The "dilemma of the (shareholder) prisoner"

The paper deals with a company law topic, *i.e.* the limits to transfer right of shareholders, analyzing it from a law and economics point of view. Suppose that the by-law of company Alfa includes certain restrictive clauses: *e.g.* lock-up or approval; in short, under the former all transfers are forbidden, whereas under the latter all transfers shall be subject to prior approval by a competent body (for instance, the board of directors of Alfa, which however does not intend to grant such approval). By means of these clauses, Alfa prevents a minority shareholder to exit the company (since the sale of its shares to third parties is not allowed). Here, the two conflicting interests at stake are the following: on the one hand, Alfa and existing shareholders (other than the minority one)'s interest in ensuring homogeneity and stability of ownership structure; on the other hand, minority shareholder's interest to freely sell its shares, so not to remain "prisoner" within the company.

The paper focuses on Italian law and more specifically on the rules of the civil code (see article 2469) governing limited-liability companies (*società a responsabilità limitata* or, in brief, *s.r.l.*), which are the most widespread legal model in Italy. The first part of the paper summaries the regulatory framework (although how some rules should be interpretated is currently debated in case-law[1] and among legal scholars). The traditional remedy set forth in order to balance the aforementioned interests is the withdrawal right. In the case previously described the minority shareholder – if entitled to this right – may thus exit the company by withdrawing. This means that there would be no entry of new shareholders, but Alfa would have to reimburse the outgoing minority shareholder the value of its shares. Three main points are noteworthy: (i) under which circumstances, a shareholder of a *s.r.l.* is entitled to withdrawal right; (ii) when such right can be exercised (*e.g.* at any time or only after an actual transfer has been denied); (iii) whether there are other remedies available, alternative to the withdrawal right (*e.g.* the so-called "French clause", providing for an obligation upon the company or other existing shareholders – once they deny a transfer – to buy the shares of the shareholder willing to exit).

After this *de iure condito* overview on Italian law, the second part of the paper analyses it from a law and economics point of view. For each of the points (i), (ii), (iii) above, the question to be answered is: are the relevant legal provisions adequate or should the matter be regulated differently? To this end, some concepts and tools of "game theory" may be useful: in particular, the "dilemma of the prisoner". There it is a real "prisoner" (a criminal under charge), whereas here it is just a shareholder metaphorically "imprisoned" in the company (assuming that it is not a criminal as well). However, also here the behaviors of the parties involved (on the one side, the minority shareholder; on the other side, Alfa and the other existing shareholders) may be read as a "dilemma" or choice in cooperative terms[2]. Once carried out the law and economics analysis, the

[1] Please see the Court of Appeal of Venice, ruling no. 2158 of 30 July 2021.

[2] In a non-cooperative scenario, it could be imagined that Alfa (*rectius*, its majority shareholder(s) controlling it) immobilizes ownership structure by means of strict by-law clauses (such as lock-up), which fully prevent transferability of shares. In doing so, the company exposes itself to a serious risk: *i.e.* the withdrawal by minority shareholder(s), not willing to remain "prisoner(s)". This large exodus (which would entitle outgoing shareholder(s) to reimbursement of its(their) shares value) may negatively affect share capital and assets of Alfa, potentially jeopardizing business going concern and reliance of its creditors on the company's financial strength. This is the worst-case scenario for all parties involved. On the contrary, in a cooperative scenario, it could be inferred that Alfa (*rectius*,

paper argues that the Italian legal provisions seem adequate, even if a few amendments may be suggested.

In the third and final part of the paper, the scope is widened to another legal model: joint-stock companies (*società per azioni* or, in brief, *s.p.a.*), both listed and not. The aim is to compare their legal provisions to those applicable to limited-liability companies (*s.r.l.*), as addressed so far. Moreover, in a comparative view, other legal systems are considered with the same goal of examining whether the legal solutions set out thereto are equal or differ from Italian ones – in the merits, but especially in terms of their economic effects.

its majority shareholder(s)) freely allows new shareholders to entry or sets out flexible by-law clauses that leave rooms for transferability (for instance, an approval clause fixing *ex ante* the parameters that new shareholders shall meet in order for their entry to be approved). This would prevent minority shareholders from withdrawing, so avoiding an impoverishment of company's assets. This may constitute a "Pareto optimum".