



Acting in Concert in Italy from Disclosure Regime to Mandatory Offer

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The European Rules

[Articles 2, par. 1, lett. *d*), TD]: «notification requirements (...) in any of the following cases (...): «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 voting rights the hold, a **lasting common policy** toward the management of the issuer in question».

[Articles 2, par. 1, lett. *d*), TBD]: «persons acting in concert' shall mean natural or legal persons who **cooperate** with the offeror or the offeree company on the basis of an **agreement**, either express or tacit, either oral or written, aimed either at **acquiring** control of the offeree company or at frustrating the successful outcome of a bid».



The TBD takes into consideration not only agreements that *oblige*: the variety of agreements is wide and open, but the goal is identified in the *acquisition of control* (or frustration of the outcome of a bid).

The Italian Rules: Transparency of Shareholders' Agreements

[Transparency: art. 122 t.u.f.]: «**In whatever format they may be stipulated**, agreements regarding the exercise of voting rights in companies with listed shares and their parent companies, within five days of stipulation shall be:

- a) notified to Consob; b) published in abstract form in the Italian daily press;
- c) filed with the Register of Companies in which the company office is registered;
- d) notified to the companies with listed shares».

The article also apply to agreements that:

- a) create obligations of consultation (...); b) set limits on the transfer of the related shares (...); c) provide for the purchase of shares or financial instruments (...); d) have as their object or effect the exercise, jointly or otherwise, of a dominant influence on such companies; [d-bis) which aim to encourage or frustrate a takeover bid (...), including commitments relating to non-participation in a takeover bid]».

➡ «Agreements shall be null and **void** in the event of non-compliance with the requirements laid down in subsection 1».

➡ As a matter of facts these agreements are **contracts** signed by the participants 4 before disclosure.



Difficulties in Enforcing the Rule

All shareholders' agreements of article 122 t.u.f. are **un-rebuttable presumptions** of Acting in concert (unless agreements provided in lett. *d-bis*) [Art. 101-bis, paragraph 4-bis, lett. a), t.u.f.] .

Acting in concert is presumed with regard to any sort of agreement, even if it does not involve (directly) the exercise of the voting rights.

The rule is easy to apply/no uncertainty.

No possibility to prove that the agreement does not involve corporate control .

Others (un-rebuttable) presumptions of acting in concert: :

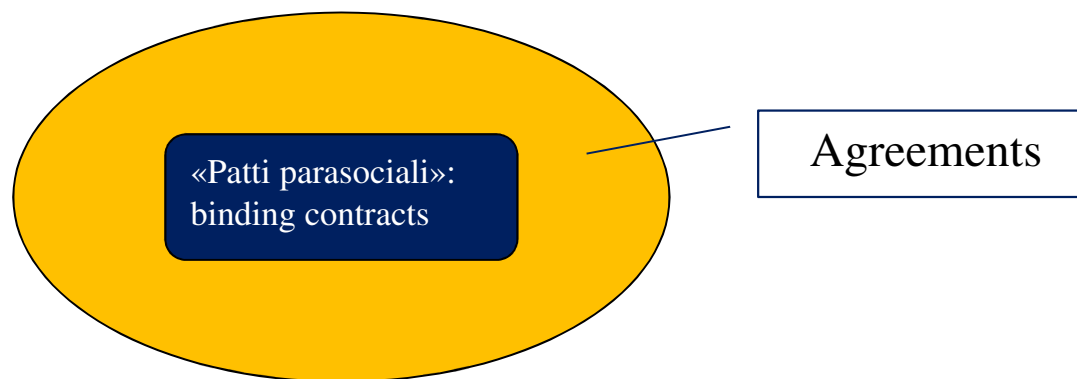
«b) an entity, its parent company and its subsidiaries;

c) companies subject to joint control;

d) a company and its directors, members of the management board, or supervisory board or general managers.» [Art. 101-bis, paragraph 4-bis, lett. a)-d), t.u.f.].

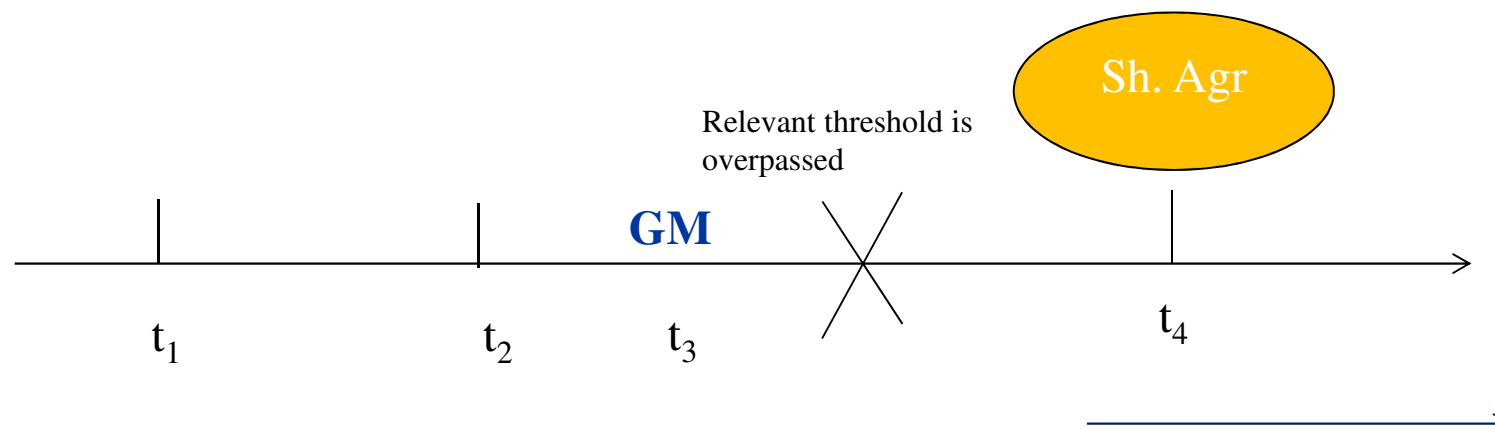
Difficulties in Enforcing the Rule.

Presumption of acting in concert IN CASE OF shareholders' agreements [patti parasociali]. If not? A problem of enforcement...



... until the adoption of the (open) definition of «persons acting in concert» of the TBD

Difficulties in Enforcing the Rule.



Actions jointly taken by shareholders:

- t_1 : the decision to frustrate the bid is taken by the group of subject acting in concert;
- t_2 : they increase their personal stakes in the target company;
- t_3 : they are aligned in exercising their voting rights in the general meeting.

From t_4 the participant of the SA are acting in concert.
Before?

Italian law does not have a rule comparable to rule 4.1. of the City Code [MAD rules apply, if the information is *precise*]



The Current Twofold Approach in Italy

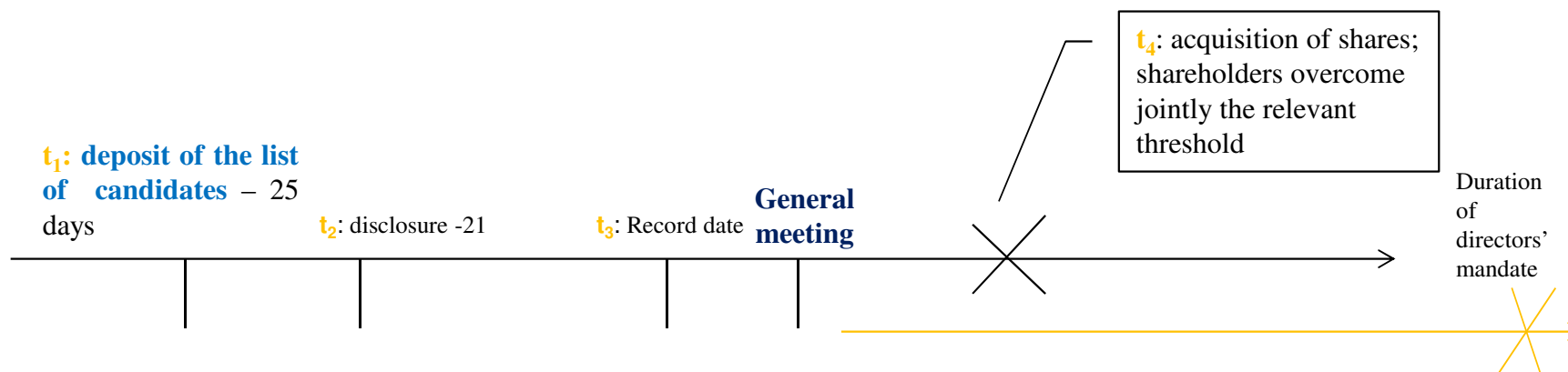
«**Persons acting in concert** shall mean natural or legal persons who cooperate with the offeror or the offeree company on the basis of an agreement, either express or tacit, either oral or written, aimed either at acquiring control of the offeree company or at frustrating the successful outcome of a bid». [**Articles 2, par. 1, lett. d), TBD**]

«**Persons acting in concert** shall mean persons cooperating together on the basis of a specific or tacit agreement, verbal or in writing, albeit invalid or without effect, for the purpose of acquiring, maintaining or strengthening control over the issuer or to counteract achievement of the aims of a takeover bid or exchange tender offering» [**article 101-bis, paragraph 4, t.u.f.**].



the presumptions of Acting in concert are still in force [**article 101-bis, paragraph 4-bis, lett. a-d), t.u.f.**].

Appointing Directors: Does It Imply Enough Evidence of Acting in Concert?



No acting in concert before t_1 : see also the Takeover Panel in Panel Statement no. 26/2009.

Cooperation without acquisitions of shares.

Deposit of the list of candidates in t_1 vs. appointment in the general meeting:

- in t_1 the forecast is that the list will receive the majority of voting rights (and appoint the majority of directors in the board);
- in t_1 no reasonable forecast is possible.

Appointing Directors: Does It Imply Enough Evidence of Acting in Concert?

The position of the Supervisory Authority

«2. The following cases of cooperation between several parties **shall not in and of themselves be classified as acting in concert** pursuant to Article 101-bis, subsection 4 of the Consolidated Law:

b) **agreements for the submission of lists of candidates for the election of the corporate bodies** pursuant to Articles 147-ter and 148 of the Consolidated Law, provided that said lists include a number of candidates that is less than half of the members to be elected or are by design preset for the election of representatives of minority interests;

d) cooperation between shareholders to:

2) gain votes for a list which presents a number of candidates that is less than half of the members to be elected, or is by design preset for the election of representatives of minority interests, also through the solicitation of voting proxies for the purpose of voting for said list.» **[art. 44-quarter Consob regulation n. 11971]**

No acting in concert when:

the number of candidates in the list is less than the majority *or* from the list only minorities representative may be elected [the final outcome of the list is predictable and the list has no connection with the list that will achieve the majority of voting rights] *or*

The list receives support during the campaign [*no acting in concert if the number of candidates is more than majority and the list will receive the majority of preferences?*]. 10



Final Considerations

The nature of agreements within the notion of «persons acting in concert» in the TBD (acknowledgment that the notion is wide: any sort of agreement).

Stability of the agreement (control without stability?).

Acquisition of corporate control (acquisition without buying voting securities?):

- in Law systems like Italy and UK to be classified as «persons acting in concert» does not correspond in itself to the trigger event of the mandatory offer obligation since relevant acquisition of shares is also required;
- from the exercise of joint control does not follow the mandatory offer obligation;
- the trigger event depends on acquisitions of voting securities (the relevant period of these purchases should be defined precisely).