

Quaderni giuridici  
(Legal research papers)

# Shareholdings of alternative investment funds in listed companies and in banks

A legal perspective

*S. Alvaro, F. Annunziata; with preface by M. Stella Richter jr*



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## **Consob**

00198 Roma – Via G.B. Martini, 3

**t** 06.8477.1

**f** 06.8477612

**e** [studi\\_analisi@consob.it](mailto:studi_analisi@consob.it)

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# Shareholdings of alternative investment funds in listed companies and in banks

A legal perspective

*S. Alvaro\**, *F. Annunziata\*\**

## Abstract

The harmonization of the European regulations on collective investment schemes (CIS) – with UCITS regulation first and, most recently, with the AIFM Directive - has expanded the areas of operation of asset managers. In particular, Alternative Investment Funds are emerging as increasingly relevant shareholders in listed companies and banks. In light of such market development, the paper explores the interaction of CIS regulation with corporate governance regulation and prudential supervision rules. First, the paper shows that the application of takeover rules to CIS as shareholders raises significant complexities. These complexities derive from the fact that the Italian law on listed issuers (takeovers, disclosure of significant shareholdings, groups and conflict of interest, slate voting, etc.) implicitly assumes that shareholders are mainly individuals or joint-stock companies rather than funds managed by a third party. Second, the paper discusses the issues posed by the acquisition of qualifying shareholdings in the capital of banks by CIS in the perspective of the compliance with micro-stability rules. The paper argues that the typical objectives of CIS regulations, in terms of transparency, fairness of conducts and the duty to serve at best CIS investors, may trade off with the need to ensure compliance with prudential rules for the invested company. More specifically, though the investment policies of CIS are obviously targeted to the search of the specific risk-return profile declared in the fund prospectus, the need to take into account further interests, such as stability and sound and prudent management of the invested banks, may not necessarily be in the best interest of CIS investors.

The papers are presented in their original Italian version, along with a shorter English version, that is intended to target foreign audiences, so that they may better contribute to the international debate.

JEL Classifications : K2, G1.

Keywords: Alternative Investment Funds - Collective investment schemes – Listed companies.

\* Head of Legal Studies Office, Research Department, Consob. \*\* Professor of Financial Institutions and Markets Law, University L. Bocconi, Milan. We would like to thank Professors Renzo Costi and Piergaetano Marchetti for the comments and useful comments provided. Any mistake remains, of course, our sole responsibility. Opinions expressed in this paper are exclusively the authors' and do not necessarily reflect those of Consob.

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# Preface

Mario Stella Richter jr\*

1. According to some rather accurate investigations<sup>1</sup>, in 2004 assets under management<sup>2</sup> amounted overall to USD 37.3 trillion. In the following years, this amount has constantly grown: USD 59.4 trillion in 2007, USD 63.9 trillion in 2012, USD 71.9 trillion in 2013, USD 78.0 trillion in 2014<sup>3</sup>; USD 78.7 trillion in 2015 and USD 84.9 trillion in 2016. This in spite of the great crisis of 2007-2009<sup>4</sup>.

Such a significant growth reflects an equally substantial increase of wealth on the investors' side, i.e. of (current or perspective) clients of the assets and wealth management industry. In 2004, the total value of investable assets amounted to USD 120.9 trillion, in 2007 it had increased to USD 159.7 trillion, in 2012 to USD 175.1 trillion, in 2015 to USD 202.3 trillion and in 2016 to USD 214.6 trillion.

A third phenomenon, directly inferable from the first two, seems significant for the purposes of our discussion: the share of wealth managed by the management industry has grown more than proportionally as compared to the increase of investable assets. In 2004, it accounted for 30.9% of the total wealth; in 2016 the assets under management represented 39.6% of investable assets.

It appears that this threefold trend – increase of wealth, increase of assets under management, increase of the share of assets under management on investable wealth – is not likely to change over the medium term.

\* Full Professor of Commercial Law, University of Rome "Tor Vergata".

1 Data processed by PwC AWM Research Centre, on the basis of those taken from the following sources: Lipper, ICI, Preqin, Hedge Fund Research, EFAMA, City UK, Insurance Europe, Financial Stability Board, Credit Suisse, Towers Watson, OECD and World Bank. See PwC, *Asset Management 2020: Taking Stock*, in *Asset & Wealth Management Insights*, May 2017, at p. 5; *Id.*, *Asset & Wealth Management Revolution: Embracing Exponential Change*, n.p., 2017, at p. 6-7.

2 This expression covers the assets managed by all types of asset and wealth managers in the world.

3 Thus, more than doubled, within ten years.

4 This growth on the global level coincided with a growth on the regional level, even if in Europe this growth was less substantial than in other geographic areas. In Europe, assets under management have increased as follows: USD 12.9 trillion in 2004; USD 21.0 trillion in 2007; USD 19.7 trillion in 2012; USD 21.9 trillion in 2016.

Some studies estimate that in 2020 investable assets will be equal to USD 284.4 trillion<sup>5</sup> and assets under management to USD 112.0 trillion; therefore, the penetration rate of the latter on the former should be equal to 39.4%<sup>6</sup>. Two-fifths of all investable assets will be managed by assets and wealth managers.

Similar estimates are made also with reference to a longer period: in 2025, investable assets could amount to USD 345 trillion and assets under management to USD 145.4 trillion, with a resulting penetration rate of 42.1%<sup>7</sup>.

2. These numbers represent the starting point to understand the reason for the continuous and radical changes affecting the discipline of asset and wealth management, not only in Italy. These numbers justify the growth of collective investment schemes, their diversification and their increasing uses.

Moreover, the growth of the resources managed and of the size of this industry has led to employ ever new technological and IT innovations in the field of asset management, with economic and business prospects that are still to be fully comprehended. Technology is thus deeply re-designing not only the entire asset management field and the way the various phases of this industry's supply chain are organized, but also the typical risk scenarios of this type of business, where the importance of cyber risks is emerging. This determines the undoubted relevance of what is generally called, using a popular and suggestive expression, "Fintech". Artificial intelligence, robotics, big data and blockchain are changing and will increasingly reshape the ways asset management activities are carried out, not only as concerns services and activities offered to savers, but also as concerns the relations between asset managers and the companies where the latter invest.

3. In turn, all the aforementioned transformations are now raising a great number of legal issues that formerly did not exist or appeared of lesser importance, when the first attempts of a specific legislation on asset management were experimented in Italy and in Europe. It seems ages since then, but actually, it was just a few decades ago.

5 This estimate is essentially based on the growth of Gross Domestic Product.

6 See PwC, *Asset Management 2020: At Brave New World, 2014*; *Id.*, *Asset Management 2020: Taking Stock*, *supra* note 1.

7 PwC, *Asset & Wealth Management Revolution: Embracing Exponential Change*, *supra* note 1, p. 6-7.

The current issues represent an extremely wide problematic area, which, I would say, has not even been exhaustively identified yet. This area includes – certainly not in a negligible position – the subject matters of this issue of Consob’s *Quaderni Giuridici*.

At a closer look, the economic phenomena of the growth and transformation of financial wealth are those that underlie the abundance of regulatory interventions concerning the asset management industry at the international, transnational and national levels.

As rightly recalled at the beginning of the paper, one of the main streams of recent legislation results from the attempt to regulate, in a macroprudential perspective, the so-called Shadow Banking System, i.e. those intermediaries (such as, for example, loan-originating funds, hedge funds, private equity funds, venture capital funds, real estate funds, commodity funds, money market funds, infrastructure funds, etc.), which operate collecting savings and lending to businesses, similarly to the credit institutions system but without being part of it.

Obviously, an urgent need to regulate this phenomenon is felt internationally, considering its economic relevance and that in many geographical areas (Europe first) it has outdone the traditional banking system in size.

More generally, at least in the European Union, we have witnessed the construction of a second pillar of the discipline of collective investment management, aimed at regulating, by looking at the subject and not at the product, the by-now huge and varied world of asset and wealth managers, which comprises all that is not included in the category of *Undertakings for the Collective Investment of Transferable Securities* (UCITS): hedge funds, private equity funds and venture capital funds, loan funds, real estate funds, etc. This second pillar, dedicated to the so-called *Alternative Investment Funds* (AIFs), is largely composed of “subjects” that also or mainly invest in controlling holdings of companies and that, in any case, are free from the rigid criterion of investment diversification.

This new stream of regulatory intervention revolves around Directive 2011/61/EU, the well-known *Alternative Investment Fund Managers Directive* (AIFMD), which uses a non-specific approach to regulate the organisation and conducts of all those subjects that are negatively identified as not managing products falling within the scope of the UCITS directives.

Yet, the guiding principles and criteria of the AIFMD do not exhaust the complex series of interventions that pertain to the sphere of alternative management, and not even the sources of European law. A series of regulatory provisions focuses on particular and specialised alternative investment funds. For example, I am thinking of European rules and regulations on European Venture Capital Funds (EuVECA), European Social Entrepreneurship Funds (EuSEF) and European Long-Term Funds (ELTIF). I am also thinking of the very recent Regulation (EU) 2017/1131 on Money Market Funds (MMF).

4. In this context, the pages that make up this issue of *Quaderni Giuridici* have more points in common with each other than it might seem at first sight.

The subject matter in the second chapter is, in fact, a direct consequence of the development and growth of the asset management industry toward multiple directions. Specifically, he begins from the growing presence of private equity funds in the share capital of banks, either as holders of qualified holdings or even of controlling holdings.

Also the first chapter is aimed at investigating a series of issues that have become relevant as a result of the economic growth of the asset and wealth management industry. This part of the paper has a composite subject matter and a two-fold soul. On the one hand it reflects on the peculiar problems that arise when an asset manager manages a majority or controlling holding in a company on behalf of a managed (alternative) investment fund. On the other hand, it adopts a more analytical approach, in order to investigate the peculiarities of a take-over bid on the shares of mutual funds, a transaction that – it goes without saying – is aimed at obtaining the majority if not even the totality of such financial instruments (hence the parallel between the control of the company and the “control” of the fund).

5. Reading this issue of *Quaderni Giuridici* suggests – or at least suggested in my case – new perspectives for observing the world of mutual investment funds and for further investigating the new legal problems raised by it.

The radical and deep transformation of the figures, size, relevance and structure of the asset management industry requires to rethink the relations between the different souls of the financial market. The traditional vision of asset management, seen as a secondary activity as compared to banking and insurance (its “big sisters”), is largely outdated by the current financial reality. Asset management has

now come out of the shadow that banks and insurance companies had cast on it. Asset management activities have gained centre stage in the financial scene and represent now the moment of expansion and the most profitable portion of financial activities in general.

However, I believe that the time has come to try and adapt the way we consider company law and corporate governance issues, at least as regards widely-held companies. The albeit natural tendency to think as if the typical shareholder of widely-held companies is a natural person or a collective subject (legal person) which brings its “own interest” (whatever this might mean in the case of a company) must be overcome, and it should always be borne in mind that, at least in an interpretation based on the typological method, investors, shareholders (and often majority and controlling shareholders) are nowadays mainly funds, i.e., autonomous assets managed (generally) in an independent way by professional and institutional asset managers, in the interest of third parties and according to logics and policies that are structurally different from those of the specific investment.

In other words, the *fund as a shareholder* not only raises problems regarding the regulation of the conduct of its manager, but also requires that the discipline of issuers, their corporate governance and financial market law be interpreted in a way that better suits the relevance of the phenomenon.

