

A MINORITY SHAREHOLDER CANNOT PERFORM A DUE DILIGENCE ON ITS COMPANY, A COURT RULES

The Court of Bologna - in a recent ruling, an *ordinanza* dated July 23, 2018 - refused to order a company to prepare a data room for a shareholder, holding less than 5% of the company's corporate capital. The shareholder was conducting a negotiation to sell its shares to a third party. In parallel, the majority shareholder had organized a data room to sell its 95% stake to another party. The minority shareholder claimed that it had the right to have a data room organized for its benefit in order to avoid interrupting the negotiations with its prospective purchaser and in order to be able to collect the information necessary to exercise its pre-emption right on the remaining 95% which was on sale.

The Court rejected the minority shareholder's claim acknowledging that the Italian legislation awards a prevailing protection to the company's confidentiality rights. Indeed, the Italian Civil Code expressly limits the right of inspection of shareholders of a company incorporated as an S.p.A. to the exam of the stockholders' ledger and the shareholders' meetings' minutes. On the contrary, a shareholder of a company incorporated as an S.r.l. has broad inspection rights over such type of company.

According to the Court, the confidentiality rights of a company forfeit if the due diligence is requested for the sale of a controlling stake. Indeed, a change of control is capable of affecting the target company directly. Therefore, said company could have an interest in providing full disclosure to the potential purchaser that could bring synergies or inject new equity in the company.

In the case at hand, the due diligence organized by the majority shareholder had started before, but we deem this argument - upheld by the Court to justify its decision - less convincing.

In the absence of specific legal provisions, the decision of the directors was placed under scrutiny by the Court to verify whether the reasons were serious and not dictated by the main shareholder's interest. We deem that the criteria that should guide directors in taking such a decision should be the percentage on sale, the stage of the negotiations and the type of counterparty (more precautions should be adopted with a competitor, for example, and the soundness of the counterparty should be verified in any case).