory chain, the governance and the internal control system, the organization and activity of the corporate bodies, the control functions and transactions with related parties".

IVASS also revealed that the Internal Control Committe had never carried out monitoring activities on related parties, nor had it ever expressed an opinion on the correctness and lawfulness of related parties' transactions[11], although the transfers of resources between Fonsai, Milano Assicurazioni and the other companies of the group have always been numerous and of a significant amount.

In this regard, an aggravating factor is that the compliance, risk management and internal audit departments called upon to validate the adequacy of these transactions did not enjoy great autonomy and independence, thus jeopardizing the reliability and integrity of their judgments.

Furthermore, IVASS discovered that the remuneration policy adopted by Fonsai was not completely adequate, highlighting the need to "determine the fixed remuneration in favor of the members of the administrative body taking into account, also in consideration of the patrimonial situation of this company, of a criterion of proportionality between the office assumed and amount of remuneration" (IVASS, 2012).

The Group also presented some critical issues in terms of transparency: the supervising authority noted the inadequacy of the management and reserving procedures in the Motor Class, as well as irregularities in the determination of the claims reserve for the 2010 financial year, which was found to be insufficient by an amount of not less than €314 million[12].

These are just some of the major problems encountered in the corporate governance of the Fondiaria Group, but they are sufficient to make the reader understand how they derive, at least in part, from policies implemented by the majority shareholder to extrapolate as much benefits as possible from the group. These practices and actions have often been carried out to the detriment of minority shareholders and other stakeholders and have compromised, in the long run, the business of Fonsai.

[11] Source: Fondiaria-SAI - Bilancio Civilistico 2011

[12]Source: "Allegati al documento informativo aggiornato", last accessed May 23rd, 2022, https://www.unipol.it/sites/corporate/files/document_attachments/allegati_al_documento_informativo_aggiornato_ugf_24-12-2013.pdf

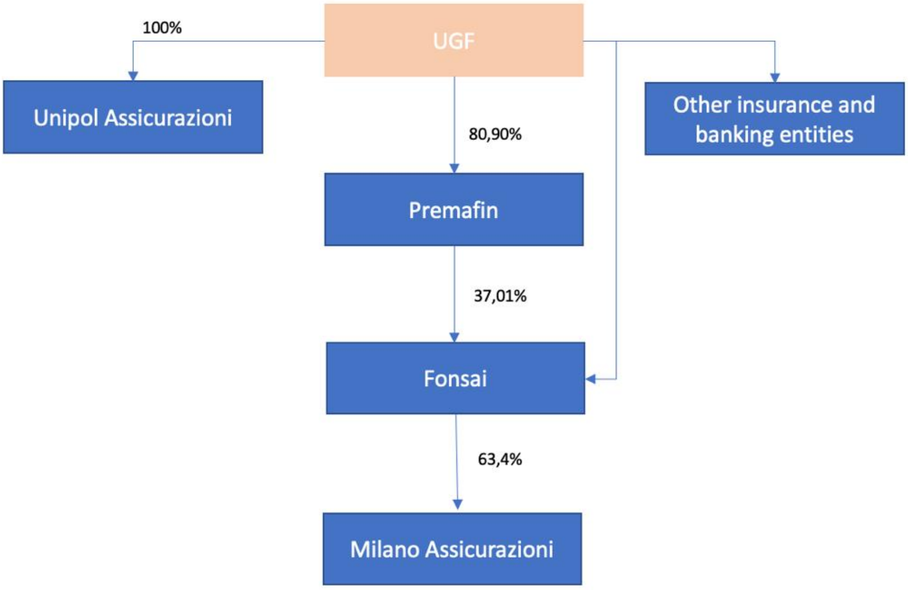
It is important to highlight the fact that the threats coming from the external environment have occurred in the context of a company whose economic and financial situation already appeared weakened due to internal criticalities.
In other words, in a moment of general crisis, the Group, and therefore the company, was already dealing with internal shortcomings and difficulties; therefore, its downfall it is not attributable only to internal or external causes but is the result of a combination of them.

2. Key facts of the merger

At the beginning of 2012, the insurance group Fondiaria-SAI was facing a period of severe financial and economic crisis (as anticipated above) and, in order to safeguard current and future solvency and to create, at the same time, a leading national operator in the insurance sector capable of competing with the main national and European competitors, the merger by incorporation of Premafin, Unipol Assicurazioni and Milano Assicurazioni (the incorporated companies) into FondiariaSAI (the incorporating entity) has been planned and implemented (Manni, 2020).
Once received the authorizations by the competent authorities[13] and subsequent approval by the respective shareholders' meetings, the merger by incorporation effectively took place and gave rise to the insurance company UnipolSai Assicurazioni S.p.A which officially became operational in January 2014. The resulting company assumed all rights and obligations of the subsidiary companies as well as the ownership of all insurance contracts of Milano Assicurazioni and Unipol Assicurazioni[14].
The transaction has been considered as being an integral part of a broader integration project between the Unipol Group and the Premafin Group: indeed, Unipol Group was the sole shareholder of Unipol Assicurazioni, while Premafin was the controlling shareholder of FondiariaSAI, which, in turn, was the controlling shareholder of Milano Assicurazioni (Figure 1).

[13] AGCM, IVASS, Banca d'Italia, foreign supervisory authorities
[14] Source: "UnipolSai in borsa", last accessed on May 21st, 2022, https://www.unipolsai.com/it/investors/unipolsai-borsa

Figure 1: Structure *ex-ante*



Source: Personal elaboration based on "Annex on updated Information Document on the Merger" [15]

The merger was carried out pursuant to and for the purposes of Articles 2501 and following of the Civil Code. Since Premafin, Milano Assicurazioni and Fonsai are issuers of financial instruments listed on an Italian regulated market, the merger was also subject to the provisions of the TUF and the Issuers' Regulation.

Furthermore, since Milano Assicurazioni, Fonsai and Unipol Assicurazioni were insurance companies, the merger was submitted for approval by IVASS pursuant to and for the purposes of articles 201 and following of the Private Insurance Code and Articles 23 and following of the IVASS Regulation[16].

Chapter 3: Transaction considerations

This third and final chapter will provide the reader with some final considerations relative to the M&A transactions and, in particular, to the Unipol-FondiariaSai case.

In the first place, the reader will be able to learn what are the advantages associated with extraordinary transactions, identifying what were the reasons that potentially led to the realization of the Unipol-Fondiaria Sai deal worth € 2.6 billion (Sole 24 ore, 2014).

[15]Website:https://www.unipol.it/sites/corporate/files/document_attachments/allegati_documento_informativo_fusione_ugf_01-10-2013.pdf

[16] Regulation n. 14 of February 18, 2008.

Then, the reader will be able to have a clearer vision of the critical aspects and risks to which the companies involved in the merger by incorporation were exposed, thus finding a practical application to what was analyzed from a juridical point of view in the first chapter of this thesis.

1. M&A as an instrument to create value

Mergers & Acquisitions (or "M&A") have been part of business for a long time and represent a valid tool available to companies to activate growth processes and create added value for their shareholders by combining assets, capabilities, governance, and human resources from two or more companies (Gaughan, 2017).

The first two most important factors that explains why companies, and in the specific case the Premafin group and the Unipol Group, typically pursue M&A transactions have to do with external or inorganic growth[17] and synergies creation.

M&A transactions often results to be the only way to achieve a considerable increase in the size of the business, to acquire new resources and skills, and to enhance those already possessed; internal growth, in fact, requires much longer implementation times and there is also a strong awareness of how difficult it is to exploit all the internal resources and skills of a single company to be competitive and achieve a strong market position (Augusta, Baccarlino, Fabris and Greco, 2016).

As a result, growing through M&A results to be the preferred alternative as it a relatively fast process, and it allows companies to gain a competitive advantage by seizing opportunities that may otherwise be lost. As far as synergies are concerned, they represent another strategic reason, if not one of the most important, which explain the importance of extraordinary transactions. Synergies can arise from the pooling of resources, that means eliminating useless and costly duplication of assets, and from the complementary presence of specialized skills, whose combined use increases both their usefulness and value (Vulpiani, 2021). Creating synergies correspond to obtaining an effect resulting from the business combination; if the value of the combined enterprises, as a result of the integration project, exceeds the sum of the values of the two individual firms, then a positive synergy is created (DePamphilis, 2017).

$$Wab > Wa + Wb$$ [18]

The higher value, which is intended to be obtained from the extraordinary transaction, may derive from a recovery of efficiency, and therefore from a reduction in costs or an increase in sales volumes.

[17] The growth paths available to companies for the creation of value are essentially two: internal growth and external growth. The internal or organic growth occurs when a company uses its own tools and resources to expand.

[18] Where Wa and Wb are respectively the acquirer and the target stand-alone values.

In this respect, it is worth pointing out that the merger transaction under analysis provided for the elimination of duplication of organizational processes and costs which, in this specific case, were particularly high given that the participating entities were listed and highly regulated.
In particular, the advisors, on the occasion of the preparation of the 2013-2015 business plan, estimated *post*-merger synergies of approximately € 350 million, distributed as follows (Figure 9): € 180 millions of operating costs synergies , € 100 million in the non-Life sector, and approximately €70 million of revenues synergies [19]

Another noteworthy point is that M&A transactions could represent a possible crisis resolution mechanism.

As the reader will recall from the previous chapter, sometimes the combination of external and internal causes can lead the company towards its decline and, at times, its bankruptcy.

Among the various areas of intervention available to companies facing a period of distress, that of mergers and acquisitions deserves particular attention: "they can be relevant, beneficial and decisive in a time of potential crisis" (Tosi, 2021).

Through M&A deals it is possible to transfer the corporate assets of the company in crisis to a healthy one, which is in charge of its recovery, engaging in the continuation of the activity, of the working relationships and in the satisfaction of creditors; this means that even in the most serious crisis situations it is possible to recall alternative solutions to liquidation, such as to guarantee the continuation of the activity (Cecchini, 2019).

This is possible as a consequence of the corporate reform implemented in 2003 which, *inter alia*, removed the prohibition on participation in extraordinary transactions for corporations in insolvency proceedings[20].

The recourse to extraordinary corporate transactions is attributable to capital, corporate and financial reorganization project, which ranges from the readjustment of the structure to the new economic conditions up to the change of management; in this sense, it is possible to state that extraordinary transactions assumes importance not only as regards the restructuring of the debt, but also as regards the revitalization of the company, thus assuming a fundamental role in the corporate recovery plan which, however, must be framed within rational and adequately informed decision-making processes to protect the various interests involved, including those of the creditors and shareholders (Bestia and Brogi, 2016).

[19] Source: "Comunicato Stampa Congiunto", last accessed on May 21st, 2022, https://www.unipolsai.com/sites/corporate/files/press_related_documents/pre_fondiariasai_2012_79.pdf,
[20] Article 116 of the Crisis and Insolvency Code introduces the link between the rules of company law and the law of insolvency procedures.

Furthermore, M&A deals often make it possible to overcome financial problems by allowing companies to leverage and take advantage of the larger size of the business complex resulting from the combination.

In a nutshell, extraordinary transactions provide tools for safeguarding the company, and, as in the case of Fonsai, they can be considered as “rescue transactions”.

In this regard, it is recalled that the results of 2011 had highlighted a situation of *deficit* of Fonsai. As a consequence, IVASS, pursuant to the applicable supervisory insurance regulations on solvency margin, asked the company to promptly present a recovery plan that would allow it to restore compliance with the necessary margins. With specific reference to the case at hand, the overall merger integration project represented the right solution to ensure the necessary and urgent the capital strengthening of Premafin and Fonsai and to restore correct solvency situation.

2. Main legal principles and issues: the withdrawal right and the veto power

The purpose of this paragraph is to explain the several legal issues that arose in the context of the above-mentioned merger transaction, with particular reference to the protection tool available to Premafin’s minority shareholders and the occurrence of a material prejudice for the Milano Assicurazioni saving shareholders.

Premafin was a "mixed" financial holding, with a corporate purpose based on both real estate and holding activities. On the contrary, the incorporating company, or Fonsai, had a corporate purpose limited by law to the exclusive exercise of the insurance business.

Notwithstanding the fact that the provisions of the by-laws concerning the respective corporate purposes were significantly different, it is important to specify that Premafin's only asset was represented by Fonsai shares. This means that, although, following the integration project, the clause of Premafin's corporate purpose would have undergone a significant change, passing from a holding company to an insurance company, its level of risk would remain substantially unchanged even after the transaction.

In this regard, on the occasion of the call of the extraordinary meeting of Premafin on 25 October 2013, it was resolved that the shareholders of the company who did not participate in the merger resolutions, which, as mentioned, is an integral and essential part of the project of integration, have had the opportunity to exercise the right of withdrawal pursuant to and for the purposes of Article 2437 of the Civil Code.

The resolution of the shareholders' meeting on the right of withdrawal was based on the acknowledgment that the merger by incorporation would have deleted the flexibility of which

Premafin was endowed; as a result of the merger, the company, starting from a situation in which it could operate in any financial and/or industrial sector, would have radically changed its corporate purpose, limiting its business to the insurance sector, under the rigid supervision of IVASS.
In addition, given that Premafin was a company listed on a regulated market, pursuant to and for the purposes of Article 2437-*ter* of the Civil Code, the liquidation value of the shares subject to withdrawal (€ 0.1747 per ordinary share) was determined by exclusively referring to the arithmetic average of the closing prices of the Premafin shares in the six months preceding the publication of the notice calling the meeting called to approve the merger plan.
It should be noted that the liquidation procedure of the Premafin shares for which the right of withdrawal has been exercised took place through a right issue pursuant to and for the purposes of Article 2437-*quarter* of the Italian Civil Code.

Another legal issue that emerged in the UnipolSai Assicurazioni case concerns the material prejudice to the saving shareholder of Milano Assicurazioni.
The merger by incorporation of Milano Assicurazioni into Fonsai has been submitted for the approval of the special meeting of savings shareholders of Milano Assicurazioni, convened pursuant to Articles 146 of the TUF and 2376 of the Italian Civil Code.
This was envisaged since, in the context of the exchange ratio of the merger, the savings shareholders of Milano Assicurazioni were offered class “B” savings shares of Fonsai, having preference rights lower than those attached to class “A” saving shares, causing that, upon completion of the merger, the shareholders of Milano Assicurazioni would receive their priority privilege only after the payment of the priority privilege in favor of the shareholders holding category "A" savings shares of Fonsai.
Since both class “A” and “B” saving shareholders of Fonsai had higher preference rights than Milano Assicurazioni’ saving shareholders, it follows that the latter did not suffer a direct prejudice because they have in any case improved their *status* in terms of individual privileges.
However, the fact that in the share capital of Fonsai there were also class “A” shares and that they had not been offered to the savings shareholders of the subsidiary at the effective date of the merger, led to the occurrence of indirect prejudice.
In the light of above, the merger by incorporation of Milano Assicurazioni into Fonsai has been approved also by the saving meeting of shareholders of the company, with the possibility to the savings shareholders who did not participate in the resolutions on the merger to exercise the right of withdrawal pursuant to and for the purposes of Article 2437 of the Civil Code.

3. Other critical points

In order to make an accurate assessment of the transaction, the reader will be provided with an evaluation of the most relevant risk factors or uncertainties arising from the merger and concerning all the participating companies as well as the sectors in which they operate.

Numerous studies have found that more than half of mergers (83%) fail to deliver the intended improvement in shareholder value (Cartwright and MacCarthy, 2005) and, according to some authors (De Bernardis and others), one of the main causes behind this percentage has to do with the cultural risk factor, typical of integration transactions.
From a cultural standpoint, incompatible organizations may generate severe effects in the resulting company, such as diverging opinions between the different management areas, loss of company performance, a slow and disorganized process of integration and, in the worst-case scenario, bankruptcy.
It follows that a merger or an acquisition could unexpectedly reduce the value of companies, rather than increasing it, due to the so-called "culture clash" (Stafford and Mile, 2013).
In the specific case at hand, difficulties were encountered in a) the coordination of management and personnel; b) the integration between already existing IT systems, structures and services, and those of the newly incorporated companies; and c) the possible loss of customers by the participating companies[21].
With regard to the last point, it is important to emphasize that when companies merge, they often undertake seemingly minor changes that can have a significant impact on customers, forcing even the most devoted to reconsider their relationship with the company (Miles and Rouse, 2011).
Another relevant topic is that of related-party transactions, which, as the reader will recall, is also one of the possible internal causes of the Fonsai crisis.
At this point it is key to highlight the fact that Unipol Group controls, both directly and indirectly, not only Unipol Assicurazioni, but also Premafin, Fonsai and Milano Assicurazioni, as a result of the subscription of the Premafin capital increase. More precisely, the Group holds a stake:

(i) direct, equal to 100% of the ordinary share capital of Unipol Assicurazioni;
(ii) direct, equal to 80.93% of the ordinary share capital of Premafin;
(iii) direct and indirect, equal to 41.94% of the ordinary share capital of Fonsai; more precisely, the

[21]Source; "Aggiornamento del documento informativo", last accessed on May 22nd 2022, https://www.unipol.it/sites/corporate/files/document_attachments/documento_informativo_aggiornato_ugf_24-12-2013.pdf

direct shareholding is equal to 4.9% and the indirect shareholding, for through Premafin, is equal to 37.02% (of which 4.17% held from Finadin);

(iv) indirect, through Fonsai, equal to 63.40% of the ordinary share capital of Milano Assicurazioni,

Therefore, Premafin must be considered a related party of Fonsai since it directly and indirectly, also through subsidiaries, exercises the *de facto* control over Fonsai pursuant to Article 2359 of the Civil Code.

Likewise, Unipol Assicurazioni must deemed to be a related party of Fonsai since the both of them are subject to the common control of Group.

Lastly, Milano Assicurazioni must also be considered a related party of Fonsai as the latter exercises the *de iure* control over Milano Assicurazioni, in accordance with pursuant to Article 2359 of the Civil Code[22].

In the light of above, the merger by incorporation qualified as a transaction of greater relevance [23] as its nature was such that the relevance thresholds referred to in the first chapter were widely exceeded.

The exchange ratio is the last, but not least, important consideration about the merger.

It is defined as "the mathematical function for calculating the number of shares in the incorporating or resulting company to be allocated to each shareholder of the incorporated companies" (Serra, 2016), and it represents an essential element during a merger process.

According to Article 2501-*quinquies* of the Civil Code, the administrative body of the companies involved in the transaction must prepare a report, explaining and justifying, both in legal and economic terms, the approach adopted to determine the exchange ratio.

In a merger by incorporation, it may happen (as in the case at hand) that the share capital of the participating companies is composed of shares belonging to different categories. In this hypothesis, since each shareholder will have to receive shares having the same value as those cancelled, the different categories of shares will be treated differently.

The complexity of the calculation is such in that both the so-called internal parity (i.e., the exchange ratio existing between different categories of shares) and the so-called external parity (i.e., the exchange ratio existing between the shares of the acquiring company and those of the merged company) must be taken into account (Foca, 2020).

[22] Source: "Documento informativo relativo ad operazioni di maggiore rilevanza con parti correlate", last accessed on May 22nd 2022, https://www.unipolsai.com/sites/corporate/files/document_attachments/Fonsai%20-%20Documento%20informativo%2027%20dic%202012.pdf

23 Source: "Documento informativo relativo ad operazioni di maggiore rilevanza con parti correlate", last accessed on May 22nd 2022, https://www.unipolsai.com/sites/corporate/files/document_attachments/Fonsai%20-%20Documento%20informativo%2027%20dic%202012.pdf

In the specific case where the share capital consists of savings shares, as in the case in analysis, " the exchange ratio between savings shares and ordinary shares must be calculated taking into account that the value of the former is not necessarily coincident with that of the ordinary shares, since the value of the savings shares, which can be inferred from the market quotations of the securities, is a function of the rights, not only of an equity nature, but also of an administrative nature, conferred by the shares in question" (Italian Supreme Court, April 20, 2020, no. 7920).
In the specific case at hand, the board of directors of the companies involved in the transaction have agreed to adopt the following exchange rates[24]:

– 0.050 Fondiaria-SAI ordinary shares for each Premafin ordinary share;

– 1.497 Fondiaria-SAI ordinary shares for each Unipol Assicurazioni ordinary share;

– 0.339 Fondiaria-SAI ordinary shares for each Milano Assicurazioni ordinary share;

– 0.549 Fondiaria-SAI “B” saving shares for each Milano Assicurazioni savings share.

It is useful to specify that if the special meeting of Milano Assicurazioni had not approved the merger, the other exchange ratios would have remained unchanged.
The Dividend Discount Model ("DDM") was identified as the main valuation methodology,“ given its flexibility and ability to capture the specificities of each company in terms of profitability, growth, solvency margin, risk level and capital components”[25].

Conclusion

This paper shows how, sometimes, the combination of exogenous and endogenous factors can lead the company towards its decline and, at times, its crisis. Extraordinary transactions provide tools for safeguarding the company, representing one of the main “rescue alternative”.
Therefore, mergers and acquisitions are nowadays carried out more and more assiduously, given the advantages that can derive *ex-post.*
However, they are, the same time, decidedly complex and articulated transactions that may result in a variety of implications and risks; the UnipolSai case provides evidence of this.

[24] Source: “Documento informativo”, last accessed May 23rd, 2022
https://www.unipol.it/sites/corporate/files/document_attachments/allegati_documento_informativo_fusione_ugf_01-10-2013.pdf
[25] Source: “Allegati al documento informativo aggiornato”, last accessed May 23rd, 2022, https://www.unipol.it/sites/corporate/files/document_attachments/allegati_al_documento_informativo_aggiornato_ugf_24-12-2013.pdf

Research showed that the transaction under consideration implied several legal issues, which were explained throughout the thesis.
First of all, it was pointed out that, since the merger gave rise to an amendment of the corporate purpose of Premafin, shareholders who did not approve the incorporation into Fonsai, have been granted with right to exit from the company pursuant to Article 2437 of the Civil Code.
The right of withdrawal represented a balancing point between the shareholder's interest in not remaining a prisoner of a company that was completely different from the one in which he/she had initially invested, and the protection of the integrity of the share capital. In fact, by exercising the right of withdrawal, the shareholder gives rise, at the same time, to an extinction phenomenon, by leaving the company, and a transformative one, by switching his/her position as a shareholder to that of a creditor of the company for the repayment of his/her shareholding (Picone and Lavorano, 2019). Thus, the exercise of the right of withdrawal represents one of potential cost that must be contemplated whenever a company is involved into an extraordinary transaction.
Secondly, it turned out that saving shareholders of Milano Assicurazione suffered a material prejudice as a consequence of the merger, in the context of which they received class “B” saving shares of Fonsai, subordinated to the priority privilege given to the category “A” saving shares.
In the light of above, it was established that saving shareholders of Milano Assicurazioni did suffer an indirect prejudice, because the transaction, while formally leaving the rights of the category unaltered, involved an indirect compression of the same.
In the previous chapters, reference was made to the debate over whether this kind of detriment could really jeopardize the special rights of shareholders and, therefore, whether the special meeting of shareholders has veto power in such a circumstance.
In the author's opinion, the answer lies in the fact that the special meeting of saving shareholders of Milano Assicurazioni was called to resolve about the merger by incorporation; as specified by Article 146 TUF, the special meeting of savings shareholders resolves on the approval of shareholders' meeting resolutions that affect the rights of the category, thus implying that the allocation of the class “B” shares could jeopardize the existing special rights and, therefore, trigger the veto power.
The special meeting of savings shareholders of Milano Assicurazioni approved the merger by incorporation with the favorable vote of 97.82%, while those saving shares who did not agree with the decision were entitled to exercise the right of withdraw pursuant to Article 2437 the Italian Civil Code, pursuant to the amendment of the shareholding rights following the merger.
Another minority protection tool investigated in this thesis is that introduced by the Consob Regulation on Related Parties’ transactions, first adopted with resolution n. 17221 of 12th March 2010, and then amended by resolutions n. 21624 of 10 December 2020.

The regulation at hand aims, *inter alia*, at protecting the minorities of listed companies from the risk of extraction of the so-called "private benefit of control", which can cause a transfer of wealth in favor of a related party at unfair conditions. Clearly, this could represent a threat for minorities and their equity investments. It is it should be pointed out that the merger by incorporation into Fonsai qualified as a transaction with related parties of "greater importance".
From a legal standpoint, the exchange ratio is the last noteworthy aspect in this concluding section. It defines the post-merger shareholder balance and ensures the protection of the minority shareholders through an equitable distribution of the number of shares of the incorporating or resulting company among the different eligible parties, based on the value of the shares they held before the merger. In the case at hand, it was determined through the DDM model, considered as one of the most flexible and easy to use valuation technique.

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