Shareholders’ agreements in Public Corporations in Chile: What Are We Missing Out?

Gonzalo Islas  
*Universidad de las Américas*

Osvaldo Lagos  
*Universidad Adolfo Ibáñez Faculty of Law*

Iván Cerda  
*Universidad Adolfo Ibáñez Faculty of Law*

Follow this and additional works at: [https://repository.law.miami.edu/umialr](https://repository.law.miami.edu/umialr)

Part of the Comparative and Foreign Law Commons, International Law Commons, and the Law and Race Commons

**Recommended Citation**

Gonzalo Islas, Osvaldo Lagos, and Iván Cerda, *Shareholders’ agreements in Public Corporations in Chile: What Are We Missing Out?*, 55 U. MIA Inter-Am. L. Rev. 343 ()

Available at: [https://repository.law.miami.edu/umialr/vol55/iss2/4](https://repository.law.miami.edu/umialr/vol55/iss2/4)

This Article is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Inter-American Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact mperezm@law.miami.edu, library@law.miami.edu.
Shareholders’ agreements in Public Corporations in Chile: What Are We Missing Out?∗

Gonzalo Islas*, Osvaldo Lagos**, Iván Cerda***

Shareholders’ agreements are quite common in many jurisdictions. Theory and empirical evidence suggest that they may have a positive or a negative impact on corporate governance structures depending on companies’ characteristics and on the goals that these contracts pursue. Shareholders’ agreements may be used as Control Enhancement Mechanisms (CEM) allowing controllers to circumvent rules that favor minority investors. However, comparing to other CEM, in many countries information regarding them is scarce. Is it necessary that shareholders’ agreements in public corporations be fully informed? We examine the case

∗ The authors would like to thank Andrés Goycolea for his committed research assistance in this project. This article is part of FONDECYT regular research project N° 1201124, on institutional problems of Chilean corporate governance system.

∗∗ Gonzalo Islas is Dean of the School of Engineering and Business at Universidad de Las Américas. He is a PhD in Economics from University of California, Los Angeles. His research focuses on corporate governance and financial history. Mailing address: Manuel Montt 948, Santiago, Chile. E-mail address: gislas@udla.cl

∗∗∗ Osvaldo Lagos is Associate Professor at Universidad Adolfo Ibáñez Faculty of Law (Santiago de Chile). He is Ph. D. in Law from Universidad de los Andes (Santiago de Chile). His research focuses on corporate law, comparative corporate governance and insurance law. Mailing address: Av. Diagonal Las Torres 2640, Peñalolén, Santiago, Chile. E-mail address: osvaldo.lagos@uai.cl.

*** Iván Cerda Donoso holds a Bachelor’s degree in Legal Sciences and served as an adjunct professor at Universidad Adolfo Ibáñez Faculty of Law (Santiago de Chile) from 2020 to 2023. Currently, he works as a lawyer at the Chilean Superintendent of Education, specializing in public resource accountability (school subsidies). His research interests include corporate law, specifically shareholders’ agreements, business groups, money laundering, and terrorism financing.
of Chile (a country that only requires to inform that a shareholder agreement exists) and compare it to Italy and Brazil cases, countries where shareholders’ agreements content is disclosed. We find out that the detail of the rules that impose or promote information might produce different results on the way that shareholders’ agreements are used. For the case of Chile, we show that its use has increased over time and that case evidence show that they may have been used to circumvent minority rights. Shareholders’ agreements play a much more important role in the control of public corporations in Chile than what has been previously discussed in corporate governance literature.

The contribution of this paper is to provide evidence in favor of the importance of mandatory rules for shareholders’ agreements disclosure and their design, not only where this information lacks, as in many developing countries, but also to reinforce the relevance of disclosure in developed markets, where the use of shareholders’ agreements in public companies is also increasing.

INTRODUCTION .............................................................................345
I. THE USE OF SHAREHOLDERS’ AGREEMENTS AS CEM ..........347
II. SHAREHOLDERS’ AGREEMENTS IN PUBLIC CORPORATIONS
IN ITALY AND BRAZIL ............................................................355
   A. Shareholders’ agreements in the corporate governance system in Italy ..................................................355
      i. Regulations of shareholders’ agreements in public corporations in Italy .............................................356
      ii. The evolution of the use of shareholders’ agreements in Italy ..........................................................361
      iii. Recap ........................................................................363
   B. Shareholders’ agreements in Brazil ..................................364
      i. Regulation of shareholders’ agreements in Brazil ..........365
      ii. The evolution of the use of shareholders’ agreements in Brazil .......................................................368
      iii. Recap ........................................................................373
III. CEM STRUCTURES IN CHILE ..................................................374
IV. SHAREHOLDERS’ AGREEMENTS REGULATION IN CHILE .......379
A. The law of shareholders’ agreements in Chile ..........................379
B. Regulation on information of shareholders’ agreements in Chile .................................................................382

V. WHAT DO WE KNOW ABOUT SHAREHOLDERS’ AGREEMENTS IN CHILE? ...............................................................................384
A. Anecdotal information on shareholders’ agreements in public corporations in Chile............................................385
   i. Shareholders’ agreements regarding management in the Cencosud-Paris merger .....................................386
   ii. Shareholders’ agreements regarding management in Corpbanca-Itaú merger ...........................................387
   iii. Shareholders agreement in the CAP Mitsubishi partnership .................................................................389
   iv. Summary .....................................................................391
B. Systematic information regarding shareholders’ agreements in public corporations in Chile ....................392
   i. The requirement of information regarding shareholders’ agreements in the annual report and its problems.................................................................392
   ii. Empirical analysis of the information regarding shareholders’ agreements in the annual reports of Listed Corporations ....................................................395

VI. SUMMARY OF THE USE OF SHAREHOLDERS’ AGREEMENTS IN CHILE .................................................................400

VII. CONCLUSION ..........................................................................402

INTRODUCTION

The discussion on the effects and implications of control enhancement mechanisms (CEM) or control structures of minority shareholders has become increasingly relevant in corporate governance literature. In a CEM-type structure, there is a deviation between control rights and economic rights. In this regard, there are different mechanisms that allow one to maintain a minority control position. Specialized literature in the matter identifies the following as the main control structures of minority shareholders: pyramidal-type
ownership structures, series of shares with different voting rights, cross-ownership structures, and shareholders’ agreements.¹

Economic literature on corporate governance in Chile has focused its analysis on pyramidal structures (as a prevalent minority control mechanism) especially since the 1990s. This is explained because pyramidal structures have been able to be identified thanks to the prevailing information rules on the stock market.² However, anecdotal evidence has shown that shareholders’ agreements can play a relevant role in the control of public corporations in Chile.³ It seems there is a big part of the picture that the corporate governance literature in Chile is missing out.

This paper reviews the information available on shareholders’ agreements in public corporations for three years: 2008, 2013 and 2018. Based on this evidence and the above anecdotal evidence, this work concludes that shareholders’ agreements play a substantial role as a structure control enhancing mechanism (CEM) in the Chilean market, and its relevance seems to be increasing.

To illustrate the importance of shareholders’ agreements as a type of CEM and the influence of disclosure rules on their use, this paper analyzes the economic and legal literature on shareholders’ agreements in public corporations, which includes the experience of Italy and Brazil. These countries are particularly observed, since, like Chile, they both have civil law systems. In addition, in both legal systems, high levels of transparency have been required or promoted regarding shareholders’ agreements relating to public corporations.

² The system presents information deficiencies at the top of the pyramid; in Chile there is an absence of regulation on beneficial owners. See Fernando Lefort, Business Group in Chile, in THE OXFORD HANDBOOK OF BUSINESS GROUPS 387, 398 (Asli M. Colpan, Takashi Hikino & James R. Lincoln eds., 2010), who points out that at the top of the pyramidal structures, the controlling shareholders are organized through close corporations, which participate at different levels of the pyramid, making it very difficult for them to be identified.
³ With regard to takeover bids (OPAs) or other forms of change of control, on occasions the regulator has required that shareholders’ agreements be disclosed by means of which companies are controlled or intended to be controlled.
This work allows obtaining criteria from which to analyze, first, the legal provisions governing shareholders’ agreements in public corporations in Chile, particularly regarding information rules. Secondly, it allows analyzing the evidence on the use of shareholders’ agreements (obtained from the existing information rules).

The observations outlined in this document permit us to conclude that the legal regulations on shareholders’ agreements combined with other rules influencing the structure of corporate governance, contributes to shareholders’ agreements playing a relevant role as CEM in Chile. Likewise, the present analysis reveals the need to modify the rules on shareholders’ agreements in public corporations; in particular, disclosure rules.

The work is organized as follows: section II reviews both theoretical and empirical literature on the impact of shareholders’ agreements and their role as a mechanism for increasing control. Section III discusses in detail the cases of Italy and Brazil. Section IV presents a historical overview of the use of CEM structures in Chile, which shows that the evolution of regulations in Chile has created an institutional framework that encourages the use of agreements as a CEM mechanism. Finally, section V discusses the use of shareholders’ agreements in Chile based on the information available in corporate reports. Finally, this section presents an empirical study on the defining factors that explain the presence of shareholders’ agreements in public corporations. Conclusions and policy recommendations are presented at the end of the document.

I. THE USE OF SHAREHOLDERS’ AGREEMENTS AS CEM

Shareholders’ agreements are contracts executed between shareholders of the same company; their purpose is to regulate their relations as shareholders of the company, influence the corporate organization and/or allocate the rights of the company they are part of. Consequently, in these contracts it is possible to find clauses that regulate the purchase and sale of shares or that compromise voting preferences at shareholders meetings. Similarly, these contracts may also seek to influence the deliberation of the board of directors or may require the signing parties to participate in financing rounds of the company, either through loans or capital increases.
The content of shareholders’ agreements depends on the objective of the parties when deciding to execute it. Through these agreements, various types of businesses can be structured, such as joint ventures or venture capital. However, when they regard public corporations, i.e., those that are authorized to offer their shares on stock exchanges, these shareholders’ agreements usually have three types of purposes.

In the first place, shareholders’ agreements can serve to promote alliances between controlling shareholders and minority shareholders. Ultimately, they provide stability to the management of business. This is particularly valuable when it comes to businesses that involve long-term investments. In this sense, they play a role similar to that of covenants with regard to the issuance of debt securities.

Secondly, shareholders’ agreements can fulfill the role of uniting votes among multiple minority shareholders to increase their influence in the management of the company. Therefore, allowing them to vote in a coordinated manner at shareholders meetings on consulted matters and even elect one or more directors.

Third, shareholders’ agreements can be used as a way to bring shareholders together as a coalition whose function is to control the governance of the company. The specific clauses of shareholders’ agreements will determine which of the shareholders that are part of the coalition are the ones who dominate the relevant decisions within that coalition and, consequently, who control the company.

In this light, it will usually be reported that there is a “controlling shareholders’ agreement”, however, it may happen that some of the subscribers of said agreement are actually the controlling shareholders. When this occurs, the shareholders agreement functions as a control-enhancing structure, or CEM.

We understand by “Increased Control Structure”, also known as “Minority Control Structures’ those in which one (or several) shareholders can exercise control even when they only own a minor proportion of the economic rights of the company.4

---

This type of structure is similar in its effects to a concentrated ownership structure, in the sense that those who control can block control attempts by other shareholders. At the same time, the difference between the control rights and the economic rights of the company creates an agency problem between shareholders. Indeed, controlling shareholders may prefer projects that increase their private benefits of control to the detriment of the value of the company. That is why this type of structure can favor the use of tunneling practices, whereby they expropriate value from the rest of the company’s investors.

Even though this is a problem typical of countries where the “continental” model of corporate governance predominates, this type of structure has become an issue that attracts attention in the US, where the use of series of shares with different voting rights has become a fairly common practice in technology companies that make public offerings of shares, such as Alphabet (parent company of Google) and Meta (parent company of Facebook).

Strictly speaking, shareholders’ agreements cannot be identified as a minority control mechanism, since in order to have an effect on control, shareholders’ agreements require adding a significant number of shares (if it seeks generating a change in the relationship between the ownership structure and control of the company). Nonetheless, shareholders’ agreements may allow groups of shareholders to increase their presence on the Board of Directors or may limit competition for control. As with pyramidal structures, series of

---

6 See, e.g., Lucian Bebchuk & Kobi Kastiel, The Perils of Small Minority Controllers, 107 GEO. L.J. 1453, 1456 (2019). These authors show that, in the case of the United States, ownership structures with series of shares have become more frequent in the case of technology companies that go public and that they frequently incorporate clauses that allow the founders to maintain control even by significantly reducing their participation in the company’s capital. On the other hand, it should be noted that these authors identify as an aggravating problem the fact that, in many cases, the control structure is “rarely transparent to investors. See also Lin, supra note 1, at 454-510.
7 See, e.g., Gianfranco Gianfrate, What do Shareholders Really Want? Evidence from Italian Voting Coalitions, 15 CORP. GOVERNANCE 122 (2007) (showing that in the Italian case, shareholders’ agreements allow groups of shareholders that represent an average of 52% of the rights to cash flow to occupy an average of 87% of the positions on the Board of Directors).
shares with different voting rights and cross-ownership has an effect on agency problems that arise within the company.

Various studies have drawn attention to this practice and its potential effects on the company’s corporate governance.8 Evidence for Europe shows that shareholders’ agreements are frequent in corporations in several countries, even when there are differences in their use.9

On the other hand, in the United States, the use of shareholders’ agreements is frequent in the venture capital industry and its relevance in public discussion has increased in recent years.10 However, as Rauterberg (2021) indicates, compared to other mechanisms, shareholders’ agreements have not been the subject of detailed study, both from an economic and legal perspective.11 This can be due to two reasons.

A first reason is that, from its beginnings, this literature focused its study on the observation of problems that occurred in dispersed property systems, especially the United States of America. Until recently, in said country shareholders’ agreements did not play a

---


9 See, e.g., Sabri Boubaker, Ownership-Control Discrepancy and Firm Value: Evidence from France, 11 MULTINATIONAL FIN. J. 211 (2007) (showing that shareholders’ agreements are present in 170 of 510 companies listed in France); see also INSTITUTIONAL SHAREHOLDER SERVICES ET AL., supra note 8, at 35 (identifying France, Belgium, Spain, and Italy as the countries where the use of shareholders’ agreements is most frequent).


11 Notwithstanding the foregoing, it should be noted that from a theoretical point of view, there is literature that, using game theory tools, studies the impacts of corporate structures where coexistent shareholders form coalitions (shareholders’ agreements) to influence the government of the company business. See, e.g., Jeffrey Zwiebel, Block Investment and Partial Benefits of Corporate Control, 62 REV. ECON. STUD. 161 (1995); see also Morted Bennedsen & Daniel Wolfenzon, The Balance of Power in Closely Held Corporations, 58 J. FIN. ECON. 113 (2000).
relevant role in the governance of public listed corporations. However, the growth of the market for developing technology companies, in addition to the intention of technology entrepreneurs to continue controlling these companies even after going public, has recently installed a debate on shareholders’ agreements in public corporations in the United States of America.

A second reason is that shareholders’ agreements are nothing more than contracts executed between individuals and therefore, it is expected that there will be evidence of them only if they are required to be disclosed. However, for the authority to demand their disclosure, there must first be awareness that their use is relevant as a mechanism to govern public corporations and that this is relevant information for the market. Therefore, there must be a public interest in their disclosure. The use of a specific CEM depends, in turn, on the existence of certain knowledge (and commercial practices) on the respective mechanism in the country in which it is used. Similarly, the respective CEM must not be prohibited, or its use must not be discouraged.

This explains why the acknowledgment of shareholders’ agreements as CEM has been earlier and more generalized in Europe.

---

13 See Fish, supra note 10, at 281-315; see also Rauterberg, supra note 10.
14 Of course, it is also important that the securities regulator is sufficiently independent and that controllers cannot exert sufficient influence to prevent the enactment of regulations that they deem inappropriate or undesirable.
15 This explains how in the United States and Great Britain, countries in which share ownership had been decentralized since at least the mid-20th century, the duty to report shareholders’ agreements in public corporations is not a specific duty but follows from a generic duty to report all those contracts that are relevant to its government. See Rauterberg, supra note 10, at 1149 n.96; see also Rafal Zakrzewski, England and Wales, in INTERNATIONAL HANDBOOK ON SHAREHOLDERS’ AGREEMENTS REGULATION, PRACTICE AND COMPARATIVE ANALYSIS 247, 256 (Sebastian Mock, Kristián Csach & Bohumil Havel eds., 2018).
16 See Lin, supra note 1, at 460 (“In a 2007 survey (Report on Proportionality in the EU) out of 464 public corporations surveyed in [16] member countries of the European Union, 44% of them had at least one CEM. Pyramidal structures, multiple voting shares and shareholders’ agreements are the most common mechanisms used among European public corporations to create leveraged control.”) (emphasis added).
Likewise, public discussion on shareholders’ agreements as CEM) has been more prolific in Italy.

What are the economic effects of shareholders’ agreements? As with minority control mechanisms (which are mostly studied by specialized literature), the effects can be opposite.

On the one hand, they can have a positive impact, since they allow the creation of incentives. For example, they allow shareholders to monitor administrators (i.e., shareholders’ agreements allow mitigating what literature calls the vertical agency problem).

It has also been said that the existence of shareholders’ agreements may be a mechanism to avoid the “hold up problem”: Shareholders’ agreements constitute a credible commitment by investors and allow investments to be made. In this case, shareholders’ agreements are used not as a mechanism to increase control rights, but rather as a commitment mechanism by a controlling shareholder to encourage the participation of minority investors. According to literature, we call these positive effects of shareholders’ agreements the “Incentive effect”.

On the other hand, shareholders’ agreements, by strengthening the control rights of those who participate in them, increase the risk of opportunistic behavior by the coalition of shareholders that are members of the shareholders’ agreement, thus, allowing them to obtain private benefits of control and, therefore, expropriate value from the rest of the shareholders. Accordingly, shareholders’ agreements can exacerbate what literature calls the horizontal agency problem. We will call this effect the “Entrenchment Effect.”

Along these same lines, Fisch criticizes the use of shareholders’ agreements, pointing out that they sacrifice “important corporate

---

17 See Gilles Chemla et al., *An Analysis of Shareholders’ Agreements*, 5 J. EUR. ECON. ASS’N. 93, 95-96 (2007). See also Angelo Baglioni, *Shareholders’ Agreements and Voting Power: Evidence from Italian Listed Firms*, 43 APPLIED ECON. 4043 (2011) (finding evidence, for the Italian case, of the use of agreements in which a controlling shareholder limits his/her voting power through them). This author, while aware of the foregoing citation, holds that in such cases, a shareholder’s agreement would play a substitute role for other corporate governance mechanisms such as Audit Committees and independent Directors. Another possible interpretation is that in such cases shareholders’ agreements fulfill a role similar to that of covenants in the case of bondholders.

law values, including transparency, predictability and standardization.\(^{19}\)

Empirical studies on shareholders’ agreements in companies traded on the stock exchange are scarce and, naturally, they are concentrated in countries where access to information on shareholders’ agreements is easier.

Two questions that have been addressed by specialized literature are, on the one hand, the analysis of the contents of the shareholders’ agreements, and on the other, the impact of shareholders agreement on the company’s performance.\(^{20}\)

Carvalhal\(^{21}\) studies the case of Brazil, a country where the use of shareholders’ agreements is frequent. Through a detailed analysis of contractual clauses, this author not only analyzes the existence of shareholders’ agreements but also studies the impact of different types of clauses (for example, restrictions on operations with related parties and reductions in the payment of dividends). In that light, Carvalhal has developed a “shareholders’ agreements index.”\(^{22}\) The value of this index increases with the level of investor protection provided by the shareholders’ agreement. His results show that there is a positive effect on company value when there is a shareholder’s agreement and that this effect is greater if the value of the “shareholders’ agreements index” is greater.\(^{23}\)

A similar result was found by Belot for a sample of 300 French companies in the 2000-2005 period.\(^{24}\) This author shows that the

---

\(^{19}\) See Fisch, supra note 10, at 916.

\(^{20}\) A related line of research is one that studies the impact of the “second shareholder” on the value of the company. See, e.g., Mauricio Jara-Bertin et al., *The Contest to the Control in European Family Firms: How Other Shareholders Affect Firm Value*, 16 CORP. GOVERNANCE 146 (2008).

\(^{21}\) See generally Andre Carvalhal, *Do Shareholder Agreements Affect Market Valuation?: Evidence from Brazilian Listed Firms*, 18 J. CORP. FIN. 919 (2012).

\(^{22}\) For the use of indices based on contractual clauses as a corporate governance tool, see Paul A. Gompers et al., *Corporate Governance and Equity Prices*, 118 Q. J. ECON. 107 (2003).

\(^{23}\) See also Andre Leonardo Pruner da Silva et al., *Agreeing and Impacting: The Effect of the Shareholders’ Agreement on Firms’ Market Value*, 15 BRAZILIAN BUSINESS REVIEW [BBR] 88 (2017) (obtaining a similar result using the index proposed by Carvalhal for a sample of 472 companies for the 1999-2013 period).

existence of shareholder’s agreements allows mitigating the negative effect on the value generated by the dispersion of shareholders. Accordingly, he interprets this evidence suggesting that shareholders’ agreements have a coordination function between shareholders and not an expropriate effect.

Volpin finds that in Italian cases, companies with shareholders’ agreements replace management more quickly (caused by poor results). This author suggest that this is caused by the active monitoring performed through shareholders’ agreements.25

However, for the case of Brazil, Gelman, Kabbach and Seidler26 show a negative effect for clauses that affect directors’ voting decisions. In this regard, this effect is greater in those cases where shareholders’ agreements include generic clauses that impose voting restrictions. These authors suggest that shareholders’ agreements that affect the voting decisions of directors reduce the monitoring role of the latter, which in turn affects the value of the company. Gelman, Kabbach and Seidler note a regulatory paradox given that, on the one hand, the law establishes a duty of independence for the members of the board of directors but at the same time allows the shareholders to control the votes of the directors elected by them through these shareholders’ agreements.27

According to the opinion of Gianfrate, which used an event study methodology for the Italian stock market between 1998 and 2003, a negative abnormal return was observed by the announcement involving the signing of a shareholders’ agreement. In turn, the opposite effect was generated when the announcement referred to the end of a shareholders’ agreement. Accordingly, said situation

25 See generally Paolo F. Volpin, Governance with Poor Investor Protection: Evidence from Top Executive Turnover in Italy, 64 J. FIN. ECON. 61 (2002).
27 Id. It should be noted that these authors criticize the methodology proposed by Carvalhal, pointing out that some of the protection clauses indicated by this author only apply to the members of the shareholders agreement and, therefore, do not generate real protection for all shareholders. The sample of companies analyzed by these authors is not the same as that used by Carvalhal, which may also contribute to the difference observed in the results of both studies.
would be consistent with the hypothesis that shareholders’ agreements are a mechanism that facilitates expropriating practices.\textsuperscript{28}

The differences found by the empirical studies are not inconsistent with theory, which indicates opposite effects and highlights the importance of the information: The impact of shareholders agreement depends both on the characteristics of its contracting parties as well as on the type of clauses that are incorporated in them. Therefore, the predominance of the incentive effect versus the entrenchment effect of shareholders’ agreements will depend on the characteristics of each contract.

II. SHAREHOLDERS’ AGREEMENTS IN PUBLIC CORPORATIONS IN ITALY AND BRAZIL

A. Shareholders’ agreements in the corporate governance system in Italy

Aganin and Volpin describe the Italian corporate governance model as one of family capitalism and concentrated ownership, i.e., companies organized in large family conglomerates. In the opinion of these authors, despite the significant growth of the Italian stock market, the family capitalism system would have been maintained as a consequence of “the absence of regulatory intervention and the abundance of government corruption”. They add, quoting Luca Enriques, that in addition to the absence of regulation, the levels of “enforcement of the law has always been extremely poor in Italy.”\textsuperscript{29}

In 2000, Melis affirmed when characterizing the Italian corporate governance system that “shareholders’ agreements’ are a fundamental mechanism, especially at the highest level of control chains.\textsuperscript{30} Accordingly, through said shareholder’s agreements large families form alliances for having control of companies. For such purpose, they vote in a coordinate manner at shareholders meetings

\textsuperscript{28} See Gianfrate, \textit{supra} note 7, at 122-132.
\textsuperscript{29} See Alexander Aganin & Paolo Volpin, \textit{The History of Corporate Ownership in Italy}, A HISTORY OF CORPORATE GOVERNANCE AROUND THE WORLD: FAMILY BUSINESS GROUPS TO PROFESSIONAL MANAGERS 325, 357 (Randal K. Morck ed., 2005).
\textsuperscript{30} Andrea Melis, \textit{Corporate Governance in Italy}, 8 CORPORATE GOVERNANCE 347, 350 (2000).
and take advantage of first refusal rights. However, since 1998 by means of the Draghi law, Italy discouraged the creation of coalitions through said mechanism by establishing a maximum term of three years for shareholders’ agreements in listed companies and by providing the possibility of breaching said agreements in the event of carrying out an offer for the acquisition of control.

i. Regulations of shareholders’ agreements in public corporations in Italy

There was a turning point after the Draghi law of 1998 (or T.U.F.) in the regulation of corporate governance in Italy, which also affected shareholders’ agreements and their regulation regarding information.

Before the Draghi law, corporate governance literature highlighted that the protection levels for minority shareholders in Italian law were deficient, to the point that Italian directors and executives were likely to confuse the idea of maximizing shareholder value with maximizing profits for majority shareholders.

Literature describes the Italian corporate governance structure as one in which families and business groups prevail, and in which the pre-eminence of these groups in the corporate governance system does not depend only on the high level of ownership concentration (in 1996, on average 46%, says Andrea Melis citing Consob). Said ownership concentration is combined with minority control structures, namely: pyramidal structures, shares without voting rights and shareholders’ agreements. These combined structures allowed the majority shareholders to “control gigantic amounts of capital while owning a relatively small stake.”

The need to compete globally and the pressure from the European Union to generate a more favorable regulation for investors caused relevant legislative changes. In this regard, the Italian

31 See Luca Enriques, Corporate Governance Reforms in Italy: What Has Been Done and What is Left to Do, 10 EUR. BUS. ORG. L. REV. 477, 486 (2009).
32 Id. at 487.
34 Melis, supra note 30.
35 Id. at 348; see also MARCELO BIANCHI ET AL., Pyramidal Groups and the Separation of Ownership and Control in Italy, in THE CONTROL OF CORPORATE EUROPE 160–61 (Fabrizio Barca & Marco Becht eds., 2002) (U.K.).
36 Melis, supra note 30.
congress authorized the executive branch to create a broad reform in corporate governance, which was materialized in the Testo Unico della Finanza or T.U.F.\textsuperscript{37} Given that the drafters of T.U.F. were aware of the role of shareholders’ agreements in the Italian corporate governance system, they incorporated new rules to mitigate the effect of control alliances through three types of measures: limited duration of shareholders’ agreements, providing means for hostile takeover – against the rules of shareholders’ agreements – and information on shareholders’ agreements.

In the first place, the Draghi Law established that it is only possible to agree on a term for shareholders’ agreements not exceeding three years. This provision ended up being a rule on the maximum duration of shareholders’ agreements by which a control coalition can be formed. In Italian law – as occurs in other civil law systems – by application of the principle of prohibition of perpetual ties of the contracting parties – which provides a limit for the duration of shareholders’ agreements – shareholders’ agreements contravening said principle can be denounced without expression of cause or \textit{ad nutum}. However, Italian law, in line with the principle of good faith, requires six months’ prior notice.

Second, the T.U.F. established that, in the event of an offer for at least 60\% of the company’s shares, the parties to the shareholders agreement may sell their shares freely, despite any restrictions on the free legal transfer established in a shareholders’ agreement\textsuperscript{38}. As

\textsuperscript{37} Enriques, \textit{supra} note, 480-482. The regulation is much more detailed than the previous regulation, since before T.U.F “shareholders’ agreements related to public corporations had to be reported to the Consob within five days and their essential content published in the press”, Bianchi, Bianco & Enriques, \textit{supra} note 34, at 160. In 2003 (\textit{Riforma organica della disciplina delle società di capital e società cooperative}, D.L. n. 6/2003 (It.)) rules on shareholders’ agreements were incorporated into the \textit{Codice Civile} (articles 2341bis and 2341-ter), which also establish regulations on the duration and publicity of shareholders’ agreements for unlisted stock companies. NICCOLO ABRIANI ET AL., \textit{DERECHO ITALIANO DE SOCIEDADES}, 273 (Nuria Latorre & Vanessa Martí trad., 2008) (Spain), maintains that “regulations of unlisted companies, which avoid providing an excessive regulatory distance from listed companies and a consequent disincentive to being listed, once again take up the duration and information aspects, but in a rather attenuated way and only for “SpA abiertas”. D.L. n. 37/2004 (It.) introduced article 5 bis to the T.U.F., which clarifies that the aforementioned \textit{Codice} rules are not applicable to companies subject to the regulation of article 122 T.U.F.

\textsuperscript{38} Or “mini breakthrough” rule, as Enriques, \textit{supra} note 29, at 487 calls it.
shareholders’ agreements are unenforceable against companies, it is therefore possible to sell shares in breach of any of their provisions. Nonetheless, given that shareholders’ agreements are contracts, they contemplate their own contractual remedies, which can become effective in the event of non-compliance. What the T.U.F. rule does is to liberate the party that sells her stock from the sanction contemplated in the shareholder agreement, usually a penalty clause.

In this regard, the aforementioned contractual remedies can have an important negative impact on equity, which can thus prevent an efficient sale. This shows that the rule on the maximum duration of shareholders’ agreements is relevant to prevent them from being used as a mechanism to avoid efficient sales. Nonetheless, Gianfrate suggests the benefits of control in addition to merely obtaining dividends still determine that there is a difference between the value of an efficient sale and that of a sale that is convenient for the controllers and will thus reinforce the entrenchment effect. Notwithstanding the above, Gianfrate acknowledges the undeniable virtuous effect of the rule under analysis.

Third, T.U.F. (in its article 122) establishes a special information regime for shareholders’ agreements regarding listed companies. Within the first five days after the shareholders agreement is executed, it must be communicated to the Consob, an extract must be published in the press, deposited in the registry of companies, and communicated to the listed public corporation.

If these obligations are not fulfilled, the shareholders agreement is null and void. Therefore, the shareholders participating in the shareholders agreement will not be authorized to vote and, if they vote, these votes can be challenged. Even more so, in such situations, the Consob is authorized to challenge those votes. Keeping a shareholder’s agreement confidential undermines its objective, therefore, a shareholder’s agreement that is kept secret is equivalent to not having concluded it. It must be worth noting that the law also establishes a fine in those cases in which the shareholders agreement is not reported. However, this fine may be insufficient if the parties

40 The typical case is a shareholders agreement involving a liquidated damages clause as an enforcement mechanism.
41 Gianfrate, supra note 7, at 129.
consider that the benefits arising from the breach of the obligation of not reporting (in this case, the benefits of a coordinated control of the company) exceed the cost of the possible fine.42

Crucial for enforcement is the rule that requires to disclose the entire shareholders’ agreement.43 This rule is relevant, because in order to carry out an accurate assessment of the rights and duties of those who are parties to a shareholders’ agreement, it is essential to review the entire shareholders’ agreement.

The requirement to publish an extract of the shareholders agreement is an additional requirement to the obligation to deliver a full copy of the shareholders agreement to the registry of commerce. This system facilitates access to the shareholders’ agreement, its consultation, and its comparison with other shareholders’ agreements.44

Likewise, the fact that the entire agreement must be deposited in a public registry and delivered to the regulator prevents differences between the shareholders agreement that binds the parties and the informed agreement. Therefore, it allows verifying if the extract contains erroneous or insufficient information.

This system may be too burdensome and unnecessary in the event minority shareholders agree to a shareholder’s agreement to coordinate their interests and defend their rights in a more feasible manner. In this regard, in 2009, shareholders’ agreements not exceeding 3% of the voting shares (or 5% in the case of small and

42 Unlike what happens in England, where the breach of the duty to inform who are the controlling shareholders and beneficial owners (person exercising significant control or PCSs) of a listed company in the public registry (Companies House), may not only prevent said beneficial owners from voting, receiving dividends and selling their shares, but it can also be considered a criminal offense, for violation of Part 21 A 790 F (information about people with significant control) of the Companies Act 2006. See Zakrzewski, supra note 15, at 256.

43 ANDREA TUCCI, PATTI PARASOCIALI E GOVERNANCE NEL MERCATO FINANZIARIO (Cacucci ed., 2005) (It.), indicates that the provision issued by the Consob (that regulates the delivery of information) considers that the “communication” that must be sent to the Consob means the delivery of the complete shareholders’ agreement, i.e., “full copy of the agreement declared in accordance with the original”. See also Alessandra Rosa, Patti parasociali, gestione e informazione societaria: una questione (italiana) davvero risolta?, ANALISI GIURIDICA DELL’ECONOMIA 131, 137 (2013) (It).

44 Rosa, supra note 43, at 132.
medium-sized companies) in listed corporations were excluded from this information requirement.\footnote{Corrado Malberti, \textit{Italy, in INTERNATIONAL HANDBOOK ON SHAREHOLDERS’ AGREEMENTS REGULATION, PRACTICE AND COMPARATIVE ANALYSIS, supra note 15, at 413, 424-425.}}

Although shareholders’ agreements in Italy do not have an exhaustive legal regulation, Italian legal opinion has developed guidelines for shareholders’ agreements. Said guidelines are based on more general rules of contract law and corporate law. According to these guidelines, shareholders’ agreements are unenforceable against the respective company, which means that corporate law remedies cannot be used to enforce them.\footnote{According to some legal opinion, an exception would be the case of shareholders’ agreements executed between all the company’s shareholders, known as unanimous shareholders’ agreements, which obviously fall outside the scope of listed companies. In this case, the proposed guideline is analogous in its effects to that of unanimous shareholders’ agreements under MBCA in the United States.}

Shareholders’ agreements are not recognized as having an effect analogous to that of bylaws in Italy, even if they are filed in the company’s records or disclosed to the public in some other way. Likewise, the validity of shareholders’ agreements related to voting rights in shareholders meetings (also referred to as \textit{sindicati di voto}) is admitted, considering that voting rights can be limited, modified, or waived. However, it is discussed whether or not shareholders’
agreements related to the vote of directors, or *sindicati di gestione* are valid.\(^47\)

ii. The evolution of the use of shareholders’ agreements in Italy

Gianfrate argues that the relationship between ownership and control is not only affected by the relationship between cash flow rights and voting rights but also by the relationship between voting rights and control rights. Among them, “probably the most relevant control rights are the rights of the board of directors.”

Gianfrate studied the information delivered to the Consob regarding 74 extracts from shareholders’ agreements reported to said entity in 2003. He finds that in those companies that report their shareholders’ agreements there is no separation between cash flow rights and voting rights. However, he does find a notable difference between these two rights with respect to the rights of the board of directors. Gianfrate calculates the median for the two rights (right to

\(^{47}\) Tucci, *supra* note 42, at 104-133, concludes that *sindicati di gestione* cannot be considered invalid in all cases (which some time are deemed invalid due to their unlawful purpose); in some cases, it can be considered a lawful commitment subject to third-party ratification. Giuseppe Sbisà, *Patti parasociali e responsabilità degli amministratori*, in *CONTRATTO E IMPRESA* 447 (1996) (It.) considers that *sindicati di gestione* are not only commercial acts but have been recognized by the legal system, whereby the latter acknowledges its purpose, i.e., to stabilize the governance of the company. In the same vein, Antonio Nuzzo, *Sulle sedi di decisione nelle società a quote e sulla prevenzione di abusi da concentrazione di potere [On decision-making centers in listed companies and the prevention of abuse from concentration of power]*, *ANALISI GIURIDICA DELL’ECONOMIA* 81, 95 (2003) (It.), which indicates that the Italian legal system can be understood as one which does not prohibit these shareholders’ agreements. However, this legal system demands that they be informed so that the market can know how corporate decisions are taken. For his part, Mateo M. Pratelli, *Problemi in tema di “sindicati di gestione”*, 32 *GIURISPRUDENZA COMMERCIALE* 112, 118-119 (2005) (It.), considers that *sindicati di gestione* in listed corporations are unlawful after the 2003 reform to the act on corporations in Italy, not only because the reasons related to the unlawful practices that drove the reform are maintained, but also because said legal reform had the explicit purpose of evolving towards a model in which the management of companies corresponds exclusively to the administrators (article 2380-bis of the *Códice Civile*). Accordingly, Pratelli believes that these types of shareholders’ agreements evidently ignore the legal design first envisioned. Likewise, Dario Scarpa, *I patti parasociali nelle S.p.A. e nelle S.r.l.* 74 (2011) (It.), indicates that “a shareholders agreement that reduces the board of directors to a mere executor of the decisions made by a corporate body that is not involved in its administration is null for violation of mandatory regulations.”
the cash flow and voting right) expressed in the 74 firms observed in 2003, and states that “while on average the voting trust as a whole can exercise 53.44 per cent of the company’s voting rights, it controls 87.35 per cent of the total board rights”. This “leveraging” effect is particularly strong when it comes to the largest shareholder, who can “capture the majority of the board seats exercising on average only 28.68 per cent of the total voting rights.”

In this sense, the leverage ratio is 1.96 for the controlling shareholders and 1.39 for the members of the shareholders’ agreement.48 In this regard, on average, in 2003 in Italy a controlling family or individual could control the company with less than 30% ownership of the shares, without even resorting to other CEM such as pyramidal structures or preferred stock.49

Using data published by Consob, Lugli and Marchini maintain that in 2010 the number of companies with a shareholders agreement on the Milan Stock Exchange was 100 out of 283 (32.69%).50 Likewise, they state that from 2011 to 2017, Consob reported that the number of companies controlled by shareholders’ agreements decreased by almost half; the same occurred with respect to their capitalization, which decreased in similar proportions.

These authors report that one of the causes explaining this decrease is the increase in the relative weight of institutional investment in the company’s capital. These types of investors consider that shareholders’ agreements that only seek control are a “limitation for the correct management of the company”, which determines its decline51. They also indicate that, according to Consob, as of 2019, there were 83 companies that had a shareholder’s agreement on the Milan Stock Exchange. Also, they state that “it is possible to affirm that shareholders’ agreements are an instrument still present and used by a large number of listed companies. What seems to have changed in recent years is its content, which is less inclined in

48 Gianfrate, supra note 7, at 127.
49 See id. at 128 (noting intricacies in the Italian model of corporate governance by the author).
50 Ennio Lugli & Luigi Marchini, I patti parasociali e la loro diffusione nelle società quote italiane [Shareholders’ agreements and their diffusion in Italian listed companies], 7 AMMINISTRAZIONE & FINANZA 35, 42 tbl.4 (2019) (It.).
51 Id. at. 43.
achieving shareholder control and more inclined in regulating the behavior of shareholders."\textsuperscript{52}

Luca Enriques provides an additional explanation for the decline in the use of shareholders’ agreements (as a CEM) in Italy. He indicates that the “mini breakthrough” rule, whose purpose was to avoid blockages in shareholders’ agreements, caused controlling shareholders to look for alternatives. Accordingly, they began building their voting coalitions through holding companies.

He reports that, according to Consob data, “at the end of 2004, there were 16 listed companies controlled by holding companies the shareholders of which were parties to a shareholder agreement, such control structure being used to avoid the mini-breakthrough rule.”\textsuperscript{53}

These facts, adds Enriques, reveal that the regulatory attempt aimed at achieving ownership dispersion of shares in a certain market (by means of regulating ownership structures) is unsuccessful. He argues that “concentrated ownership structures are the symptom of a disease (high private benefits of control) rather than its cause.” In other words, the cause of concentration is not given by the means through which it is organized, but rather the high private benefits of control, i.e., what encourages this type of organization.

iii. Recap

Shareholders’ agreements constitute an institution with which Italian law and practice are accustomed. Italian family capitalism has traditionally used this mechanism to structure the control of large companies in this country.

However, the legislative reform that took place through T.U.F. in 1998 intervened three key elements for preventing shareholders’ agreements to be used as CEM: their duration (which was limited to three years), their effectiveness (by limiting acquisition offers that involved control changes), and their privacy (since the rule on information was in force immediately). In addition to those measures, the new regulations required the publication of the complete shareholders’ agreement.

\textsuperscript{52} See \textit{id.} at 42-44 (suggesting that shareholders’ agreements are executed not so much to seek control, but rather to “stabilize decisions and ownership structure in a long-term perspective.”).

\textsuperscript{53} Enriques, \textit{supra} note 31, at 493 n. 65.
The new regulations caused the use of CEM to decrease. However, it has also been recorded that its use has been evolving positively, whereby it has been used less as a minority control tool and more as a structure to provide stability to long-term businesses. This is manifested in a greater use of shareholders’ agreements as a mechanism for the coordination of votes in shareholders meetings and less to influence the conduct of directors.

This is the opposite effect of what is observed in Brazil. As in Italy, a legal amendment changed the regulations on information; however, this regulation has led to a greater use of shareholders’ agreements as CEM and the strengthening of these types of agreements (which seek to influence the conduct of directors and their voting rights).

**B. Shareholders’ agreements in Brazil**

In Brazil, shareholders’ agreements not only have legal recognition; the law requires the corporate bodies of companies to enforce them. This enforcement obligation not only considers aspects related to the sale of shares and voting preferences at shareholders’ meetings, but it also includes voting decisions of directors of corporations. Regarding this latter aspect, there has been debate on the legality of these type of agreements.

Nonetheless, for shareholders’ agreements to be enforceable through corporate law remedies, Brazilian law requires that shareholders’ agreements be published. Accordingly, this legal requirement has acted as an incentive for these agreements to be published. This notwithstanding those cases where shareholders’ agreements involving *hechos relevantes* (material information) must be published (as required by law).\(^54\)

The combination of legal regulation and the effect of the development of the Brazilian stock market, after the creation of Novo Mercado, seem to have promoted the use of shareholders’

---

\(^54\) Érica Gorga, *Changing the Paradigm of Stock Ownership from Concentrated Towards Dispersed Ownership: Evidence from Brazil and Consequences for Emerging Countries*, 29 NW. J. INT’L. L. & BUS. 439, 472-473 (2009) (explaining that shareholders’ agreements in listed companies are considered *hechos esenciales* and that, therefore, they must be reported to the *Comissão de Valores Mobiliários* when they imply changes in the control of the company).
agreements as a way to receive investment through the issuance of shares but still maintain control.

The need to report shareholders’ agreements has not reduced their use; to the contrary, their regulation, as discussed below, seems to have influenced controlling shareholders to consider that the obligation to disclose information is a small cost necessary to remain in control while receiving equity investment.

i. Regulation of shareholders’ agreements in Brazil

The Corporations Act of Brazil (LSAB) expressly establishes that “shareholders’ agreements whose purpose is the purchase and sale of shares, preferences to acquire them, exercise of voting rights or power of control must be custodied by the company when filed at their headquarters” (article 118 LSAB). This rule alone means that the shareholders’ agreements deposited in the company’s registries are enforceable against it, which, in turn, implies that their stipulations also affect third parties that are not parties to the agreement, but who are current or future shareholders of the company, as if they were included in the corporate bylaws.

This conclusion is confirmed by paragraph 9 of article 118 of LSAB. The provision establishes that if a shareholder (party to the shareholders’ agreement), or a director bound by said agreement, cast their vote against it or are absent from the respective meeting, other shareholders or directors can exercise the vote of the defaulting shareholders or directors in accordance to the shareholder agreement duly filed. Therefore, the company is obliged to enforce the shareholders agreement if required by shareholders or directors.

---

55 This is the status of the regulation since 2001 Law No. 6404, de 15 de Dezembro de 1976, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] (Braz.) or LSAB, which governs the Societies per Ações. Article 118 of LSAB was modified in 2001 by Law No. 10303, which introduced, inter alia, the rules of paragraph 9, of article 118 of LSAB.

56 Law No. 6404, de 15 de Dezembro de 1976, art. 118 ¶ 1, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] (Braz.) (noting that “the commitments or encumbrances resulting from said agreement may only be enforced against a third party after the agreement has been duly registered in the shareholder registry and in the share certificates, if applicable.”).

57 The authors of the commented rule were careful in determining that they involve directors “elected according to the terms of the shareholders’ agreement”, i.e., it is not necessary that they be part of the shareholders agreement but must be bound by it.
Although this situation responds to the enforceability obligation to which the company is subject to, the law expressly provides that the chairman of the shareholders meeting or, as the case may be, the chairman of the board of directors, will not consider a casted vote that goes against a shareholder’s agreement duly deposited in the company’s registries (paragraph 8 of article 118 of LSAB). Thereby, the law provides an unusual enforcement capacity to shareholders’ agreements, regardless of what type of companies they relate, i.e., public corporations or close corporations. Therefore, those shareholders’ agreements that stipulate how directors must vote are valid. In addition, the law determines that said type of agreements can be enforced by the company. In that light, directors are effectively subject to the shareholders’ agreement.

However, part of Brazilian legal opinion has held that, from the fact that the shareholders’ agreements are enforceable against the company or against third parties, it cannot necessarily be derived that certain shareholders’ agreements are lawful or valid. These types of agreements must be valid for them to be legally effective. Thus, their validity will be deemed doubtful if their stipulations affect the role of the board of directors as an autonomous administrative body. Some authors consider that, if the rules of article 118 are interpreted in accordance with other provisions of LSAB, their validity can be challenged. This conclusion can be reached by arguing

58 Bernard S. Black, Antonio G. De Carvalho & Érica Gorga, *The Corporate Governance of Privately Controlled Brazilian Firms*, 7 REVISTA BRASILEIRA DE FINANÇAS 385, 422 (2009) (Braz.).
59 A less discussed effect regarding the enforceability of shareholders’ agreements in Brazil is the one contemplated in paragraph 4 of article 118 of LSAB. According to this rule, “the shares registered by virtue of this article cannot be traded on the stock exchanges or in the over-the-counter market”, which implies that the shares subject to the shareholders agreement are not transferable. This is without prejudice to the fact that the shareholders agreement can expressly contemplate a restriction on the free transfer of shares. A restriction on the free transfer of shares expressly contained in a shareholder’s agreement also has an effect analogous to a Bylaws restriction, since it obliges the board of directors to enforce it (i.e., the body that the act orders to ensure that no share transactions are carried out that contravene the written and deposited shareholders’ agreement). In addition, a shareholder’s agreement that limits the transfer thereof can provide a specific performance clause if it is contemplated in the respective shareholders agreement (duly deposited in the company’s registry) and if it is duly informed (paragraph 1 of article 118 of LSAB).
that shareholders’ agreements that limit directors’ votes are contrary to the duty of loyalty, or because these types of agreements would be prohibited by LSAB; or because in some cases they violate an express provision of LSAB.

Gelman, Kabbach and Seidler summarize the discussion on the effect of shareholders’ agreements on directors’ votes. They point out that the positions held by legal opinion can be grouped into three. The first considers that shareholder’s agreements are always lawful, because they consider that the interest of the control group is comparable to the corporate interest. The second group states that the agreements themselves are not illegal, since directors can stop applying them. This group sustains this position by appealing to the duty of independence directors are bound to. The third group considers that these clauses are incompatible with the duty of independence of directors and that article 118 paragraphs 8 and 9 introduced a rule that compromises the duty of diligence.

Despite the well-constructed arguments by Brazilian doctrine, particularly Gorga, Masullo and Ferreira, the truth is that LSAB was expressly modified by Law No. 10,303 of 2001. With this in mind, it is hard not to consider that paragraphs 8 and 9 of article 118 prevail due to their specific scope and because of the fact that these rules were enacted after the recognition of directors’ powers and duties rules in the original LSAB.

The criticism of the authors to this rule, in any case, is fully justified. However, Brazilian legal opinion does not account for a clear case law position regarding this issue. In consequence, controllers can rest in the fact that the amendment of LSAB validly allows

---

60 Law No. 6404, de 15 de Dezembro de 1976, art. 155, Diário Oficial da União [D.O.U.] (Braz.); see also Jose Ferreira, Os acordos de acionistas que regulam a conduta dos administradores das S.A., à luz do Direito brasileiro [Shareholders’ agreements that govern the conduct of Corporation’s managers under Brazilian law], 3 Revista Direito das Sociedades [RDS] 495 (2018) (Braz.) (explaining that adding that the stipulation of these shareholders’ agreements would also contravene the duty in question.).

61 Érica Gorga, Direito Societário Atual 199-201 (2013) (Braz.).

62 Helena Masullo, Shareholders’ agreements in publicly traded companies: a comparison between the U.S. and Brazil, 12 Revista Direito Internacional [Brazilian J. Int’l. L.] 402, 411 (2015) (Braz.), in the event the rule requires executives to be elected by the board of directors (article 146 of LSAB).
shareholders’ agreements to bind or influence the vote of directors as agreed to by the signing parties to the shareholders’ agreement.

ii. The evolution of the use of shareholders’ agreements in Brazil

The growth in the use of shareholders’ agreements as CEM in Brazil occurred due to the privatization process that took place in that country in the 1990s. However, the use of documented shareholders’ agreements at the beginning of the 2000s, while significant, is much lower than that observed after the LSAB reform in 2001. This reform, as has been explained, is the one that introduced the enforceability of shareholders’ agreements (whose purpose is the control of the relevant company). In other words, the reform allowed directors or shareholders to demand compliance with the shareholder’s agreement, even against the positions held by other directors. This enforceability was allowed to be materialized through remedies that involve the company itself.

According to the shareholders’ agreements that were observed, clauses related to directors’ votes had a significant increase. Likewise, the use of shareholders’ agreements has been encouraged by the creation of new segments of the São Paulo Stock Exchange (Bovespa), particularly Novo Mercado. In this segment, all shares must have voting rights. This regulation prohibits for Novo Mercado what

63 Bernard Black et al., Corporate governance in Brazil, 12 EMERGING MKT. REV. 21, 36 (2010) (indicating that the discrepancy between rules governing the vote of directors (by means of shareholders’ agreements) and the obligation of directors to manage the company for the benefit of the corporate interest, even against the interests of those who elected them, has not yet been addressed by the courts.).
64 Gorga, supra note 61, at 195.
65 Id. at 195–96 (reporting that at the beginning of the 2000s, 23% of 225 public corporations observed had shareholders’ agreements.).
66 Id. (showing that in 2007, of 84 companies listed on BM&FBovespa (Level 1, Level 2, and Novo Mercado segments) without a controlling shareholder, 50% had shareholders’ agreements, of which 61.53% had clauses regarding the vote of directors (“clauses specifying the matters whose deliberation in the board of directors would depend on the prior approval of the parties to the shareholders’ agreement”, see Id., at 196. In 2012, of 107 companies observed without a controlling shareholder in the same three trading segments of BM&FBovespa, 51.4% had shareholders’ agreements, with 58 agreements, i.e., more than one per company. Of these 58 shareholders’ agreements, 40 (68.9%) contained clauses related to directors’ votes).
has been a CEM structure traditionally used in Brazil: shares without voting rights. Valadares and Leal show that in 1996 of 325 companies listed on the Bovespa, only 11% (35) did not have non-voting shares and the average use of non-voting shares (as a proportion of total shares) was 54%.67

This explains the increase in the use of shareholders’ agreements related to control, particularly those whose purpose is to influence the vote of directors. However, this increase does not respond only to a greater use of shareholders’ agreements, it also responds to the scope addressed by those agreements. “Previously —Erica Gorga says—, typical shareholders’ agreements were executed between controlling shareholders and minority shareholders, who sought to safeguard their economic interest in the company, therefore using contractual mechanisms that would allow this objective to be achieved. Recently, shareholders’ agreements began to be executed between minority shareholders who, individually, do not have control of the company, but who, through this contractual arrangement, can gather such power with the aim of conducting company business.”68

Consequently, since 2001, those companies that have an interest in financing themselves through equity in the market, can achieve it without their controlling shareholders losing control, since the regulation on shareholders’ agreements gives them enough security to remain in charge of the governance of the company.69 Despite the promise of higher levels of protection for minorities, what seems to have happened is nothing more than the replacement of one CEM (non-voting shares) by another (shareholders’ agreements).

The foreseeable effect on the Brazilian corporate governance system is leaving the corporate bodies of companies functionless (“esvaziamento”), allowing company control without paying a premium thereof, the reduction of corporate control costs and the

---

68 Gorga, supra note 61, at 197.
69 See Gorga, supra note 54, at 455 (noting that for Brazil it is usual that the levels of concentration of wealth and property in Latin America determine that financing via equity in the stock market is not relevant for companies that are part of large economic groups).
decrease in the value of investments made by shareholders that are not a party to the shareholders’ agreement.70

Empirical observation confirms these predictions, as it finds that the shareholders’ agreements most used in Brazil are those that coordinate the decision-making process, bind the directors’ vote, and limit the free transferability of shares.71 The so-called “umbrella clauses” in these types of agreements are particularly inappropriate in terms of corporate governance best practices, which allow prior control of board decisions and whose use has been constantly increasing in Brazil.72

It is estimated that control through shareholders’ agreements has been increasing in Brazil, probably as a consequence of the decrease in ownership concentration73. It can be observed that, since several companies have been listed in the new BOVESPA segments (which establish higher corporate governance standards that restrict the use of certain minority control structures), control through pyramidal structures and shareholders’ agreements has become the more

71 Masullo, supra note 62, at 406.
72 Gorga, supra note 54, at 47–79 (noting that studies of shareholders’ agreements of 84 Novo Mercado, Level 1, and Level 2 companies, which do not have a single controlling shareholder. It detects that, of them, 42 (50%) had valid shareholders’ agreements, of which 26 (61.90%) had shareholders’ agreements that regulated the vote of directors. See also Masullo, supra note 61, at 411. Masullo’s study is a review of shareholders’ agreements executed and reported in Brazil and the United States of America between 2010 and 2012. Masullo, supra note 61, finds that in Brazil, in that period, 25 shareholders’ agreements (39% of the total sample) contained rules whose purpose was to regulate the decisions of directors. “In particular, 15 of them imposed the appointed of executives, despite the fact that according to article 142 of LSAB, the election of executives falls under the responsibility of the board of directors. Interestingly, 13 of those 15 agreements are registered in a special segment of [Brazil’s main stock exchange] BM&FBOVESPA (Level 1, Level 2, and Novo Mercado). In this sense, not only the Corporations Act is being violated, but also market rules that require the independence of directors.).
attractive option for those who intend to receive capital from investors. Accordingly, they can achieve said purpose by issuing shares for the companies they control but, at the same time, not lose that control.74

This situation is naturally open to criticism. In this regard, generating various and costly structural and regulatory changes in the market seems like a contradiction given that there are corporate mechanisms that allow old family capitalism practices. Nonetheless, this is a regulatory inconsistency that is not surprising.75 This can be seen in regulations that allow unusual degrees of enforcement, whereby shareholders’ agreements can validly influence the vote of directors of listed corporations. This regulatory inconsistency is deepened by the fact that empirical review of these agreements shows that they negatively affect the investment value of non-controlling shareholders.76

According to the evidence observed above, it can be concluded that in Brazil the legal requirement that requires reporting shareholders’ agreements of listed public corporations seems an incentive for controlling groups. In other words, this legal requirement allows them to deepen this control mechanism. This situation has developed after the legislative reform that provided restrictions on minority control mechanisms.77 Although shareholders’ agreements under LSAB of 1976 were already regulated in article 118 (whereby in its first paragraph provided that shareholders’ agreements were mandatory for the company once deposited at its headquarters), the rule only referred to shareholders’ agreements involving the purchase and sale of shares, preferences to acquire them and exercise of the shareholders’ voting rights. The provision did not refer to

74 Gorga, supra note 53, at 478–79. (concluding, after an empirical review of shareholders’ agreements in Brazil, that “this study shows that control comes in different forms. Despite the current focus of specialized literature, control does not only come through share ownership in a direct or indirect way (pyramidal structures). It can also take contractual forms. This section presents evidence concerning the effects of shareholders’ agreements on corporate governance. Shareholders’ agreements function as substitute control mechanisms when ownership is more dispersed.”).
76 Carvalhal, supra note 20; see also Gelman et al., supra note 25.
77 Gorga, supra note 75, at 853-854.
agreements related to directors’ votes, nor did it establish the special enforcement mechanisms of the current paragraphs eighth and ninth. However, disclosure of shareholders’ agreements was still necessary. Even though the publicity of shareholders’ agreements does not allow enforcing them against the company, it does constitute a minimum requirement for a statute to make an exception to the privity of contracts rule.

Therefore, what promotes disclosure of shareholders’ agreements in Brazil is the enforcement effect that derives thereof. But,

---

78 A fourth type was added to the three types of agreements mentioned: “[shareholders’ agreements on the exercise of control]”, and paragraph 8 was added, by virtue of which whoever presides over a collective governing body (shareholders’ meeting and corporate organ) shall not consider votes contrary to the agreement; and paragraph 9, by which either at a shareholders meeting or at a board of directors meeting, a shareholder (party to the agreement) or a director (elected by a party to the agreement) may exercise the voting right of a shareholder or director who is absent or has failed to comply with the agreement.

79 From the civil law perspective, unless a legal rule expressly establishes it, the publicity of an act does not imply that this act is enforceable against third parties. For the same reason, the disclosure of a shareholder’s agreement is not comparable to the disclosure of bylaws. Consequently, in terms of its effects, publicizing a shareholders agreement clause is not the same as incorporating a clause in the company’s bylaws. In the first case (a shareholders agreement clause), unless there is an express legal rule, it is only mandatory for the parties to the shareholders agreement and is not enforceable against third parties and will not be subject to the limitations provided for “corporations” (which are analyzed in this paper). In the second case, i.e., if it is incorporated into the bylaws, such clause is mandatory for all current and future shareholders of the company and is subject (in terms of its validity) to the respective legislation on corporations. On the other hand, the Model Business Corporation Act allows shareholders’ agreements to be enforced (derived from their publicity requirement) and authorizes their approval for the purpose of incorporating such clauses in the company bylaws. However, it is subject to multiple technical limitations (from a civil law perspective): the shareholders agreement must be unanimously approved, the agreement must meet a publicity requirement by depositing it in the company’s registries and its existence must be indicated in the share certificate. Upon complying with those provisions, directors are exempted from liability for decisions adopted in light of the shareholders’ agreement. In this regard, shareholders are ultimately liable for the decisions taken according to the shareholders’ agreement. Finally, the shareholders’ agreements are only valid to the extent the company remains as a close corporation.

80 As has been indicated, there is also an obligation to report shareholders’ agreements given that they are considered hechos esenciales in some cases. However, this obligation will not apply if the sanction for not publishing such hechos
at the same time, this publicity requirement reveals an inadequate institutional solution (from the corporate governance perspective): the loss of independence of the board of directors, particularly harmful in concentrated ownership systems. In this light, even though shareholders’ agreements provide a structure that facilitates coordination in terms of the governance of the company, at the same time, exacerbates the possibilities of tunneling practices. Consequently, in the case of Brazil, the publicity requirement does not necessarily stand as an institutional mechanism to improve investor protection; its existence sheds light on clauses whose legality, although discussed by some, is not problematic in practice. To the contrary, said publicity requirement is largely promoted since it allows taking advantage of a minority control mechanism whose legality is recognized by statute.81

iii. Recap

Considerable use of shareholders’ agreements in Brazil can be traced back to the 1990s. However, until 2001, the main purpose behind its use was the coordination of shareholders for the protection of minority groups. Two facts modify this state of affairs: first, the reform of LSAB in 2001, which recognizes the enforceability of shareholders’ agreements against the company, even with respect to those clauses related to the decisions to be adopted by the directors. Secondly, the creation of Novo Mercado, which, although improves corporate governance standards through various requirements, including the prohibition of issuing non-voting shares, does not address other CEMs.

esenciales is not sufficiently rigorous and if there is no clarity as to whether third parties (that are not part of the company) are obliged to comply with this requirement.

81 Bernard S. Black et al., An Overview of Brazilian Corporate Governance, CORNELL 101 L. FAC. PUB’N. 1, 8-14, 39 (2008) (showing that, based on a survey on corporate governance in Brazil in 2005 show that of 36 companies that declare they have shareholders’ agreements, 33 (92%) are deposited at the company’s registries, thus, taking advantage of the enforceability and enforcement mechanism of article 188 of LSAB; there is one company that does not deposit the shareholders agreement in the company’s registries, but does inform its shareholders; and the remaining two companies declare that they do have shareholders’ agreements, however, they do not deposit them at the company’s registries and do not disclose them to their shareholders.).
In fact, the use of shareholders’ agreements for control is encouraged. The statutory publicity requirement of shareholders’ agreements does not improve corporate governance. On the contrary, given that it allows its enforceability against the company, it ends up constituting a rule instrumental to the use of shareholders’ agreements as CEM.

As has been seen, the evolution of the use of shareholders’ agreements in Brazil seems to go in the opposite direction to the evolution of the use of shareholders’ agreements in Italy. Furthermore, the publicity rules on shareholders’ agreements have ended up playing a diverse role, which shows that the effect of the information rules depends on the institutional system in which they are incorporated. But how much can we know about a corporate governance system in which, unlike those examined, there are no information rules that allow knowing precisely who enters into shareholders’ agreements, what kind of agreements they conclude and how those agreements impact on corporate control? In other words, what relevant information for the corporate governance system can we reasonably assume that we are missing out?

III. CEM STRUCTURES IN CHILE

Minority control structures are also present in Chile. This section briefly outlines how their regulation and use has changed over time.

During the first half of the XX century, Chilean corporations were characterized by having a relatively dispersed ownership system, but with scarce competences for control, where business groups, both family groups and foreign affiliate firms, were able to maintain control of multiple companies through the use of interlocked boards of directors and by increasing their controlling rights through financial institutions (such as Banks and Insurance Companies, which, via their own investments and through depositary shares or shares as collateral were able to concentrate an important voting power that could be exercised by their controlling shareholders). A reduced number of companies had a shareholding structure

83 Regarding the role of insurance companies and banks in the control of ownership of corporations, see Interview by Andrea Lluch with Ricardo Claro, Creating
with a series of shares with different voting rights and pyramidal structures were uncommon.

In 1965, the book “The Concentration of Economic Power“ by Ricardo Lagos, opened a public discussion on the concentration of decisions at a business level that was achieved from interlocked directories. In 1970, Law 17.308 prohibited cross-ownership structures, established incompatibilities for board members (including the prohibition of being a director of a corporation for directors and bank executives and for senior public positions) and limited to three the number of boards of directors where a person could participate. However, neither restrictions were established for series of shares with different voting rights nor for pyramidal ownership structures. A decade later, Law 18.046 of 1981 eliminated the restriction on the number of boards of directors where a person could participate.


84 Ricardo Lagos, La Concentración del Poder Económico [The Concentration of Economic Power], (1965) (Chile).
85 Law No. 17308, Junio 29, 1970, Diario Oficial [D.O.] (Chile). The process to pass this Law took 4 years. In the parliamentary motion where the act originates, it was noted that one of its motivations was that “the administration of companies has not been, in many cases, sufficiently genuine and representative of small shareholders.”
86 Law No. 17308 art. 95, Junio 29, 1970, Diario Oficial [D.O.] (Chile). Although theoretical developments of the agency theory are subsequent to the discussion of this Law, the agency problem can be clearly appreciated in the words of Senator Alberto Jerez during the parliamentary discussion of the project “The initiatives made by the directors that control several companies are unknown by the shareholders at the moment of their inception, and the latter do not participate in the combinations to dominate the new companies on the basis of investments that are not made to capitalize such companies” (History of the Law, pp. 468).
87 Id. (noting that the practice of interlocking directorates has been historically frequently used in the case of Chile); see also Matias Braun, Ignacio Briones & Gonzalo Islas, Interlocking directorates, access to credit, and business performance in Chile during early industrialization, 105 J. Bus. Rsch. 381 (2019) (analyzing the network of boards of directors up to 1922); see also Erica Salvañ et al., Chile’s Business Network in 1939: Between the Global Crisis and Adaptation to State-Led Industrialization Policies, in Capitalist, Business and State-Building in Chile 185 (Manuel Llorca-Jaña et al., eds, 2019).
88 In 2016, Law No. 20945, Agosto 30, 2016, Diario Oficial [D.O.] (Chile), amended the free competition legislation, adding as an anti-competitive practice, the “simultaneous participation of a person in relevant executive positions or as a
One of the persisting structural characteristics in the Chilean corporate sector in the last forty years is the concentration of the shareholding ownership. Different authors have shown that, despite various legal amendments, most Chilean companies have high levels of concentration. This, however, does not preclude the existence of different minority control mechanisms.

In particular, two mechanisms that had an important development since 1974 where pyramidal structures and the use of a series of shares with different voting rights (known as preferred and privileged shares). This development was influenced by the expansion of business groups in the seventies, which, using pyramidal structures systems, where able to expand their control over a large number of companies, and, in the eighties, the privatization of public companies, where, in several cases, the managers of the companies could acquire control through the use of shareholding structures that gave them an enormous over-representation when electing the board of directors of such companies.

In the year 2000, and in response to the scandal caused by the takeover of Enersis group by Endesa España, Law 19.705 (known as “Ley de OPA”), the procurement of control through public takeover bids was regulated and limitations to the use of series of shares with different voting rights were set out, stating that such privileges could not exceed five years, what led, in practice, for listed companies to not include differentiated voting rights after such date.

director in two or more competing companies”. In 2021, the Fiscalía Nacional Económica submitted the first complaints for infringement of this rule.

89 See Le Fort, supra note 2, at 387-423.

90 One of the most notorious examples of the above was the case of the Enersis group, where the main executives of Chilectra, maintained control of the group through a series of investment companies known as “Chispas”. These companies held 29% of the ownership of the Enersis holding, which, in turn, held 19.6% of the ownership of Endesa Chile. “Chispas” had a structure where series A shares, held 99.94% of ownership and Series B shares, only 0.06%, but with an effective control of these companies according to the Bylaws.

91 Strictly speaking, the preferences that grant predominance in control, can only last five years, which may be extended by agreement of the extraordinary shareholders’ meeting. The rule on quorum of the agreement is unclear. If it is deemed that the general rule to extend preferences should be applied (in public corporations and close corporations), then it is two thirds of the affected series. But obviously, such a rule aims to limit the use of this CEM structure in public corporations and cannot subject to consultation to the shareholders that benefit from this
Pyramidal structures, known in the Chilean financial market as “Cascadas”, have been the most used structure of minority control in the Chilean sector in the last fifty years, and its use is frequent in business groups, the predominant organizational structure in Chile. Lefort and Walker show that around 70% of non-financial listed companies in the Chilean market belong to one of the fifty largest business groups. Donelli, Larrain and Urzua report that more than 30% of Chilean companies are controlled through a pyramidal control scheme. A similar figure is reported by Lefort and Gonzalez who point out that approximately one third of listed companies are in levels 2 and 3 of a pyramid. The dominant presence of business groups and pyramidal structures is a common characteristic in the rest of Latin America.

The use of pyramidal structures and their impact in various performance indicators of the company has been studied by different authors. The agency theory states that a pyramidal structure of control may exacerbate the problem of the horizontal type of agency, where controlling shareholders may extract the value of minority

---


93 See Gonzalo Islas, *Corporate Governance and Ownership in Chile, 1854 -2012*, in THE IMPACT OF GLOBALIZATION ON ARGENTINA AND CHILE 45 (Geoffrey Jones & Andrea Lluch eds., 2015) (noting that showing that economic liberalization was used as an instrument of control in the 1960s).


96 Fernando Lefort & Rodrigo Gonzalez, *Hacia un mejor gobierno corporativo en Chile [toowards a better corporate governance in Chile]*, 11 ABANTE 19, 26 (2008).
investors. In empirical studies, the most used measure to study this problem is the difference between the rights over cash flow and the rights of control.

Empirical evidence shows that the major difference between the rights over cash flow and the voting rights leads to a loss of value of the company, and this effect is greater in companies under family control. However, this effect is mitigated when the company is part of a business group. On the other hand, evidence shows that pyramidal structures have influence over investment decisions: in companies where the separation between rights is greater, the investment is less sensitive to the company’s cash flows, which is an argument in favor of the efficiency of pyramidal structures. However, it should be noted that empirical studies have not used shareholders’ agreements as a control variable, so it is not possible to identify how the use of shareholders’ agreements interact with the presence of pyramidal structures.

A relatively recent development within the Chilean market has been the trend by certain business groups to “simplify” their corporate structures, reducing the use of pyramidal structures. Since 2014, Enel has simplified the corporate structure of Enersis Group. In June 2021, SQM group informed the CMF of the launch of studies about “the optimization of the corporate structure of the business group, attending particularly to strengthening the capital structure of the company,” for which they ordered to hire external advisors, and “to the extent that this contributes to the company’s interest, the board of directors may submit for consideration of the shareholders, to carry out reorganizations that may include mergers between companies of the same business group”. While this kind of evidence is still anecdotal, it is worth asking if these decisions may be connected to the fact that during the last years, pyramidal structures have been subjected to greater inspection and application of sanctions by the regulator.

99 See Diego Pardow, *La Experiencia Chilena Disuadiendo Ilícitos Corporativos* [The Chilean Experience Deterring Illicit Corporate Equity Management], 1 Derecho Público Iberoamericano 55 (2012) (Chile) (analyzes the decisions...
In conclusion, the evolution of the regulatory framework in Chile has limited the use of certain minority control structures, prohibiting cross-shareholding and limiting the use of multiple series of shares. On the other hand, the punishment at a market level and the intensity of inspection over pyramidal structures works as a deterrent for the expansion of pyramidal structures. The above highlights the need for greater observation and study on shareholders’ agreements, as a possible substitute of such mechanisms.

IV. SHAREHOLDERS’ AGREEMENTS REGULATION IN CHILE

A. The law of shareholders’ agreements in Chile

Just like in most countries of the world, shareholders’ agreements are not comprehensively regulated by statute in Chile. Statutes only refer to certain aspects of their regime when addressing them. As a result, shareholders’ agreements in Chile are subject to the general rules of corporate law and private law. In general, they are valid, unless it may be considered that their purpose is illicit for breaching a public policy rule. Therefore, they are valid and binding between the parties even when they contravene the statutory regulation of the relevant corporate organization of the company referred in the shareholders’ agreement.\(^{100}\) Likewise, they are unenforceable to the company, as a consequence of privity of contracts (article 1545 of the Civil Code of Chile), whereby they only create obligations for the parties to the agreement.

Nevertheless, current regulation of article 14 of Chilean Corporate Act (Ley de Sociedades Anónimas 18.046 de 1981 or LSA), from investigations of the Superintendence of Securities and Insurance (predecessor of the CMF) and proposes that during the period 1990-2012 the Superintendence showed a bias towards monitoring companies with a comparatively weaker controlling shareholder. While a detailed analysis of the decisions of the Superintendence after 2012 is not within the scope of this work, case evidence suggests that during the past years the Superintendence and the CMF have shown an increasing interest in inspecting conducts related to pyramidal structures (Case SQM y ENEL).

\(^{100}\) Osvaldo Lagos, *Una mirada contractualista a las objeciones a la validez de ciertos pactos de accionistas en el derecho chileno* [A contractualist view of the objections to the validity of certain shareholder’s agreements under Chilean law], *in Ponencias de las IX Jornadas Chilenas de Derecho Comercial* 593, 599-602 (Macarena Railef ed., 2021) (Chile).
after its amendment in 2009, attempted to make shareholders’ agreements enforceable as to third parties, but only those restricting the free transfer of shares. The result was a technically very poor amendment, from which these shareholders’ agreements, complying with the formality of filing in the company, become enforceable as to third parties. Its scope has only been discussed by the doctrine and no judicial decisions are known on the rule. A point of view of the meaning of the rule, construes that this enforceability as to third parties means that, if the shares that are restricted for transfer by the shareholders agreement are disposed of without complying with the filed shareholders’ agreement, the company must register the transfer anyway. However, this transfer would be null and void and, once a court decision has been obtained, the company must cancel the registration of the shares under the name of the new holder and must register them again under the name of the original holder, this is, the party that breached the shareholders’ agreement. Another point of view of the rule, taking into account that the amendment is technically deficient and detrimental for the Chilean corporate governance system, construe that the enforceability as to third parties means tutela aquiliana over the credit, this means, the possibility to claim compensation for damages for the breach of the shareholders agreement not only from the counterpart, but also from the third party outside the shareholders agreement that acquires the shares.

101 Law No. 18046 art. 14, Octubre 21, 1981, DIARIO OFICIAL [D.O.] (Chile) (“the Bylaws of public corporations may not include limitations to the free transfer of shares. Private agreements between shareholders relating to the transfer of shares, shall be filed in the company, and made available to other shareholders and interested third parties, and a reference to them shall be made in the Registry of Shareholders. If this is not the case, such shareholders’ agreements shall not be enforceable as to third parties. Such shareholders’ agreements shall not affect the obligation of the company to register without delay the transfers that are presented, as provided in article 12.”).

102 See id.

103 See generally JORGE UGARTE, PACTOS SOBRE TRANSFERENCIAS DE ACCIONES [AGREEMENTS ON THE TRANSFER OF SHARES] (2016) (Chile).

104 Osvaldo Lagos, El Mundo Al Revés: Pactos De Accionistas, Restricciones A La Libre Cesibilidad De Las Acciones Y La Reforma Del Articulo 14 De La Ley De Sociedades Anónimas [The World Turned Upside Down: Shareholders’ Agreements, Restriction To The Free Tradeability Of Shares And The Reform To The Section 14 Of The Corporations Act], REVISTA CHILENA DE DERECHO PRIVADO [RCHDP], July 2014 (Chile).
As it will be seen, it could be considered that this rule influenced on the number of shareholders agreement disclosed – at least those that restrict the free transfer of shares – as was the case in Brazil: the enforceability of the shareholders agreement increases its enforcement, because it allows access to remedies recognized in corporate rules, in this case, that the company does not register the transfer of shareholders that contravenes a filed shareholders’ agreement. However, it is unlikely to happen, because, as previously explained, the enforceability set out in article 14 LSA is weak, even if the stronger legal construction on its effect was applied. Second, because the registry of shareholders is a private instrument kept by each company, the information on shareholders’ agreements filed in the registry is not automatically conveyed to the regulator and it requires an inspection effort that is probably not being carried out. Third, because what is filed is only a reference to the shareholders’ agreement, and its content is subject to the construction of the rule by the informant. But this effect should not be completely ruled out, because once the shareholders agreement is filed in the company, the corporate bodies cannot claim ignorance and, therefore, they risk at least an administrative sanction (fine) for not informing. Particularly, if the selling of shares corresponds to a controlling stake subject to a shareholder agreement, then it is possible that those shares do not change hands in a sufficiently long period of time, so as to avoid that the corporate remedy seems unfeasible.

The other rule referring to shareholders’ agreements is article 98 of Law 18.045 of 1981 on Securities Market. This rule was

105 Which clauses constitute restrictions to the free transfer of shares? There is no agreement by the doctrine. Also, how much should be informed about them, is it enough to name them, should they be registered in detail? Should the enforcement mechanisms contained in the shareholders agreement to make this clause more effective be indicated?

106 Law No. 18045 art. 98, Octubre 21, 1981, DIARIO OFICIAL [D.O.] (Chile), or LMV; “Joint action agreement is the arrangement between two or more people that simultaneously participate in the ownership of a company, directly or through other individuals or controlled legal persons, whereby they commit to participate with identical interest in the management of the company or to obtain control thereover. The existence of such agreement shall be presumed between the following persons: between representatives and represented, between a person and their spouse or their relatives up to the second degree of consanguinity or affinity, between entities belonging to the same business group, and between a company and its controller or each of its members. The Commission may qualify if a joint
incorporated to the Law on Securities Market (hereinafter, LMV) through a legal amendment aimed to improve the levels of information in the market with the purpose of supervising more accurately the solvency of those institutions where it invested, in particular, insurance companies. To do this, it is necessary to make visible or explicit the linkages between companies that are part of a group, and this is the purpose of the regulation. In this context, the joint action agreement is a *de facto* concept (there may or may not be a written contract) whose objective is the control of the company. Therefore, for these purposes, a joint action agreement may be presumed from the ownership relations (company and controlling shareholder), family ties or affiliation to the same business group.

B. Regulation on information of shareholders’ agreements in Chile

There are no rules with an express mandate to give full publicity to the shareholders’ agreements relating to the management of a public corporation or that make public offering of securities. By contrast, requirements on information may be found in different rules of the Financial Market Commission or CMF (former Superintendence of Securities and Insurance), relating to certain aspects of these contracts.
The most important of these rules is General Rule No. 104 of 2001, that requires to inform the characteristics of the shareholders’ agreements that allow to take control of an audited company, and in particular if they consider preemptive rights whether to purchase or sale shares and their specific modalities.

Additionally, General Rule No. 30 of 1989 (hereinafter, NCG 30) requests that security issuers incorporate in their annual report information relating to the existence of a joint action agreement that affects the control of the company.\(^{107}\) However, it does not require an indication of their clauses or for them to be fully published.

Likewise, General Rule No. 269 (hereinafter, NCG 269) requires to declare transactions on the securities of the company, made by persons that have at least 10% of the shares of the capital of the company or that may designate a director, by themselves or through joint action agreements, which provides the CMF evidence of the existence of the agreement.

The CMF has instructed on two occasions that the companies inspected by it should submit specific information on shareholders’ agreements. This was carried out by Official Circulars No. 64 of 5 January 2001 and 597 of 14 April 2010, which required regulated companies to submit shareholders’ agreements filed in the company according to article 14 of the Corporations Act No. 18,046 of 1981 (hereinafter, LSA).\(^{108}\) Further, it was requested to inform on shareholders’ agreements that affect the free transferability of shares and to inform “if the submitted shareholders’ agreements contain confidential parts”. While this rule does not require information of a joint

---

\(^{107}\) Under Law No. 18045 art. 98, Octubre 21, 1981, Diario Oficial [D.O.] (Chile), the controlling shareholders of the company (individual or legal person) are identified, according to the definition of Title XV. The percentage controlled directly or indirectly by the controlling shareholder and by each of its members, if applicable, should be informed. Further, it should be indicated if the controlling shareholders have a joint action agreement and if this agreement has been formalized or not; likewise, it requires to inform the existence of these shareholders’ agreements, in relation to the registration of securities in the Registry of Securities.

\(^{108}\) Law No. 19705, Diciembre 20, 2000, Diario Oficial [D.O.] (Chile) (regulating public offers of share acquisitions and establishes regimes for corporate governance) [hereinafter OPAS Act]; Law No. 20382, Octubre 20, 2010, Diario Oficial [D.O.] (Chile) (introducing improvements to the rules that regulate corporate governance of companies. Unfortunately, this information does not allow for a full study).
action agreement contained in the shareholders’ agreement, it does seem to require to accompany the integrity of the shareholders agreement file in the company, although, as has been stated, it allows to indicate which part of the shareholders agreement are “confidential”. However, this information is not available to the public.109

Therefore, it is not possible to conduct a comprehensive review of the shareholders’ agreements relating to the management of a public corporation. They usually remain hidden, despite that from the legal obligation to communicate every “material fact” provided in Article 12 LMV, it should be considered that it is mandatory to publish the full shareholders’ agreement. However, certain shareholders’ agreements linked to widely known transactions have been published, precisely because, as has been seen, it is a requirement of the administrative regulation of takeovers (OPAs) and because the regulator has the power to require information, which may have taken place in these cases due to the discussion on the application of the regulation on mandatory OPA.110

V. WHAT DO WE KNOW ABOUT SHAREHOLDERS’ AGREEMENTS IN CHILE?

To observe the use of shareholders’ agreements, we count with two sources: the anecdotal information of the full content of shareholders’ agreements and the systematic information to the reference to shareholders’ agreements made in the annual report of every public corporation (ex NCG 30).

109 After submitting a request through transparency (Law No. 20285, Ley Sobre Acceso a la Información Pública, Agosto 11, 2008 DIARIO OFICIAL [D.O.]), we verified that the information received by the CMF was meagre, both regarding the answers to the requirement and the quality of the information received. In our opinion, this is related to the enforcement problems that the Chilean system presents regarding information on shareholders’ agreements.

110 For example, the CMF required CAP S.A., through oficio No. 3271 of 03.04.2010, to inform about the master agreement and the shareholders agreement related to “Compañía Minera del Pacífico S.A.” (CMP) and “Compañía Minera Huasco S.A.” (CMH). The general manager of CAP S.A. informed that “the contracts indicated in the oficio of reference were published prior to receiving your oficio, in the website www.cap.cl”.

A. Anecdotal information on shareholders’ agreements in public corporations in Chile

The first of these sources comes from those shareholders’ agreements that have been published by the parties or by a requirement of the CMF, concerning specific transactions.

It can be observed in them that shareholders of public corporations have used shareholders’ agreements not only to regulate the voting in shareholders’ meetings, but also to attempt to impose decisions on the board of directors, with a high level of effectiveness, even though such shareholders’ agreements may be considered unlawful. Likewise, restrictions to the free transfer of shares may be observed in these shareholders’ agreements. The effect of the combination of both types of shareholders’ agreements is the creation of a quasi partnership, that is, personalizing a capital company. This is not problematic in the case of close corporations or sociedades por acciones, particularly if the shareholders’ agreements are signed by all the shareholders of the corporation (pactos omnilaterales). But taking into consideration that these shareholders’ agreements are designed to control public corporations, their effect is particularly anomalous: they allow a company that trades in the stock market and that has a significant number of investors that subscribe shares, to be subject to privatized management decisions, adopted outside the board of directors, following a regulation that the investors outside of the shareholders agreement do not have access to. In this sense, the clause of the shareholders agreement between CAP and Mitsubishi, whereby the parties commit to not provide information regarding the agreement without consulting the other party, unless required by law, is particularly noteworthy. This provision makes clear an expected behavior: to the extent that an obligation to inform does not exist, or where a very relevant operation does not hint to the existence of a shareholders agreement concerning a


112 Sociedades por acciones are a sort of derivation of close corporations that resembles French société par actions simplifiée (SAS), but with just a few imperative rules, so shareholders may include in the charter many clauses that would be void in a corporation’s charter. They were introduced to Chilean law in 2007.
public corporation, it is difficult to expect for the parties to the agreement to willingly decide to publish it. Below, three shareholders’ agreements are reviewed that help illustrate their use in the Chilean market, briefly outlining the context where they were used.

i. Shareholders’ agreements regarding management in the Cencosud-Paris merger

In 2005, Mehuin and Cencosud agreed to take the necessary steps to merge Almacenes Paris (Paris), a retailer, and Cencosud, the parent company of a supermarket business group. The agreement between Jorge Gálmez (through the company Mehuin S.A.) and Horst Paulmann (Cencosud S.A.), considered a shareholders agreement, which included a joint action agreement “for the joint management and governance of Paris” (as declared by the parties) from the moment that the OPA (a public offer to buy Paris shares) was declared successful and until the merger of Paris by Cencosud.

In 2004, the Gálmez family, controller of Almacenes Paris S.A., had sold a large part of their shares to a joint venture of corporations, prominent among them, the controllers of the groups Quiñenco and Consorcio. Only Jorge Gálmez retained a relevant proportion of the ownership of Paris (27%) and agreed, with Quiñenco (11.5%) and Consorcio (11.5%) to a shareholder’s agreement to restrict the free transferability of their shares, granting preferential acquisition rights. Shortly after Jorge Gálmez entered into this agreement, Cencosud began an offensive to acquire control of Paris through an ingenious mechanism that would allow it to avoid the restriction imposed by the shareholders’ agreement: an OPA (public offering) for 100% of Paris stock, which would be declared successful with the acquisition of 40% of Paris. The shares of Paris would be paid with securities of Cencosud, not with money. The reason for Cencosud to declare the success of the OPA with 40% (a percentage lower than the 50% controlled by the shareholders agreement between Quiñenco, Consorcio and Gálmez), was the agreement that was reached with Gálmez to vote in favor of a merger between Paris and Cencosud, for which it was necessary to count with two thirds of the shares with voting rights (67%, that is, the votes of Gálmez plus the votes of Cencosud in Almacenes Paris if the OPA was deemed successful).
In the shareholders agreement Mehuín committed, among other things, to not dispose of its shares in Paris. For its part, the joint action agreement provided that in relation to certain “important decisions”, included in a list of eight cases, the directors should vote according to the instructions issued by Mehuín and Cencosud: The election of the president of the board of directors, the election of the general manager, the adoption of a business plan, the approval of a dividend policy, the approval of the distribution of interim dividends, the agreement on a joint venture with another company, the creation or elimination of subsidiaries, acquiring a debt over USD 10,000,000, all decisions that, according to Chilean law, should be adopted by the board of directors. In case there was no agreement between controlling shareholders regarding the manner to exercise their vote, the parties should meet to establish in writing a common position, and they have the duty to inform the directors of such an agreement. In case an agreement was not reached in such a meeting, the shareholders agreement considered the possibility to resort to an “independent third party”. This third party could settle the manner of voting on the “important decision”, determining the “common position” that should be communicated to the directors.

If in a period of thirty days since the communication of the “common position”, the board of directors does not vote on the “relevant decision “according to the “common position”, “because of the resistance of one or more directors of one of the parties to vote and give effect to the relevant agreement”, it is deemed that the parties to the joint action agreement have breached it, therefore it is possible to resort to the arbitrator designated in the contract to impose sanctions and exercise the rights arising from it.

All of this, despite the statement that this procedure is established “notwithstanding the right of every director to vote in a different manner if they deem that such agreements may be detrimental to the corporate interest”.

ii. Shareholders’ agreements regarding management in Corpbanca-Itaú merger

On 29 January 2014, Corpbanca bank informed the Superintendence of Banks and Financial Institutions that it would merge with Itaú bank.
The agreement substantially meant a change of the controlling shareholder of Corpbanca, given that, because of the operation, Itau Unibanco would own a little more than half of the shares in the parent company of the merged bank, Itaú Unibanco, which in turn would control 66.5% of the merged bank (Itaú Corpbanca). Formally, the operation was built as a merger where Corpbanca would take over the Chilean subsidiary of Brazilian bank Itaú. After the approval of the merger, an increase of capital equivalent to 33.58% of Corpbanca would take place, which would be distributed between the shareholders of Banco Itaú Chile. Afterwards, pursuant to the exchange ratio negotiated in the merger, Itau Unibanco would have the majority of shares of the merged bank with a 33.58%, Corp Group 32.92% and the rest of the shareholders 33.5%. Itau Unibanco and Corp Group (the business holding of the Saieh family) control Itaú Corpbanca through a shareholders’ agreement. This is an operation that has been controversial, given that the agreements included extraordinary benefits for Corp Group, particularly credits, credit lines with preferential rates and put options of shares with repurchase options. All this could be estimated to be the premium for the change of control that Corp Group received, exclusively appropriating and excluding from this benefit the rest of Corpbanca’s shareholders.

The parties entered into a transaction agreement and a shareholder’s agreement, where details of the deal and the manner that they would jointly exercise control of the merged bank were described.

The shareholders agreement includes restrictions to the free transferability of the shares. Particularly, right of first offer, right of co-sale (substantially a tag along agreement), and a drag along clause.

Likewise, the parties of the shareholders agreement included a clause of non-competition in the bank business or other related businesses, and it prohibited them from hiring executives of their counterparts in the shareholders agreement.

The shareholders agreement also included rules on how the directors of the merged bank should adopt certain decisions, as described below.
In section 2.2., the shareholders agreement governs how the board of directors of the Chilean and Colombian subsidiaries of Itaú Corpbanca should be composed and how they should act.

Section a “establishes that the directors should vote, to the extent allowed by the applicable law, together in the same block according to the recommendations of the parent company Itaú. The above, unless it concerns one of the issues established in section 2.8. of the shareholders agreement, requiring in such cases a super-majority, therefore, the consent of CorpGroup for the adoption of particularly relevant agreements listed in that section.”113

Section “d” of that section establishes that if a director of a subsidiary of the Company referred to in the shareholders agreement (Itaú Corpbanca) does not comply with the requirement of voting in a certain manner, then the shareholder that appointed the director shall take the necessary measures for that director to be removed in the relevant shareholders meeting within sixty days. Further, if due to such discrepancy a decision pursuant to the will of the parent company Itaú or agreed with Corp Group cannot be adopted, such event shall be considered a substantial breach by the shareholder that appointed such director.

The parties do not agree to a penalty clause, because they declare that compensation of damages is an insufficient remedy. Therefore, but without waiving other remedies, the right to request safeguard measures is recognized to obtain the specific execution of the shareholders’ agreement, “in any court with competent jurisdiction.”

iii. Shareholders agreement in the CAP Mitsubishi partnership

On February 10th, 2010, the board of directors of CAP S.A. (CAP), a privatized steel manufacturing company, announced that, jointly with their group of subsidiary companies, it would carry out a number of operations with the purpose of achieving a partnership with MC Inversiones Ltda. (indistinctly, MCI or Mitsubishi, a Japanese company). Its purpose was the development of iron exploitation through the incorporation of Mitsubishi to the ownership of

113 Shareholders Agreement between ITAÚ UNIBANCO HOLDING, S.A., [“ITAÚ HOLDING COMPANY”], INVERSIONES GASA LIMITADA, CORP GROUP HOLDING INVERSIONES LTDA., CORP GROUP BANKING S.A., COMPANÍA INMOBILIARIA Y DE INVERSIONES SAGA LIMITADA and INVERSIONES CORP GROUP INTERHOLD LTDA.
Compañía Minera del Pacífico S.A. (CMP), by the acquisition of shares equivalent to 25% of its capital. This was achieved by the transfer of 50% of the shares of Compañía Minera Huasco S.A. (CMH), equivalent to 15.9% of CMP shares, by merging CMH into CMP. This merger contributed around USD 250 million in EBITDA to CMP for developing new projects. Also, by an increase of capital of CMP corresponding to 9.1% of the paid-in capital, for USD 401,000,000, paid exclusively by Mitsubishi.114

The operation was controversial because, although it may be seen exclusively as a way to inject capital to the mining operation of CAP group to support its development, it can also be considered as a disguised means to acquire control. Indeed, CMP is the main asset of CAP S.A. (representing around 80% of the assets of CAP S.A., according to the main shareholder of Invercap S.A., the parent company of CAP, Juan Enrique Rassmuss in his submission to the SVS in March 9th 2010). The consequence of the operation, that grants veto power to Mitsubishi for the adoption of the main decisions relating to the management of CMP and, also, first refusal rights, is the creation of a coalition for the control of CAP between a few shareholders of Invercap S.A. and executives of CAP with Mitsubishi and, also, hinder the acquisition of control of CMP by an interested third party. Therefore, it may be considered, in substantive terms, an appropriation of control of the assets of CAP, but without paying a premium for the control.

Section 6.1. of the shareholders agreement between CAP and MC Inversiones Limitada (MCI) of February 2010, sets the procedure according to which the parties of the contract will agree on the most relevant decisions (“major decisions”) of the board of directors. The clause states that the parties will carry out the necessary acts to secure that CMP and its subsidiaries do not execute any act regarding the following matters [the major decisions of the board of directors] without previously obtaining a vote of approval of at least four of the directors of CMP, including the approving vote of at least one of the directors elected with the votes of MCI in a duly convened session of the board of directors.

In any case, if a proposal of the parties (“designated proposal “as described in clause 6.3. a) does not obtain the positive vote of

the board of directors, including the director elected with the votes of MCI, a procedure is established including a mediation phase. If an agreement is not reached within 30 days of initiating the mediation, the decision may be adopted without the approval of MCI, granting in certain cases indicated in the contract, a put-option of the shares of CMP owned by CMI that requires CAP to acquire those shares.

As may be seen, the effect of these clauses is to grant veto power in the decisions of CMP to MCI, despite holding only 25% of the shares. Further, Mitsubishi participates in the ownership of CAP with 19.27% of the shares, being the second largest shareholder after Invercap S.A. which holds 31.32% of the shares, and in turn does not have a controlling shareholder with blocking power or with the power to elect the majority of the board of directors.115

The shareholders agreement also considered restrictions to the free transfer of shares, a right of first refusal of a purchase offer, right to tag along, IPO “piggy-back” right. Likewise, the shareholders agreement contained rules regarding the financing of the referred company and a dividend policy.

Regarding its publicity, the shareholders agreement established: “None of the parties will give a press release or will make a public announcement relating to the existence of this agreement or to the transactions considered therein, without prior approval of the other parties, unless required by the applicable law, in which case, the affected party, to the extent possible, should consult with the other party and offer to such party the opportunity to comment on the announcement before its press release.”

iv. Summary

It is likely that we have only been able to learn about the shareholders’ agreements analyzed in this section due to the size and relevance of the deals where they were used. These shareholders’ agreements show how a part of the shareholders of a public corporation appropriates the management of the business, an expected practice arising from the purpose of the operations and the uses and

---

115 Up to 31 March 2016, the largest shareholder of Invercap S.A. was Inversiones Hierros Viejos Ltda., with 38.67%, however, its president was Roberto De Andraca, main promotor of the partnership between CAP and Mitsubishi, and until recently, President of CAP.
factual organization of the Chilean market, but against the law and risky for minority shareholders. In these particular cases, in at least two operations, the possibility exists that the shareholders’ agreements allowed them to circumvent the regulation on OPAs, in detriment of minority shareholders. On the other hand, the partnership between CAP (iron producer) and Mitsubishi (iron consumer) for the control of the most valuable assets of CAP (iron mining), together with the veto power of Mitsubishi over the decisions of the board of directors, illustrates that these types of agreements may be concerning for minority shareholders from the perspective of operations between related parties. Likewise, some of the shareholders’ agreements establish long term partnerships for the control and establish mechanisms to give instructions to the board of directors, making it improbable to comply with the rule of management in benefit of the corporate interest, because in practice the management is subordinated to the definitions of the controlling members of the shareholders’ agreement.116

B. Systematic information regarding shareholders’ agreements in public corporations in Chile

i. The requirement of information regarding shareholders’ agreements in the annual report and its problems

The second source to find information about the use of shareholders’ agreements in Chile is the systematic information regarding the references to shareholders’ agreements (and to “joint action

116 The management of the business in benefit of the corporate interest requires for it to be carried out by an autonomous body: the board of directors. This autonomy does not entail that the board of directors may not communicate with the controlling shareholder/s, or that the board of directors cannot receive suggestions or proposals by the controlling shareholders (“you can nominate, but don’t dominate!”). But the final decision reflected in the corporate agreements falls to the board of directors. Likewise, the rules on liability should be distributed: the liability of the board of directors requires their independence when making a decision. But if the decision has been imposed, it breaches the rule of independence of both the board of directors and the shareholder that imposes the decision, therefore both of them incur in liability, See generally CANDIDO PAZ ARES, Identidad y diferencias del consejero dominial [Identity and differences of the nominee director], in ESTUDIOS SOBRE ORGANOS DE LAS SOCIEDADES DE CAPITAL: LIBER AMICORUM, 39 (Aranzadi ed., 2017) (Spain).
agreements”) public corporations deliver every year in their reports (memoria)\textsuperscript{117}. But this source suffers from deficiencies.

While all companies should provide this information, its inspection remains difficult, considering that they are private contracts where the report depends on the subscribing shareholders, which are formally external actors to the corporate bodies. This entails that special enforcement rules should be designed to promote the provision of this information. In comparative law, the most effective rules are those that establish the invalidity of the non-reported shareholders agreement or criminal sanctions for breaching the rules of information of the securities market\textsuperscript{118}. But merely imposing fines seems like an insufficient mechanism to ensure that shareholders who have no interest in providing information effectively communicate such information, for three reasons: first, unlike a criminal sanction, the personal risk of not reporting is low because it is only of a proprietary nature, particularly if fines are not truly considerable; second, unless expressly regulated, the subject of the obligation is unclear,

\textsuperscript{117} The specific part of the NCG 30 that imposes the obligation to inform in the report states that, regarding the information relating to control, “it should be expressly indicated, if the members of the controlling shareholders have or not a joint action agreement and if the latter is formalized or not. In case a formalized joint action agreement exists, it should inform if it considers or not limitations to the free disposal of shares”.

\textsuperscript{118} An effective way to strengthen the enforcement, as seen in light of the review of Italian act on shareholders’ agreements, is the mechanism used by article 122 T.U.F. According to this rule, if the parties do not report on the shareholders’ agreement, the agreement is void. This rule entails for the agreement to have no use for the parties if it is not published, since they will not be able to demand the fulfillment of its clauses, not even between them, which urges them to give publicity. A similar rule was incorporated through the Spanish act on Securities Market in 2003, presumably inspired by the Italian rule, see Francisco León Sanz, La publicación de los pactos parasociales en sociedades cotizadas [The publication of shareholders’ agreements in listed companies], in DERECHO DE SOCIEDADES ANÓNIMAS COTIZADAS: ESTRUCTURA DE GOBIERNO Y MERCADO, 1167 (Aranzadi-Thomson Reuters eds., 2006) (Spain). Likewise, such was the original purpose of article 14 LSA in Chile: the shareholders’ agreements not filed in the company would be deemed as not executed, see Lagos, supra note 101. In the United States of America and the United Kingdom, the enforcement is not specific to report the shareholders’ agreements, but it is equally effective because of its seriousness: criminal sanctions are imposed in case that agreements or contracts relevant to determine the control of a company are not reported.
which might be a good defense against the imposition of a fine;\footnote{Who is obligated, the company, the management bodies of the company? What happens if they claim lack of knowledge? Are the shareholders of the company regulated by the CMF? If these questions are not answered by the regulation, the efficiency of the rule is severely affected.} third, because, unless it has hints, the regulator cannot inspect a fact that is unknown to it.

Likewise, the specific content of the information that is reported is left to the discretion of the informant and it is also likely that the company that reports does not have access to the shareholders’ agreement. Therefore, corporate bodies cannot verify if the information provided to the regulator has been produced in a correct or incorrect manner.

On the other hand, the regulatory standard states the features to be mentioned in very broad terms. The rule requires to report “if the members of the controlling party have or not a joint action agreement and whether this agreement has been formalized”. Additionally, in case a “joint action agreement “exists, “it should be reported if this agreement considers or not limitations to the free disposal of the shares”. We should infer that, when referring to joint action agreements, it refers to shareholders’ agreements relating to the control, but it does not make a distinction whether this joint action agreement is agreed for the shareholders meeting (which would be lawful) or for the board of directors (which would be unlawful).\footnote{See Villareal, supra note 111.}

Additionally, a wide margin of discretion remains for the informant to determine the level of detail of disclosure. Substantially, from this information, it is difficult to evaluate the shareholders’ agreements. The non-controlling investors can hardly assess positively or negatively the impact of the shareholder agreement in the quality of the corporations’ governance.

Something similar happens with the concept of restrictions to the free transfer of shares. Scholars have different views regarding the types of clauses that this concept includes, whether it only considers those that prevent the sale of stock or if those that force to sell should also be considered.\footnote{Vial, supra note 103, at 23; see also Villareal, supra note 104; see Victor Antúnez, Pactos Sobre Transferencia de Acciones en la Empresa Familiar [Agreements on the Transfer of Shares in the Family Business] 91 (2021) (Chile).} On the other hand, the effect of the restriction
to the free transfer of shares depends on the kind of restriction, since some of them are more intense than others and, also, on the enforcement mechanisms that the shareholders agreement may consider. The case of takeover of control of Paris by Cencosud previously analyzed, shows that a restriction to the free transfer of shares can be circumvented if the shareholders agreement does not consider all the possibilities of transfer of control of the business. Therefore, it is difficult to evaluate how the liquidity of the securities is affected by the way in which the information is required.

Finally, in both cases, it is foreseeable that the vagueness of the information requirement would make it difficult to compare how shareholders’ agreements affect the corporate governance of different stock companies, even if they are listed in the Chilean market and are subject to the same rules. The outlined problems justify why in the United States of America, Italy and Spain, it is mandatory to fully inform on the shareholders’ agreement.122

ii. Empirical analysis of the information regarding shareholders’ agreements in the annual reports of Listed Corporations

For the empirical analysis, three years have been selected to measure the level of information that can be obtained regarding the presence of shareholders’ agreements in corporations included in the list of issuers of the Stock Exchange of Santiago.123 Information is analyzed for years 2008, 2013 and 2018.

Information presented by issuers of publicly-listed shares in their annual reports was reviewed, regarding ownership and control of the company. Additionally, the material facts disclosed by each issuer were reviewed, from January 1st 2001 until December 31st 2018, with the purpose to determine if the companies consider giving publicity to their shareholders’ agreements as a material fact to be disclosed in the market.124

122 See Rauterberg, supra note 10, at 1149 (note 96) (discussing the United States approach); see Sanz, supra note 118, at 1170 (discussing Spanish approach); For Italy, see Malberti, supra note 45 (discussing the Italian method).

123 Country clubs, schools and Banks are excluded from the sample, reducing the total number of analyzed companies.

124 In this regard, the Embonor S.A. (a soft drink bottler) case is noteworthy. This listed corporation does not inform the existence of shareholders’ agreements in their annual corporate report (memoria) of 2008. But, in a material fact concerning
Finally, in the cases where companies disclosed the existence of shareholders’ agreements in their annual report or through material facts, a request via email was made for these agreements and, the regulator Superintendence of Securities and Insurance was also consulted regarding the shareholders’ agreements of these issuers.

Going forward, the relevant information obtained for each year regarding the number of companies that inform the existence of agreements between their shareholders in their annual reports or as essential facts, will be summarized, likewise, those where a presumption of joint action agreements may be applied, ex article 98 de la Ley No. 18,045 (II), will also be mentioned. Finally, an account will be made of those companies affected by a shareholders agreement on upstream control), that is, those where the controlling shareholder is in turn controlled by a joint action agreement or an agreement on control (III).

The available information prevents the conduction of a detailed analysis of the contractual clauses of the shareholders’ agreements. Notwithstanding, in the case of information available of shareholders’ agreements reported by issuers of publicly-listed securities (I) they will be classified taking into account if those agreements are related to the restriction of free transferability of shares.

---

125 None of the contacted companies answered the requests.
126 In Notice No. 29996 of 09 November 2017, the SVS answered that “The noted requested information, regarding the answers provided by the companies listed in the Registry of Securities in compliance with Official Circulars 64 of 2001 and 97 of 2010, contains data that if disclosed may affect their interests, as occurs with the information of individuals or legal persons that are a part of the shareholders’ agreements”.
127 Integrated Annual Report 2022, Viña Concha y Toro, https://vina-cyt.com/en/investors/financial-information/ (last visited Jan. 31, 2024). The case of Viña Concha y Toro is interesting, since it has family economic groups, Guilisasti Gana family, Larrain family, and Fontecilla family, which act under an informal joint action agreement, this suggests that it may be an opportunity to circumvent the content information of the agreement on control. It is noted that these same family groups control the company Viñedos Emilia SA and declare to have the same kind of agreements in their annual report according to its page 8.
coordination in the election of directors, coordination of votes in shareholders’ meetings or union of votes, and those where the existence of a shareholders agreement is only mentioned without disclosing further information.128

The following table presents a summary of the use of shareholders’ agreements in Chilean Public Corporations:

Table 1: Information on Shareholders’ agreements 2008-2013

<table>
<thead>
<tr>
<th></th>
<th>2008</th>
<th>2013</th>
<th>2018</th>
</tr>
</thead>
<tbody>
<tr>
<td>Companies included in the sample</td>
<td>201</td>
<td>196</td>
<td>172</td>
</tr>
<tr>
<td>Companies that report agreements</td>
<td>25</td>
<td>28</td>
<td>40</td>
</tr>
<tr>
<td>Companies that report shareholders’ agreements that include restrictions to the free transferability of shares</td>
<td>5</td>
<td>11</td>
<td>24</td>
</tr>
<tr>
<td>Companies that report shareholders’ agreements of their controllers that include voting coordination in shareholders’ meetings (sindicato de voto)</td>
<td>4</td>
<td>3</td>
<td>2</td>
</tr>
</tbody>
</table>

128 The existing differences in the manner of informing require in certain cases, to perform a construction exercise regarding the clauses of shareholders’ agreements. For example, Cementos Bio-Bio in its annual report of 2008 expressly states the existence of a shareholder’s agreement between the controlling shareholders that “considers detailed rules on this issue, establishing as a restriction that none of them may commit to third parties their participation or vote in ordinary and extraordinary shareholders’ meetings . . . “. Unfortunately, the information provided is scarce, but, if they make a commitment with the members of the shareholders agreement to not commit their participation and vote in the meeting, it is most likely that this is a shareholder’s agreement in which the signatories have coordinated the exercise of voting rights at the shareholders’ meeting.
A first highlighted feature is that during the analysis period an increase in the number of companies that report shareholders’ agreements is registered, growing from 25 (12.4%) to 40 (23.3%). It should be noted that, regarding the use of clauses, according to the available information, the highest frequency of use occurs with clauses that restrict the free transferability of shares, which also register a relevant increase during the period. However, it should be noted that the manner in which the shareholders’ agreements are informed in the reports, often do not allow to clearly determine the use of certain clauses, which means that it is very likely that the number of companies where a coordination of votes and coordination in the election of directors exist, or even where instructions to the directors exist, may be underestimated.

On the other hand, the presumption of joint action does not always mean that a shareholders agreement exists. The presumption may obey to cases of companies belonging to a same group, so that

| Companies that report shareholders’ agreements that include coordination when electing directors | 4 | 5 | 5 |
| Companies that report the existence of joint action agreements, without disclosing details of the agreement | 18 | 12 | 13 |
| Companies in which the existence of joint action agreements is presumed | 38 | 54 | 29 |
| Companies in which an existing “Upstream” shareholders agreement is reported or a joint action agreement is presumed | 15 | 6 | 10 |

Source: Prepared by the authors
a shareholder’s agreement for control or for the restriction of free transfer of shares would be unnecessary.

It should also be considered that the rule only requires reporting on shareholders’ agreements relating to control, therefore, other shareholders’ agreements with other purposes are not reported, such as an agreement between minority shareholders for the election of directors or to coordinate participation in extraordinary shareholders’ meetings. The latter is, in fact, unusual in the Chilean system of corporate governance, except for the case of coordination between the Administradoras de Fondos de Pensiones (national pension funds managing companies who are relevant institutional investors in the Chilean market) for the election of directors in public corporations.

The following table introduces certain characteristics with respect to the structure of ownership and control of companies.

**Table 2: Characterization of Companies with Shareholders’ agreements 2008-2018**

<table>
<thead>
<tr>
<th></th>
<th>2008</th>
<th>2013</th>
<th>2018</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Without report of</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>an agreement</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Total of</strong></td>
<td>185</td>
<td>25</td>
<td>175</td>
</tr>
<tr>
<td><strong>Companies</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Participation</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Controller / Major</strong></td>
<td>49.7%</td>
<td>29.6%</td>
<td>52.5%</td>
</tr>
<tr>
<td><strong>Shareholder</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Concentration</strong></td>
<td>3403.31</td>
<td>1691.36</td>
<td>3813.88</td>
</tr>
<tr>
<td><strong>of the ownership</strong></td>
<td>(HH Index)</td>
<td>(HH Index)</td>
<td>(HH Index)</td>
</tr>
<tr>
<td><strong>Belonging to a</strong></td>
<td>93</td>
<td>15</td>
<td>112</td>
</tr>
<tr>
<td><strong>business group</strong></td>
<td>(50%)</td>
<td>(60%)</td>
<td>(64%)</td>
</tr>
<tr>
<td><strong>Foreign control</strong></td>
<td>33</td>
<td>1</td>
<td>33</td>
</tr>
<tr>
<td></td>
<td>(50%)</td>
<td>(52%)</td>
<td>(53%)</td>
</tr>
</tbody>
</table>
From the information of the table, it is possible to infer that the use of shareholders’ agreements is more frequent in companies where the participation of the major shareholder in the company is lower and where the concentration of ownership (measured through the Herfindhal index) is also lower. This suggests that its use in Chile is mostly related to building coalitions of shareholders rather than to controlling shareholders that seek to grant assurances to minority shareholders. It is also observed that their use is more frequent in companies with domestic controlling shareholders (or that do not have a controlling shareholder) versus those companies where it is possible to identify a foreign controlling shareholder. This may reinforce the idea that shareholders’ agreements are mostly used as CEM (a way of building coalitions for control), because transnational companies acquiring control of Chilean listed companies usually have the financial capacity to acquire control by themselves.

VI. SUMMARY OF THE USE OF SHAREHOLDERS’ AGREEMENTS IN CHILE

When observing the information provided on shareholders’ agreements and the conformation of business groups incorporating the reviewed public corporations, it may be regarded that shareholders’ agreements in public corporations mainly fulfill four functions. First, they bind companies where their main shareholders are members of controlling families of the productive companies. These shareholders’ agreements are found in upstream companies of the public corporation and are not always reported (for example, the shareholders agreement for the control of the electric generator Colbún S.A. in the case of the Matte family). Second, they add participation in shares between different economic groups, commonly family groups, to acquire control of a public corporation (for example, the shareholders agreement for the control of the privatized telecommunications company Entel S.A.). Third, they coordinate a joint venture to gather different capabilities in the development of a business (for example, the agreement on control over IRSA, controller of Compañía de Cervecerías Unidas S.A., between Quiñenco S.A. (Luksic group) and Heineken). Fourth, as a background to merging operations or takeover of control, they coordinate the older
controlling shareholder with the new controlling shareholder, agreements that in several cases are designed to have a limited duration and that are inserted in a new framework agreement (such as the case of the shareholders agreement between Luksic and Claro groups for the control of the shipping company CSAV S.A.). The most observed functions are the first and the second ones mentioned, which coincide with the concept of Control Enhancement Mechanism or CEM.

A significant fact that is inferred from the observations made, is the increase of reported shareholders’ agreements, particularly regarding restrictions to the free transfer of shares. This increase may be explained by two reasons previously suggested: first, because of an increase of pressure to inspect pyramidal structures; second, because of the amendment of article 14 LSA by law 20.382 of 2009. This fact also suggests a discrepancy between the observed reality in the anecdotal information and the reported information: in the first, as expected, it is stated that shareholders’ agreements relating to control (joint action agreements) and the shareholders’ agreements that restrict the free transfer of shares go hand in hand; but in the second, it is observed that transfer agreements increase more than control agreements.

Shareholders’ agreements in the Chilean market have an impact over the control of companies and may facilitate the avoidance of rules that protect minority shareholders, such as the mandatory OPA regulation or even insider trading regulation. However, the manner in which the information is requested to the market is deficient: it allows the existence of hidden agreements, by not establishing adequate enforcement rules; it prevents to identify the positive or negative impacts in corporate governance, and, consequently, the value of the shares of public corporations; they are insufficient to evaluate their effect in the liquidity of shares; it hinders comparison between companies, because their inaccuracy grants broad discretion to the informant regarding the quality of the information provided.

The characterization of companies that use shareholders’ agreements seem to suggest that these agreements are used as mechanisms to obtain or maintain control in those cases where the major shareholder cannot exercise control by itself, and not as a mechanism to achieve partnerships with minority shareholders. However, because of the lack of accuracy when reporting the specific clauses
of the shareholders’ agreement and of lack of enforcement itself, it is impossible to know the way in which this control is structured, unlike what happens, for example, in Italy or in Brazil. Because of this, analysts of the Chilean market face difficulties to evaluate the benefits and disadvantages of the shareholders agreement to control a company, thus the levels of information are deficient in comparison to other markets.

Finally, the characterization of shareholders’ agreements also indicates that control through agreements is a more common practice among domestic controlling shareholders. This suggests that it is not possible to characterize domestic economic groups exclusively as groups whose CEM are pyramidal structures. In many cases, the pyramidal structure is supplemented by shareholders’ agreements.

VII. CONCLUSION

Shareholders’ agreements are contracts that may be used as a structure to broaden control (CEM). But unlike other CEM, it is difficult to accurately learn the positive or negative effect of a shareholder’s agreement in the governance of a company. For this, it is essential to have rules that mandate the provision of information on shareholders’ agreements in listed corporations. However, the detail in the design of these rules is key, since they may constitute an incentive to enter into shareholders’ agreements that play a role as CEM, just as it happens in Brazil and, very probably, in Chile. By contrast, a correct design of these rules may promote the use of shareholders’ agreements as structures whose function is to give stability to corporate governance, creating higher value for the companies, as it seems to be the evolution of its use in Italy.

In Chile, the rules that regulate the disclosure of shareholders’ agreements referring to listed corporations, hinder an accurate evaluation of their impact in the governance of the company and in the system of corporate governance in general. However, certain features of their use in the Chilean corporate governance system may be observed from case studies and from the analysis of systematic information of the references to shareholders’ agreements in the annual reports.

On the other hand, case studies in Chile attest to the fact that shareholders’ agreements may be used as a means to facilitate
control takeovers avoiding the mandatory OPA and, also, may reg-
ulate the manner in which external decisions of the company will be
adopted, and that will directly impact how operations between re-
lated parties are carried out. A correct assessment of corporate gov-
ernance requires the existence of information over these variables.

Considering the above, it is concluded that the main purpose of
entering into shareholders’ agreements in Chile in public corpora-
tions seems to be obtaining or maintaining control, i.e., they are used
as CEM, since their use is more frequent in companies where the
participation of the major shareholder in the company is lower and
where the concentration of ownership is also lower. This use is
mostly observed in companies without a controlling shareholder or
with a domestic controller. In contrast, unlike the Italian case, there
is no relevant variation in their use depending on the activity area,
which reaffirms its function as CEM, as opposed to its use as a sta-
bilizing mechanism of governance for long term investments.

The report on the use of shareholders’ agreements in Chile in-
creased in the period 2008-2018, which may be due to a regulatory
change in 2009, whereby the agreement is enforceable as to third
parties if filed in the company. It is likely for controlling sharehold-
ers to have been more willing to report existing agreements to take
advantage of the legal effect, although, as has been analyzed, in
practice this mandatory effect before third parties is minor.

But the vagueness of the information regarding shareholders’
agreements makes it difficult to accurately evaluate their impact on
the governance of a listed corporation in particular, and over the cor-
porate governance system in general. If case studies are combined
with systematic information, it may be considered that agreements
that seek to influence the conduct of directors are probably under
reported, that is, that many more agreements that those expressly
reported exist, both when it is informed that there is a shareholders’
agreement but without detailing its content, and when a shareholders
agreement is not reported but a joint action agreement may be pre-
sumed in those cases in which control is not determined by the fact
that it belongs to a group.

The Italian experience suggests that discouraging the use of a
CEM may result in its replacement by another, to the degree that the
institutional structure continues to be ineffective to suppress the pos-
sibility to obtain private benefits of control. However, it appears that
better rules on information of shareholders’ agreements may promote their efficient use. In Chile, a simple reform may substantially improve the knowledge about the way public corporations are controlled through shareholders’ agreements, significantly increasing the quality of the information provided to the market and promoting that shareholders’ agreements be used to benefit corporate interest.