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Shares as a Quasi-private Asset arising from Transferability Restrictions in American and Italian Jurisprudential Systems and Corporate Practice

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ABSTRACT

This paper examines the legal circumstances under which shares transferability may be restricted and in specific circumstances, outrightly prohibited. As points of reference and context, shares' transferability restrictions are examined under American and Italian jurisprudential systems. These restrictions may be imposed not only by public law through legislative acts and case law through court rulings but also by private law through provisions in firms' articles of association, bylaws and or internal memoranda. Discussion of these law classification then follows under i) the Anti-Outsider, ii) Anti-Performance Suboptimality iii) Anti-Trust, iv) Anti-Insider Trading and v) Anti-Foreigner restriction provisions. This taxonomy can be described as the five A's of share transferability restrictions. This thesis assigns and identifies shares as having not only a private but also a unique quasi-private characteristic. The identification and description of this quasi-private aspect of shares is a novelty in management and corporate law literature. Quasi-private shares subject to heavy transferability restrictions, inhibit a shareholder from exercising fully and freely their property rights. This article concludes by stating and after comprehensively demonstrating that share transferability restrictions are for the most part, the norm rather than the exception under American and Italian jurisprudential systems and corporate practice.

Keywords: *Anti-Outsider, Anti-Performance Suboptimality, Anti-Trust, Anti-Insider Trading and Anti-Foreigner restrictions, Quasi-private shares*

I. INTRODUCTION

(A) GENERAL OVERVIEW, EMERGENCE OF TRADE IN SHARES AND STOCK EXCHANGES

In western Europe, the formation of the first joint stock companies, that led to the eventual

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establishment of stock exchanges, occurred through the issuing of royal decrees by the Dutch, British and French governments. Early frontrunners include the East India Company that was formed to trade with the east Indies and Asia. Established in 1773, the London Stock Exchange is the oldest stock market in the world. However, following the failure of the British East India Company and in order to prevent fraudulent malpractices and exploitation of investors, the issuing and trade in shares was suspended in the United Kingdom until 1825. The New York Stock Exchange (NYSE) was established in 1792. The oldest American stock exchange is not the NYSE, but the Philadelphia Stock Exchange that was founded in 1790. The PHLX was purchased by Nasdaq OMX Group in 2008 and is today the second stock exchange in the United States.

It is commonly assumed that since shares fall under the classic definition of an asset, that they are freely transferable from one owner to another, on a willing buyer willing seller basis. This property would fulfill one of the conditions of a private good, namely their excludability. According to *Nicholson (2004),* a private good is *"an item that yields positive benefits to people".* While according to *Powell (2008),* a consumable and non-consumable private good has the following characteristics. (1) They are excludable where owners can exercise exclusive private property and consumption rights -thus excluding non-owners from such rights, (2) are rivalrous and (3), scarce. Further, according to *Klein & Robinson (2011),* property rights form the following rights bundle. Namely, the right to use the good, the right to earn income from the good, the right to transfer the good to others, alter it, abandon it, or destroy it (the rights of ownership cessation) and the right to legally enforce these rights. These descriptions of property rights by *Klein & Robinson (2011),* reinforce the most critical characteristic of a private good, its excludability as defined by *Powell (2008).* In this study, these descriptions of property rights in private property will be used in the analysis of restrictions on transferability of shares in listed and close corporations with reference to Italian and United States jurisprudential systems and corporate practice.

There can be no doubt that shares held and owned by individuals are a private good /asset. The question therefore arises regarding the qualifying adjective, "quasi".

This thesis seeks to demonstrate that shares are a quasi-private good where an individuals' right to freely transfer shares from one person to another may in many specific instances be severally restricted, inhibited or prohibited. Unlike other asset goods such as real estate, where the right to dispose of or transfer private property is the sole discretion of the owner(s), the holder of shares may in certain instances be unable to fully exercise his/her right to sell personal property, without *i*) referring consent of non-owners or *ii*) meeting pre-defined conditions of non-owners.

This aspect of shares' transfer restrictions makes shares a quasi-private good under these defined circumstances.

While the concepts of *public* and *quasi-public* goods are commonplace in economic and management literature, this thesis' identification and description of a quasi-private good with specific reference to shares, is a novalty.

In economics and management literature, quasi-public goods are defined as the provision of goods such as health, toll roads and education services by government. Under the definition of a quasi-public good, many charactarists of a private good such as excludability and positive marginal costs of supply to an additional consumer are retained with the only distinction being provision of such private goods or services by the state, *Broadway et al., (1994).* Under this scenario, public provision of a private good is justified on the grounds of market failure, merit wants, externalities or distributional limitations, *(Hare 1998).*

Examples of public goods include services such as street lighting, public order and law enforcement services, national defence, emergency services (ambulances, fire engines etc), sewerage systems and so on. Public goods generally are provided free of charge and are non-excludable in as far as nobody can be excluded or prevented from mutually or individually enjoying them.

Shares become quasi-private due to transferability restrictions imposed by public law, by firms' articles of association/by-laws and or by a firms' internal memoranda. These restrictions limit a fundermental charactaristic of a private good, which is the right of asset owners to freely alienate or transfer this aspect of private property. This makes shares a quasi-private good under these circumstances and instances as defined in this thesis. However, in the rare instances that shares are not subject to restrictions on transferability, they retain their full charactarists of being normal private goods where their owners can enjoy full property rights.

Restrictions on transfer of shares belonging to employees employed by firms occurs through internal memoranda, contracts and notices. This point is in particular reference to restricted stock, performance stock and share options and similar stock. Both restricted shares and share options are forms of equity remuneration enjoyed by a special class of employees. Restricted shares are often used by firms to retain and or incentivize best performance by key employees in the attainment of predefined corporate objectives. Unvested shares are normally bought back by the issuing firm should the employee leave the firms' employment. While still on the firms' employment, the holder can vote, participate in annual general meetings and receive dividends. Restricted shares are often used by firms to motivate key staff typically managers or R&D

specialists to attain set milestones. In the United States, restricted shares are granted not purchased and may be forfeited if preset milestones are *i*) not met or *ii*) upon violation of Securities and Exchange (SEC) trading restriction provisions. This set of restrictions are classified in this thesis, as *Anti-Insider Trading* and *Anti-Performance Suboptimality* provisions. With *Anti-Insider Trading* being imposed by public law and *Anti-Performance Suboptimality* provisions being imposed by private law memoranda, contracts and notices.

This thesis therefore attempts to show that shares are a very special type of good and or asset and that can possess the character of being private *or* quasi-private depending on whether transfer restrictions apply to them or not. In addition, this thesis provides a comprehensive and useful descriptions of the types of restrictions on the transferability of shares that exist under Italian and United States jurisprudential systems and corporate practices for listed and close corporations.

(B) Historical Perspectives Of The Close And Listed Corporation In Italy

The corporate form in Italy dates back to Roman antiquity through an arrangement known as "*peculium", Hillman (1997).* Medieval ideas on the concept of limited liability date back to 11th century Italy. Under the "*commenda"* system, a managing partner assumed the physical risks associated with a voyage while the passive partner assumed the financial risks in funding a merchant vessel. On completion of the voyage the partners would divide the profits according to a predefined formula, *Williston (1888).*

More recent and formal Italian commercial law has its origins in the introduction of the French Commercial Code in 1807 during the era of Napoleonic rule. This Code also established the first stock exchanges in Italy. The French Commercial Code were adopted in the 1865 and 1882 as Italian commercial Codes following the founding of the Kingdom of Italy in 1861. The Code of 1882 established for the first time the regulation of companies limited by shares. Previously, promoters needed prior authorization from the state to establish autonomous companies as was the case of royal charters in Britain and the Netherlands.

The situation was rather different in Venezia Giulia, Tridentina and Trentino-Alto Adige (North and South Tyrol) which were then part of the now defunct Austro-Hungarian Empire. In these areas, the limited liability company form had been introduced by the Austro-Hungarian imperial law *Gesetz uber Gesellschaften mit beschrankter Haftung*-GmbH rgba No. 58 in 1906. This commercial statute remained in force up to the annexation of these territories from the defeated Austro-Hungarian Empire, by the Kingdom of Italy at the end of WWI. Legislative and legal system unification with the rest of Italy occurred in these territories through the *Royal*

Decree of 1928 by the then King of Italy Vittorio Emanuele III.

The *Civil Code (Codice Civile) of 1942* merged the Civil and Commercial Codes of Napoleonic origin into one Code. This law remained in force until it was amended in 1991 as a result of compliance of the 4th and 7th European Commission's directives. As mentioned above, the history of stock exchanges in Italy dates back to the promulgation of French Commercial Code in 1807 and its application in Italy in 1808. During this period of Italian history, Italy was ruled by France under Viceroy Eugene De Beauharnais the grandson of Napoleon Bonaparte. The Milan Stock Exchange was established in 1808 followed by those in Bologna, Genova, Venice, Turin and Palermo in 1861, 1855, 1875, 1850 and 1842, respectively. The Milan FTSE MIB based *Borsa Italiana SpA* is today the only stock exchange in Italy. The number of quoted companies has grown from 20 in 1900 to 421 including foreign firms, in 2017. This number of firms includes those listed in the AIM Italia Stock Exchange. AIM Italia is Borsa Italiana's market that specifically caters for the listing needs of Italian SME's in raising their capital requirements for expansion. Borsa Italiana SpA began operations in 1998 and is today a subsidiary of the London Stock Exchange. Piazza Affari as it is informally known, is regulated by the *Commissione Nazionale per la Societa e la Borsa* (Consob) and the Italian Ministry of Economy and Finance.

In 2003, the Italian parliament amended *Title V of the Civil Code* that regulated joint stock companies and co-operatives. The amendments which came into force in 2004, established new characteristics for limited liability partnerships, limited liability companies (Srl's, *Articles 2462 to 2483*) and joint stock companies (SpA's, *Articles 2325 to 2451 cc*). Innovative high tech Start Ups were recognized by *Law Decree 179* of 2012. Under Italian commercial law, there are three general types of firms. The following are the most common forms. These are:

- partnerships (*societa di persone*) and these can *be societa semplice, societa in nome collectivo (s.n.c.)* or *societa in accomandita semplice (s.a.s).*
- corporations *(societa di capitali)* and these can be *societa per azioni (S.p.A.)* or *societa a responsibilita limitata (s.r.l.)* and
- *co-operatives (societa co-operativa).*

The capital structure of SpA firms is divided into shares while the capital structure of Srl's is divided into stakes (*quota*). For the purposes of analysis in this thesis, these two types of business organizations will be considered. The Srl's are the most common type of business organization with limited liability. However, only the SpA's business form can be listed on the Milan Stock Exchange. Both the stakes (*quotas*) in Srl's *(Article 2470 paragraph 3 Italian Civil Code)* and SpA *(Article 2470 paragraph 2 ICC)* shares can be traded or transferred from one owner to another.

(C) Historical perspectives of the close and listed corporation in the United States

As indicated in the Introduction, during the 1600's the government of the United Kingdom began granting royal charters for the establishment of joint stock companies for overseas trade. These royal charters validity included Britain's 13 colonies in New England, North America. As has been discussed previously, these charters included the East India Company's monopoly for trade with India, among others. In the newly established colonies of New England, the Virginia Company was granted a Royal Decree issued by King James I in 1606 as a monopoly for trade with Britain's colonies in North America. Prior to the Declaration of Independence of the United States of America, corporations were unlawful in North America unless explicitly authorized by Royal Charter issued by the British Crown or an Act of Parliament of the United Kingdom. Through the amalgamation of investors' capital, joint stock companies were able to perform tasks that were too large for singular governments or individuals to perform for example, the construction of railways.

Following independence from the United Kingdom and until the late 19th century, forming a corporation in the United States of America required legislative acts of State assemblies. This practice closely mirrored developments in the United Kingdom. By the early 19th century there were only about 350 companies that had been formed through legislative processes *Blumberg, (1993).* The State of New York through the *Act Relative to Incorporations for Manufacturing Processes of 1811*, was the first state to pass a law regulating the establishment of limited liability companies by registration. The New England States of New Jersey, Connecticut and Delaware followed suit in 1816, 1837 and 1883 respectively *Smiddy, Cunningham et al, (2010).*

Today, more than half of American listed corporations and more than 60% of Fortune 500 firms are incorporated, domiciled and registered in the State of Delaware under the *Delaware General Corporation Law (DGCL).* The *Delaware General Corporation Law of 1899* is popular with entrepreneurs due to its business-friendly corporate legal structure, lower corporate and franchise tax rates, fewer shareholders rights against directors and Delaware's specialized corporate disputes, Court of Chancery. The Constitution of the United States of America grants liberty to entrepreneurs to incorporate their firms in any state regardless of whether they do business or are headquartered in that State *Paul vs the State of Virginia vol. 75 US 168 and Butler, (1985).* The American Bar Association published the *Model Business Corporation Act (2002).* The MBCA template has been adopted and is in use by 24 States, *Bebchuk, (2005).* The DGCL and the MBCA legal models are the statutory bedrocks of the corporate form in the USA.

(D) THE PLACE OF TRADE IN SHARES IN THE CAPITALIST ECONOMIC SYSTEM

The primary marketplace where shares are traded is the stock exchange. There can be little doubt as to the central role and importance of trade in shares to a national or to the global capitalist economic system. There is a strong body of literature that shows that there is a strong link between stock market development and economic growth. Since stock markets are where shares are traded and transferred from one owner to another, understanding the nature of applicable restrictions is important from an investors point of view. *Levine (1991)* and *Bencivenga et al., (1996)* demonstrate that the ease of trading shares is critical for economic growth. *North (1991)* argues that the lowering the costs of transferring ownership rights can lead to economic growth through the establishment of stock exchanges.

According to *Greenwood & Smith (1997)* large stock exchanges can increase saving mobilization costs thus facilitating resource allocation to productive technologies. *Levine (1991)* demonstrates through the use of an endogenous growth model, that stock exchanges can accelerate economic growth by enabling trade ownership of firms without disrupting a firm's productive activities while permitting market agents to diversify their investment and asset portfolios. *Levine* also demonstrates that stock markets can affect economic growth in two fundamental ways. Firstly, by improving a firm's efficiency through the dependence on human capital production externalities while improving a firm's efficiency through the elimination of capital withdrawals from firms. The second way stock markets can influence economic growth is through resource mobilization devoted to firms thus increasing liquidity for investment, improving firms' efficiency and reducing productivity risks.

Using an extensive data base of 24 developing and developed countries, *Goldsmith (1969)* was able to provide conclusive evidence of a positive relationship between the ratio of financial institutions assets to GNP and per capita output. Other studies *Levine & Zervos (1993); Levine & Zervos (1998); Beck & Levine (2003); Atje & Jovanovic (1993); Rousseau & Wachtel (2000)* have shown similar results that the development of stock markets is strongly correlated to real GDP growth rates and per capita income growth. The conclusions reached were that stock markets provided provide different financial services and opportunities to those provided by banks and other financial intermediaries. According to *Stiglitz (1994),* efficient stock market prices reflect all possible available information outcomes and that this lowered the need for painstaking and expensive efforts to gather more information for an investor's investment decision. The knock-on effect is that investors are able to make better investment decisions leading to better allocation of scarce resources among firms. Better resource allocation leads to higher investment efficiency and higher levels of economic growth. In addition, according to *Saint-Paul (1992); Obstfeld (1994)*; *Deveraux & Smith (1994)* stock markets increase global risk diversification opportunities that make high return, high risk domestic and international investments viable thus leading to improved cross-country allocation of scarce resources. Similar statements can be made of modern portfolio theory, *Markowitz (1952).* Stock markets are also important in increasing investor incentives to seek information about for their investment objectives, thus influencing positively on a firms' corporate governance, *Holmstrom & Tirole (1993); Kyle (1984).*

According to World Bank data *(https://data.worldbank.org/indicator/CM.MKT.TRAD.CD)* the total value of shares traded in world stock exchanges rose from US$ 1,747 trillion in 1984 to a peak of US$ 99,791 trillion in 2015. This exponential increase occurred within a time frame of only 31 years. The value of shares traded has since stabilized to about US$ 60,359 trillion in 2019. According to World Bank estimates, the total value of global economic output in terms of GDP was US$ 80 trillion in 2017 *(http://databank.worldbank.org/data/download/GDP.pdf).* These statistics indicate that shares are clearly the most valuable and traded type of asset in the world. With reference to the value of shares traded in the stock exchanges of the United States, in 1984 the total value stood at US$ 1,108 trillion. This figure had a pre-financial crises stock market crash peak of US$ 47,245 trillion in 2008. This figure has since declined to stand at US$ 23,192 trillion in 2019. Note these data refer to the value of shares *traded* and not to market capitalization with the latter having much higher values.

These data in themselves reveal an interesting feature regarding the decline in dominance of US stock markets and the growth in emergent stock exchanges in the international financial markets scene. In 1984, US stock markets accounted for 63.4% of the value of shares traded globally, this figure had fallen to 38.6% in 2019. In the Italian context, *(https://www.borsaitaliana.it/borsaitaliana/statistiche/statistiche-storiche/scambi/2020)* the total value of shares traded was just US$ 4,04 billion in 1984. However, this figure has since increased to US$ 738 billion in 2019. This represents a large exponential rise over the 35-year time period.

II. THE PROBLEM STATEMENT

Ignorance by investors, agents and sellers on the restrictions that in most cases govern the transfer of shares, can lead to dramatic and unexpected negative financial and legal consequences. Knowledge of the existence of these restrictions would lead to the avoidance of many of these often-punitive problems, hence the need for this study. As will be extensively discussed in Chapter II, knowledge of the existence of restrictions by market players, can lead to the avoidance of criminal penalties either in the form of fines, imprisonment or both. This is particularly the case of ownership by foreigners or a specific category of foreigners of shares in strategic industries such as defense, minerals, telecommunications etc. that may be imposed by legislative acts by government. Similar negative legal repercussions may be encountered in Anti-Insider Trading and Anti-Foreigner violations.

Indeed, ignorance of prevailing private law restrictions on the transferability of shares can lead to civil penalties and proceedings especially in the case of close corporations where a seller or buyer may be sued for violations of such restrictions. As is often the case, consent to transfer shares to a non-existing shareholder(s) often requires the permission of the existing shareholder group. Noncompliance can lead to legal proceedings against the infringing shareholder by the existing infringed shareholders.

Therefore, knowledge of the existence of these restrictions can lead to the avoidance of costly legal litigation both in terms of money and time, hence the need for this analysis. This example is particularly relevant to minority shareholders who are trying to escape oppression by majority shareholders. Knowledge of existing restrictions can, in addition lead to the avoidance of transaction and administrative costs normally associated with shares' transfers.

III. Purpose Of The Study

While the focus of study is the United States and Italy, this study can be used as an easily modifiable template for similar studies for states with similar or disimilar jurisprudential laws to those of these two countries. Towards this end, this study outputs four flowcharts illustrating the decision pathways that potential market players would need to follow in navigating the legal issues involving the transferability of shares as financial assets.

In addition, this study introduces the concept of a quasi-private good. In relation to shares, this study shows that shares are a unique financial asset that can have the dual characteristics of being either a private good or a quasi-private good depending on whether caveat transferability restrictions apply or not.

It is therefore the purpose of this study to provide a broad panorama of existing shares transferability restrictions that exists in the United States and Italy. It is an additional purpose of this thesis to demonstrate the shares restrictions can be classified into five general classifications. Shares restrictions can be either Anti-Outsider, Anti-Performance Suboptimality, Anti-Trust, Anti-Insider Trading or Anti-Foreigner. The first two characteristics exists because of provisions in private law specifically in a firms by laws/articles of association or internal memoranda while the latter three exist due to provisions in public law.

IV. Research Objectives

The primary research objective of this study is to enumerate specific circumstances under which shares' transferability is restricted or prohibited in relation to:

1) Exclusively public law in the United States and Italy in the case of listed companies,

2) Exclusively private law in the United States and Italy in the case of close corporations and

3) Jointly public and private law in the United States and Italy for both listed and close corporations.

4) Demonstrating that restrictions in the transferability of shares is the norm rather than the exception in Italian and American jurisprudential systems and corporate practice.

5) Demonstrate the quasi-private character of shares.

6) To analyze, compare and contrast similarities and differences in law between the United States and Italy with regard to the above situations 1 to 3.

V. Literature Review

According to *Andre (1978),* close corporations use restrictions on the transfer of shares for purposes of control by existing shareholders. Existing shareholders can exercise control to exclude unwanted entrants from joining the shareholder group, to prevent key personnel from leaving the corporation or to prevent members of an existing shareholder group from acquiring shares of other members of an existing shareholder group. This last point could be detrimental to maintaining the equilibrium status quo within an existing shareholder' interests' group. Were the last restriction not in place, an existing shareholder with adequate resources, would easily change the balance of the shareholder group and even acquire a controlling interest to the detriment of other existing members of the shareholder group in the firm.

Bertrand, Hakkala et al., (2010), further note that most countries in the world have laws that can be used to block foreign acquisitions for reasons of national security. And that most countries can extend the application of these restrictions to not just strategic industries but to also R&D intensive industries and greenfield champions. The Linear-quadratic-Cournot model they develop shows that blocking foreign acquisition of local firms is welfare improving if and only if the combination of synergies and initial quality is sufficiently low. *Bertrand, Betschinger & Settles (2016)* present an interesting analysis on how in a mixture of economic nationalism, political affinity alignment or misalignment can increase or decrease the host government likelihood of impeding a foreign firm from acquiring a local target firm. With regards to R&D champions *Bertrand, Hakkala et al., 2012* maintain that governments encourage greenfield foreign direct investments in R&D intensive industries while discouraging foreign acquisitions of domestic high-quality firms. In this thesis, this behavior by governments in strategic and sensitive sectors is classified as Anti-Foreigner provisions. These restrictive provisions are codified in public law and examples abound in United States and Italian jurisprudential systems as will be exhaustively discussed in Chapter II of this thesis.

Benedetto (2016) provides an extensive description of restrictions on the transferability of shares with respect to sensitive and strategic sectors of the United States, EU and in particular in Italy. *Benedetto* lists strategic sectors according to EU and Italian classifications as follows; the defense, national security, 5G technology, energy, transport, banks and other financial institutions, communications and high-tech sectors.

Bertrand et al., (2016) define political affinity, a term borrowed from international relations theory, as the similarity of alignment in political ideology and interests by states and governments in global affairs. While many governments actively encourage the setting up of greenfield investments (e.g., in FDI's), restrictions on the foreign acquisition of local firms are commonplace. *Enderwick, (2011); Heinemann, (2012); Bertrand et al, (2016)* argue that the nationality of the acquirer can play a decisive role in a host government blocking a foreign acquisition of a domestic firm irrespective of the strategic nature or otherwise of the sector in question.

Higher political affinity on the other hand, translates into a lower perceived level of strategic or other threat that lowers potential conflict in political, economic or other terms, *Dixon &Moon, (1993); Gartzke, (2000).* The converse is true that lower political affinity between the host government of the acquirer and the host government of the target, will increase the likelihood of unfavorable government intervention. These unfavorable government interventions can take various forms on the basis of a host government's *de jure* or *de facto* ability to intervene as discussed by *Dine & Erel, (2013).*

Indeed, one of the discussion themes of this thesis is restrictions on the transferability of shares in strategic sectors and domestic R&D champions. This theme falls under the Anti-Foreigner provisions as introduced in this thesis. The level of political affinity is of high relevance based on the nationality of the acquirer. But as shall be demonstrated in the Chapter II, in the case of the United States and Italy jurisprudential systems, in some instances even with high political affinity, outright prohibitions to the acquisition of shares in firms operating in some sectors may be imposed on all investors irrespective of nationality.

Ghebrehiwet & Motchenkova, (2017) discuss the relationship between foreign direct investments, foreign ownership restrictions and technology transfer in the resources sector. The authors find that foreign ownership restrictions may limit FDI crowding out effect as opposed to forming joint venture with domestic firms. Joint ventures between foreign MNCs and domestic parastatals are often used by government to capture rents from domestic natural resources. Often local firms lack the financial and technological know-how to exploit domestic natural resources. Governments can also directly restrict the equity share of foreign firms by becoming part of the shareholder group in order to reduce the crowding out effects.

Holderness (2003) demonstrates how English inheritance law has evolved to facilitate transferability by moving from the group approach to joint ownership and by discouraging joint ownership of assets. *Holderness* uses four general approaches by which joint property has been held historically and across legal jurisdictions- the group approach, the organizational approach, the partnership approach and the corporate approach. And the influence these diverse approaches have had on alienability. Alienability is defined by economists as the opportunity and the incentive to transfer resources to higher-valued uses. *Holderness* defines joint ownership as the situation where several people simultaneously have the right to benefit from the exercise of a particular right associated with an asset. A central approach to Holderness's analysis is whether an *open* or *closed* class of individuals are assigned the right to receive the benefits produced by a joint asset. A class is closed when individuals can enter the class and therefore obtain the rights to receive the benefits produced by a joint asset. A closed class can be accessed only by first obtaining the permission of a current member of a class. Closed classes include shareholders of for-profit firms. *Holderness* correctly states that a fundamental characteristic of private property is a closed class of beneficiaries. This characteristic is always satisfied with individual property but is only sometimes satisfied with joint property holding.

Holderness comes close to distinguishing the difference between private and quasi-private character of shares without quite doing so. The four-property rights approach to joint ownership identified by *Holderness* are Group, Organizational, Partnership and Corporate. On the transferability of individual beneficial ownership interest *Holderness* is of the view that for Partnerships transferability is *"possible but often restrictions on transfer"* while for Corporate transferability is *"possible and* seldom *restrictions on transfer"*. By the term "seldom" *Holderness* implies that restrictions on transferability of shares are "not often" and "rare" which is the anti-thesis of the position of this study. It is the thesis of this study to demonstrate that restrictions on the transferability of share are commonplace from the point of view of private and public law and that they are in actual fact the norm rather than the exception. In corporate law literature the transferability of shares is seen as largely free. For example, *Ireland (2010)* states that, *"unlike the ordinary partnership, the joint stock company is a business association built around a relatively small number of specific people around a capital fund composed* of freely transferable shares *owned by a large and fluctuating body of company members".*

Moreno-Leon (2008) holds a similar position by stating, *"the free transferability of shares common to public corporations is not present in close corporations".* However, has shall be discussed in a later section of this study the free transferability of shares in public (listed) corporations is restricted by four of the five A's of the transfer taxonomy. These being Anti-Performance Suboptimality, Anti-Trust, Anti-Insider Trading and Anti-Foreigner public law provisions. Nonetheless, *Moreno-Leon* correctly states that in close corporations, there is a restriction in the ability of investors to alienate their shares. This type of restriction is named as Anti-Stranger provisions in this study and forms part of the five A's shares transfer restrictions provisions taxonomy.

According to *Painter (1960)* under United States jurisprudence, *"the basic question is whether a doctrine which relates primarily to real and tangible personal property should be applied to stock which although expressly declared by many statutes to be personal property, also has some characteristics of a contract….but for the most part courts have been content to equate stock and personal property and apply a supposed public policy against restraints". Painter* maintains that the rights of minority shareholders would be best protected by requiring that restrictions be set forth in the corporate charter.

The most frequently found prohibition is sale of stock to an outsider unless first offered to the corporation and the remaining stockholders, *Hornstein (1950).* This is restriction is named in management corporate law literature as the right to first refusal or first option. Another frequent requirement is that a shareholder who ceases to be employed by the firm *must* first offer to sell his shares to the firm or its other shareholders. In addition, under the New York Stock Corporation Law section 66 the corporation has the power to refuse to a transfer if the shareholder is indebted to the corporation. *Hornstein* mentions other restrictions include the need to seek approval from the board of directors and restrictions barring transfers to competitors.

Karabay (2010) examines a host governments' motivation for restricting ownership shares of multinational corporations (MNC) in foreign direct investment (FDI) projects. Host governments are desirous in capturing a MNC's surplus but is impeded from capturing it due the MNC's private information about its firm specific advantage(s). A host government can remedy this information constraint by using ownership restrictions to force a joint venture with a domestic firm. *Karabay* observes that the optimal mechanism involves ownership restrictions that decrease as the size of the MNC's firm specific advantage(s) increase (e.g., patents, expertise, managerial, organizational, manufacturing practices, trademarks etc.). The value of FDI in 1998 stood at 14% of world GDP but notwithstanding its many advantages such as technology spillovers, international trade integration, globalization etc. restrictions on FDI are fairly common with the most obvious one being foreign ownership restrictions, *Karabay.* Host government purpose of the ownership restriction policy is never to limit access to foreign firms but the capture of rents from the MNC's activity. Property rights theory, *Grossman & Hart, (1986); Hart &Moore, (1990); Hart, (1995)* states that ownership rights affect ex-ante investment decisions through their influence on the distribution of ex-ante surplus. The host government wants to maximize its welfare that includes its tax revenue and any possible profit of the domestic joint venture partner but faces an asymmetric information deficit of the MNC's surplus. The remedy to this asymmetric information deficit is to force ownership restrictions through the participation of a domestic firm. The domestic firm will be in a position to seal the asymmetric deficit problem because it can monitor Joint Venture cash flows by exploiting its ownership control rights. *Karabay* concludes by stating that under incomplete information, ownership restrictions can be welfare- improving through the reduction of information deficits of the host government.

Under Dutch private (close) company the BV or *Besloten Vennootschap* the transfer of shares is restricted subject to either the approval of a certain corporate body or to compliance with the pre-emption rights of other shareholders, *Kluiver (2007).* Dutch company law provides minority shareholders with an innovative right to be bought out. This right is conditioned on the need for a minority shareholder to demonstrate that the company's affairs are being conducted in a manner that is unfairly oppressive and or prejudicial to the interest of members. *Kluiver* advocates for the right of a minority shareholder to exit the shareholding group provided that a reasonable notice period is observed and if additional costs of financing are considered.

The repression and exploitation of minority shareholders can find full expression in a close corporation, *O'Kelly &Thompson (2003)*. The resulting majority opportunism is any one of the following situations arise in a close corporation, 1) When the principal of majority rule is applied based on the number or percentage of shares held; 2) Functions separation between shareholders, directors and management; 3) Absence of guaranteed employment or dividend rights for all shareholders and 4) The impossibility of applying the corporate unilateral dissolution mechanism, *Millar (1997).*

Easterbrook & Fischel (1991), stress the advantages of corporate governance of close family corporations from a principal-agent point of view and hold that these advantages require share transferability restrictions. *Sund & Bjuggren (2012)* identify four categories of restrictive clauses. These are 1) Prohibitive clauses where transfers are expressly forbidden with for a period of time or perpetuity excluding transfers due to inheritance. 2) Consent clauses which oblige the shareholder to seek authorization from the shareholding group, the board of directors or the annual general meeting. 3) The right of first refusal clauses obliges a shareholder to inform the BoD and who in turn the other members of the shareholder group or the shares can be purchased by the company based on fair value. 4) Post-sale purchase right obliges the acquiring shareholder to inform the BoD who in turn inform the shareholding group. Members of the shareholder group has the option of buying the shares. 5) Mandatory buy-sell agreement obligates the shareholder group to purchase the shares of a member to wishes to sell his/her shares or who becomes deceased. Mandatory buy-sell agreements are particularly common in the USA. According to *Sund & Bjuggren* the protection of family ownership is of critical importance. Unwanted acquisitions by outsiders may jeopardize and upset delicate and fruitful cooperation among members and threaten the position of a CEO family member.

Team production and moral hazard problems can be solved by allocating residual income rights to stakeholders supplying critical contributions. Stakeholders include employees but suppliers, lenders or customers *Hansmann, (1996)*.

Successful Spanish Mondragon cooperatives have incentive schemes by which stakeholders providing critical contributions in fostering sales growth participate in ownership and governance that results in producing competitive advantages over rivals *Turnbull (1995)* The allocation of these rights motivates such stakeholders to make more collaborative and efficient behavior due to the fact that it enables them to earn part of the profits generated by their actions *Blair (1996), Zattoni (2011)* by assigning shares to critical stakeholders. It is commonplace in many high-tech firms to find stock granting plans targeting employees into buying shares at a special price *Weeden etal, (2000).* Stock granting plans include stock options plans and Employee Share Ownership Plans (ESOPs) *Lawler, (2000).* Such schemes are particularly diffuse in the USA and in include Scanlon, Rucker and Improve-share *Kaufman, (1992).*

According to *Blasi et al., (2003)* as much as 23% of the total private sector workforce or about

24 million workers are involved in some form of employee ownership. While Scanlon, Rucker and Improshare are mainly cash bonus schemes, of interest to this study are ESOPs because they involve the issuing of shares to employees and the shares so issued have transferability restrictions. ESOP's are extensively discussed under Anti-Performance Suboptimality provisions in Chapter II of this thesis.

A large, sizable gap exists in employee ownership between the USA and the EU. Only about 5% of work sites of EU firms have employee ownership compared to 23% of US workers in the private sector. There is in addition no evidence of broad-based use of stock option plans in the EU compared to their widespread prevalence in the USA the majority of employee owners are concentrated in listed corporations in the USA while employee shareholders were concentrated in close corporations in the EU. *Blasi et al., (2003).* Of the EU countries surveyed, Italy had an employee ownership rate of just 2% *European Foundation, (1997).*

Weeden, et al., (2000) state that growth is particularly high among corporations that adopt stock option plans that covers most of non-management employees. Results from their study demonstrate that support for the idea that broad based stock option plans increase firm productivity and do not harm firm performance. This leads to the suggestion that fast-growing firms can find stock option plans to be an important tool of attracting and retaining employees while maintaining high business growth.

According to *Cuidan, (2017)* the explicit regulation of the autonomous character of the limitation on share transfer in articles of association and their effectiveness of the restrictive clauses has consensus in academia. It is necessary for judges to distinguish all forms of legal effect of restrictive clauses in restraining shares transfer according to different perspectives of long- and short-term contracts in a firm's article of association.

The European Commission's desire for harmonization of European takeover regulation is inspired by the assumption that takeovers enhance efficiency *Clarke, (2006); Jackson & Miyajima, (2007).* Within the EC there is an ideological "clash of capitalism" between the LME (liberal market economy) shareholder value-oriented approach and the CME (coordinated market economy) stakeholder capitalism approach *Hall & Soskice (2001); Kelly at al., (1997).* According to *Clift, (2008)* these two different approaches to corporate governance nexus have diverse consequences to the possibility, impact and prevalence of corporate takeovers. The CME ideology emphasizes competitive market arrangements to coordinate firm activities with suppliers of financing in stock markets rather than banks or institutional processes. By contract the CME approach emphasizes nonmarket interactions, institutions relationships and modes of coordination to firm financing.

According to *Manne, (1965)* in the face of takeovers and especially hostile takeovers, market discipline is brought to bear on the operations and behavior of management. Suboptimal managerial performance can lead to punishment by stock markets by rewarding shareholders with higher share prices in the form of takeover bids. A successful hostile takeover would almost immediately lead to the dismissal of incumbent managers by the new owners. This is the core of shareholder value in LME ideology.

The threat of hostile takeover bids has a major impact on executive and firm behavior. Several defense tactics are normally employed to impede hostile takeovers. The first are "pre-bid" restrictions which confer differential (higher) shareholder rights in "golden shares", limitations on certain shareholders voting rights, voting ceilings, multiple votes and the "poison pill". Poison pills are *Monks & Millow, (2004)* "'*rights or warrants issued to shareholders that are worthless unless triggered by a hostile acquisition attempt. If triggered, poison pills give shareholders the ability to purchase shares from, or sell shares back to, the target company".* This defense tactic considerably raises the cost of a bid thus impeding a potential hostile takeover. Once a hostile takeover is launched, "post-bid" defense tactics include divestures that sell off or lock up prized assets that makes the firm less attractive to a hostile offer, share buybacks and the issuing of new shares to friendly anti-takeover shareholders and so on.

To counter such moves that impede the free market for bids through, "board passivity" and "mandatory bid" the EU introduced provisions (through *Articles 9 & 11*) that neutralized these defensive tactics employed by insiders to frustrate takeovers. Anti-mandatory bid provisions required that once a controlling (75%) threshold, in accordance with national company law is reached, the new majority could annul structural defense devices *Knudsen, (2005); Menucq, (2006)*. Board passivity are any post-bid frustrating actions by managers and board members.

The European Parliament however made operationalization of *Articles 9 & 11* optional on member states based on the principal of "reciprocity". The principal of reciprocity was meant to address the issue of a level playing field amongst firms in member states. Specifically, Article 12(3) determined that a member state through national legislation, exempt firms from invoking Articles 9 & 11 if they receive a hostile offer made by a company that does not apply the same Articles as the target firm or by a firm controlled indirectly or directly by the offering firm. The offering company may be an EU firm, but it remained unclear whether these Articles applied to non-EU firms *Menucq, (2006); Clarke, (2006)*.

VI. Restrictions On The Transferability Of Shares In Close Corporations In Italy

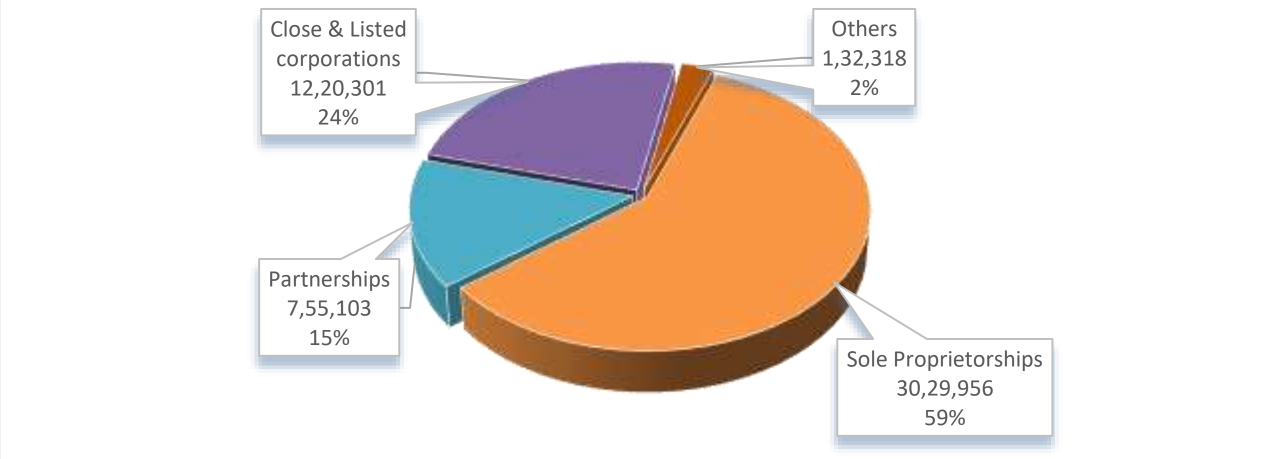
(A) Anti-Outsider restrictions applicable to close corporations in Italy

By way of definition Anti-Outsider provisions are those provisions in a close corporations articles of association that inhibit, restrict or prohibit the alienation of shares by a member of a shareholding group to an individual or entity outside the core shareholding group. An outsider is that individual or entity who is a stranger to the rest of the core shareholding group.

Anti-Outsider provisions in Italian close corporations are contained in the articles of association (*atto costitutivo*). The Codes of Commerce of 1921 and 1925 (*Commissione Reale per la Riforma dei Codici, Sottocommissione B, Codice di Commercio, Vol.1 Articolo 149*), provided default rules establishing non-transferring shareholders pre-emption rights. *Article 149* stated *interalia* that "*unless established otherwise in the articles of association shares are transferable according to a public deed with pre-emption rights and conditions in favor of the other shareholders*". Restrictive clauses of Italian close corporations include clauses requiring the consent of other shareholders to effect a transfer (*clausole di godimento*), clauses granting shareholders pre-emption rights of first refusal (*clausole di prelezione*), clauses prohibiting pledges and usufruct of shares (*clausole impeditive e limitative del pegno e che limitano il godimento*) and clause of absolute prohibition (*clausole di intresferibilita assoluta*), *Giovagnoli (2010); Maffei (2011).*

According to *Vicente (2014),* from analysis of the Aida database *"most articles of association of companies selected provided restrictions on transfer of shares".* The dominance of family firms to the Italian economy and corporate landscape cannot be overemphasized. According to *L'Osservatorio AUB* Italy is one of the European countries with the highest number of family businesses. It is estimated that there are 784,000 family-owned businesses in Italy representing more than 85% of all business and generating 70% of all employment. According to the data from the Chambers of Commerce of Italy (Camere di Commercio di Italia) www.infocamere.it, as of 2019 there were 6,091,971 registered firms of all judicial forms in Italy. Of these 5,137,628 were active. According to judicial form, registered close corporations in the form of SpA's and Srl's (*societa di capitali*) totaled 1,763,011 while those actually active totaled 1,220,301. Partnerships (*societa di persone*) totaled 966,872 while those actually active totaled 755,103. Sole proprietorships (*imprese individuale*) totaled 3,151,407 of which those actually active totaled 3,029,956. Other types of firms (cooperatives, consortiums etc) totaled 210,681 of which those active totaled 132,318.

Figure 1: Active firms in Italy, 2019



Source: Chambers of Commerce of Italy, 2019.

Of interest to this thesis is the 1,220,301 active close and listed corporations that consist of SpA's and Srl's. As discussed in Chapter I, these are limited liability companies whose shares and quotas can be alienated albeit with restrictions or untransferable with outright prohibitions. In addition, these 1,220,301 closed and listed firms consist of consist of family and non-family firms. It is safe to assume that most family firms begin and are founded initially as sole proprietorships. Due to the desire of the founder to include close family relations in the affairs of an expanding sole proprietorship, there comes the need to protect the family patrimony from creditors. The only possible alternative would be to upgrade to a limited liability firm in the form of a Srl. and eventually, as the business expands to a SpA.

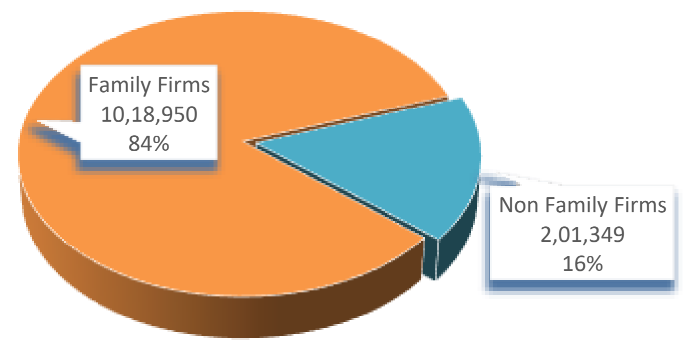
Sole proprietorships are most likely to be micro enterprises defined as firms with <5 employees and the close and listed corporations would most likely be small, medium and large enterprises (SM &L E's).

For the motive of protecting family patrimony from creditors, family firms (FF's) will most likely be Srl's or SpA's instead of partnerships. Of particular interest to this study is the significant family firm segment of close and listed corporations that number 1,220,301 firms in 2019. As discussed in Chapter I the primary motive of including transferability restrictions in articles of association, is to exclude the possibility of an "outsider" from entering into a close-knit core shareholder group without the consent of the other shareholders. It is clear that the need to exclude "outsiders" from the shareholding group would be even more critical in the case family firms *Sund & Bjuggren, (2011)* . The objective of share transferability restrictions in family firms would be to keep the shareholding group to be strictly within members of a family group *Sund & Bjuggren, (2012).* For this reason, it can safely be assumed that all close family firms have severe shares transfer restrictions to persons or strangers from outside the core family shareholder group.

According to *Aida* definitions, a small enterprise has revenues of between €20 to 50 million whereas large enterprises are defined as having revenues in excess of €50 million. In a study conducted by the Bank of Italy and AIdAF, the Italian Association of Family Firms, family firms represent 93% of total companies in manufacturing enterprises with at least 50 employees. According to *Instituto Nazionale di Statistica, Istat* (Italian National Institute of Statistics) 85% of Italian companies are family firms, while *Corbetta et al., (2016)* estimates this number to be 82%. The average of the two percentages is 83.5% which means of the 1,220,301 close and listed corporations in Italy 1,018,950 are family firms this totals are summarized in Figure 2.

Given the fact that 83.5% of Italian close corporations are family firms, it inevitably follows that these firms will have severe restrictions on transfer of shares to outsiders. And given the findings of *Vicente (2014)* that the vast majority of close corporations have restrictive share transfer clauses in their articles of associations, it would be safe and reasonable to presume and conclude at least 83.5% of Italian close corporations have shares transfer restrictions. The automatic implication of these data is that in this segment of firms, share transfer restrictions are the norm rather than the exception. Below are pie charts representations of active Italian family and non-family firms in 2019.

Figure 2: Number of Italian family and non-family close corporations, 2019



Source: Istat, Aida 2019.

(B) ANTI-PERFORMANCE SUBOPTIMALITY RESTRICTIONS APPLICABLE TO CLOSE CORPORATIONS IN ITALY

By way of definition, Anti-Performance Suboptimality restrictions are those provisions that inhibit or prohibit the transfer of shares unless until certain predetermined corporate performance thresholds or milestones are achieved. Anti-Performance Suboptimality provisions are linked the issuing of shares to employees. These shares can be issued as stock options such as non-qualified stock options, incentive stock options and restricted stock. Shares so issued carry share transfer restrictions on shareholders in the form of lockups. Stock incentive plans (SIP's) or employee stock option plans (ESOP's) have performance optimality conditions. If these performance optimality conditions are not attained by employees, then these shares cannot be fully owned or alienated. SIP's and ESOP's therefore have strict Anti-Performance Suboptimality provisions.

According to *Barca & Becht, (eds 2001)* SIPs are effective tools in linking managers' remuneration to a company's share value. Their study shows that stock option plans account for as much as 98% of the correlation between the Chief Executive Officer's compensation and company performance, while base pay and bonuses impact by 2%. The study by *Zattoni, (2000)* showed the increased diffusion by large Italian firms, of SIP's and the prevalent characteristics of equity incentive plans. In Italy, the enactment of the tax reform of January 2008, provided strong incentives for beneficiaries for the adoption of SIPs. Fiscal measures were enacted that allowed tax exemptions for shares received through a SIP issued by Italian companies. The main restriction imposed on SIP's are lock up agreement clauses that prohibit the sale of this class of shares to outsiders before a set or defined period of time. Due to their specific nature Stock Incentive plans exist in the internal memoranda of companies because they are employer to employee contracts. Stock option plans are drafted and approved by a firms board of directors through internal memoranda. Startups lacking in cash can offer employees stock options as a staff retention and incentivization tool.

Typically, stock grants assign shares free of charge or under very favorable payment terms. Restricted stock plans can be sold or given back to the employee if specific corporate goals are unmet. Once these shares are issued there is a vesting period which must lapse before an exercise period expires in which a set purchasing exercise price is met. After the expiry of the stock option vesting period employees earn the right to sell or otherwise alienate the option. Usually after the attainment or a pre-defined performance milestone e.g. The attainment of a certain return on investment/equity, earnings per share or share market price. When the exercise price exceeds the market price the shares can be sold in the market for a profit (that is when the option is "in the money"). For this reason, employee performance must be optimal in order for shares acquired under an option incentive plan to reach a market value > the exercise value. This means that SIP's have an Anti-performance suboptimality provision. While overall, the amount of shares transferred to employees through SIP's and ESOP's is small relative to a firms' total shares the relevance of transfer restrictions is the subject matter of this study.

(C) Anti-Trust restrictions applicable to close corporations in M&A's in Italy

By way of definition there are two technical terms here, *i)* anti-trust and *ii)* mergers & acquisitions. Anti-trust provisions in public law are those provisions that are designed to prevent the accumulation by firms of monopolistic powers, abuses, tendencies and practices that stifle competition in specific economic sectors. Anti-trust law provisions target many anti-competitive behavior by firms such as price fixing, creation of cartels, market allocation, bid rigging. When acquiring firm buys the shares of a target firm to the extent that the acquiring firm acquires a controlling stake in the target firm an acquisition would have occurred. The target firm either becomes a subsidiary of the acquiring holding firm with a separate identity or the target company can be fully merged into the acquiring firm thus losing its original identity. In the later instance a merger would have occurred. An acquisition can either be friendly or hostile. The transfer of shares resulting from a merger and acquisition can be prohibited if that M&A will result in a violation of anti-trust laws.

Of relevance to this study, are anti-trust provisions as that relate to anti-competitive behavior by firms as a result of corporate mergers and acquisitions. The essential reason for the relevance of anti-trust laws to this study stems from the fact that transfers of shares are involved in mergers and acquisitions. This subsection discusses the restrictions on the transfer of shares imposed on mergers and acquisitions, by Anti-Trust public law provisions in an effort to impede market concentration through anti-competition behavior in Italian closed corporations.

Law No. 287/1990 (Norme per la tutela della Concorrenza e del mercato) established the intial rules governing mergers and acquisitions in Italy. As a member of the European Union, Italy is bound by legislative acts passed by the European parliament. Mergers and Acquisitions are regulated by Directive 2005/56/EU applicable to cross border mergers and the *European Union Merger Regulation 139/2004* (aka *"EUMR"*). In exercise of community dimension, the European Commission has exclusive competence if a concentration if a combined business has worldwide revenues in excess of € 5 billion and a community wide business in excess of € 250 million. EC intervention becomes necessary where a merger and acquisition would significantly impede effective competition within the common market and result in the strengthening of a dominant position. According to Article 3.1 EUMR 139/2004 "*change of control on a lasting basis results from (a) the merger of two or more previously independent undertakings…(b) the acquisition…if direct or indirect control of the whole or parts of one or* *more undertakings*".

In determining the single and sufficient condition for incompatibility with EU merger regulation, the EC uses the "SIEC" test the acronym for "significant impediment to effective competition".

Italy has several public anti-trust oversight authorities that can impede a merger of acquisition that involves the transfer of shares. The Italian competition authority *Autorita Garante della Concorrenza e del Mercato (AGCM)* was established by Legislative Decree *(Decreto Legislativo)* n. 287/1990. The media and communications sectors are regulated by the Italian authority of communications *Autorita per le Garanzie nelle Communicazioni (AGCOM)* and was established by Legislative Decree *(Decreto Legislativo)* n. 249/1997. Specific anti-trust limits applicable to mergers and acquisitions in the media and communications sector are contained in Article 43 of the Code on audio visual media services Legislative Decree *(Decreto Legislativo)* n.177/2005; Article 1 of Law Decree n. 249/1997 and AGCOM resolution n. 368/14/Cons.

One of the cardinal duties of the Italian anti-trust authority, AGCM is surveillance over takeovers that result from M&A's by controlling industry concentration ratios in order to check increases in possible abusive accumulation of market power. Anti-trust economists (and the EU in accessing market "density") use the Herfindahl-Hirschman Index (HHI) and the concentration ratio [CR(n)] to control for market power domination arising from mergers and acquisitions. The AGCM has statutory powers to prohibit a proposed merger & acquisition.

The N-firm concentration ratio is: CRn = C1 + C2 + C2 + …+Cn

Where Cn is the market share of the n^{th} largest firm in the industry and n is the number of firms included in the calculation of market ratio. This ratio shows the cumulative market share of the N biggest firms in a particular market or sector. For instance, if the 3-firm concentration in the Italian TV sector is 0.88, it means that the cumulative market share of the 3 largest TV broadcasters in Italy is 88%. The Herfindahl-Hirschman Index aka the HHI-score or HHI-index, is named after its inventors anti-trust economists Orris C. Herfindahl and Albert. Hirschman. Conditions of perfect competition exist when CRn = n/N. Where N is the total population of firms in a market or sector and where n is a sample of this population. All firms will have theoretical equal market share. Low concentration rations vary from 0 to 0.4. Medium concentration ratios range from 0.41 to 0.70 and suggests the existence an oligopolistic market structure where a sector is dominated by a few firms with each having significant market share. High concentration suggests the existence of an oligopoly at the very least or a duopoly or a monopoly. High concentration ratios range from 0.71 to 1.

However, AGCM uses legal provisions as provided by *Legislative Decree 287/1990,* EU Jurisdictional notices and case law in determining the notification thresholds. In Italy, prior to 2012 the premerger filing and notification to AGCM is necessary when the combined revenue turnover in Italy and its non-Italian business exceeds € 498 million or when the Italian target revenue turnover are in excess of € 30 million. However, from 2013 these two alternative conditions became cumulative meaning that the new threshold is € 515 million due to an amendment to *Legislative decree 287/1990.* Both thresholds are adjustable according to the Italian GDP price deflator index. In terms of corporate control, it is not necessary that the acquiring firm control the majority of shares of the target firm. Rather under *Legislative Decree 287/1990*, a minority shareholding may constitute a concentration insofar as its shares are sufficient to confer either on its own or with others in the shareholding group effective de facto control of the strategic commercial decisions of the target.

joint ventures are subject to AGSM merger control if it constitutes a concentration and as long as the joint venture has as its primary objective the coordination of the actions of the independent undertakings. According to *Article 19.2 of Legislative Decree 287/1990* the penalty of non-compliance to notification obligations of a proposed merger & acquisition is a fine not exceeding 1% of turnover of the undertaking. This is a very heavy fine because if the minimum threshold of notification is € 515 million, then the fine is €5.15 million. In the case of hostile takeovers, notification is required immediately after the official declaration to bid for the target firm but not later than the date of notification to Consob.

According to EU definitions EC recommendation 2003/361 and the Italian ministerial decree of 18/04/ 2005, SME's are firms with <= € 50 million. The number of Italian close corporations that would meet the criteria of notification to AGSM merger and acquisition control is therefore very small. Indeed, according to www.reportaziende.it there are only 406 Italian firms with the annual revenues of at least € 498 million that would come close to meeting AGCM's notification threshold. Therefore, Anti-Trust provisions in Italian public law would apply to very few firms. Mergers and acquisitions of and by the overwhelming majority of the 1,220,301 close corporations would be permissible under EU and Italian law.

(D) ANTI-INSIDER TRADING RESTRICTIONS APPLICABLE TO CLOSE CORPORATIONS IN ITALY

Anti-Insider restriction provisions are imposed by public law for trading in publicly traded shares. Therefore, these restrictions are only applicable to listed corporations. Shares of close

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corporations cannot be quoted or traded in the Milan Stock Exchange for this reason, Anti-Insider Trading provisions by definition, cannot apply to close corporations.

(E) ANTI-FOREIGNER RESTRICTIONS APPLICABLE TO CLOSE CORPORATIONS IN ITALY

According to the European Union Court of Justice, the concept of public security encompasses not only external and internal security but also in the production of goods and services that may be deemed vital for the security existence of the EU or any one of its member states. According to the ruling of the European Court of Justice *art.65, para. 1 letter. B, TFUE (Treaty on the Functioning of the European Union)* restrictions on the transfer of shares can only be justified on the basis of public order or security. By way of definition, Anti-Foreigner provisions are public law restrictions or prohibitions on the sale or transfer of shares to foreign nationals in domestic firms where these enterprises are domiciled. For the most part national security concerns arising from possible foreign ownership of firms engaged in strategic sensitive sectors or industries are the primary motive behind Anti-Foreigner public law provisions against sale or transfer of shares to foreign nationals or entities.

This following analysis is necessary in the context of Italy as a member state of the European Union and her obligation to adhere to EU norms and regulations with relation the relevant *European Takeover Directive of April 2004.*

The special powers member states of the European Union have in restricting the transfer of shares in strategic sectors, came to be called the "golden share" rule later modified into "special powers" subsequent to rulings of the European Court of Justice (ECJ), the highest judicial organ of the European Union.

In 1994, the Italian parliament enacted a law *Decreto Legislativo (Legislative decree) on 31 May 1994, no. 332* to manage the divesture and privatization in joint stock firms in which the Italian state or Italian parastatals had a shareholding stake. This law was subsequently amended by *Legislative decree no. 474 of 30th July 1994.* Further amendment occurred through *Legislative decree no. 350 of 24th December 2003 (Finance Law, 2004).* The Legislative Decrees as fully amended provide for the Italian State to hold special powers *(poteri speciali)* in specific firms.

In particular, *Article 2(1) of Legislative Decree no. 332/1994,* provides *inter alia:*

1. *The President of the Council of Ministers shall determine, by decree adopted on a proposal of the Minister for Economic Affairs and Finance, in agreement with the Minister for Productivity and the competent sectoral ministers and after notification to the competent parliamentary committees, those companies controlled directly or*

indirectly by the State and operating in the defense, transport, telecommunications, energy resources and other public service sectors, the articles of association of which are to stipulate that, prior to the adoption of any measure resulting in a loss of control, there shall be inserted, by resolution to that effect passed at an extraordinary general meeting of the company, a provision conferring on the Minister for Economic Affairs and Finance one or more of the following special powers, to be exercised in consultation with the Minister for Productivity.

Article 2(1) (a) to (d) describes the aforementioned special powers:

(a) power to oppose the acquisition by investors of significant shareholdings representing at least 5% of voting rights or a lower percentage fixed by decree of the Minister for Economic Affairs and Finance. For the expression of their opposition, the authorities have a period of 10 days from the date of the communication which must be made by the directors of the company concerned when the request is made for entry in the register of shareholders, while the transferee has 60 days in which to challenge the decision of the authorities before the competent court or tribunal.

(b) power to oppose the conclusion of contracts or agreements between shareholders representing at least 5% of voting rights or a lower percentage fixed by decree of the Minister for Economic Affairs and Finance. The periods of 10 and 60 days mentioned in subparagraph (a) are applicable to opposition by the authorities and to an action brought by the shareholders participating in the contracts or agreements concerned, respectively.

(c) power to veto resolutions for the dissolution of the company, transfer of the undertaking, merger, demerger, transfer abroad of the company headquarters, alteration of the company's objects, amendment of the articles of association removing or modifying the special powers. A period of 60 days is provided for challenging a veto.

(d) power to appoint a non-voting director.

Clauses for the exercise of these special powers were inserted to strategic Italian parastatals, *inter alia* Eni, Telecom Italia, Enel, Finmeccanica in the petrochemical, defense, telecommunications and energy sectors. *Finance Legislative Decree 2004, Article 1(1) & (2)* further provided:

1) *The special powers referred to in Article 2 of Decree-Law No 332/1994 shall be exercised solely when justified by important and compelling reasons in the public interest concerning, more particularly, public policy, public security, public health*

and defense, and shall take the form of measures appropriate and proportionate to the protection of those interests, such as the application of appropriate time-limits, without prejudice to observance of the principles of domestic and Community law and, above all, of the principle of non-discrimination.

2) *Without prejudice to the rules laid down in subparagraph 1, the special powers provided for in Article 2(1)(a), (b) and (c) of Decree-Law No 332/1994 shall be exercised in the following circumstances:*
   (a) *real and serious risk of an interruption of the minimum national supply of energy and petroleum products or in the supply of related and subsequent services and, in general, of the supply of raw materials and goods essential to the public as a whole, and interruption of the supply of a minimum service in the telecommunications and transport sectors.*
   (b) *real and serious risk to the continuous performance of obligations vis-à-vis the public as a whole in connection with the supply of a public service and to the performance of the duties entrusted to the company in order to serve the public interest.*
   (c) *real and serious risk to the security of plant and networks in essential public services.*
   (d) *real and serious risk to national defense, military security, public policy and public security.*
   (e) *health emergencies.*

The European Commission initiated legal proceedings (Commission vs Italian Republic) in the European Court of Justice, alleging infringements of *Articles 43 EC* (relating to the freedom of establishment) & *56 EC* (free movement of capital). The EC objected *inter alia*, that *Legislative Decree 2004* did not state under what conditions the special powers may be considered to the extent that investors under what situations these powers may be exercised. In particular the EC maintained that the concept "real and serious risk" in *Article 2(1)(a) to (d)* were undeterminable, numerous, and undetermined. The EC maintained that Legislative Decree went far beyond what was necessary to protect public interest.

In its ruling *(Judgement of 26/03/2009-case C-326/07)* the Justices of the European Court of Justice, held that,

1. *By adopting the provisions contained in Article 1(2) of the Decree of the President of the Council of Ministers of 10 June 2004 defining the criteria for the exercise of the special powers referred to in Article 2 of Legislative Decree No 332 of 31 May*

1994, converted into law with amendments by Law No 474 of 30 July 1994 (decreto del Presidente del Consiglio dei Ministri, definizione dei criteri di esercizio dei poteri speciali, di cui all'art. 2 del decreto-legge 31 Maggio 1994, n. 332, convertito, con modificazioni, dalla legge 30 Luglio 1994, n. 474), *the Italian Republic has failed to fulfil its obligations:*

- *under Articles 43 EC and 56 EC, in so far as those provisions apply to the special powers provided by Article 2(1)(a) and (b) of the Legislative decree, as amended by Law No 350 of 24 December 2003 relating to the provisions for drawing up the annual and pluriannual budget of the State (Finance Law for 2004) (legge n. 350, disposizioni per la formazione del bilancio annual e pluriennale dello Stato (Legge Finanziaria 2004), and*
- *under Article 43 EC, in so far as those provisions apply to the special power provided by Article 2(1)c of the Legislative decree.*

It is noteworthy that the ECJ did not invalidate *Article 2(1)(d) & (e)* which meant that these subsections are lawful under EU and Italian law and that as a consequence, remain in force. This judgement by the ECJ on the legality of subsections (d) and (e) form the basis of restrictions on the transferability of shares by public law with relation to Italy and the strategic sectors of its economy.

Subsequent to the ruling of the ECJ and in strict compliance to the ECJ ruling, the Italian parliament passed *Legislative Decree No. 21 of 15th March 2012* and passed with amendment into *Legislative Decree No. 56 of 11th May 2012.* The latter law was amended by *Legislative Decree No. 148 of 16th October 2017* and passed with amendments into *Legislative Decree 172 of 4th December 2017.* These series of laws came to be known as the "Golden Power Law". The 2017 amendments introduced the high-tech sectors for government intervention. In particular critical of sensitive electronic infrastructure (5G technologies), storage and data management technologies such as artificial intelligence, semiconductors, robotics, communications network security, nuclear and space technologies. The inclusion of 5G technologies was specifically aimed against the adoption of Huawei's technology to mitigate generally unfounded, national security and spying fears.

Particular focus was aimed at non-EU purchasers and entities of Italian strategic equities. These laws in addition, also imposed new heavy financial penalties for infringement. Fines of up to twice the value of an infringing transactions and not less than 1% of the aggregate sales of the transacting companies, whichever is higher could be imposed by the Italian authorities. These fines previously only applied to the energy, communications and transport sectors but were expanded to include the national security and defense sectors. These laws were only applicable to transactions approved by the respective companies after 16th October 2017.

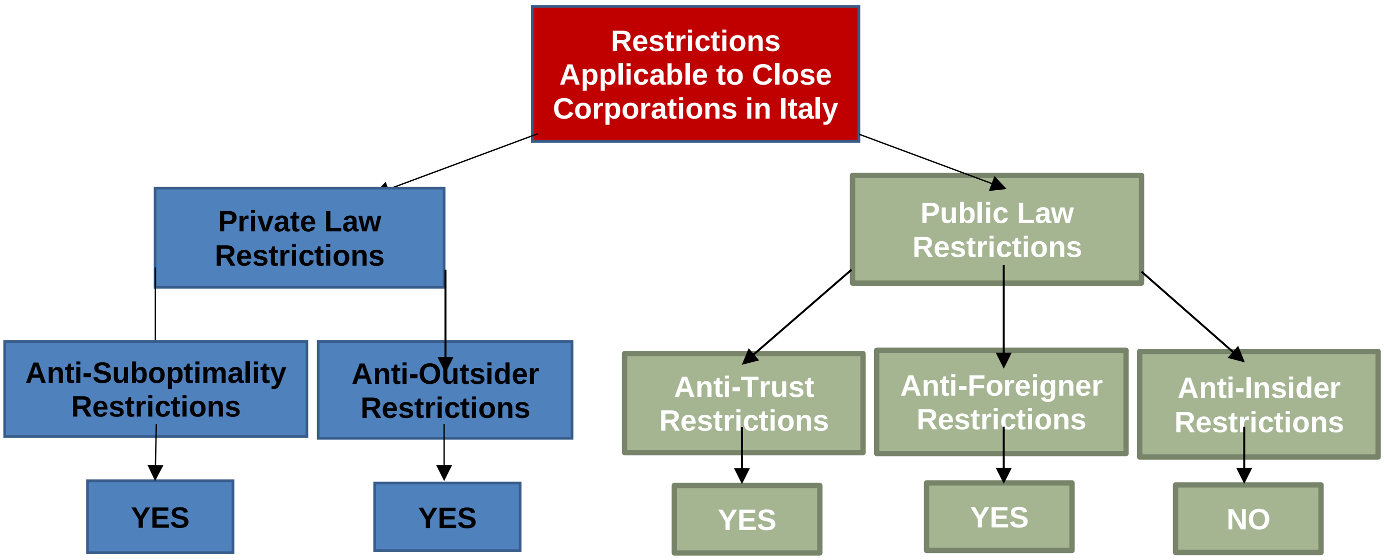
Under the *Golden Power* laws, the government of Italy has powers to impose restrictions to transactions relating to the transfer of shares from Italian strategic industries and firms to foreign nationals or corporate bodies. These powers as mentioned earlier, include the power of veto or the imposition of special conditions as the government may deem fit.

It is the legal responsibility of the Italian firms to notify the office of the President of the Council of Ministers of any intended transaction that touches on strategic industries and firms. However, since enactment of the golden power laws, the government of Italy has intervened in only 6 times from the 40 times Italian firms have notified the authorities of their intent to transfer shares or assets to foreign nationals or entities. These instances are the transfer of Avio's aeroengine business division to General Electric Corp. of the USA in 2013, the purchase of Piaggio Aero Industries by Mubadala Development Co. of the United Arab Emirates in 2014, the sale of IDS Ingegneria dei Sistemi's GeoRader division to Hexagon Geosystems of Switzerland in 2016, the aborted listing of ENAV for 49% of its share capital, the IPO sale of the spinoff of the EVO division from Piaggio Aero Industries to PAC Investments LLC of the USA in 2017, the transfer of shares of TIM to Vivendi of France in 2017.

The aforementioned strategic industries and sectors are classified by *www.reportaziende.it/nav-by-ateco.php* as follows: 1) Extraction of crude petroleum oil and natural gas.10 firms, 2) Manufacture of coke and products derived from petroleum refining 99 firms, 3) Manufacture of computers, electronics and optics 470 firms, 4) Manufacture of ships 51 firms, 5) Manufacture or airplanes, space vehicles and related equipment 36 firms, 6) Manufacture of military combat vehicles 5 firms, 7) Supply of electrical energy and gas 595 firms, 9) Collection, treatment and supply of water 116 firms, 10) Land Transport 1,671 firms, 11) Maritime and internal waterways transport 48 firms, 12) Air transport (passengers and goods transport) 30 firms, 13) Postal services 1 firm (Poste Italiane: Revenues € 8.5 billions), 14) Activity of television & radio programming and transmission 25 firms, 15) Telecommunications (fixed, mobile, satellite and other) 119 firms, 16) Manufacture of arms, munitions and related articles and implements of war, national defence 157 firms.

(F) RESTRICTIONS FLOW CHART APPLICABLE TO CLOSE CORPORATIONS IN ITALY.

Figure: 3



The total number of strategic firms as defined by Italian Anti-Foreigner legislation provisions listed above is 3,433. These firms have Anti-Foreigner restrictions where the sale and transfer of their shares is prohibited without the express permission of the President of the Council of Ministers of Italy. Of this number the vast majority 3,058 or 89% are closed corporations while the rest are listed corporations.

VII. Restrictions On The Transferability Of Shares In Listed Corporations In Italy

(A) Anti-Outsider Restrictions Applicable To Listed Corporations In Italy

As a matter of definition, Anti-Outsider provisions against the transfer of shares to persons or entities outside a core shareholding group do not exist in the Articles of Association of listed corporations. This is due to the fact that shares of listed corporations are publicly traded in stock exchanges. As noted earlier private law restrictions may exist in articles of association of a close corporation or in its internal memoranda. With reference to listed corporations private law Anti-Outsider restrictions cannot exist in a listed corporations articles of association. Families are the dominant block holders in the shareholding structure of the vast majority of Italian listed companies *Zattoni, (2006).*

(B) Anti-Performance Suboptimality restrictions applicable to listed corporations in Italy

As indicated earlier, the number of Italian listed companies relative to the total number of firms of legal forms Srl's and SPA's, is small as the total number is 421. However, these 421 listed firms include the largest Italians firms in terms of capital employed, revenue and persons employed. The 421 listed firms include all of Italy's multi-national corporations.

As indicated earlier Anti-Performance Suboptimality restrictions are defined in a firms internal memoranda as they are part of employee/employer performance contracts. These contracts are typically stock incentive plans (SIPs) and Employee Stock Option Plans (ESOP's). An indispensable feature of SIP's and ESOP's is that they involve the concession of an issuing firms shares to key employees typically but not limited to top management and key R&D specialists. The purpose of this subsection is to determine the extent of use of these contracts among Italian listed corporations in the context of the prevalence and relevance of share transfer restrictions that may apply to them. The primary influence in increases in the remuneration of top management and R&D specialists are annual bonuses and stock options grants, *Conyon & Murphy, (2003).*

Essentially the concession and transfer of SIP and ESOP shares cannot be effected without the attainment of predefined corporate goals and performance milestones by targeted employees. Therefore, these shares issued under SIP's and ESOP's will inevitably have transfer Anti-Performance Suboptimality provisions in that they can only be conceded by the issuing firm if the employee attains specific pre-defined corporate goal(s) or milestone(s) as stated per the contract. Another restrictive feature of SIP and ESOP contracts are lock up provisions that prevent employees from selling their shares for a period of time for various reasons.

There are three schools of thought that are used to explain the diffusion of SIP and ESOP contracts in an increasing international labor market for top management and R&D specialists. The first school of thought is the optimal contracting view that states that remuneration contracts are designed to minimize agency costs between top management and R&D specialists to the shareholding group, *Jensen & Murphy, (1990).* The second school of thought is the rent extraction view that states that powerful insiders may influence a firms internal remuneration processes for their own personal interest. This is the so called "rent extraction" or "management power" point of view, *Bebchuk et al., (2002).* The final school of thought is the perceived cost view that states that firms may favor remuneration structures for their perceived (imagined or actual) cost advantages., *Hall & Murphy (2003).*

Chaffins, (2003); Chaffins & Thomas, (2003), note that there is a global convergence towards the Americanization of international remuneration practices which is noted by high incentives and lucrative compensation contracts. In a sense this convergence is to be expected because the market for top management is international. For example, the CEO of Fiat SpA can also be the

CEO of Chrysler Motor Corporation. A German CEO can be expected to lead a company in Dubai or the USA or an American can lead a subsidiary of an American multinational corporation in an African country etc. The uniformization and internalization of remuneration structures and practices would only be inevitable. Arguments for the use of SIP and ESOP contracts contend that:

- **i)** They incentivise top management and R&D specialists to align their pay level interest to the shareholding group through the provision of a direct link between their remuneration and firm stock price performance maximization.
- **ii)** SIP and ESOP contracts also contribute to the retention and attraction of highly skilled and experienced top management and R&D specialists in an increasing internationalized labour marketplace.
- **iii)** SIP and ESOP contracts encourages beneficiaries to leave their comfort zones and take risks. In other words, they encourage top management and R&D specialists to leave risk neutrality and aversion inhibitions to risk taking positions that may serve to increase shareholding group value.
- **iv)** SIP and ESOP contracts also reduce (otherwise) direct cash labour costs to top management and R&D specialists (that would otherwise debit net profit and thus reduce earnings per share ratios for the core shareholding group).

To better understand and investigate the relationship between the firm ownership structure of Italian listed firms and their use of SIP and ESOP contracts (which is the subject matter of this subsection) *Zattoni & Minichilli (2009),* employed a logistic regression model and t-test difference-of-means statistical methods for their data analyses. The dependent variable was set as "the use of Equity Incentive Plans" and the independent variable as "the absence of a controlling shareholder with more than a 30% shareholding stake".

The results of the analysis of data showed that:

- ***i)*** The size of the firm and not its shareholding group structure, is the primary driver for corporate adoption of these contracts.
- ***ii)*** The adoption of these incentive contracts was not used extensively to extract firm value at the expense of the core shareholding group and,
- ***iii)*** The characteristics of these incentive contracts was consistent with tax break laws that take advantage of preferential tax treatment.

It is therefore clear that listed Italian companies (because of their size) routinely use SIP and ESOP contracts as a powerful goal incentivization (and employee retention) tool as part of their remuneration packages to top management and key R&D specialists. An employee leaving the firm before the expiry of a predefined set of time would also result in the loss of shares that they would have been entitled to had they remained in the firm.

It can therefore be summarized that the non-attainment of predefined corporate time goals and performance milestones would constitute a sufficient Anti-Suboptimality Performance provision restriction on the transferability of shares from the issuing firm to its employees.

(C) ANTI-TRUST RESTRICTIONS APPLICABLE TO LISTED CORPORATIONS IN M&A'S IN ITALY

Anti-Trust provisions applicable to listed corporations in mergers & acquisitions is exactly identical to those applicable to close corporations. These provisions have been extensively discussed in subsection 6.3.

(D) ANTI-INSIDER TRADING RESTRICTIONS APPLICABLE TO LISTED CORPORATIONS IN ITALY

By way of definition, Anti-Insider Trading restrictions are public statutes that prohibit and criminalize the use by insider operatives of material nonpublic information for profit while trading in shares, options and derivatives. Profit taking in such situations can take place in two ways.

i) Through the use of privileged nonpublic information acquired as a result of insider knowledge of an expected positive corporate outcome that will result in a certain rise in the firms publicly share future price to purchase shares at a spot rate thus realizing a profit.

ii) Through the use of privileged nonpublic information acquired as a result of insider knowledge of an expected negative corporate outcome that will result in a fall of a firms publicly traded share future price to sell held shares, options and derivatives at a current higher spot rate thus realizing a material saving by avoiding a certain loss.

An insider is defined as a company employee, director or a beneficial shareholder holding more than 10% of a firms stock. An expanded definition follows the misappropriation theory to include who misappropriates material nonpublic information and "tips" or trades such information on any stock would constitute insider trading that is punishable by law.

In Italy, the abuse by corporate insiders of material nonpublic information and market manipulation is regulated by Legislative Decree no. 58 of 24th February 1998 *(Decreto Legislativo n. 58 del 24 Febbraio 1998)* and by *EU Directive 2003/6/CE of 28th January 2003.* The EU directive is codified and incorporated in Italian law through the *Testo Unica sulle Finanza (TUF). TUF* is also known as legge Draghi is the principal source of legal provisions in Italy, with reference to finance and financial intermediation. This law is applicable to all 421 firms quoted on the Milan FTSE MIB stock exchange. In Italy, the regulatory public body with responsibility to investigate and prosecute cases of insider trading in the Milan FTSE MIB is the *Commissione Nazionale per la Societa e la Borsa* (Consob).

According to *Article 184 of the TUF,* the criminal offence of abuse of privileged information is committed when:

"[...] whoever, being in possession of privileged information by virtue of his or her capacity as a member of the administrative, management or control bodies of the issuer, of the shareholding in the issuer, or the exercise of an employment, a profession or a function, including public, or an office:

a) purchases, sells or carries out other transactions, directly or indirectly, on its own account or on behalf of third parties, on financial instruments using the same information.

b) communicates such information to others, outside the normal exercise of their work, profession, function or office.

c) recommends or induces others, on the basis of these, to carry out any of the operations indicated in letter a)."

The *TUF* imposes the sanction on the abuse of privileged material nonpublic information, with a prison term of between two and twelve tears *and* a fine of between twenty thousand and three million euros. Profits realized from illegal insider trades are also liable to confiscation by the state. *Article 181, comma 1 of the TUF* defines privileged material nonpublic information as: *"[...]information of a precise nature, which has not been made public, concerning, directly or indirectly, one or more issuers of financial instruments or one or more financial instruments, which, if made public, could affect sensible the prices of these financial instruments. "*

EU Regulation no. 596/2014 and *EU Directive 57/2014* are meant for adoption and imposition of punitive sentences to cases of abuse of privileged material nonpublic information and stock prices market manipulation. These two laws for the imposition of gradual penalties based on the seriousness of insider misconduct with penalties ranging from fines and actual imprisonment.

However, *Linciano (2003)* notes that the Italian legal system has experienced enormous problems in detecting and prosecuting violations of anti-insider trading laws. *Luciano* notes that since the introduction of anti-insider trading laws, there has been only two convictions. The prosecution rate is also equally very low. Illegal disclosure of material nonpublic information on future movement of stock prices is widespread. Firm specific information leaks

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appear to be incorporated in stock prices way before public disclosure. *Linciano* notes two major weakness of Italian law:

i) Large shareholders, officers, directors and other persons who may possess material nonpublic information are not required to report to Consob their transactions on their firms' shares. This is a major loophole that makes it extremely difficult to detect illegal insider dealings.

ii) Insufficient penal deterrence relative to illegal realizable profits.

However, it is clear from the preceding discussion that public law Anti-Insider Trading imposes share transfer restrictions on employees of listed Italian firms.

(E) Anti-Foreigner restrictions applicable to listed corporations in Italy

Anti-Foreigner provisions as they pertain to foreign nationals and firms has been extensively discussed in subsection 6.5. These Anti-Foreigner restrictions on the transfer of shares to foreigners also applies to listed Italian firms. The basic laws that govern sale of shares by close corporations applies in an equal measure, to listed firms.

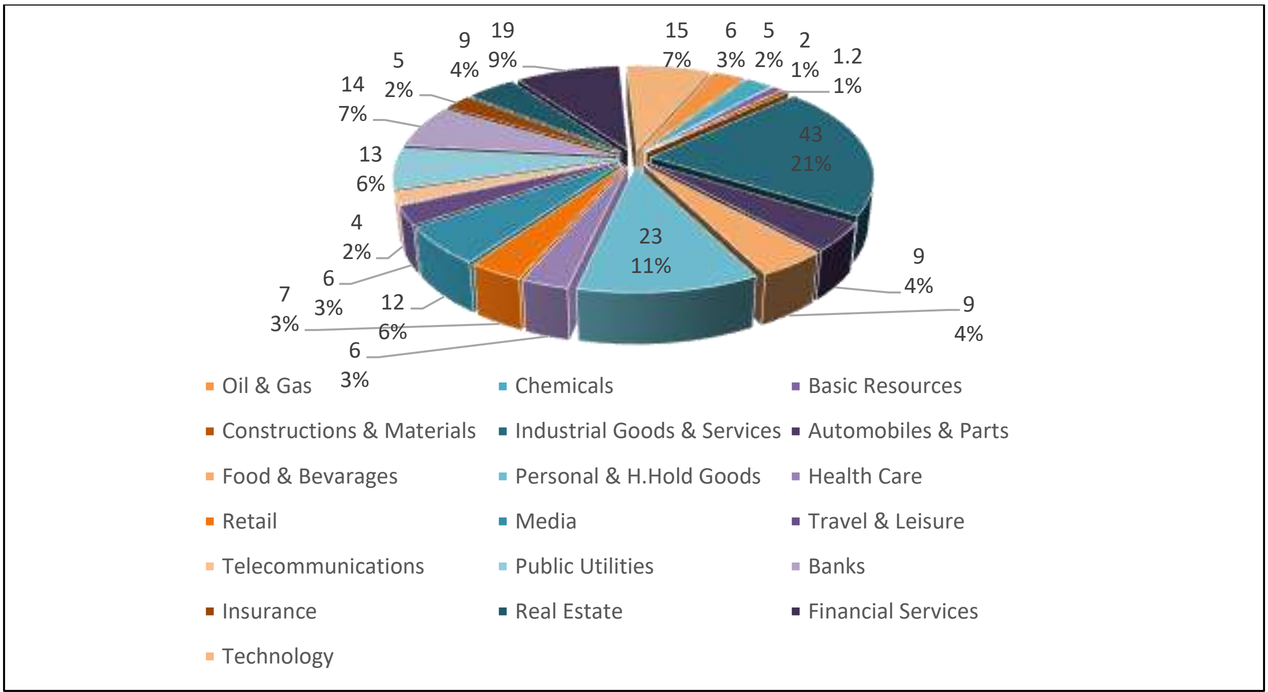
According to: *https://sseinitiative.org/stock-exchange/borsa-italiana/* there are 426 firms listed on the FTSE MIB stock exchange. These firms represent the largest enterprises in Italy with a market capitalization of over euros 700 billion which is equal to 38.89% of Italy's Gross Domestic Product. These 426 firms therefore represent the peak of the pyramid of Italian enterprises. While the 40 firms that for the FTSE MIB Index are the peak of this peak as they represent the largest Italian commercial enterprises.

The vast majority of these firms operate in sensitive strategic sectors as defined in subsection 6.5. This means these firms would be required by law to notify and report to the Office of the President of the Council of Ministers of Italy of any shares sold to non-Italian citizens. Given the size and strategic importance of these firms to the Italian economy this implies that public law Anti-Foreigner transfer of shares restrictions applies to a very significant component of the Italian economy.

According to: *https://www.borsaitaliana.it/borsa/azioni/settori.html?lang=en* the 426 firms quoted on the FTSE MIB stock exchange fall under 19 super sectors. These are: 1) The FTSE All-Share Oil and Gas, 6 firms. 2) FTSE Italia All-Share Chemicals, 5 firms. 3) FTSE Italia All-Share Basic Resources, 2 firms. 4) FTSE Italia All-Share Constructions and Materials, 12 firms. 5) FTSE Italia All-Share Industrial Goods and Services, 43 firms. 6) FTSE Italia-All Share Automobiles and Parts, 9 firms. 7) FTSE Italia All-Share Food and Beverages, 9 firms. 8) FTSE Italia All Share Personal and Household Goods, 23 firms. 9) PTSE All-Share Health

Care, 6 firms. 10) FTSE All-Share Retail, 7 firms. 11) FTSE Italia All-Share Media, 12 firms. 12) FTSE Italia All-Share Travel and Leisure, 6 firms. 13) FTSE Italia All-Share Telecommunications, 4 firms. 14) FTSE Italia All-Share (public) Utilities, 13 firms. 15) FTSE Italia All-Share Banks, 14 firms. 16) FTSE Italia All-Share Insurance, 5 firms. 17) FTSE Italia All-Share Real Estate, 9 firms. 18) FTSE Italia All-Share Financial Services, 19 firms and 19) FTSE Italia All Share Technology 15 firms.

Figure 4: FTSE MIB Firms by Sector.



Source: Borsa Italiana SpA.

It is immediately notable that nine of these sectors are captured as falling in the sensitive and strategic definition of Italian Anti-Foreigner transfer of shares restrictions an enumerated exhaustively in section 6.5. These strategic sectors that have implications to Italian national security and public safety as envisaged in relevant Italian legislation are: 1) The FTSE All-Share Oil and Gas, 5) FTSE Italia All-Share Industrial Goods and Services, 11) FTSE Italia All-Share Media, 13) FTSE Italia All-Share

Telecommunications, 14) FTSE Italia All-Share (public) Utilities, 15) FTSE Italia All-Share Banks, 18) FTSE Italia All-Share Financial Services and 19) FTSE Italia All Share Technology.

Furthermore, it should be noted that Italy's manufacturers of armaments and implements of war (which is a strategic sector vital for national defence) are included in the Industrial and Services super sector above. These firms include armaments manufacturers Leonardo-

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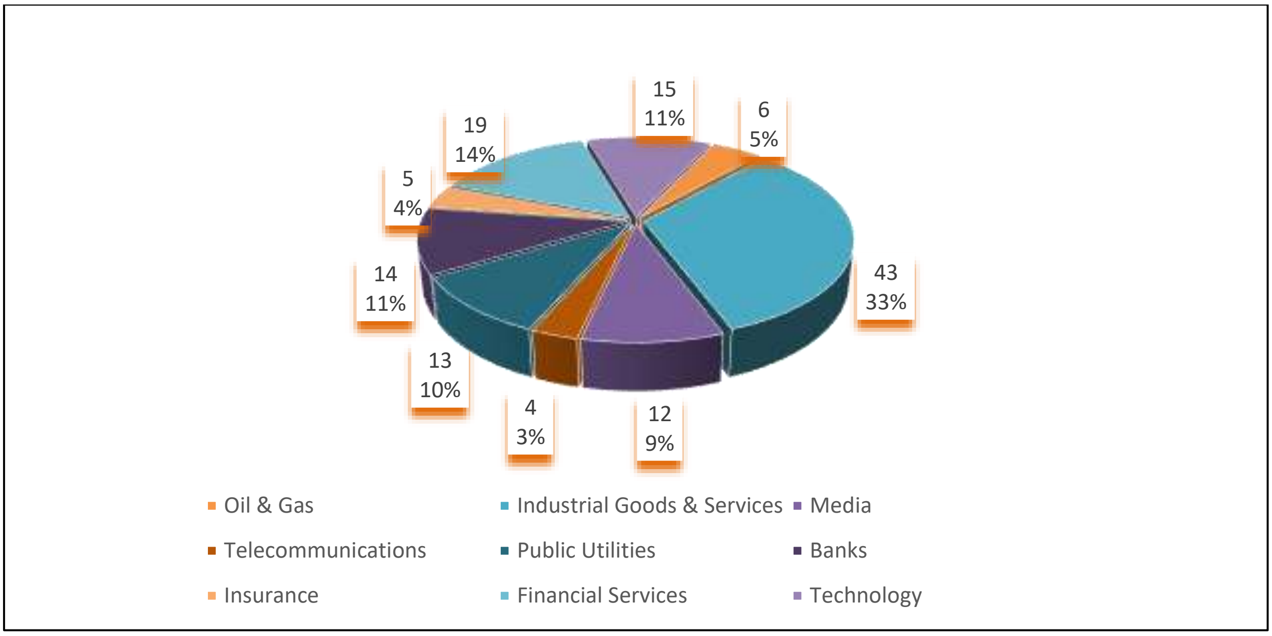
Finmeccanica SpA and Fincantieri SpA amongst others. These information are captured in the graphical representations 4 & 5. By way of summary, it is important for perspective buyers of shares in Italian strategic industries to be aware of the severe transfer restrictions imposed by public law Anti-Foreigner legislation when purchasing stock on the FTSE MIB stock exchange.

Figure 5: FTSE MIB Index Firms by Strategic Sector.

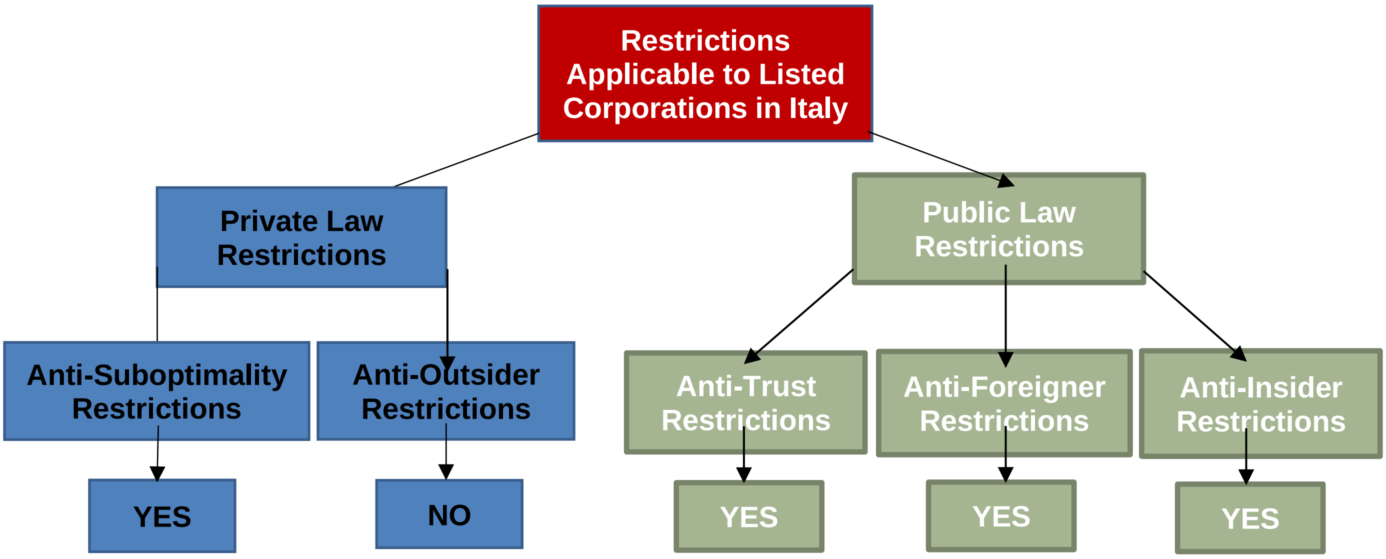


Source: Borsa Italiana SpA.

It should also be noted that close and therefore non-listed corporations active in strategic sectors should be aware of the same Anti-Foreigner restrictions on the transfer of shares. For example, non-listed manufacturers of armaments and implements of war such as Beretta SpA, OTO Melera SpA, AnsaldoBreda SpA cannot sell their shares to foreigners without the express consent of the President of the Council of Ministers of Italy

(F) RESTRICTIONS FLOW CHART APPLICABLE TO LISTED CORPORATIONS IN ITALY

Figure: 6



VIII. Restrictions On The Transferability Of Shares In Close Corporations In The United States Of America

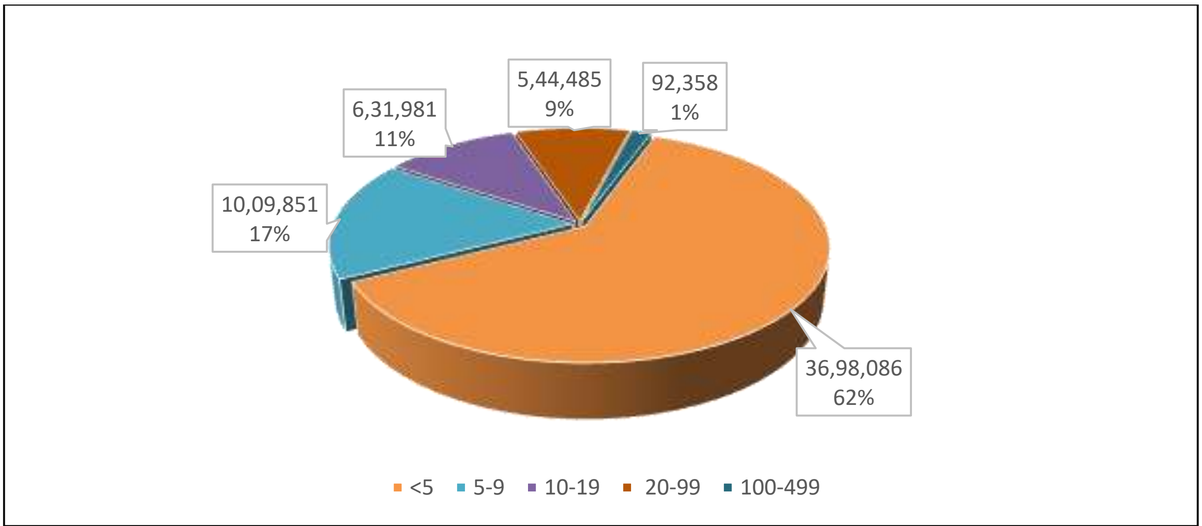
(A) Anti-Outsider restrictions applicable to close corporations in the USA

Restrictions on shares' transfer in close corporations are linked to maintenance of internal shareholding equilibrium within an existing shareholder group as well as preventing or controlling the entry of any new potential entrant(s). The Supreme Court of the State of Wisconsin supported this view regarding the protection of the shareholder group from unwelcome intrusion with share transfer restrictions in, *Casper v. Kalt-Zimmers Mfg. Co., 159 Wis. 517, 522, 149 N.W. 754, 756 (1915).* In its ruling the court held that, *"The personal element is as important in the make-up and management of a corporation as it is in almost every other undertaking. Restrictions, therefore, reasonably protecting incorporators or stockholders in their interests by permitting them first to purchase stock offered for sale, should be held lawful as promotive of good management and sound business enterprise".*

These restrictions are governed by private contract law emanating from a close corporation bylaws and articles of association. Restrictions on the transfer of corporate stock in the United States is widespread and common, *Restatement (Second) of Property (Donative Transfers) sec. 4.4, Reporter's Note 8., at 227 (1983).* It is estimated that the shares of stock of at least half the corporations in the United States are subject to share transfer restrictions. That figure is most likely to be much higher in view of the widespread use of the close corporation with limited liability, as a form of business organization. According to the US Census Bureau 2017 data, of the 5,996,900 active registered firms, 5,339,918 (89%) had fewer than 20 employers *(https://www.census.gov/data/tables/2017/econ/susb/2017-susb-annual.html)*. And only about 20,139 firms (34%) had 500 or more employees. Of these only 4,397 firms (0.07%) were listed on US stock exchanges

(https://data.worldbank.org/indicator/CM.MKT.LDOM.NO?locations=US).

Figure 7: United States Firms' Size, Totals & Employee Statistics, 2017



Source: United States Census Bureau, 2017, Own elaboration

The rule of thumb is that the smaller the firm the higher the likelihood that it will be a close corporation (and therefore a family-owned business), with stock transferability restrictions. Such restrictions are in this study referred to as Anti-Outsider restrictions.

The *Uniform Stock Transfer Act* enacted in most American States more than a century ago, governs the transfer and sale of corporate stock. This law provides *(Sec. 14) inter alia,* that transfer restrictions placed upon stock in order to be valid, must appear in the face of the share certificate. It is important to note that this *Act* in effect codified private law practice of share transfer restrictions as they appear in firms bylaws or articles of association. In effect, this widespread private law corporate practice was confirmed by this *Act, Ehrle (1921).*

As a corporation grows and as the need to raise capital for expansion expenditure also inevitably rises, the loosening up of stock transfer restrictions occurs as more and more shareholders join the core shareholder group. At the point in which a corporation is sufficiently large to be listed in a stock market, share transferability restrictions are at their minimum. This situation as will be discussed in other subsections, would not free the firm from Anti-Foreigner, Anti-Trust and Anti-Insider public laws share transferability restrictions that are in force in the United States.

(B) Anti-Performance Suboptimality provisions applicable to close corporations in the USA

Unlike Italy where the use of Stock Incentive Plans (SIP'S) and Employee Stock Option Plans (ESOP's) is almost exclusively the preserve of large firms *Zattoni, (2009),* in the United States the use of these contracts as part of employee renumeration is quite widespread. These contracts are commonly used by startups and all large Fortune 500 firms alike. The first ESOP was invented by Louis Kelso in 1956 to allow the buyout of the owners of *Peninsula Newspapers* by its employees. Since then, the use of these contracts has swept the length and breadth of the American corporate landscape. As indicated in subsection 7.2, SIP's and ESOP's serve the dual purpose of being an incentive and staff retention tool.

The basic restrictions on their transfer from the issuing firm to its employees are based on the attainment of a predetermined corporate goal or milestone and or vesting period restrictions where an employee has to remain in the employment of the issuing firm for a specific predefined period of time. Therefore, there are Performance Suboptimality restrictions on the transfer of shares from the issuing firm to its employee if the employee is unable to meet milestone or time performance predefined parameters.

Derivative instruments in the form of Employee Stock Option Plans are generally not transferable before the underlining shares are issued. Unlike in Italy and most other European counties, these contracts in the United States are made to the employee rank and file, to suppliers, customers and other outsider stakeholders. Whereas in Italy and the rest of Europe, SIP and ESOP contracts are generally made to top management and key R&D specialists of large firms. By way of summery therefore, it can be stated that Anti-Performance Suboptimality provisions can inhibit the transfer of shares from the issuing firm to its employees if their performance is suboptimal (in terms of attaining predefined corporate milestones or the vesting period). The vesting period is the minimum amount of time an employee has to remain with the employer in order to meet time optimality performance restriction conditions in the SIP or ESOP contracts.

(C) Anti-Trust restrictions applicable to close corporations in M&A's in the USA

In the United States, there are four laws that are generally considered applicable as anti-trust legislation these are:

i) The *Sherman Act of 1890.* This *Act* was passed by Congress "as a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade". The *Sherman Act* prohibits "every contract, combination or conspiracy in restraint of trade and any monopolization, attempted monopolization or conspiracy or combination to monopolize."

ii) The *Federal Trade Commission Act of 1914.* This act prohibits "any unfair methods of competition, deceptive acts or practices". This act also created the Federal Trade Commission (FTC) as a public regulator.

iii) The *Clayton Act of 1914.* This act prohibits anti-competitive mergers and acquisitions and "interlocking directories". Interlocking directories are instances in which one individual makes business decisions in a horizontal setting. *Section 7* of the *Clayton Act* specifically prohibits mergers and acquisitions whose effect "may be essentially to lessen competition or to create a monopoly". The *Clayton Act* was subsequently amended by the *Robinson-Patman Act of 1936.* This former law prohibits discriminatory pricing, services and allowances in dealings between firms. Provisions of the *Clayton Act* were further strengthened by the *Hart-Scott-Rodino Anti-Trust Improvements Act of 1976.* This former legislation required firms planning large mergers and acquisition to provide prior information to the United States Federal Trade Commission and the Anti-Trust Division headed by the Assistant Attorney General of the United States Department of Justice of any intended merger and acquisition for approval.

iv) The *Williams Act of 1968* amended the *Securities Exchange Act of 1934* as it pertains to tender offers. The *Williams Act of 1968* further imposed mandatory disclosure requirements with regard to cash based tender offers. A person, firm or consortium group hoping to merge and acquire the shares of another firm makes a tender offer to the target firm. A tender offer is a corporate takeover bid to purchase stock, held by shareholders of the target firm for cash or corporate security swap with the acquiring entity. The *Williams Act of 1968* requires a person, firm or a consortium group to make full disclosure to the Securities and Exchange Commission, of its source of cash used in the tender offer, the offer purpose, the plans of the acquirer if successful, and any agreements and obligations concluded with the target firm. The *Williams Act of 1968* further requires filing and full disclosure to the US Securities and Exchange Commission on any entity intending to acquire 5% of outstanding stock of a firm that is subject to Federal registration obligations. Such disclosures once filed, are then sent to all stock markets where the shares of the target firm are traded with the objective of making them available to the target firms shareholders. Other disclosure obligations imposed by the said *Act* include restrictions on the cash tender offer mechanics while imposing prohibitions against improper, fraudulent and incomplete disclosures. The *Williams Act of 1968* grants prosecutorial powers to the US Securities and Exchange Commission in enforcement measures through lawsuits brought against an acquirer before a Federal court.

The public body regulators mandated to enforce provisions of these keynote *Acts* are the United States Federal Trade Commission, the United States Department of Justice and the United States Securities and Exchange Commission (SEC).

The focus of this subsection will be the *Clayton Act of 2014* and the *Hart-Scott-Rodino Anti-Trust Improvement Act of 1976* and the *Williams Act of 1968* because these are the Acts that are the most relevant in merger and acquisitions corporate practice in the United States.

Mergers and acquisitions have the potential of being beneficial to consumers if they lead merged firms to provide better, cheaper, higher quality goods and more innovation through enhanced operational efficiency than if the two separate companies were to attempt do the same separately. In other words, such beneficial mergers and acquisitions enhance market dynamics in a positive manner for the consumer.

However, the danger is that some predatory mergers and acquisitions can be done deliberately to have the opposite negative effect on market dynamics. In other words, predatory mergers and acquisitions can be harmful to consumers because they can lead to less competition, higher market prices, less variety, lower quality goods and reduced sectoral innovative efficiency and capacities.

As regulators, the Federal Trade Commission and the United States Department of Justice has to satisfy and determine whether or not the intended merger and acquisition enhances market power. In this regard, the Federal Trade Commission and the United States Department of Justice greatest concern are horizontal mergers. Horizontal mergers occur between two previously direct competitors merge. Because the two relevant merger laws are forward looking, they seek to inhibit mergers that are likely to have or lead to harmful negative market dynamics.

In cases where the regulatory agencies and merging and acquiring candidates cannot agree on remedies to anti-competitive concerns, full hearing before a Federal court and contesting litigation becomes necessary in order to prevent a proposed merger. The notification threshold does not apply to mergers and acquisitions having original threshold revenue values of <US$ 10 million or a combined adjusted threshold of <US$18.8 million, *https://www.govinfo.gov/content/pkg/FR-2020-01-28/pdf/2020-01423*. Proposed mergers above these figures must file their premerger applications by law to both the Federal Trade Commission and the United States Department of Justice. There are filing fees payable by the acquiring firm, of between US$ 45,000 and US$ 280,000 depending on the size of the proposed transaction *https://www.ftc.gov/enforcement/premerger-notification-program/filing-fee-information*.

Under the *Hart-Scott-Rodino Anti-Trust Improvement Act of 1976*, firms contemplating certain large mergers are required by law to file premerger notifications to the Federal Trade Commission and the United States Department of Justice. What follows is five step review process. These steps are:

i) Filing Notice of a Proposed Deal.

ii) Clearance to one anti-trust Agency.

iii) Waiting period Expires and Parties proceed to close M&A deal or Agency Issues Second Request

iv) Parties Substantially Comply with The Second Requests.

v) The Waiting Period Expires and Parties proceed to close M&A deal or the Agency challenges the Deal by filing for preliminary injunction relief in a Federal Court pending determination of the case.

From the preceding discussion it is clear that, as in the Italian situation public law Anti-Trust legislation in American corporate practice imposes severe regulatory restrictions on the transferability of share in cases of proposed mergers and acquisitions that inevitable involve the transfer, purchase or exchange of shares.

(C) Anti-Insider Trading restrictions applicable to close corporations in the USA

As enumerated in subsection 7.4, Anti-Insider Trading provisions are not applicable by definition, to close corporations. Anti-Insider legislation specifically prohibits insiders of listed shares from using privileged material nonpublic information for profit taking or for the avoidance or minimization of losses. The shares of close corporations by definition, are not listed or traded in any stock exchange. The shares of close corporations can only be traded or exchanged through private contracts if there are no share transfer restrictions to outsiders or to the core shareholding group.

(D) Anti-Foreigner restrictions applicable to close corporations in the USA

Instances of restrictions imposed by public law, on the transfer of shares in the United States include *inter alia,* the *Foreign Investment and National Security Act, 2007* (FINSA). The US Congress deliberately left undefined the term, *"national security interest"* to allow its legal interpretation in the broadest sense that may include *any* economic activity or sector *Graham & Marchick, (2006); Pradhan, (2005).* This *Act* confers absolute discretionary power on the Committee on Foreign Investment in the United States (CFIUS) and the President of the United States, to stop *any* purchase by an undesirable foreigner of any shares in a US firm engaged in any economic activity. CFIUS is a top-level multiagency government body chaired by United States Secretary of the Treasury and is composed by up to nine cabinet secretaries, the Director of National Intelligence and the United States Attorney General. CFIUS therefore has membership from the highest echelons of the government of the United States of America. FINSA protects United States companies from takeover bids through a very well-developed anti-takeover arsenal *Monks and Minow, (2004).*

It is a mandatory statutory requirement that any target US firm involved in an acquisition by a foreign entity must self-declare the proposed transaction to CFIUS. Mandatory declarations and review filings are required of foreign investments in US firms that design, develop, test, fabricate and produce technologies in 28 specific areas. These areas are: (1) Internet protocol or telecommunications service; (2) Certain internet exchange points; (3) Submarine cable systems; (4) Submarine cable landing systems; (5) Data center at a submarine landing facility; (6) Satellite or satellite systems servicing the Department of Defense; (7) Industrial resources manufactured or operated for a Major Defense Acquisition Program; (8) Any industrial resource manufactured pursuant to a "DX" priority rated contract; (9) Any facility that manufactures certain specialty metals, chemical weapons, carbon. alloy and steel plates, and other specified materials; (10) Any industrial resource financed by the *Defense Production Act*, Industrial Base Fund, Rapid Innovation Fund, Manufacturing Technology Program, Defense Logistics War stopper Program, or the Defense Logistics Agency Surge and Sustainment program; (11) Electric energy storage systems; (12) Any electric storage system linked to the bulk electric system;(13) Electric energy generation, transmission or distribution for military installations; (14) Any industrial control system used by bulk-power systems, or a facility directly supporting a military installation; (15) Certain refineries; (16) Certain crude oil storage facilities; (17) Certain LNG import or export terminals or certain natural gas underground storage facilities; (18) Systemically important financial market utilities; (19) Certain financial market exchanges; (20) Technology providers in the Significant Service Provider Program;

Any rail line designated as part of the DOD Strategic Rail Corridor Network; (22) Certain interstate oil pipelines; (23) Certain interstate natural gas pipelines; (24) Any industrial control system utilized by interstate oil or natural gas pipelines; (25) Certain airports; (26) Certain maritime ports or terminals; (27) Public water systems; (28) Any industrial control system utilized by public water systems or treatment works.

The Exon-Florio Amendment to the *Defense Production Act 1988* conferred upon the President of the United States the powers to block proposed mergers, acquisitions and takeovers of persons engaged interstate commerce in the US that threaten the national security of the US.

In 1992, the US Congress passed the *"Byrd" Amendment* to the *Exon-Florio statute* through Section 837(a) of the *National Defense Authorization Act* for Fiscal Year 1993 requiring CFIUS to investigate M&A's or takeovers where the acquirer is controlled by or acting as an agent of a foreign state and where the acquisition results in the control of a firm engaged in interstate commerce in the US that could adversely affect the national security interests of the United States. It should be recognized the definition of *"a firm engaged in interstate commerce"* in the United States is an extremely broad term that doubtless ropes in literally thousands of close or listed US firms. In 2018 the US Congress passed the *Foreign Investment Risk Review Modernization Act* (FIRRMA) that gave additional powers to CFIUS over foreign investments in real estate, private equity access to US high technology firms' cutting-edge R&D information and US-Chinese joint ventures.

FIRRMA signed by President Donald Trump, confers on the President "*the authority to block or suspend proposed or pending foreign mergers, acquisitions or takeovers by or with any foreign person that could result in foreign control of any United States business, including such merger, acquisition or takeover carried out through a joint venture that threaten to impair the national security".* As previously discussed, the unspecified legal parameters on what exactly constitutes "national security" has the effect that "national security" is a term broad enough as to constitute literally any United States interest.

FIRRMA recognizes political affinity in that it has provisions for discriminating among investors from certain countries that are determined to be of special concern for *"having demonstrated a declared strategic goal of acquiring a type of critical technology of infrastructure that would affect the leadership of the US in areas related to national security."*

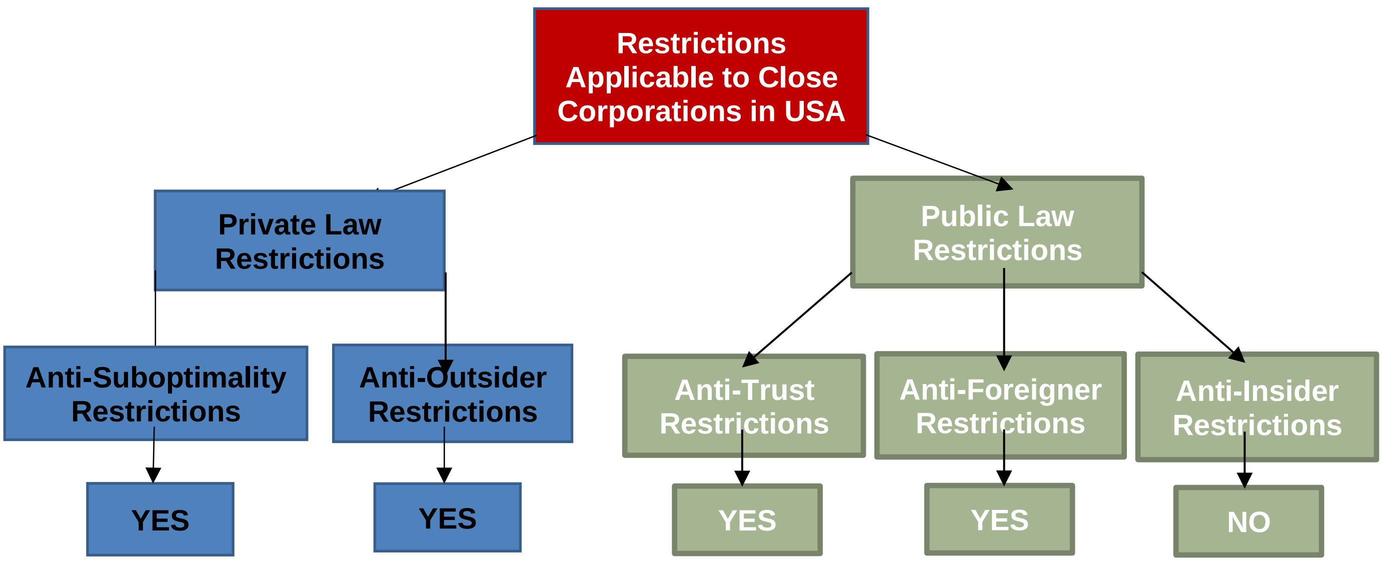
This new law greatly expanded the scope of shares' transfer transactions to include noncontrolling investments by foreign persons whether natural or statutory, in US firms involved in critical technologies, critical infrastructure, internet sites collecting personal data on US citizens and real estate in close proximity to US military or other security installations.

Controlling interest is defined as being at least 10% of voting ordinary shares of a listed company or at least 10% of the total assets on a close corporation. The ultimate decisions of the President of the US under FIRMMA are not subject to judicial review or intervention but the process maybe subject to review or interpretation to ensure compliance to legal procedures as defined in the above-mentioned laws. This obligation was recognized by the US District of Columbia in *Ralls vs the Committee on Foreign Investment in the United States.*

The normal remedy required by the President of the United States is divesture of investments by undesirable foreign persons in American firms. For example, in exercise of his powers under United States law, President Donald John Trump on 4th August 2020 issued an executive order requiring ByteDance Ltd the Chinese parent company of TikTok, to divest for the popular app's US operations within 90 days. This order also required divesture from US media app Musical.Iy. ByteDance was also required to notify on a weekly basis its compliance with this order to CFIUS and to allow US Federal authorities access to all premises and premises of ByteDance, TikTok or any of their US subsidiaries. Byte Dance was also required to destroy all personal data on US citizens it had obtained in the course of its normal business. Attorney General William Barr was given authoritative powers to "take any steps necessary" to enforce the executive order. In this particular case of TikTok while the potential risks existed, there was by the time the executive was being issued, no compelling evidence of any attempt by Chinese State intelligence to seize or use data on US citizens in an effort to compromise US national security concerns.

(F) Restrictions Flow Chart applicable to close corporations in the USA

Figure: 8



This unfounded fear is a clear example of political affinity as previously discussed.

This remedial feature of divesture is a principal difference between US and Italian law with the latter having provisions for the imposition of punitive fines for non-compliant firms violating public laws governing restrictions on Anti-Foreigner share transferability restrictions in strategic firms.

IX. Restrictions On The Transferability Of Shares In Listed Corporations In The United States Of America

(A) Anti-Outsider restrictions applicable to listed corporations in the USA

As noted and explained in subsection 7.1 private law Anti-Outsider share transfer restrictions cannot apply to listed firms because by definition, shares of publicly quoted firms can be transacted in an open stock market to members of the public who are strangers to each other.

(B) Anti-Performance Suboptimality restrictions applicable to listed corporations in the USA

United States corporate practice birthed and is the cradle of Stock Incentive Plans (SIP) and Employee Stock Option Plans (ESOP) contracts as human resources renumeration instruments. For this reason, it is to be expected that these contracts are fully ingrained in all aspects of United States corporate practice.

According to *Kruse (2002),* publicly held firms account for the bulk of employer stock and total ESOP assets. The percentage of ESOP assets held by employees is 9.7% in close corporations and 28% in listed firms. *Kruse* states that that firm productivity increases by 4-5% on average from the time ESOP contracts are made and that this increased productivity rate is maintained over time. This noted productivity jump is more than twice the average annual growth rate of the United States economy for over 20 years prior to 2002. In an analysis of seven empirical studies *Kruse* states that these studies indicate that employee ownership of a firms shares is linked to higher employment stability without decreases in firm efficiency.

In a study of American listed companies from 1983, *Blair at al., (2000)* found that firms with elevated Employee Stock Option Plans were 20% more likely than their competitors to survive through 1995. *Blasi & Kruse, (1991)* in a study involving the then entire population of 1000 listed firms, found that there is a wide sectoral distribution from manufacturing, services and retail trade of diffuse use of ESOP contracts. Similar results were found by *Kroumova, (1999)* showing elevated concentrated use of ESOP contracts in transportation, communications, utilities, financial services, mining and retail trade. Lower levels of ESOP contracts concentration were found in the agriculture, construction, wholesale trade and other services. *Weeden et al (1998)* also confirmed wide sectoral distribution of the use of ESOP contracts from among listed firms. A New York Stock Exchange (NYSE) survey in 1990, demonstrated that 36.4% of current shareholders first acquired shares through a firm run employee share ownership plan, 32.1% from an employee share ownership plan and 4.3% from a firm bonus plan. While according to the *United States Department of Labor, (2000)* and *Leonhardt, (2002)* fully 3 million employees who get ESOP contracts *every year* do so in listed firms.

These referenced studies indicate the high level of diffusion and use of SIP and ESOP contracts among American listed firms. And as was indicated and explained in subsection 7.4, employees holding SIP and ESOP contracts have to fulfil two performance optimality conditions that also serve as share transfer restrictions:

1) Employees have to achieve Goal Performance Optimality conditions by achieving predefined corporate goals or milestones.
2) Employees have to achieve Time Performance Optimality conditions by remaining in the employment of the SIP or ESOP issuing firm for a predetermined period of time (the vesting period).

Employees who fail to achieve the above stated Performance Optimality conditions cannot have a firms shares issued and transferred to them by their employer. Therefore, it can be said that SIP and ESOP contracts that involve the transfer of shares, have Anti-Performance Suboptimality transfer of shares restrictions.

In terms of comparison, the level of diffusion and use of SIP and ESOP contracts is higher among listed firms in the USA than in Italy and indeed in much of the European Union. This is due to the fact that the use of SIP and ESOP contracts as a renumeration tool has a longer tradition in the United States than in Italy or elsewhere in the European Union.

(C) Anti-Trust Restrictions Applicable To Listed Corporations In M&A's In The USA

Anti-Trust restrictions applicable to listed corporations in mergers and acquisitions in the USA are exactly the same as Anti-Trust restrictions applicable to close corporations in the USA. This is due to the fact that the relevant laws applicable in both instances to closed and listed corporations are alike. These legal provisions have been exhaustively and extensively discussed in subsection 8.3.

(D) Anti-Insider Trading restrictions applicable to listed corporations in the USA

Partly due to fact that the United States has the oldest tradition with regard to stock exchanges, it is unsurprising that it has been on the forefront in the enactment of stringent Anti-Insider trading share transfer restrictions' legislation.

As has been exhaustively explained in subsection 7.4 insider trading involves the use by insiders (rank and file employees, members of the board of directors etc), of material nonpublic information for profit taking or for loss avoidance or the disclosure of the same information to third parties who would then trade illegally in the firms shares with profit taking or loss avoidance objectives.

Material nonpublic information includes but is not limited to the following situations:

1) Financial results that have not yet been made public.
2) Future expected earnings or losses.
3) News of an impending or intended initial public offer (IPO) that has not yet been disclosed to the public or to public regulators.
4) News of an impending or intended divesture, spinoff, merger or acquisition that has not yet been disclosed to the public or to public regulators.
5) Significant inward or outward changes to top management or R&D specialists.
6) Stock dividend payout plans or splits.
7) New debt or equity offerings.
8) Impending large inward contracts or tenders' awards.
9) Positive or negative R&D outcomes that can result in increases in profit or loss expectations that may affect the movement of quoted prices of shares positively or negatively, upon public disclosure.

Prohibited and illegal trade in securities includes but is not limited to, common or preferred shares, share options (including ESOPs), warrants, derivatives instruments and convertible debt. The public regulators of Anti-Insider Trading legislation are the United States Securities and Exchange Commission (SEC) and the Office of the Attorney General of the United States Department of Justice (USDOJ).

In the United States, Anti-Insider trading restrictions are imposed by the following set of legislation:

1) The *Securities Act of 1933*. This *Act* was passed in the aftermath of the stock market crash of 1933 and the subsequent Great Depression. The *Securities Act of 1933* was the first Federal legislation regulating trade in financial securities and is the actualization of the *Interstate Commerce Clause* of the *Constitution of the United States of America.*

The regulation of primary security instruments is the responsibility of the *Securities Act of 1933*. The express purpose of this *Act* is to ensure the full disclosure of information to potential investors intending to invest in securities and to mitigate fraudulent conduct and intent by the issuing firm. Securities intended for sale to American citizens must be registered by filing a registration statement with the United States Securities and Exchange Commission. Initial Public Offer (IPO) registration documents include a prospectus with full information about amongst others, the firm, its officers, its business and audited financial statements. Severe criminal and civil liability are imposed on the firm, its officers and underwriter for inaccurate or misleading information.

2) The *Securities Exchange Act of 1934.* This *Act* established the United States Securities and Exchange Commission. The SEC is the public regulator charged with the responsibility of enforcing American Federal securities legislation. The SEC regulates all stock exchanges in the United States including the NYSE, NYSE American and NASDAQ (National Association of Securities Dealers Automated Quotation System). This *Act* in addition also regulates market players such as brokers, brokerage firms and other stock market intermediaries.

3) The *Insider Trading Sanctions Act of 1984.* Also known by its acronym *ITSA*, this *Act* was enacted to give the SEC additional punitive options against cases of insider trading. Before the enactment of *ITSA*, the was no statutory powers to inflict punishment other than criminal prosecution. *ITSA* introduced the possibility of civil action against violation of insider trading laws where the SEC is the plaintiff as opposed to the USDOJ. The *ITSA* provides a triple damages penalty over and above disgorgement and forfeiture of realized illegal profits or losses avoided. The triple damages penalty means an individual found to have engaged and profited from illegal insider trading, can be inflicted with a penalty to pay three times the value of the profits taken or losses avoided. This is addition to other punitive criminal penalties that can be inflicted by other related Anti-Insider trading statutes. The defendant could be liable to pay in excess of five times the sum of the illegal profits taken or losses avoided in addition to suffering lengthy prison sentences, *Silver, (1985).*

4) The *Insider Trading Securities Fraud Enforcement Act of 1988.* This purpose of this *Act* is the imposition of direct responsibility on firms to monitor securities transaction of their employees of the firm’s securities and the prevention of illegal use of the firms material nonpublic information in such trade. Heavy penalties can be imposed on the firm because of employees engaging in insider trading by transacting in the firms securities. Imposable penalties that can be inflicted by US regulatory authorities on employees include:

i) A civil penalty of up to three times the profit earned or loss avoided and

ii) A criminal fine irrespective of how little the profit taken or loss avoided was, of up to US$ 1 million and

iii) A maximum sentence not exceeding 10 years in Federal prison.

In addition, for a firm as a whole as well and the Chief Compliance Officer individually or any other person performing such supervisory role, who fails to take appropriate action to prevent illegal insider trading, the following punitive penalties apply:

iv) A minimum civil sanction US$ 1 million or three times the profit gained or loss avoided (whichever is higher) as a result of an employee's or other insiders misconduct and

v) An additional "top up" maximum criminal fine of US$ 2,5 million.

Prohibited securities dealings by a spouse of an employee or other insider are deemed by this *Act* to have the same punitive consequences as those directly initiated by the employee or other insider.

5) The *STOCK Act of 2012.* Also known as the *Stop Trading on Congressional Knowledge Act of 2012*, this *Act* prohibits members of the United States Congress and employees of the United States Congress from using material nonpublic information acquired during the normal course of their duties, for their personal benefit. This statute also applies to all employees in the Congressional, Executive and Judicial branches of the government of the United States who by virtue of their employment may come in possession of market sensitive material nonpublic information. This *Act* also requires members of the United States Congress to publicly disclose their dealings in any financial securities on their websites within 45 days of such dealings.

It is abundantly clear in view of the length and breadth of legislation and the severity of inflictable penalties, that the Congress of the United States has consistently and historically, taken an extremely dim view on the issue of insider trading and the resulting market price manipulations and distortion.

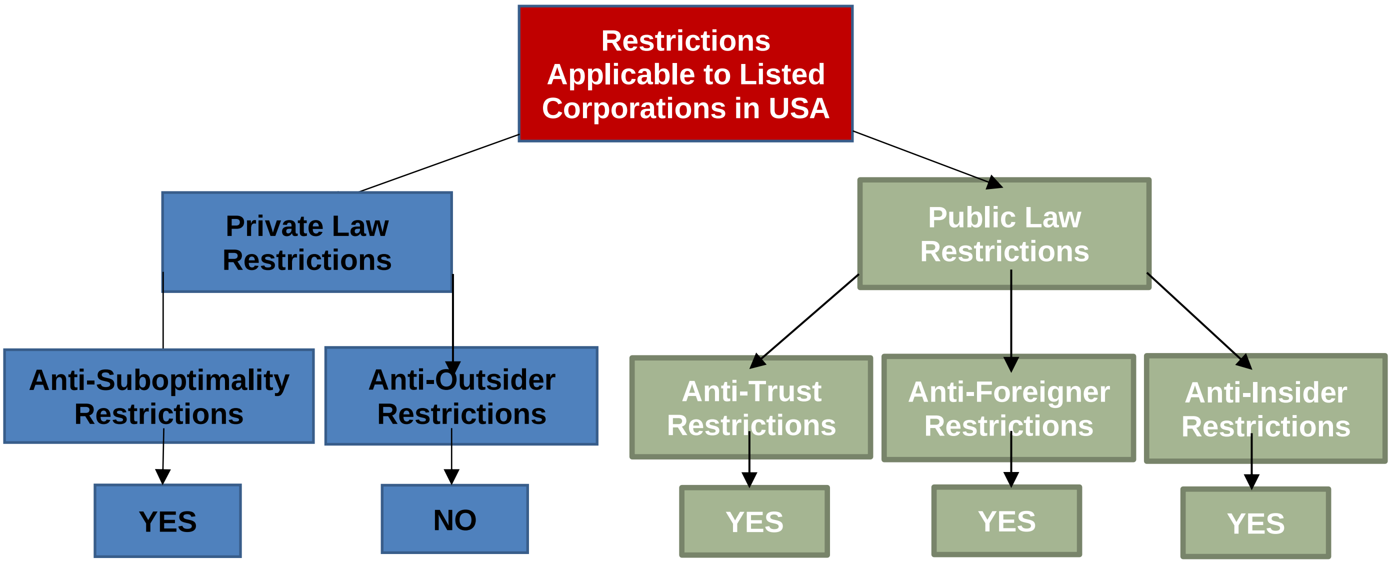
(E) ANTI-FOREIGNER RESTRICTIONS APPLICABLE TO LISTED CORPORATIONS IN THE USA

Anti-Foreigner restrictions applicable to listed corporations in mergers and acquisitions in the USA are exactly the same as Anti-Foreigner restrictions applicable to close corporations in the

USA as previously discussed.

(F) Restrictions Flow Chart applicable to listed corporations in the USA

Figure: 9



X. Conclusion

Throughout this study the reader has been taken through the entire panorama of the various types of laws and regulations as they apply to the transfer or alienation of shares under United States and Italian jurisprudence and corporate practice. This panorama clearly demonstrates that the transfer of shares is anything but free. In the vast majority of cases as demonstrated, the transfer of shares is subject to heavy and punitive restrictions or prohibitions under applicable private and public law.

This study has also highlighted the vast differences that exist between United States and Italian law with regard to the transfer of shares. For example, loopholes in Italian Anti-Insider Law makes it difficult to successfully prosecute insider trading while in the United States prosecution and enforcement are often aggressively and successfully pursued. The severity of imposable penalties is also clearly stricter and harsher in United States Anti-Insider laws than under Italian law. This difference results in significantly reduced levels of deterrence to Italian offenders.

The central core of this study was the identification and description of the quasi-private character of shares. It is the considered view of the author that this objective has been met. This study has also for the first time identified and described the five A's taxonomy of transfer of shares restrictions namely, i) the Anti-Outsider, ii) Anti-Performance Suboptimality iii) Anti-

Trust, iv) Anti-Insider Trading and v) Anti-Foreigner provisions classifications.

The number of public laws that restrict the free transferability of shares are clearly wide and far reaching with the overriding concern of government appearing to be consumer, societal protection and national security considerations. The reason why these factors are important to government stems from the fact that the ownership of shares is the basis of economic power. This economic power can be exercised in a negative manner to the detriment of consumers, society and even the state itself. The ownership of shares is the means of exercising control of an economy's means of production, therefore restrictions are placed on who can exercise this economic power. This study in addition, clearly demonstrates that it is unfeasible for any close corporation, listed firm or its shareholders irrespective of which stage it is on its development curve, to escape public law restrictions on the sale or transfer shares under both United States and Italian jurisprudential systems and corporate practice.

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