

# The Shareholders Agreements: Typologies, Diffusion and Influence on Corporate Governance of Italian Listed Companies

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**Abstract** The shareholders agreement is an agreement drawn up by the shareholders when the company is founded, or after its foundation, to rule one or more aspects of the relationships held by the shareholders. The shareholders agreement phenomenon is particularly relevant in the Italian context, where it is possible to observe a lot of companies with fragmented ownership in which it is not often possible to find an economic subject that holds so many shares to manage the company. Therefore, it is interesting to investigate the typologies and the diffusion of the shareholders agreements of the Italian listed companies, with the aim to analyze their influence on the corporate governance policies. The paper wants to answer to the following question: do some enterprise characteristics exist that makes more probable that a company adopt a shareholder agreement respects to another one?

The empirical analysis is developed on the Italian listed companies at the date of 30, April 2010, belonging to all the sectors classified by Milan Stock Exchange.

**Keywords** Corporate Governance, Shareholders Agreement, Voting Right, Ownership, Shareholders Rights

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## 1. Introduction

The shareholders agreement is an agreement drawn up by the shareholders when the company is founded, or after its foundation, to rule one or more aspects of the relationships held by the shareholders.

Such agreement represents one of the tools through which, especially in public companies, the shareholders put together blocks of shares in order to have the majority in the shareholders meetings and to pursue specific interests.

The shareholders agreement phenomenon is particularly important and relevant in the Italian context, where it is possible to observe a lot of companies with fragmented

ownership in which it is not often possible to find an economic subject that holds so many shares to manage the company. By this way, it is possible to observe the opportunity to create “management and control groups” that could vote in the shareholders meetings on the base of what it was decided outside it, in a “pre-company meeting” context.

In Italy, Legislator allows the shareholders agreements (Art. 2341-bis, 2341-ter e art. 122, 123, 124 e 207 del D.Lgs. 24.2.1998, n. 58), while in business economic theory there are different and more critical considerations about those aspects (Chemla G., Habib M.A., Ljungqvist A., 2007) [1].

Starting from such considerations, it may be considered that the shareholders agreements could be interpreted as elements in evident contrast and antithesis with a governance able to even manages the minority interests and the interests of potential investors.

It seems quite clear that if we consider the governance as a discipline whose primary aims are to resolve the problem of company control and to guarantee a high level of transparency in ownership structure, the issue regarding agreements take out of institutional cannot absolutely be neglected.

The matter regarding the study of the shareholders agreement is set with particular emphasis and interest inside the Italian economic panorama, where in the last years the phenomenon has grown up with an increasing frequency both in companies listed to the Milan Stock Exchange and in companies not listed; while the first will be the object of the research, the latter will not be considered (M. Allegrini, S. Bianchi Martini [2]; M. Bianchi, M. Bianco, L. Enriques [3]; M. Bianchi, M. Bianco, S. Giacomelli, A. M. Paces, S. Trento [4]; G. Gianfrate [5]; G. Gianfrate [6]; L. Zingales [7]).

Up to the year 2006 the data related to the shareholders agreements of the Italian companies listed to Milan Stock exchange in Milan were systematically published inside the annual report of CONSOB.

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**Table 1.** CONSOB Annual Report 2006 about Shareholder Agreement

Kind of shareholders agreement in the Italian listed companies												
31 December 2006												
Kind of shareholders agreement												
Number of agreements	Block		Vote			Global			Total			
	Shareholder equities syndicated	Number of companies	Number of agreements	Shareholder equities syndicated	Number of companies	Number of agreements	Shareholder equities syndicated	Number of companies	Number of agreements	Shareholder equities syndicated	Number of companies	
Mta												
2002	7	31,5	7	8	39,7	8	32	47,6	30	47	43,9	41
2003	8	39,0	8	11	41,9	9	36	46,9	34	55	44,8	47
2004	7	50,8	7	10	40,8	8	39	47,8	37	56	46,9	47
2005	8	32,2	8	10	42,4	8	46	49,1	43	64	45,9	52
2006	7	45,4	7	8	44,3	4	44	50,0	43	59	48,7	52
Mtax												
2002	6	38,9	3	3	62,9	3	15	49,1	13	24	48,3	16
2003	6	30,7	-	-	-	-	4	44,8	4	10	36,3	9
2004	4	29,5	-	-	-	-	7	41,9	6	11	37,4	8
2005	2	29,0	-	-	-	-	6	49,6	5	8	44,4	6
2006	1	25,4	-	-	-	-	7	50,2	6	8	45,2	6

Therefore, it is absolutely interesting to investigate the typologies and the diffusion of the shareholders agreements in the Italian listed companies, with the aim to analyse their influence on the corporate governance policies.

Starting from those considerations, the aim of the study is to understand how corporate governance system of the enterprises that adopted shareholders agreements could change and influence the traditional management systems.

In particular, the paper wants to contribute to the corporate governance studies trying to understand, through an empirical analysis on the companies listed at the Milan Stock Exchange, (i) if some characteristics of enterprise exist that makes more probable that a company adopt a shareholder agreement respects to an other one, (ii) which characteristics assume corporate governance system in the enterprises that have shareholder agreements, and, at least, (iii) In which way corporate governance of the enterprises could be influenced by the presence or the absence of the shareholders agreements.

The paper first describes the institutional context inside which it places the discipline of the shareholders agreements, analyzing regulatory binds, constitutive characteristics and different typologies. The results of the analyses allow to shape a theoretical framework on the basis of the studies developed in literature. Once identified the research method and the sample investigated, the paper reports the results of the research and verifies whether shareholders agreements are easier present in a certain kind of companies operating in particular economic sectors. Eventually the paper describes the future steps of the investigation on the shareholders agreements in the Italian listed companies at Milan Stock Exchange.

## 2. The Institutional Context and the Theoretical Framework

The intensive adoption of shareholders agreements has forced the Legislator to discipline them, more than to oppose them, in order to protect the different interests involved. With regard to the not listed companies, the Italian Civil Code considers that the shareholders agreements, in whatever form stipulated, are intended to stabilize the ownership structure or the governance of the company and, more specifically, those having for object the voting right or the limits to the transfer of shares in companies that control or have a dominant influence ex. art 2341-bis c.c. The article 2341-ter establishes that the shareholders agreements in listed companies to Stock Exchange must be published otherwise any deliberation taken might be contested. The legislative decree n. 58 of February 24 1998 TUF (Unique text on the financial brokerage), articles 122, 123, 124 and 207, rules in punctual way the shareholders agreements in listed companies to Stock Exchange. The art. 122 establishes that any agreements regarding limitations or regulations of voting right, obligation or option of preventive consultation for the exercise of voting right, obligations about the transfer

of shares or any other pact for the arranged purchase, must be communicated, to Consob, within five days from the date of its underwriting, otherwise the agreement has to be considered ineffective.

Now it is possible to perceive the complexity of the matters pertaining to the government and the control of the companies, as well as the particular criticality that such problems assume in case of companies listed to the Stock Exchange to the financial market of the public saving, as well as to the growth of the business dimensions and the to articulate some organizational models of enterprise.

The Italian context is set entirely in a peculiar position, with own characteristics that compete to define entirely an approach particular to the analysis and the resolution of the matters pertaining to the companies' governance.

Following such optics of investigation, it is evident entirely as in the Italian panorama the model of the public company doesn't result to be comparable with that developed in Anglo-Saxon model and, consequently, also the theories and the applicable models in such context can result not often usable.

Regarding the aspects above mentioned, the agency relationship, asserted and shared by most part of the researchers, has a peculiar and more complex application in this field of analyses, because of even if in the most typical public companies the managers become autonomous arbiters of the decision of the company, in the Italian public companies, often owned by groups of few shareholders, it could be observed that managers are often the emanation of such few shareholder, operating in the exclusive interest of these shareholders. Managers, the "agents", therefore have to defend not their own interest, but the interest of groups of owners composed by few subject, that is those people who have elected them.

Regarding the issue of the ownership of the enterprises, it is very important the presence of a rule that protects the general interest to the knowledge of the owner structures, and able to recognize the real ownership and size of block of stocks through which the company is controlled. To such respect, the provided rule from the TUF about the owner structure goes beyond the boundaries of the simple information about the owners' equity and the transparency of the relations among the shareholders, but it goes to engrave on the market of the corporate control.

A special case that could be mentioned for the relief and the diffusion assumed during the last years in theme of definition of the owners structure of the company is that of the shareholders agreement. The shareholders agreements represent a complex and variegated phenomenon, that goes to define pacts among the shareholders in order to regulate some aspects regarding the execution of the social relation in general terms and that, in the substance, partially limiting the freedom of the shareholders, involving the obligation from the same ones to observe determined behaviours to engrave on the operations of the company. Such pacts have been disciplined for the first time in Italy with the legislative decree 58/1998 TUF, with exclusive reference to the listed

companies; for the companies not listed the regulatory reference it is even more recent, having been introduced during 2003 inside the most general reform of the corporate law.

From the juridical point of view, it is essential to observe as the shareholders agreements represent contracts with a free form; they only bind the contracting shareholders and, consequently, they can't be opposed, in any way, towards the company. In the last years both in the business and jurisprudential field many scholars have debated regarding the admissibility or less of such agreements. Those people who don't hold admissible such types of pacts bring as motivation the impossibility to consider the voting right as a marketable good<sup>1</sup>. Contrarily, those people who hold admissible the shareholders agreements recognize admissible the separation between the voting right and the linked action; others still consider valid the shareholders agreements on the basis of constitutive elements that have necessarily to be valued in every single case on the basis of the definition of specific behavioural rules or duration. Currently, also from the regulatory point of view, it has prevailed the thesis it turns to recognize the admissibility of the shareholders agreements since they should stay outside the social organization, but the right to do not comply with the pact if the deliberation of the should cause a breach of the social contract.

From a business and economic point of view, such agreements can be general or partial according to two points of view. First of all they can be stipulated by all the shareholders or only from some of them; secondarily, every shareholder adherent to the pact can participate with all of her/his shares or only with some of them, absolutely staying free to practice to own discretion the correlated social rights to the other owned shares.

More particularly, the finalities that are usually pursued with the underwriting oh the shareholders agreements can be various and different, but in absolute terms they have all incidence on the corporate governance. Particularly, such accords can be used in order to:

- stabilize the corporate government through accords aimed to condition the administrative activity and the formation of the wish of the meeting;
- stabilize the owner structure of the company through ties to the free trading of the shares.

The first ones, called "voting right shareholders agreements", are accords that pledge the contracting parties to a simple mutual consultation before every meeting; the accord could provide ties regarding voting to take place in agreement to what it has preventively decided by the underwriters' pact. The second one, called "transferring shares right shareholders agreements" are pacts through which all the contracting parties, or some of them, are obliged not to sell their own stocks or to transfer them under specific conditions. Less invasive if compared to the first two are the so-called ones "pacts of consultation", which

essentially bind the parties to discuss and to confer before the expression of the vote in the meeting.

Given such characteristics, it seems quite evident that these agreements represent a real limitation of the freedom of the single shareholder that underwrites the pact. The principal elements of the shareholders agreements are: the extraneousness and autonomy of such accords in comparison to the social contract, the incidence of such accords on the management of the society and on its operations, since the principle purpose of the agreement is to handle the relations among shareholders differently respect to the company's statute. From one side, therefore, it is possible to observe the separation and the independence of the pacts in comparison to the company's statute and, from the other side, the incidence of the same on the corporate governance.

The principal purpose of the shareholders agreements' underwriters is usually to give stability to the government of the company or to its structures. Understood the deep incidence of the shareholders agreement on the social contract, the element that allows to consider not compromised all the interests that are protected by the norms dictated for the deliberations of the company meeting is the possibility that such agreement have a form of publicity; in such it is allowed to the shareholders and the third parties to know contents and possible incidences on the government and on the control of the company. In view of that, the legislator through the legislative decrees 58/1998 TUF for the listed companies and n. 6/2003 for the not listed company has intervened to introduce one specific and detailed advertising regime. It is of absolute evidence, in fact, as it is absolutely necessary to guarantee the transparency of the owner structures of the companies and at same time to recognize the freedom to effect the agreement most suitable to the pursued finalities.

### 3. Research Method

The research has empirically been developed having as goal the analysis of the typologies and the diffusion of the shareholders agreements in the Italian companies listed to the Milan Stock Exchange with the aim to understand its influence on the structuring of the systems of corporate governance.

In agreement with such aims, the empirical analysis is developed on the Italian listed companies at the date of 30, April, 2010, belonging to all the sectors classified by Milan Stock Exchange.

More in detail, at first the study has individualized and selected for investigation the Italian companies listed on April, 30th, 2010. about those companies, the analysis proceeds to appraise the presence of shareholders agreements on April, 30th, 2010.

The framework is developed finding correlation the data collected from all the available documents on the website of the company, of Consob and of Milan Stock Exchange referring to Ownership, Equity and Board of Directors.

Particularly, from the website of Consob, the Italian

<sup>1</sup> Bonelli, 1905; Vivante, 1914; Sequi, 1932.

listed companies Regulator, we download all the shareholders agreements at April, 30th, 2010 so that to make an assessment of the characteristics of those shareholders agreements and their impact about structure of governance of the selected companies.

#### 4. The Empirical Analysis

On April, 30th, 2010 Italian companies, whose shares were duly listed at Milan Stock Exchange, were 283. Between these companies, 100 had communicated to Consob, as rules Article 122 of the Decree Law n. 58 of February, 24th, 1998, the existence of shareholders agreements having as direct or indirect object the voting right or the transferring right on their issued shares.

**Table 2.** Listed companies with shareholders agreement

N of listed companies on 30.04.2010	%	Share Capitalisation of listed companies on 30.04.2010 (in million of €)	%
283		438.888,94	
N. of listed companies with shareholders agreements on 30.04.2010		Share Capitalisation of listed companies with shareholders agreements on 30.04.2010 (in million of €)	
100	35,34%	130.340,41	29,70%

The number of companies with shareholders agreements represented the 35,34% of the Italian listed companies listed to the Milan Stock Exchange and the 29,70% in terms of capitalization. This is able to demonstrate that the

phenomenon since 2006, the year of last publication of the data in the annual relationship of Consob, had kept on growing.

By the analysis of the companies having the greatest capitalization value on April, 30th, 2010, it emerges that just 1 among the greatest 5 of those companies (characterized by a capitalization superior than 20.000,00 mlns €) has shareholders agreements. An interesting consideration can be effected subtracting from the value of the overhead capitalization of the listed companies that one of the first 4 companies that don't have shareholders agreements.

**Table 3.** Share Capitalisation of listed companies with shareholders agreements

Share Capitalisation of companies listed on 30.04.2010	%
269.857,56	
Share Capitalisation of listed companies with shareholders agreements on 30.04.2010	
130.340,41	48,30%

The table above represented underlines as, operating through the hypothesis above described, the relationship among the capitalization of the listed companies having shareholders agreements in comparison to the capitalization of the remaining listed companies results to be of absolute relevance, attesting approximately in a value near to 50%.

In a further step of analysis, it could be observed that the phenomenon has cross-functional value because of, apart little exceptions, it involves all the economic sectors in which Italian Stock Exchange has divided the listed companies.

**Table 4.** Shareholder Agreement for sector

	Sector	Total companies for sector	Shareholders agreements for sector	%	Capitalization for sector
1	GOODS	49	15	30,61%	42.038,37
2	CHEMICAL	5	1	20,00%	655,14
3	ENERGY	6	0	0,00%	83.995,79
4	FINANCE	60	31	51,67%	152.636,86
5	INDUSTRY	65	20	30,77%	40.287,86
6	WEALTH	7	2	28,57%	4.449,27
7	CONSUMER SERVICES	31	9	29,03%	18.669,69
8	PUBLIC TILITIES	19	11	57,89%	72.579,32
9	TECHNOLOGY	20	9	45,00%	1.968,25
10	TELECOMUNICATIONS	6	2	33,33%	20.892,18
11	OTHER	15	0	0,00%	716,21
		283	100	32,69%	438.888,94

The chart above represented allows to answer to a research question that wants to verify if come enterprise characteristics exist makes more probable that a company adopt a shareholder agreement respects to another one.

It appears meaningful to notice that there are 3 sectors in which the observed phenomenon is broadly above the middle values. It concerns particularly the sectors Finance, Public Utilities and Technology.

A possible motivation of the strong presence of shareholders agreements inside the Public Utilities and Technology sectors could be find in the fact that those are sectors in which it is possible to see high-intensities investments and long period economic return. Such aspect would explain the necessity from the partners to stabilize the decisions and the structure ownership in the long term period.

To the meantime, as it regards the Finance sector, in the chart under exposed it is shown a further examination on the base of the under-sectors in which the same main sector is divided by Italian Stock Exchange.

**Table 5.** Shareholder Agreement for sub-sector

	Sub-sector Finance	Total companies for sub-sector Finance	Shareholders agreements for sub-sector	%
1	INSURANCE COMPANIES	8	5	62,50%
2	BANKS	20	10	50,00%
3	REAL ESTATE COMPANIES	11	4	36,36%
4	FINANCIAL SERVICES	21	12	57,14%
		60	31	51,50%

It is possible to notice that in the sectors of Insurances, Banks and Financial services the high presence of shareholder agreement could be explained by the fact that the assets of such society is characterized by the presence of shares in another companies whose management needs a stable accord to furnish clear indications to the controlled companies.

With reference to the characteristics and to the typologies of the shareholders agreements, the study has found they have extremely variegated characteristics. To allow a first classification, shareholders agreements could be potentially of two typologies: voting right shareholders agreements or the transferring shares right shareholders agreements.

The situations is more complex because of often are integrated further clauses, even without specify in which classification the agreement is, making more problematic the analysis.

From the analysis made and represented in the chart over there, it emerges that it could not exist a prevalence of a

typology of agreement respect to the other one.

**Table 6.** Kind of Shareholder Agreements

Kind of shareholders agreements	Number of companies
Voting right shareholders agreements	82
Transferring shares right shareholders agreements	85

About this aspect, a further element of absolute interest could be furnished considering the companies that have adopted both the typologies of shareholders agreements, that are 67 in comparison with the wider 100. Therefore, prevailing choice when a listed company decides to adopt a shareholders agreements seems to be the one to have of both individual pacts (vote and block).

## 5. Conclusions

In conclusion, it is possible to observe that the phenomenon investigated presents characteristics of absolute relevance. Besides, the analysis has permitted to observe that the presence of the shareholders agreements suffers strong incidences, in terms of numerical presence and in terms of constituted characteristics of the same, in reason of the different sectors analysed. It is been able to observe, in fact, that some sectors, like Finance, Public Utilities and Technology, are that ones in which the shareholders agreements have the greater diffusion.

The considerations due in the course of the analysis are necessarily subjective and partial because of they derive from a purely descriptive investigation.

It is also opportune underline that the developed observations will have to be necessarily confirmed and subsequently deepened by a quantitative analysis that will concern mainly the following points:

1. "qualitative" analysis of the shareholders agreements and of the subjects that have indeed stipulated. In short, the aim is to analyse the subjects that have set in the shareholders agreements (if companies or persons, even belonging to the same family), so as to analyse if the agreement has been stipulated directly by the owner of the company or by the owner of the holding society;

2. analysis of the ownership and of the characteristics of the board of directors (number of managers and characteristics of the statutory auditors) of the companies that have adopted a shareholders agreements in comparison with the governance of the companies that have not adopted those agreements;

3. analysis of the main economic-financial indicators, together with the value of the capitalization value of the listed companies, with the aim to understand their evolution in accordance to the eventual change of the agreements, developing the analysis in a comparative level in comparison with that companies that, to the contrary, haven't developed those agreements.

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