SUSTAINABLE GOVERNANCE AND REGULATION OF BANKS AND PUBLIC COMPANIES: A STUDY OF THE CONCEPT "ACTING IN CONCERT"

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Abstract

This Article explores the main convergences and divergences among the different notions of "persons acting in concert" adopted by certain EU and US regulations concerning financial institutions and public companies, for the purpose of identifying a common set of principles governing the interpretation and application of such legal concept. This analysis shows that while under the regulations on the ownership structure of banks and financial institutions the legal notion of "persons acting in concert" is widely applied and extensively interpreted – since the operation of such companies must be protected also from potential (and not only actual) risks – both the takeover bids' and transparency rules mainly look at the actual exercise of governance rights over listed targets, for the purpose of expanding, respectively, the list of bidders and the information provided to the public on the ownership structure of such companies. As a consequence of the above, we conclude that the notion of "persons acting in concert" should remain flexible and adaptable to the different goals pursued in the various sets of rules as the case may be.

Keywords: Governance, Regulation, Banks, Public Companies

1. INTRODUCTION

In the recent years an increasing number of legal frameworks deal with the notion of "persons acting in concert" in the international financial systems. References to such concept are generally aimed at achieving different goals, ranging from the extension of the parties bounded by disclosure duties vis-à-vis either the public or the competent supervisory authorities – in case of acquisition of significant stakes in banks, insurance companies, investment firms and listed issuers – to the identification of the joint offerors under the applicable takeovers' rules.

Despite the assortment of regulatory notions of "acting in concert" worldwide, the "anti-avoidance" essence of such concept generally aims at expanding the list of entities bound by the same legal duty as a consequence of a strong connection among them. The proliferation of a variety of relationships among natural and legal persons operating in the financial markets increased the risk that the traditional categories of *interposition* were not adequate to attract the several structures which can be currently adopted by the same "center of powers".

In other words, rules addressed only to the persons belonging to the same *corporate group* or *family* cannot properly cover certain connections among sophisticated investors operating in the modern financial markets. This happens in a context in which acquisitions and material corporate transactions often require the involvement of several parties, with different skills and financial sources, unified by a common intent: the acquisition of a joint control over a target company.

Thus, domestic and transnational sets of rules now expressly include "persons acting in concert" among those jointly liable with either the bidder, or the target company, in the context of a public M&A deal, on the assumption that such persons potentially cooperate in order to achieve the same goals on the basis of pre-existing and relevant relationships (so that their activities are deemed products of a combined action).

However, if these rules are not properly addressed and well-balanced, they could interfere with the free exercise of shareholders' rights, leading to a sub-optimal level of management's monitoring in public companies.[1] In other words, as

[1] See, among others, DIEUX and LEGEIN, *Questions relatives à la notion de concert en droit belge*, in *Forum Financier/Droit bancaire et financier*, 2012, 143 et seq.; BONNEAU and PIETRANCOSTA, *Acting in Concert in French Capital Markets and Takeover Law*, in *Revue Trimestrielle de Droit Financier*, 2013, 17 et seq.; BIARD, *Action de concert*, in *Revue de droit*

pointed out by the EU Commission, the lack of legal certainty provided by the current EU rules on this subject is perceived as an obstacle to effective shareholders' cooperation since equity-investors need to know when they can share information and cooperate with one another without running the risk that their actions may trigger unexpected legal consequences.[2]

For such a purpose, certain financial laws and regulations make a distinction between a "white-list" of permitted acting in concert conducts – that typically include initiatives promoted by *minority* shareholders (concerning the harmonized exercise of their reciprocal corporate rights) – and a "black-list" of personal connections that generally trigger a presumption of joint-responsibility among the entities acting in concert.[3]

The following paragraphs explore the "acting in concert" relationship taking into account the EU directives on the acquisition of significant holding in banks and other financial institution, as well as the EU directive on takeover bids on listed corporations and both the EU and US transparency regulations on the ownership of public companies.

2. THE EU REGULATION ON THE ACQUISITIONS AND INCREASES OF QUALIFYING HOLDINGS IN BANKS AND OTHER EU SUPERVISED ENTITIES

Due to the increasing integration of financial markets and the frequent use of group structures extended across multiple Member States, a single acquisition or increase of a qualifying holding in financial institutions may be subject to scrutiny in several countries. This has led to the adoption of EU law provisions based on the principle of maximum harmonization of the procedural rules and assessment criteria throughout the European Union.[4]

Consistently, the EU Directive 2007/44/EC (the "Acquisition Directive")[5] established a legal framework for the prudential assessment of acquisitions by natural or legal persons of a qualifying holding in credit institutions, insurance and reinsurance companies and investment firms (hereinafter, collectively, "supervised entities").[6] The Acquisition Directive is intended to prevent the circumvention of initial conditions for authorization to carry out the relevant activity and, more generally, to set prudential requirements aimed at safeguarding the stability of the market.[7]

According to the Acquisition Directive, Member States' legislations shall require any natural or legal person, *including such persons acting in concert*, who have taken a decision either to acquire a qualifying holding in a supervised entity – or to further increase such a qualifying holding (over certain material thresholds of voting rights or share capital of the target company)[8] – to inform the competent supervisory authorities indicating the size of the intended holding and any relevant information.[9]

Since the definition of "*persons acting in concert"* is not provided in the Acquisition Directive – and considering the lack, in the sectoral law provisions, of harmonized notions of "persons acting in concert'" – different methods have been employed by the national competent authorities to establish the existence of such relationship.[10] Moreover, the need for further clarifications about the meaning of "acting in concert" is also explained by the differences between the definitions of such linkage used in other EU directives, such as the EU directive 2004/25/EC (the "Takeover Bids Directive")[11] and the EU directive 2004/109/EC (the "Transparency Directive")[12] (see, respectively, the following paragraphs 3 and 4).

In such a context, the non-binding guidelines for the prudential assessment of acquisitions, originally drafted in 2008 by the former three Level-3 Committees (CEBS, CESR, and CEIOPS), broadly defined «*persons acting in concert when each of them decides to exercise his rights linked to the shares he acquires in accordance with an explicit or implicit agreement made among them*».[13]

Just recently, on December 2016, EBA, EIOPA and ESMA (collectively, the "ESAs")[14] amended and updated the "2008 joint guidelines" on the prudential assessment of acquisitions and increases of qualifying holdings in the financial sectors (which are addressed to the competent national supervisory authorities) in order to clarify certain complex issues on this subject including, among others, the scope of the "acting in concert" notion and practice (the "updated joint guidelines").[15] According to the updated joint guidelines, the competent supervisory

bancaire et financier, 2007, 68 et seq.; SANTELLA, BAFFI, DRAGO and LATTUCA, *A Comparative Analysis of the Legal Obstacles to Institutional Investor Activism in the EU and in the US*, in *European Business Law Review*, 2012, 257 et seq. [observing that *"The possibility of acting in concert without restrictions would help to overcome the collective action problems"*].

[2] See the *Action Plan on Corporate Governance and Company Law* of December 12, 2012, available at *www.europa.eu*, 11 et seq.

[3] An overview of such conducts is provided by ESMA, *Information on shareholder cooperation and acting in concert under the Takeover Bids Directive – 1st update*, June 2014, available at *www.esma.europa.eu*, in which the authority recognizes that shareholders may wish to cooperate in a variety of ways and in relation to a variety of issues for the purpose of exercising good corporate governance but without seeking to acquire or exercise control over the companies in which they have invested.

[4] In other words the thresholds for notifying a proposed acquisition or a disposal of a qualifying holding, the assessment procedure, the list of assessment criteria and other provisions of the directive to be applied to the prudential assessment of proposed acquisitions should therefore be subject to maximum harmonization.

[5] See the EU Directive 2007/44/EC, published in *O.J.E.U.*, n. L 247/1 of 21 September 2007, p. 1 s. The Acquisition Directive amended the European directives applicable on this issue to credit institutions (Directive 2006/48/EC), investment firms (Directive 2004/39/EC), and insurance and reinsurance undertakings (Directive 2007/44/EC).

[6] More in particular, for the purpose of this article the term "supervised entity" replaces the following terms (which are used in the sectoral directives): "credit institution", "assurance undertaking", "insurance undertaking", "re-insurance undertaking" and "investment firm".

[7] See recitals 3 and 4 of the Acquisition Directive.

[8] As a result of which the proportion of the voting rights or of the capital held would reach or exceed 20 %, 30 % or 50% (or so that the supervised entity would become its subsidiary).

[9] As a consequence of the acting in concert, each of the persons concerned (or one person on behalf of the rest of the group of persons acting in concert) should notify the target supervisor of the relevant acquisition or increase of a qualifying holding.

[10] See the EC Commission report on the application of Directive 2007/44/EC of 11 February 2013, available at *www.eur-lex.europa.eu*.

[11] See Article 2(1) (d) of Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids, published in O.J. L. 142 of 30.4.2004, 12.

[12] See Article 10(a) of Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, published in O.J. L. 390 of 31.12.2004.

[13] See point 1 of Appendix I of the joint guidelines for the prudential assessment of acquisitions and increases in holdings in the financial sector as required by Directive 2007/44/EC, available at *www.eba.europa.eu*. When certain persons act in concert, domestic supervisory authorities should aggregate their holdings in order to determine whether such persons acquire a qualifying holding or cross any relevant threshold contemplated in the sectoral directives and regulations.

[14] See on the role of ESAs, among others, TROIANO, *Interactions between EU and national authorities in the new structure of EU financial system supervision*, in *Law and Economics Yearly Review*, 2012, vol. 1, 104 et seq.; ID, *The new institutional structure of EBA*, in *Law and Economics Yearly Review*, 2013, vol. 1, 163 et seq.

[15] The updated guidelines have been issued by the ESAs pursuant to Article 16 of Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010, and are available at *www.esas-joint-committee.europa.eu*. The updated guidelines will apply from October 1, 2017.

authorities should not be precluded from concluding that certain persons are acting in concert merely due to the fact that one or several such persons are *passive*, since inaction may contribute to creating the conditions for an acquisition or increase of a qualifying holding or for exercising influence over the target company.[16]

Furthermore, the updated guidelines provide two non-exhaustive lists of activities, in which the ESAs respectively mention factors that generally trigger (the "black-list") or not (the "white-list") the notion of "acting in concert" for the limited purposes of the Acquisition Directive and connected regulations.

On the one hand, the black-list of relevant "concerting activities" developed by the ECAs includes certain matters that normally disclose a common intent of the parties to jointly exercise a significant influence over the governance of the target company. Such factors include the execution of shareholders' agreements or other similar agreements on matters of corporate governance concerning the target company (*i.e.* "contractual collaboration")[17], the existence of family memberships, occupational connections [18] or group relationships (*i.e.* "subjective collaboration")[19]; the draw-down of the same financial sources (*i.e.* "financial collaboration")[20], and/or the occurrence of consistent voting patterns by certain shareholders (*i.e.* "voting collaboration").

On the other hand, according to the ECAS' view, when shareholders cooperate only in order to exercise their *minority* corporate rights, their collaboration is generally considered exempted from the acting in concert presumption, unless their cooperation is not merely an expression of a common approach on a specific matter but one element of a broader agreement or understanding between the shareholders.[21] More in particular, in certain circumstances (*i.e.* the "white-list") persons are not typically deemed to be acting in concert, such as when they *(a)* enter into discussions with each other about possible matters to be raised with the company's management body or when they make representations to the company's management body about company policies, practices or particular actions that the company might consider taking; *(b)* exercise certain statutory "minority" rights attached to their shares[22] and/or agree to vote in specific resolutions in the general meeting (aimed at protecting their minority corporate interest), in any case not affecting the appointment of members of the management body. Among the exempted resolutions the ECAs mentioned, for instance, the following: rejection of a related party transaction; approval (or rejection) of proposals concerning either directors' and auditors remunerations, or extraordinary transactions (including acquisition or disposal of assets, reduction of capital and/or share buy-back, capital increases, dividend distributions); other "monitoring" resolutions (such as the appointment and removal of auditors, appointment of special investigators, company's financial statements, company's policy in relation to the environment or any other matter relating to social responsibility or compliance with recognized standards or codes of conduct).

In the middle between the black-list and the white-list ECAs also identified a "grey-area" in which are placed cases of cooperation among shareholders in relation to the appointment of minority members of the management body of the target company. In such circumstances, certain further factors should be scrutinized in order to verify if the collaboration among shareholders pursue the intent of fostering an efficient minority action or the goal of a joint influence over the business and governance of the target company.[23]Only in the latter case the collaboration among shareholders does trigger the notion of the acting in concert activity.

The European framework confirm that policymakers could follow different approaches in order to identify a relevant "acting in concert" conduct, ranging from the establishment of exhaustive or non-exhaustive lists of circumstances in which persons are deemed or presumed to act in concert, to the establishment of a list of activities where cooperation among shareholders will not, by itself, lead to a conclusion that such persons are acting in concert. However, as the ECAs correctly observed, there are no grounds that would render one policy option preferable to another, on a standalone basis, considering that, on one side, identifying factors which might indicate that persons are acting in concert enhance supervisory convergence, but, on the other side, leaving the national supervisory authorities with the flexibility to deal with specific circumstances on a case-by-case basis would enable the supervisors to judge each case on its own merits.

However, the legal framework concerning the acquisition of material stakes in banks and other supervised entities shows relevant differences compared with other notions of acting in concert disseminated in the EU legislative framework. First, the notification requirements set forth by the Acquisition Directive are triggered even if the increase of the relevant shareholding would not cause a change of control over the supervised entity, considering that such authorizations aim at protecting the transparency and stability of companies running activities of public interest.[24]

[16] See the joint guidelines, 12. In other words, the competent supervisory authorities should take into account all relevant elements in order to establish, on a case-by-case basis, whether certain parties act in concert.

[17] Excluding, however, pure share purchase agreements, tag along and drag along agreements and pure statutory pre-emption rights, on the assumption that such agreements typically do not pursue governance objectives.

[18] Whether the proposed acquirer holds a senior management position or is a member of a management body or of a management body in its supervisory function of the target undertaking or is able to appoint such a person.

[19] Excluding, however, those situations which satisfy the independence criteria set out in paragraph 4 or, as the case may be, 5 of Article 12 of Directive 2004/109/EC on the harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, as subsequently amended.

[20] For the purpose of the acquisition or increase of holdings in the target company.

[21] According to the joint guidelines (par. 4.9), the "white-list" includes activities that generally do not trigger an acting in concert conduct among different persons.

[22] Such as statutory rights to add items to the agenda of a general meeting; table draft resolutions for items included or to be included on the agenda of a general meeting; or call a general meeting, other than the annual general meeting.

[23] Such analysis looks at the following factors: (a) the nature of the relationship between the shareholders and the proposed member(s) of the management body; (b) the number of proposed members of the management body being voted for pursuant to a voting agreement; (c) whether the shareholders have cooperated in relation to the appointment of members of the management body on more than one occasion; (d) whether the shareholders are not simply voting together but are also jointly proposing a resolution for the appointment of certain members of the management body; and (e) whether the appointment of the proposed member(s) of the management body will lead to a shift in the balance of power in such management body.

[24] As pointed out by PELLEGRINI, *Financial derivatives. regulation and disputes in the Italian legal order*, in *Law and Economics Yearly Review*, 2013, vol. II, 376, as a consequence of the financial crisis there is now a tendency to abandon traditional forms of self-regulation of intermediaries in favour of an increase in public control to guarantee the protection of the

Thus, the scope of the "acting in concert" is broader than in other EU legal framework, so that it includes not only contractual cooperation among shareholders concerning shares actually owned by them, but also the converging "decision" to exercise their respective corporate rights (not limited to the voting rights)[25] independently from the fact that this decision is «*taken before or after the time the relevant persons decide to purchase shares in the firm*».[26]

3. ACTING IN CONCERT AND TAKEOVER BIDS' DIRECTIVE

The notion of "persons acting in concert" plays a relevant role also in the context of transactions in control over public companies, since in such environment its scope indirectly impacts on the tradability of listed shares and, therefore, on certain financial markets' dynamics.[27]

Article 2, par. 1, lett. d, of the Takeover Bids Directive expressly define "persons acting in concert" as any natural or legal persons who cooperate with the offeror or the offeree company on the basis of an agreement, either express or tacit, either oral or written, «*aimed either at acquiring control of the offeree company or at frustrating the successful outcome of a bid*».[28]

Such a notion has been set forth by the Takeover Bids Directive in order to expand the scope of the events triggering an obligation to launch a mandatory tender offer over the entire share capital of target listed companies. As well known, the mandatory bid rule mainly aims at spreading the "controlling premium" paid by the new controlling entity among all the existing shareholders of the target company who are not interested in maintaining their equity-investment in such listed company.[29]

In particular, pursuant to Article 5, par. 1, of the Takeover Bids Directive, a mandatory tender offer must be launched when a natural or legal person, as a result of his/her own acquisition – or the acquisition by "persons acting in concert" with him/her – directly or indirectly exceeds certain thresholds of voting rights in a target listed company (added to any existing holdings of those securities of his/hers and the holdings of those securities of "persons acting in concert" with him/her) giving him/her control of that company.

Therefore, where the securities held by a group of shareholders carry voting rights, which in total are below the national threshold for "control", there are no immediate bid consequences for those shareholders, even if they are regarded as persons acting in concert.[30] On the other hand, a mandatory tender offer obligation is triggered if one or more of those shareholders *acquires* more voting securities so that *(a)* either in total the securities held by the group carry the specified percentage of voting rights that confers "control" under national takeover rules, *(b)* or the pre-existing controlling structure over target has been significantly modified.

While in certain EU countries the obligation to launch a mandatory tender offer merely arises from when shareholders act in concert in circumstances where, independently, they have already acquired securities in that company which, in total, carry the specified percentage of voting rights that confers "control" under national takeover rules (*i.e.* even though no further securities have been acquired)[31], in other EU jurisdictions no mandatory bid obligation will arise initially when the shareholders come together to act in concert in such circumstances.[32] In the middle stays the Italian regime, pursuant to which a mandatory tender offer obligation will arise when shareholders acting in concert exceed the relevant threshold as a result of acquisitions of securities carrying voting rights made by any of them if they are made in the twelve months before they come together to act in concert (or at any time after they come together to act in concert).[33]

In a nutshell, for the purpose of the Takeover Bids Directive the acquisition of a block-holding which generally grants the "controlling powers" over a listed target triggers the obligation – for the new controlling entity – to launch a mandatory tender offer rule addressed to the remaining shareholders of target. Given the above, a change of control becomes relevant under such perspective even if the new controlling entity is composed by two or more

diverse public and private interests that underlie the functioning of the financial markets. In this respect see also CAPRIGLIONE and SEMERARO, *Financial Crisis and Sovereign Debt. The European Union between Risks and Opportunities*, in *Law and Economics Yearly Review*, 2012, vol. I, 4 et seq.; CAPRIGLIONE and SACCO GINEVRI, *Politics and Finance in the European Union. The Reasons for a Difficult Encounter*, Wolters Kluwer, 2016, 81 et seq.

[25] This view has been shared by member states enacting these provisions. See for instance FSA, *Handbook, SUP 11, Annex 6G, Aggregation of holdings for the purpose of prudential assessment of controllers*, available at *www.fsa.gov.uk*, 2016 [where the authority observed that «*[w]hile the rights 'linked to' shares for these purposes are most likely to be voting rights, persons may be 'acting in concert' where they decide to exercise other rights related to shares, either in addition to or instead of rights attached to voting power, in accordance with an agreement made between them* »]. In this respect see GHETTI, *Acting in Concert in EU Company Law: How Safe Harbours can Reduce Interference with the Exercise of Shareholder Rights*, in *ECFR*, 2014, 604 et seq.

[26] See FSA, *Handbook, SUP 11, Annex 6G, Aggregation of holdings for the purpose of prudential assessment of controllers*, available at *www.fsa.gov.uk*, 2016.

[27] See, among others, ENRIQUES, GILSON and PACCES, *The Case for an Unbiased Takeover Law (with an Application to the European Union)*, in *Harvard Business Law Review*, 2014, 86 et seq.

[28] Member States have adopted different definitions of "persons acting in concert". Some have replaced the notion set forth by Article 2.1, par. 1, let. D, of the Takeover Bids Directive, while others have also incorporated, in various ways, the broader concept of «*the concerted exercise of voting rights by shareholders*» with a view to pursuing a common policy or strategy in relation to the company or exercising a dominant influence over it, taking into account the dirrefenr notion of acting in concert provided by Article 10 of the Transparency Directive (on which see next par. 4) [more details in ESMA, *Information on shareholder cooperation and acting in concert under the Takeover Bids Directive – 1st update*, June 2014, available at *www.esma.europa.eu*, 15].

[29] See WYMEERSCH, *A New look at the Debate about the Takeover Directive*, available at *www.ssrn.com*, 4 et seq.; CENZI VENEZZE, *The Costs of Control-enhancing Mechanisms: How Regulatory Dualism Can Create Value in the Privatisation of State-owned Firms in Europe*, in *EBOR*, 2014, 499 et seq.

[30] See EUROPEAN COMMISSION, *Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Application of Directive 2004/25/EC on takeover bids*, June 2012, available at: *www.europa.eu*, 9 [where the European Commission stated that "*the concept of "acting in concert" could be clarified on EU level, in order to provide more legal certainty to international investors as to the extent to which they can cooperate with each other without being regarded as "acting in concert" and running the risk of having to launch a mandatory bid*"]; EUROPEAN PARLIAMENT, *Resolution of 21 May 2013 on the application of Directive 2004/25/EC on takeovers bids*, available at *www.europarl.europa.eu* [where the European Parliament observed that: «*the concept of 'acting in concert' is essential when calculating the threshold that triggers the launch of a mandatory bid, and understands that Member States have transposed the definition provided for in the Directive differently*»].

[31] These Member States are Austria, Croatia, the Czech Republic, Finland, France, Germany, Greece, Lithuania, the Netherlands, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain and Sweden [see ESMA, *Information on shareholder cooperation and acting in concert under the Takeover Bids Directive – 1st update*, June 2014, available at *www.esma.europa.eu*, 14].

[32] This is the situation in Belgium, Cyprus, Denmark, Hungary, Iceland, Ireland, Luxembourg, Norway and the United Kingdom [more details in K.J.HOPT, *European Takeover Reform of 2012/2013 –Time to Re-Examine the Mandatory Bid*, in *EBOR*, 2014, 185 et seq.].

[33] See, among others, MOSCA, *Azione di concerto e OPA obbligatoria*, Milano, EGEA, 2013, 1 et seq.; TUCCI, "*Acquisto di concerto" e "azione di concerto"*, in *Riv. dir. comm.*, 2010, I, 915 et seq.

persons acting in concert or, alternatively, if the support of such persons caused or fostered the acquisition if the controlling stake by one or more of them.

Therefore, since the essence of a control influence requires the disposal of voting rights attached to the securities issued by the relevant target company, for the purpose of the takeover bids' regulations an acting in concert relationship produces legal consequences when it affect the distribution of the voting rights in the shareholders' meeting of the target company.

However, EU and domestic authorities recognize that shareholders may wish to cooperate in several ways for the purpose of exercising good corporate governance and without seeking to acquire or exercise control over the companies in which they have invested, for instance discussing together issues that could be raised with the board, making representations to the board on those issues, or tabling or voting together on particular resolutions.[34] In such circumstances ESMA clarified that cooperation among shareholders will not «*in and of itself*» lead to a conclusion that they are acting in concert for the purposes of the Takeover Bids Directive[35], provided that if shareholders cooperate to engage in an activity which is not included on the white-list, that fact will not, in and of itself, mean that those shareholders will be regarded as persons acting in concert.[36]

This promotes an open shareholders' activism, in line with the EU and international trends and policy-makers' goals aimed at fostering the effective engagement of shareholders in listed companies and financial institutions[37] for the purpose of strengthening their monitoring actions vis-à-vis the appointed directors and managers and, thus, in the interest of a long-term development of the participated entity.[38] In other words, the encouragement of investor engagement both at European[39] and national level (mainly through voluntary codes and other soft-pressure tools), seems likely to increase shareholders' activism, which will become a stable element of the corporate background, to be taken into account by boardroom and companies.[40]

An interesting example of multiple level regulation of the "acting in concert" issue – under a takeover bids' perspective – is offered by the Italian Legislative Decree No. 58 of 1998 (the "Italian Securities Act") at Articles 101-*bis*, 109 and 122 (implementing the Takeover Bids Directive). The "acting in concert" notion provided by such provisions is based on a general principle which, in turn, is further developed by a black-list of persons *deemed* "acting in concert", by a grey-list of persons *presumed* acting in concert and finally by a white-list of exempted relationships.

The general principle – stated by pursuant to Article 101-*bis*, par. 4, of the Italian Securities Act – states that "person acting in concert" mean persons «*who act on the basis of an explicit or tacit agreement, verbal or in writing, even if invalid or without effects, for the purpose of acquiring, maintaining or strengthening control over the [listed] target or for the purpose of frustrating a tender offer or an exchange tender offer*».[41]

Without prejudice to the above, *in any event* the following persons are considered to be acting in concert (by a *iuris et de iure* presumption): *(i)* the parties of a shareholders' agreement, even if void, mentioned under Article 122 (paragraphs 1 and 5, letters a, b, c and d) of the Italian Securities Act 42, *(ii)* any entity, its controlling entity and its controlled companies, *(iii)* companies subject to joint control, and/or *(iv)* a company and its directors, members of the management board or of the supervisory board or general managers (the "black-list").

Just a presumption (*iuris tantum*) of "acting in concert is triggered in case of familiar relationships[43]; and/or between a person and his/her financial advisors for transactions relating to the issuer (the "grey-list").[44]

[34] As pointed out by GHETTI, *Acting in Concert in EU Company Law: How Safe Harbours can Reduce Interference with the Exercise of Shareholder Rights*, in *ECFR*, 2014, 599, excessively broad acting-in-concert rules would clearly have a detrimental effect on monitoring cooperation considering that activist shareholders could have to comply with burdensome transparency requirements, and, in certain circumstances, would be forced to launch a costly mandatory bid.

[35] In this terms see the white-list drafted by ESMA, *Information on shareholder cooperation and acting in concert under the Takeover Bids Directive – 1st update*, June 2014, available at *www.esma.europa.eu*, 5 et seq.

[36] The above mentioned white-list has been substantially mirrored by the one drafted by the ESAs for the purposes (highlighted in the previous par. 2) of the prudential assessment of acquisitions and increases of qualifying holdings in the financial sectors.

[37] See, among others, BEBCHUK, *The Myth that Insulating Boards Serves Long-Term Value*, in *Colum. Law Rev.*, 2013, 1637 et seq.; BEBCHUK et al., *The Long-Term Effects of Hedge Fund Activism*, in *Colum. Law Rev.*, 2015, 1085 et seq.; KASTIEL, *Against All Odds: Hedge Fund Activism in Controlled Companies*, in Colum. Bus. Law Rev., 2016, 60 et seq.; COFFEE JR. and PALIA, *The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Governance* available at *www.ssrn.com*, 2015; PACCES, *Exit, Voice and Loyalty from the Perspective of Hedge Funds Activism in Corporate Governance*, in *Erasmus Law Review*, 2016, 199 et seq.

[38] See in this respect GOSHEN and SQUIRE, *Principal Costs: A New Theory for Corporate Law and Governance*, available at *www.ssrn.com*, 3 et seq.; CREMERS, GIAMBONA, SEPE and WANG, *Hedge Fund Activism and Long-Term Firm Value*, available at *www.ssrn.com*, 2015, 5 et seq.; SACCO GINEVRI, *The Rise of Long-Term Minority Shareholders' Rights in Publicly Held Corporations and Its Effect on Corporate Governance*, in *EBOR*, 2011, 587 et seq.

[39] See, for instance, the *Proposal for a Directive of the European Parliament and of the Council amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement* and *Directive 2013/34/EU as regards certain elements of the corporate governance statement*.

[40] See CAPRIGLIONE and MASERA, *Bank Corporate Governance: A New Paradigm*, in *Open Review of Management, Banking and Finance*, 2016, 5 et seq., highlighting the «*significant role of the shareholders in the definition of banking's strategies as well as in the identification of those who must be held responsible for the corporate management*».

[41] According to the UK Takeover Code, par. C1, September 12, 2016, persons acting in concert comprise persons who, pursuant to an agreement or understanding (whether formal or informal), co-operate to obtain or consolidate control (as defined below) of a company or to frustrate the successful outcome of an offer for a company. A person and each of its affiliated persons will be deemed to be acting in concert all with each other.

[42] All the shareholders' agreements indicated under Article 122, paragraphs 1 and 5, letters a), b), c) and d) of the Italian Securities Act trigger a *iuris et de iure* presumption of "acting in concert" among the contractual parties [*i.e.* agreements, in whatsoever form concluded, that: a) create obligations of consultation prior to the exercise of voting rights in companies with listed shares or companies that control them; b) set limits on the transfer of the related shares or of financial instruments that entitle holders to buy or subscribe for them; c) provide for the purchase of shares or financial instruments referred to in paragraph b); d) have as their object or effect the exercise, jointly or otherwise, of a dominant influence on such companies]. However, Article 122, paragraph 5, letter d)-*bis* of the Italian Securities Act mentions an additional class of shareholders' agreements, which includes those agreements aimed at favoring or at frustrating the achievement of the goals of a tender offer over a listed company. Such class of shareholders' agreements is not "literally" included among those classes triggering *iuris et de iure* the "acting in concert" presumption (mentioned by Article 101-*bis*). Thus, in such circumstances, an "acting in concert" conduct may be triggered only if the specific agreement triggers the general notion of acting in concert, such as in the case that the agreement's provisions show the mutual intent of the parties to acquire, maintain or strengthen a control position over the Target. It shall be noted that – according to Article 122 of the Italian Securities Act – a shareholders' agreement is considered executed by the parties for the purpose of the acting in concert (and of the disclosure duties) even if the agreement has been reached by them either orally or *per facta concludentia*.

[43] Such as in case of a person and his/her spouse, cohabiting partner, persons related by consanguinity or affinity, and direct relatives and relatives up to the second degree, and children of his/her spouse or cohabiting partner.

[44] Just in case such advisors (or companies belonging to their group), after awarding the appointment or in the month prior, had made purchases of issuer securities outside the trading on own behalf carried out according to ordinary operations and at market conditions. See Art. 44-*quater*, par. 1, of Consob Regulation on issuers No. 11971 of 1999, as amended from time to time.

In the following circumstances a cooperation among persons is not considered, in itself, a relevant acting in concert, being index of collaboration among minority investors: *(a)* coordination among shareholders for the purpose of implementing the actions and exercising the rights typically granted by the Italian law to minority shareholders; *(b)* agreements for the submission of slates of candidates for the election of the corporate bodies, provided that such slates include a number of candidates that is less than half of the total members to be elected (or are designated to achieve a representation of minority interests); *(c)* cooperation among shareholders to prevent the approval of a resolution of the shareholders' meeting on corporate bodies compensations, related parties' transactions, authorization to compete for directors or derogation to the passivity rule; or *(d)* cooperation among shareholders to approve a shareholders' meeting resolution concerning derivative actions, proposals coming from minorities or converging voting on minority slates.[45]

In short, the Italian model implements - in a sophisticated manner - the main guidelines developed at the EU level, considering that on the one hand it leave flexibility to the competent authority to deal with the specific circumstances from case to case but, on the other hand, indicate to the relevant or potential shareholders the activities which are always considered an index of acting in concert, allowing them to structure their transactions and agreements either in a safe way or sharing since the beginning costs and responsibilities arising from a mandatory tender offer over an Italian listed company.

4. TRANSPARENCY RULES IN THE EUROPEAN UNION

As anticipated above, Article 10, par. 1, let. a), of the Transparency Directive (on the harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market) – concerning in particular the acquisition or disposal of major proportions of voting rights – contains another sectoral notion of "acting in concert", providing that the notification duties mentioned therein apply to a natural person or legal entity to the extent it is entitled to acquire, to dispose of, or to exercise voting rights in the issuer. For such a purpose the EU legislator includes also «*voting rights held by a third party with whom that person or entity has concluded an agreement, which obliges them to adopt, by concerted exercise of the voting rights they hold, a lasting common policy towards the management of the issuer in question*».[46]

In other terms, when a shareholder – or persons acting in concert - exceeds certain voting right thresholds as a consequence of the acquisition or disposal of shares (or as a result of events changing the distribution of voting rights), such circumstance shall be made public. Also in this context when the cooperation is based only on discussions among shareholders of a listed company, there is no acting in concert as there is no agreement among them, but when there is such an agreement we may face a signal that the shareholders have moved from simple cooperation to activism.[47]

For the purpose of the Transparency Directive, the notification duties aim at identifying who is controlling the way in which voting rights are exercised, both by detecting additional voting rights that shareholders may have under certain circumstances listed in Art. 10 of such directive[48] (for the purposes of aggregation with the shares they hold) and by identifying an additional set of natural persons or legal entities that need to make notifications on major entitlements to voting rights (i.e. persons acting in concert).[49]

In a nutshell, the objective of the notification requirements in the Transparency Directive is to disclose to the market major holdings of voting rights and continuing changes in such holdings, when the proportion of voting rights reaches, exceeds or falls below a notification threshold (even though shares are not acquired or disposed of).[50]

Under Art. 10(a) of the Transparency Directive, existing shareholders (or holders of voting rights) that enter into an *agreement* without acquiring additional voting rights are also covered by the notification duty set forth therein.[51] As pointed out by some commentators, these tools might help catch and aggregate undisclosed positions which formally belong to different actors [52], even if the notion at hand does not require *actual* concerted action (but only a binding obligation to act pursuant to a concert agreement) – being aimed at informing the market before the exercise of the voting rights – and cover only *voting* agreements concerning shares *already acquired* by the parties.[53]

[45] See Art. 44-*quater*, par. 1, of Consob Regulation on issuers N. 11971 of 1999, as amended from time to time.

46 Such notion of acting in concert substantially mirrors that established by Article 92(c) of the Directive 2001/34/EC of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities, published in O.J.E.U. n. L 184, July 6, 2001, 1 et seq.

[47] MAZARS, *Transparency Directive Assessment Report*, available at *www.europa.eu*, 109 et seq.

[48] Pursuant to Art. 10 of the Transparency Directive, the notification requirements shall also apply to a natural person or legal entity to the extent it is entitled to acquire, to dispose of, or to exercise voting rights in any of the following cases or a combination of them: (…) (b) voting rights held by a third party under an agreement concluded with that person or entity providing for the temporary transfer for consideration of the voting rights in question; (c) voting rights attaching to shares which are lodged as collateral with that person or entity, provided the person or entity controls the voting rights and declares its intention of exercising them; (d) voting rights attaching to shares in which that person or entity has the life interest; (e) voting rights which are held, or may be exercised within the meaning of points (a) to (d), by an undertaking controlled by that person or entity; (f) voting rights attaching to shares deposited with that person or entity which the person or entity can exercise at its discretion in the absence of specific instructions from the shareholders; (g) voting rights held by a third party in its own name on behalf of that person or entity; (h) voting rights which that person or entity may exercise as a proxy where the person or entity can exercise the voting rights at its discretion in the absence of specific instructions from the shareholders.

[49] CESR, *Final Technical Advice on Possible Implementing Measures of the Transparency Directive*, CESR/05-407, June 2005, p. 29. As pointed out by ENRIQUES, GARGANTINI and NOVEMBRE, *Mandatory and Contract-Based Shareholding Disclosure*, in *Uniform Law Review*, 2010, 720, ownership disclosure ("OD") «*is particularly relevant both for the market and for the regulators in that it allows to understand who has or may have an influence over management, thus facilitating the monitoring of blockholders' use and abuse of control power. Also, OD allows investors to understand the nature of controlling blockholders and other significant shareholders. Most of the time, this constitutes key information to enable investors to make an informed assessment of firms' value*». See also PEDERSEN and THOMSEN, *Ownership Structure and Value of the Largest European Firms: the Importance of Owner Identity*, in *Journal of Management and Governance*, 2003, 27 et seq.; ZETZSCHE, *Hidden Ownership in Europe: BAFin's Decision in Schaeffler v. Continental*, in *EBOR*, 2009, 115 et seq.

[50] CESR, *Final Technical Advice on Possible Implementing Measures of the Transparency Directive*, CESR/05-407, June 2005, 29.

[51] CESR, *Final Technical Advice on Possible Implementing Measures of the Transparency Directive*, CESR/05-407, June 2005, 29.

[52] See ENRIQUES, GARGANTINI and NOVEMBRE, *Mandatory and Contract-Based Shareholding Disclosure*, in *Uniform Law Review*, 2010, 723.

[53] See GHETTI, *Acting in Concert in EU Company Law: How Safe Harbours can Reduce Interference with the Exercise of Shareholder Rights*, in *ECFR*, 2014, 602 et seq.

In addition, the agreement must be aimed at establishing a *lasting common policy towards the management of the issuer,* implying a high degree of commitment with reference to the duration of the relationship.[54] Therefore, agreements without long-lasting effects or not addressed to influence the management of an issuer (such as, for instance, those concerning the payment of dividends or the removal of a minority member of the Board) do not trigger the requirement above mentioned.[55]

5. BLOCK-HOLDERS DISCLOSURE UNDER THE U.S. SECURITIES LAWS

The notion of "persons acting in concert" is widely used also by the US securities regulation, according to which requiring immediate disclosure of the accumulation of outside blocks of public-company stock will improve market transparency.[56] In particular, under Section 13(d) of the U.S. Securities Exchange Act of 1934 – as amended by the Williams Act of 1968 – any person who (after acquiring directly or indirectly the beneficial ownership of any equity security of a class which is registered) exceeds 5 per centum of such class shall, within ten days after such acquisition must disclose certain information to the U.S. Securities and Exchange Commission ("SEC") as necessary or appropriate *in the public interest or for the protection of investors.*[57] The purpose of this rule is to enable investors to make intelligent investments decisions by providing them with information concerning shifts in corporate ownership which portend a change in control.[58]

In addition, pursuant to Section 13(d)(3) of the U.S. Securities Exchange Act of 1934, when two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer, such syndicate or group shall be deemed a "person" for the purposes of this disclosure rule. This extension of the definition of "person" would prevent a group of persons who seek to pool their voting or other interests in the securities of an issuer from evading the provisions of the statute because no one individual owns more than the relevant threshold of the securities. [59]

According to SEC Rule 13d–5(b)(1) «*[w]hen two or more persons agree to act together for the purpose of acquiring, holding, voting or disposing of equity securities of an issuer, the group formed thereby shall be deemed to have acquired beneficial ownership (…) as of the date of such agreement, of all equity securities of that issuer beneficially owned by any such persons*».[60]

On July 18, 2011, the U.S. Court of Appeals, Second Circuit, rendered its decision in *CSX Corporation v. The Children's Investment Fund Management (UK) LLP*[61], clarifying the SEC rule mentioned above. In particular, the Second Circuit – reaffirming that the touchstone of a group within the meaning of section 13(d) is that the members combined in furtherance of a common objective[62] – recognized that whether a group exists under section 13(d)(3) of the Securities and Exchange Act turns on whether there is sufficient direct or circumstantial evidence to support the inference of a formal or informal understanding between members for the purpose of acquiring, holding, or disposing of securities.63 More in particular, the Second Circuit stated that SEC Rule 13d–5(b)(1) applies only to groups formed for the purpose of acquiring, holding, voting or disposing of securities of the target firm; therefore, according to the Court, such Rule does not encompass all "concerted action" with an aim to change a target firm's policies even while retaining an option to wage a proxy fight or engage in some other control transaction at a later time (indeed, the Rule does not encompass "concerted action" with a change of control aim that does not involve one or more of the specified acts).

Consistently, the SEC has also clarified that, in order for one party to a voting agreement to be treated as having or sharing beneficial ownership of securities held by any other party to the voting agreement, evidence beyond formation of the *group* would need to exist. For example, if a party to the voting agreement has the right to designate one or more director nominees for whom the other parties have agreed to vote, the party with that designation right becomes a beneficial owner of the securities beneficially owned by the other parties, because the agreement gives that person the power to direct the voting of the other parties' securities. Similarly, if a voting agreement confers the power to vote securities pursuant to a bona fide irrevocable proxy, the person to whom voting power has been granted becomes a beneficial owner of the securities under Rule 13d-3. Conversely, parties that do not have or share the power to vote or direct the vote of other parties' shares would not beneficially own such shares solely as a result of entering into the voting agreement.[64]

6. CONCLUSIONS

As previously pointed out, the definitions of "persons acting in concert", accompanied by examples provided by EU and US legislations as well as by national regulations, may be similar in wording across sectoral legislation but in practice there is no generally accepted definition of the notion of "acting in concert". Diversities in the notion of "acting in concert" can be explained also in light of the public

[54] See GHETTI, *Acting in Concert in EU Company Law: How Safe Harbours can Reduce Interference with the Exercise of Shareholder Rights*, in *ECFR*, 2014, 602 et seq.; ENRIQUES, GARGANTINI and NOVEMBRE, *Mandatory and Contract-Based Shareholding Disclosure*, in *Uniform Law Review*, 2010, 713 et seq.

[55] MAZARS, *Transparency Directive Assessment Report*, available at *www.europa.eu*, 109 et seq.

[56] See BEBCHUCK and JACKSON, *The Law and Economics of Blockholder Disclosure*, in *Harvard Business Law Review*, 2012, 109 et seq.; see also EMMERICH et al., *Fair Markets and Fair Disclosure: Some Thoughts on the Law and Economics of Blockholder Disclosure, and the Use and Abuse of Shareholder Power*, in *Harvard Business Law Review*, 2013, 135 et seq.

[57] If any material change occurs in the facts set forth in the statement filed with the Commission, an amendment shall be filed with the SEC, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

[58] See POWELL, *"Acquisitions" and "Groups" Under Section 13(d) of the Securities Exchange Act of 1934*, in *Boston College Law Review*, 1971, 149 et seq.

[59] In this sense see the section-by-section summary of the House Report on the of the Williams Act, reported in U.S. Code Cong. & Ad. News, 1968, 2811 et seq. [«*This provision is designed to obtain full disclosure of the identity of any person or group obtaining the benefits of ownership of securities by reason of any contract, understanding, relationship, agreement or other arrangement*»].

[60] Available at *www.sec.gov*.

[61] Available at *www.whitecase.com*.

[62] See Roth v. Jennings, 489 F.3d 499, 508 (2d Cir.2007) (quoting Wellman v. Dickinson, 682 F.2d 355, 363 (2d Cir.1982)).

[63] See CSX I, 562 F.Supp.2d at 552 (quoting Hallwood Realty Partners, L.P. v. Gotham Partners, L.P., 286 F.3d 613, 617 (2d Cir.2002).

[64] See SEC, *Exchange Act Sections 13(d) and 13(g) and Regulation 13D-G Beneficial Ownership Reporting*, July 14, 2016, available at *www.sec.gov*.

interests protected by the different legal frameworks.

For instance, the "Takeover Bids Directive" and the "Transparency Directive" – as well as the disclosure duties set forth by the US Securities and Exchange Act – are mainly focused on voting rights, whereas the aim of the banking and financial framework is to also have transparency regarding the capital stakes in the target institution.[65]

This also explains why, under the Transparency Directive, also future concerted acquisitions fall within the definition of acting in concert, since comparing the provisions on the acting in concert set forth by the takeover bids and transparency legal frameworks with those provided by the prudential regulations comes to light a dissimilar scope justified by a different range of interests protected by the respective sets of rules.[66] In other words, while takeover provisions generally apply to changes in the control of the company and transparency rules typically look at the disposal of voting rights over a listed target, on the other hand stability and prudential provisions also include less shocking events, such as the non-control-granting and increase of a shareholder's stake in a company.[67]

Such picture is consistent with a consolidated legal regulation on the ownership structure of banks and other financial institutions, according to which the competent authorities are directed to appraise the suitability of the shareholders – and possibly to reject any particular shareholder structure as improper when the institution is being formed – for the purpose of enabling the supervisory authorities to assess, and as they see fit to reject, any inappropriate group structure that could be detrimental to safe and sound banking management.[68]

In conclusion, the notion of "persons acting in concert" should remain flexible and adaptable to the different goals pursued in the various sets of rules by the anti-avoidance provisions which introduced, from case by case, such subjective extension. However, other forms of collaboration among investors – not aimed at threatening the interests protected by the relevant financial regulations – should not be considered as "acting in concert" conducts for such a purpose, since an overreaching of activities triggering an acting in concert presumption might discourage an effective exercise of monitoring rights attached to minority stakes, thus affecting the best governance of financial institutions and public companies.

[65] See Art. 22, par. 1, of the Directive 2013/36/EU of 26 June 2013 ("CRD4"). See in this respect CAPRIGLIONE, *Banking Governance within Company Interests and Prudential Regulation. (European Regulation and Specific Italian Rules)*, in *Law and Economics Yearly Review*, 2014, vol. I, 65 et seq.; SEPE, *A crisis, public policies, banking governance, expectations & rule reform: when will the horse go back to drink?*, in *Law and Economics Yearly Review*, 2014, vol. I, 210 et seq.; BINDER, *The Banking Union and the Governance of Credit Institution: a Legal Perspective*, in *EBOR*, 2015, 478 et seq.; TRÖGER, *Organizational Choices of Banks and the Effective Supervision of Transnational Financial Institutions*, in *Tex. Intern. and Comp. Law Rev.*, 2013, 177 et seq.

[66] For instance, as pointed put by the EUROPEAN COMMISSION, *Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Application of Directive 2004/25/EC on takeover bids*, June 2012, available at: *www.europa.eu*, 6, *«The broad definition of the term, included in the Acquisitions Directive's level 3 guidance, is however not used by regulators in connection with takeover bids»*.

[67] See GHETTI, *Acting in Concert in EU Company Law: How Safe Harbours can Reduce Interference with the Exercise of Shareholder Rights*, in *ECFR*, 2014, 601 et seq.

[68] See EU COMMISSION, *Proposal for a Second Council Directive*, COM (87) 715 final, February 16, 1988, section 11.2(b); GRUSON and NIKOWITZ, *The Second Banking Directive of the European Economic Community and Its Importance for Non-EEC Banks, in Fordham International Law Journal*, 1988, p. 224 seq.

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