

## **Antonio Fazio: Update on the change in the control structure of some Italian banking groups**

Report by Mr Antonio Fazio, Governor of the Bank of Italy, to the Interministerial Committee for Credit and Savings, Rome, 26 August 2005.

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### **1. Introduction. Supervisory procedures and action in the case of transactions involving the capital of banks**

The controls on the ownership structures of banks contribute, together with the other instruments of prudential supervision, to the pursuit of the objectives of sound and prudent management of intermediaries and the stability, efficiency and competitiveness of the banking and financial system (Article 5 of the Consolidated Law on Banking). Effective performance of the controls has accompanied the international opening of the ownership of Italian banks, which is also significant in comparison with other European countries. The proportion of foreign-owned capital in the four major banking groups averages 16 per cent in Italy, 7 per cent in Germany, 3 per cent in France and 2.6 per cent in Spain. In Italy competition has increased; the range of services offered to customers has broadened; unit operating costs have been reduced. This process is still under way. Under Community and Italian law, the acquisition of shareholdings in banks above given thresholds, which start at 5 per cent, must be authorized by the Bank of Italy; moreover, holdings that allow the exercise of control must always be authorized (Article 19 of the Consolidated Law on Banking).

All shareholders' agreements leading to the coordinated exercise of voting rights at a bank must be notified to the Bank of Italy within five days. Voting rights that are the subject of unreported agreements may not be exercised. The evaluations conducted by the Bank of Italy are intended to prevent major shareholders from exercising their rights to the detriment of the sound and prudent management of the bank. To this end the Bank of Italy takes into account: (a) the characteristics of the parties intending to acquire the holdings; (b) the upper limit of 15 per cent on industrial and commercial companies' holdings of a bank's capital and (c) in the event of the acquisition of a controlling interest, the business plan pursued.

If the acquirer is a bank, the evaluation also looks at the operation's impact on the bank's overall situation and organization and that of the entity created by the combination (Article 53 of the Consolidated Law on Banking). If the acquirer is an EU bank, Community law requires prior consultation with the supervisory authority of its country of origin, which is responsible for verifying its sound and prudent management. The sustainability of acquisitions is evaluated with reference to prudential regulations, which are based on common international principles; in this regard, capital adequacy with respect to the various forms of risk is of fundamental importance.

In particular, the regulations state that banks' capital, in the composition employed for supervisory purposes, must be equal to at least 8 per cent of their riskweighted assets.<sup>1</sup>

Banking groups are required to report their capital ratios to the Bank of Italy twice a year, with reference to the situation on 30 June and 31 December of each year; these official reports must be sent, respectively, by 25 October and 25 April following the reference date.

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<sup>1</sup> In the case of banks belonging to banking groups, the minimum capital requirement is lowered to 7 percent (at the "individual" level), while the requirement for the group as a whole remains 8 per cent (at the "consolidated" level). Furthermore, the Bank of Italy also requires the main banking groups to aim for higher capital ratios than the regulatory limits: the so-called target ratios.

Compliance with the regulations is verified on the basis not only of statistical reports, but also of information and documents acquired by the Bank of Italy as part of its administrative activity and in the course of interviews with corporate officers. Supervisory inspections can be conducted to obtain further information regarding the management of the bank and the quality of the data transmitted.

Community law and supervisory instructions do not exclude the possibility of deviations from regulatory requirements, but require that suitable measures be adopted promptly to restore compliance with the capital ratio.

In the case of business combinations, the Bank of Italy examines the amount of capital available as well as the plans for raising any additional funds that might be needed. The evaluations are made on the basis of the latest balance sheet of the acquirer, audited, in the case of listed banks, by a leading firm of independent auditors; these evaluations are supplemented with information acquired in the course of ordinary supervisory activity and with additional information, data and simulations obtained during meetings with corporate officers or from other sources.

In general it is not economically advantageous, in the early stages of planning, for the bank making the acquisition to obtain more funds than are necessary for ordinary operations, not least in view of the substantial progress the capital market has made in recent years; acquiring capital in advance would primarily affect the shareholders, by reducing the return on their capital. The authorizations contain mandatory provisions to coordinate the making of investments in shareholdings with the raising of capital.

In order to provide safety margins with respect to the minimum ratios prescribed by the regulations, the Bank of Italy often requires contingency plans for raising further capital to be drawn up, ready for implementation in case of need. The Bank of Italy performs a different evaluation of mergers and acquisitions, entirely separate from the examination of the prudential aspects, by virtue of the powers as antitrust authority for the banking sector entrusted to it under Law 287/1990. I will not go into this aspect in detail because it has no bearing on the facts that are the focus of attention today; in the case of the Banca Nazionale del Lavoro, the opinion of the Antitrust Authority is pending.<sup>2</sup>

The procedures followed by the Bank of Italy in the conduct of its supervisory activity comply with the provisions of Law 241/1990, as amended, which regulate administrative proceedings, making a distinction between the examination stage and the decision-making stage.

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<sup>2</sup> The Antitrust Authority recently asked the parties concerned to provide information about an existing consultation agreement relating to FINSOE, the company controlling UNIPOL, entered into by Monte dei Paschi di Siena, a shareholder in FINSOE, and Holmo Spa, which controls it.

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In the interests of a desirable plurality of technical evaluations, these stages have always been characterized by a dialectical approach correlated with functional roles, professional capacities and related responsibilities.

The internal regulations prescribe how these dialectical positions are synthesized and regulate the powers and duties of the people authorized to make decisions.

## **2. Transactions involving the capital of Banca Antoniana Popolare Veneta (Antonveneta)**

### **2.1 Governance structure of Banca Antonveneta**

During 2004 relations between the members of the shareholders' agreement governing Banca Antonveneta (ABN Amro, Lloyd Adriatico and some entrepreneurs) became increasingly strained, mainly because of the large number of participants and the diversity of their objectives; in December some of them announced their intention not to renew the agreements upon expiry. Given this situation, ABN Amro, which in June 2004 had expressed an interest in increasing its holding in Antonveneta, signified its willingness to find a solution for the bank's governance that would safeguard its

investment; on the other hand, Banca Popolare di Lodi (BPL) informed the Bank of Italy that it intended to put itself forward as reference shareholder in the search for new governance arrangements for Antonveneta.

From the point of view of the Bank of Italy, the uncertainties surrounding the evolution of Banca Antonveneta's ownership structure threatened to destabilize its management policies, thereby undermining the effectiveness of the ongoing internal reorganization and enhancement of the bank's balance-sheet assets; this process had been initiated recently by the management in order to solve the considerable operating and organizational problems from which Antonveneta had been suffering for some time; the consolidated profit and loss account for 2003 closed with a loss of €842 million, partly as a result of substantial value adjustments to loans. In 2004 it showed a profit of €282 million.

Against this background of uncertainty, ABN Amro and BPL were repeatedly urged to reach an agreement that would ensure the sound and prudent management of Banca Antonveneta. Contacts between the two parties in the early months of 2005 nonetheless failed to produce mutually acceptable solutions regarding either the governance of the bank or commercial agreements; on the contrary they led to an acceleration of plans by both parties to undertake transactions involving the capital of Banca Antonveneta.

## **2.2 *BPL's application to increase its shareholding to 14.9 per cent of Banca Antonveneta's capital***

On 4 February BPL gave the Bank of Italy prior notification of a plan to acquire 14.9 per cent of Antonveneta's capital. A formal application was sent on 11 February; the Bank of Italy granted authorization on 14 February, ten days after the notification.

The capital needed to ensure the sustainability of the transaction was to come from an existing surplus of own funds and the forthcoming issue of a €300 million subordinated loan for which authorization had already been obtained. The plan drawn up by BPL to strengthen its capital base by issuing additional instruments was designed to maintain a high solvency ratio even after the investment.

Since the issue of the capital instruments announced by BPL would take a few weeks, in the authorization measure the bank was invited to proceed gradually in acquiring the shareholdings; the document contained a further request that additional measures to strengthen capital be scheduled for the end of 2005 to take account of the effects of the application of the new International Accounting Standards.

In the weeks after 14 February technical meetings were held to discuss the proposed issue of capital instruments with innovative features; the Bank of Italy requested additional documentation and after careful examination demanded changes to the transaction; consequently the preparation of the issue took longer than initially planned.

## **2.3 *ABN Amro's applications for authorization***

On 15 March 2005 ABN Amro informed the Bank of Italy, in its prior notification, that it was interested in acquiring control of Banca Antonveneta through a complete-acquisition tender offer.

ABN Amro sent the official request for authorization, accompanied by the prescribed documentation, to the Bank of Italy on 30 March. In compliance with the requirements of European legislation and the supervisory Instructions, the Bank of Italy, after subjecting the documents to a preliminary examination, on 12 April applied to the Dutch supervisory authority for information regarding ABN Amro.

On 12 April ABN Amro requested authorization to hold shares in excess of the thresholds of 15 and 20 per cent of capital, on the grounds that it wished to ensure the success of its bid.

One complex point that arose in the course of the examination was the fact that ABN Amro was in possession of bonds convertible into Antonveneta shares; conversion of these bonds would have had major effects on the ownership structure and governance of Antonveneta.

On 19 April, seven days after the formal application was made, the Bank of Italy authorized ABN Amro to increase its shareholding in Banca Antonveneta to 20 percent.

At the time it was not possible to give permission to go beyond that threshold: authorization to do so would have placed the Dutch bank in a position to increase its holding to the next threshold prescribed by the regulations, 33 per cent; attainment of that threshold would have made a tender offer mandatory, whereas the application to gain control of Antonveneta by means of a voluntary tender offer was still being evaluated.

On 20 April ABN Amro formally undertook not to exceed 30 per cent of Antonveneta's capital, thereby making the potential bond conversion into the bank's shares irrelevant for the purpose of calculating ABN Amro's total shareholding. On 27 April the Bank of Italy authorized ABN Amro to acquire up to 30 per cent of Antonveneta's capital.

On 6 May, once the necessary analyses and verifications and the consultation with the Dutch authorities had been completed, ABN Amro was authorized to take control of Banca Antonveneta. The examination, which began with ABN Amro's prior notification on 15 March, lasted 52 days; starting from the date of the formal application for authorization, which was

submitted on 30 March, the inquiry lasted 37 days; 17 days were taken up by the consultation with the Dutch authorities.

The tender offer terminated on 22 July 2005, with the shares tendered amounting to just over 2 per cent of Antonveneta's capital. ABN Amro publicly announced its intention to return the shares acquired during the tender offer and that it was not interested in remaining a minority shareholder in Banca Antonveneta.

#### **2.4 BPL's additional investment**

On 31 March BPL announced its intention to increase its shareholding in Antonveneta to 29.9 per cent and submitted a formal application for authorization on 4 April.

During the technical meetings held to assess whether BPL had sufficient capital, the Bank of Italy asked the bank's officers to explain how the capital requirements would be met. They replied that steps would be taken to match the disbursement with actions to strengthen the capital base; proposals included the use of securities lending and the pledges of shares in order to acquire voting rights of the order of 10 per cent of Antonveneta's capital; the sale to foreign banks of minority shareholdings in companies controlled by the group for an overall value of around €1 billion; and additions to the subordinated loans already planned. Finally, in a longer term perspective, a substantial capital increase was envisaged to support the bank's growth plans.

The estimates submitted by BPL showed the investment to be sustainable. The cost of acquiring the entire 29.9 per cent share in Banca Antonveneta's capital was estimated at around €2 billion, while the new capital resources that were the subject of the two applications for authorization amounted to €2,275 million, later raised to €2,380 million. At the end of the transaction the bank's capital ratio would stand at 10.3 per cent.

On 7 April authorization was granted, seven days after the start of the examination of the application. Even assuming unfavourable developments regarding certain variables, acquisition of the shareholding appeared compatible with the sound and prudent management of the BPL group.

After obtaining authorization for the shareholding, BPL asked the Bank of Italy to approve the issue of the instruments to strengthen its capital base described in the application and to include them in the computation of supervisory capital. The Bank of Italy called for changes in the terms and conditions of the issues, so that they would have standard technical features; the authorizations were granted in measures adopted after examinations lasting up to one month.

In the meantime the Bank of Italy held several technical meetings to keep abreast of developments in the capital strengthening plan and, in particular, the sale of minority holdings of companies belonging to the group.

On 29 April BPL's shareholding reached 29.5 per cent of Antonveneta's capital. On 30 April the shareholders' meeting of Banca Antonveneta renewed the governing bodies and appointed members put forward by BPL. Subsequently, according to the documents produced by BPL at the beginning of May, it was found that the acquisitions had been effected with less recourse to securities lending and pledges of shares than originally proposed; moreover, it appeared that the timetable for the sale of minority shareholdings had not been respected. As a consequence, from April of this year the capital ratios were briefly out of line, although the shortfall was subsequently removed.

These circumstances have no bearing on the effects of the authorization already granted by the Bank of Italy, as confirmed by the recent decision of the Lazio Administrative Court dated 13-19 July and filed on 9 August, but they are relevant for sanctions. The relative investigations, which began immediately, concluded with a formal notice issued on 29 July to the members of BPL's board of directors and board of auditors.

## **2.5 BPL's takeover bids for Antonveneta**

On 22 April Banca Popolare di Lodi gave the Bank of Italy prior notification of a plan to acquire control of Banca Antonveneta by means of an exchange tender offer. The formal application was filed on 5 May. Preliminary estimates showed that BPL's capital ratios after the acquisition would have been above the regulatory minimum regardless of the amount of shares tendered. Moreover, the planned capital increase of €1.5 billion would have further increased the capital surpluses.

In April Consob, with which the Bank of Italy had begun cooperating in February with regard to the transactions involving Antonveneta's capital, intensified its checks.

Among other matters, Consob informed the Bank of Italy of the acquisition of Antonveneta shares by BPL on behalf of a number of parties. Consob investigated this activity on the basis of information first requested from BPL and then of inspections and the Central Credit Register data it requested on two occasions from the Bank of Italy. The requests for Central Credit Register data were transmitted on 20 April and 4 May and satisfied by the Bank of Italy in six and two working days respectively.

With a resolution dated 10 May Consob, proceeding on its own authority, found that an undeclared shareholders' agreement existed between BPL and other Antonveneta shareholders for the concerted acquisition of Antonveneta shares and the exercise, individually or jointly, of a dominant influence over Antonveneta; the resolution also drew attention to the manner in which loans had been granted for the purchase of Antonveneta shares.

The Bank of Italy promptly notified the suspension of voting rights to the persons indicated in the Consob resolution and initiated the administrative sanction procedure against them for violations of the provisions concerning the notification of shareholders' agreements to the Bank of Italy and the authorization to acquire major shareholdings. Furthermore, judging that there had been instances of non-compliance with the rules on credit management, the Bank of Italy initiated an additional sanction procedure against BPL.

The Consob resolution, which was transmitted to the Bank of Italy in a letter dated 11 May, substantially modified the information available to the Bank; the obligation to make a tender offer, with a further outlay of cash, altered the overall context of the supervisory evaluations.

On 17 May BPL, conforming with the obligations resulting from Consob's finding, applied to the Bank of Italy to authorize the mandatory cash tender offer as well and transformed the exchange tender offer for which it had applied for authorization on 5 May into a cash and exchange tender offer basically similar in content to the exchange tender offer.

At the same time BPL executed a shareholders' agreement among the persons indicated in the Consob resolution, which was notified pursuant to Article 20 of the Consolidated Law on Banking.

On 2 June the shareholders' meeting of Banca Popolare di Lodi approved a €1.5 billion capital increase; on the same occasion the name of the bank was changed to Banca Popolare Italiana (BPI). The offering terminated on 15 July with an acceptance rate of 99 per cent, which took the capital ratios well above the regulatory minimums.

In view of the uncertainties regarding the transactions for the capital cover of the mandatory tender offer, on 8 June the Bank of Italy asked BPI to submit documents on the actions intended to ensure that the 8 per cent requirement would continue to be satisfied after the acquisition. In addition, the Bank formalized some especially stringent guidelines that BPI was to follow in order to ensure that the bank's capital base could sustain the mandatory tender offer.

BPI responded to the requests by providing updates and documents on the capital strengthening needed to sustain the acquisition of control of Banca Antonveneta.

Lastly, on 20 June the Bank of Italy initiated an inspection of a general nature at BPI, *inter alia* with the aim of checking, in connection with the acquisitions, the bank's capital ratios, its credit disbursement and management procedures and its statistical reports. The first checks concerned the amount of BPI's own funds.

The latter initiative came after the start on 9 June of an inspection at Antonveneta to check whether the functioning of the bank's ordinary operations had been impaired by the temporary uncertainty stemming from the precautionary suspension of the shareholders' resolution of 30 April renewing Banca Antonveneta's governing bodies, ordered by the Court of Padua on 21 May. The inspection ended on 24 June without significant findings.

## **2.6 *The examination of BPI's proposed tender offers.***

The examination, conducted according to the criteria and methods referred to above, focused principally on three aspects material to the granting of authorization to acquire control of Antonveneta: a) the BPI group's capital adequacy; b) BPI's "quality" as a shareholder, taking account of the above-mentioned Consob resolution and the consequent steps taken by the Bank of Italy; and c) the checks carried out by the Bank of Italy regarding the conduct in connection with the temporary shortfall of BPI's capital ratio.

On the last two points the Bank of Italy continued to avail itself of the advice of authoritative jurists who had collaborated with it from the start of the Antonveneta case. Recourse was made to outside experts in view of the complexity of the factors to be evaluated, the novelty of the case and the extremely specialized nature of the matter, including its practical application. Professors Agostino Gambino, Massimo Luciani, Fabio Merusi and Paolo Ferro-Luzzi collaborated; Professors Gambino and Luciani were part of the Bank of Italy's defence team in the trial before the Lazio Administrative Court.

The examination began by estimating the overall capital ratio at 30 June on the basis of the documentation and statements produced at the time by BPI. The ratio was found to be equal to

9.2 per cent on the more restrictive assumption that the shareholding already held would be consolidated using the equity method; if it were not consolidated, taking into account the intervening suspension of the voting rights attaching to it and the absence of BPI representatives on Antonveneta's board of directors, BPI's capital ratio would have been higher than 11 per cent.

Considering the capital strengthening measures envisaged by BPI, and particularly the capital increase of €1.5 billion then under way, it was found that the bank's capital base could sustain the transaction in the event of the tender offers succeeding. However, the examination also revealed uncertainties as regards the situation that would emerge with the year-end application of the International Accounting Standards, due to put options issued by BPI to third parties on shares of group companies and the commitment to purchase Antonveneta shares owned by the other parties to the shareholders' agreement. As regards the conduct deemed material for the purpose of verifying compliance with the requirements for the quality of the shareholders and sound and prudent management, an initial phase of the examination found questionable conduct in business dealings by shareholders of Antonveneta, in relation to the facts brought to light by the Consob resolution of 10 May and the checks carried out by the Bank of Italy.

For a fuller evaluation of the facts, the analysis of these aspects was usefully supplemented by the observations already made by the legal advisors; the results of a further consultation contributed significant elements for an appreciation of the case from the standpoint of the granting of authorization.

The convergent opinions of the legal advisors, authoritative and expert in the matter, were considered to overcome the various doubts that had arisen in the first phase of the

examination and to provide a correct interpretation of the letter and the spirit of Italian and Community legislation.

On 11 July 2005 the Bank of Italy authorized BPI to acquire control of Antonveneta, giving an ample account of the grounds for its decision in the authorization measure.

The integration of the two banks as envisaged in the business plan presented positive aspects from the supervisory point of view, considering the significant synergies that would arise, partly as a consequence of the new group's strong territorial roots.

On the basis of the advisors' opinion, the authorization measure recalled the necessary autonomy of the Bank of Italy's evaluation of matters able to impair sound and prudent management with respect to the above-mentioned Consob resolution.

It was observed that the law provides for the mandatory tender offer as an ex post remedy in favour of minority shareholders; accordingly, a comparison of the different interests led to the conclusion that the consequences of denial of authorization were so serious that such a course was possible only if the applicant bank was found to be manifestly unsuitable, to an extent that rendered the threat to the target bank's stability obvious.

In addition, separate evaluations were made of the conduct of the bank's corporate officers and the "reliability" of the bank. According to the approach adopted, the conduct was punishable with administrative sanctions. The imposition of an administrative sanction does not affect the reliability of the bank, which is the effective applicant for authorization and its ability to ensure sound and prudent management is not in question. As regards the conduct in question, the sanction procedure had already been initiated by the Bank of Italy.

Similar considerations hold for the temporary shortfall of the capital ratio, since, as noted earlier, this had been made good in full and the Bank of Italy had already initiated the administrative sanction procedure for violation of the rules on capital requirements.

With regard to BPI's prospective capital adequacy, account was taken of its formal commitments to meet any need for a further strengthening of its own funds and of the feasibility of the steps it envisaged. At all events the Bank of Italy expressly required BPI to:

- launch the cash/cash and exchange tender offer once the conditions for the successful outcome of the capital increase then under way had been verified;
- reformulate the shareholders' agreement between BPI and the other shareholders of Antonveneta, so as to avert a negative impact on capital adequacy with the entry into force of the International Accounting Standards for supervisory purposes;
- modify the agreements concluded with Société Générale, Deutsche Bank and Dresdner Bank for the transfer to them of up to 30 per cent of the Antonveneta shares acquired in the cash tender offer for subsequent resale on the market and reduce the market risk borne by BPI;
- take every step that might be necessary in the future to ensure compliance with the prudential rules.

The examination began on 22 April with the prior notification transmitted by BPI and lasted 80 days. From the date the first formal application was submitted (5 May), it lasted 67 days, including the period in which the time limit was suspended.

Meanwhile, the Bank of Italy and Consob continued to exchange information and documentation in the context of their ordinary cooperation. The Bank of Italy described in detail the fact-finding activities it had begun and the checks and inspections under way, notifying Consob of each decision it made concerning BPI's acquisition of control of Antonveneta.



## **2. *Actions under administrative law and the ruling of the Lazio Administrative Court***

Between April and June ABN Amro decided to apply for legal remedies, requesting, among other things, the annulment or revocation of the authorizations issued by the Bank of Italy to BPL (now BPI) whereby the latter had been progressively authorized to raise its holding in Banca Antonveneta to 29.9 per cent.

These applications were examined by the Lazio Administrative Court, which on 28 April dismissed the applicant's request for suspension of the authorizations and then issued its ruling on the merits of the case, dated 13-19 July and filed on 9 August.

The Administrative Court recognized the full legitimacy of the acts of the Bank of Italy.

The judges preliminarily excluded that BPL had been granted favoured treatment with the issue of its authorizations in less time than had been taken for ABN Amro, since the two applications involved different situations (BPL's directed towards the acquisition of minority albeit qualifying holdings, ABN Ambro's towards the acquisition of control), that merited distinct evaluations.

In this regard, I recall that the examination for the granting of authorization to acquire control of Antonveneta lasted 52 days for ABN Ambro and 80 days for BPI.

In stating the grounds for its ruling, the Administrative Court underscored that the go-ahead for the transaction was "formulated in such a way as to reconcile the preeminent needs of banking supervision with the characteristic dynamism of market transactions", and affirmed that the authorization for BPI to increase its interest in Antonveneta up to 29.9 per cent came at the end of "an examination that appears to have been complete and appropriate" and that the Bank of Italy had evaluated the sustainability of the transaction from the "standpoint of sound and prudent management".

Furthermore, the Court confirmed the correctness of the conduct of the Bank of Italy, on the grounds that "the Bank of Italy is required to verify not so much the current amount of the applicant's own funds in relation to the entire planned acquisition, as the adequacy and practical feasibility of the proposed plan for capital strengthening, thereby making a forecast, with a high degree of technical discretion, in which its institutional functions are ultimately manifested".

The Administrative Court also explicitly ruled that supervisory indications imparted at the time of granting an authorization are not conditions for the effectiveness of the authorization; they constitute accessory elements by way of guidance.

Consequently, supervening developments do not impinge on the effects of the authorization measure or its legitimacy, but are relevant, on a different plane, for the Bank of Italy's powers of control and sanction with regard to compliance with its prescriptive supervisory instructions.

The Bank of Italy based its activity on these principles again in authorizing BPL to acquire control of Banca Antonveneta.

### **2.8 *Events following the granting of authorization for BPI to acquire control***

Following the authorization measure of 11 July, Consob ascertained the existence of an undeclared agreement between BPI and Magiste International for the concerted purchase of Banca Antonveneta shares and the exercise, possibly on a joint basis, of a dominant influence over that bank, as well as the interposition of two foreign funds in some purchases of Antonveneta shares made prior to 30 April 2005.

In this case too the Bank of Italy notified suspension of the voting rights and initiated the administrative sanction procedure under the Consolidated Law on Banking in connection with

the relevant matters indicated in the Consob resolutions, which included the management of BPI's finance area.

On 26 July the decree issued by the Milan public prosecutor's office for the sequestration of the Antonveneta shares owned by the parties to the shareholders' agreements, including BPI, was notified to the Bank of Italy. According to the investigators, some financial transactions carried out in order to comply with the capital ratios, particularly the sales of minority shareholdings, had been merely artificial.

On 27 July Consob ordered the precautionary suspension of both the cash tender offer and the cash and exchange tender offer made by Banca Popolare Italiana. Moreover, the supervisory inspections begun at BPI on 20 June revealed credit derivative agreements with a maturity of one year entered into with the London branch of Deutsche Bank; according to the interim reports of 29 July and 8 August by the head of the inspection team, the transaction may have been executed without following normal internal procedures. In view of the links between the credit derivatives and the minority shareholdings sold, the effect of the disposals carried out to strengthen BPI's capital base may be substantially annulled. At the Bank of Italy's request the company's governing bodies are making the necessary checks.

On 30 July the Bank of Italy had already ordered the suspension for up to ninety days of BPI's authorization to acquire control of Antonveneta, considering it necessary to make a further examination of the effects of subsequent developments on the evaluations included in the authorization measure of 11 July 2005.

## **2.9      *The situation of BPI's capital ratios***

The current situation of the BPI group, taking account of the recently executed capital increase of €1.5 billion, shows a substantial surplus of capital with respect to the minimum requirements.

The surplus is estimated at €2.3 billion, with an overall capital ratio of 15.8 per cent. If on the basis of the further examinations now under way it should be necessary to sterilize the benefits to the capital ratios of the above-mentioned disposals of minority shareholdings, the surplus is estimated to be €1 billion and the overall capital ratio to be 11.3 per cent in the absence of corrective measures.

If BPI were to sell the Antonveneta shares in its possession, this would lead to a substantial increase in the capital surplus, to €4.4 billion, and in the overall ratio, to 22.5 per cent; in the event that the effects of the above-mentioned disposals of shareholdings were sterilized, these figures would be €3 billion and 18 per cent respectively.

A revival of the cash tender offer cannot be independent of the prompt execution of the further measures of capital strengthening already approved by the company's governing bodies and authorized by the Bank of Italy (a capital increase of €300 million, a €400 million issue of preference shares and conversion of the €1,200 million convertible subordinated loan).

The need for full compliance with the Bank of Italy's guidance for dealing with the prospective impact of the application of the International Accounting Standards remains unaffected.

The Bank of Italy is following the development of the situation and will adopt the measures falling within its sphere of competence, taking account of the decisions that will be made by the company's governing bodies.

### **3. Transactions involving the capital of Banca Nazionale del Lavoro**

#### **3.1 Governance structure of Banca Nazionale del Lavoro.**

In April 2004 some BNL shareholders - Banco Bilbao Vizcaya Argentaria (BBVA), Assicurazioni Generali and Dorint-Della Valle - concluded a shareholders' agreement concerning the management of the bank covering a total of 28.39 per cent of BNL's share capital (the "pact").

In July 2004 other non-bank, non-financial shareholders of BNL entered into a rival shareholders' agreement (the "counterpact"), which among other things regulated the way in which the voting rights attaching to their ordinary shares would be exercised; the share capital covered by the counterpact increased progressively from an initial 13.5 per cent to 27.7 per cent.

Individually, the parties to the counterpact owned shareholdings that did not exceed 5 per cent. Consequently, their share purchases were not subject to prior authorization by the Bank of Italy and were in compliance with the ceiling designed to ensure separation between banking and commerce. This ceiling does not apply to shareholders' pacts as such.

The existence of two opposing pacts gave rise to a state of conflict within the body of shareholders and the board of directors of BNL, engendering uncertainty in the management and operation of the bank and impeding initiatives for its revival and growth.

#### **3.2 Banco Bilbao Vizcaya Argentaria's application for authorization to acquire control of BNL**

On 18 March 2005 BBVA gave the Bank of Italy prior notification of its intention to acquire a controlling interest in BNL by means of a voluntary exchange tender offer for all of BNL's ordinary shares.

On 13 May, after completing the required consultation procedure with the Bank of Spain and receiving clarifications from BBVA concerning the procedure for the exchange tender offer and its business plan for BNL, the Bank of Italy authorized BBVA to acquire, by means of an exchange tender offer, a holding of more than 50 per cent of BNL's share capital. The application process lasted a total of 56 days, from the prior notification on 18 March to the authorization on 13 May. Counting from 29 March, the date on which the formal application for authorization was submitted, the process took 45 days, including a suspension of 19 days for consultation with the Spanish supervisory authority and for the acquisition of additional information from BBVA.

In a note dated 30 May BBVA asked the Bank of Italy to modify the authorization issued on 13 May by eliminating the requirement to exceed the 50 per cent threshold.

In a note dated 10 June the Bank of Italy responded that if as a result of the exchange tender offer BBVA were to acquire a holding of less than 50 per cent of BNL's share capital, the Bank of Italy would evaluate the suitability of the new ownership structure to carry out the necessary reorganization.

The major strategic and operational investments necessary to relaunch BNL require an ownership structure that can ensure stable management and effective policymaking, ultimately to safeguard the savings entrusted to the bank by its depositors.

Similar considerations had in the meantime been set forth on 7 June in a note to the Minister for Community Policies in response to a specific request from the European Commission for clarifications concerning the 13 May authorization.

Appreciation for the information provided by the Bank of Italy was expressed in a letter from the Competition Directorate-General on 13 July.

On 14 July the Bank of Italy granted the application that BBVA had made on 16 June to acquire up to 30 per cent of BNL's share capital through its exchange tender offer, independently of acquisition of a majority holding. In response to BBVA's further request for recognition of its de facto control of BNL if its holding exceeded the 30 per cent threshold, the Bank of Italy reaffirmed the need to await the outcome of the exchange tender offer in order to verify the Spanish bank's actual exercise of control.

The tender offer expired on 22 July. Acceptances amounted to around 1 per cent of BNL's share capital. BBVA announced that it would not acquire the shares if they were not enough to attain the majority of BNL's share capital, thus implicitly acknowledging the failure of the exchange tender offer.

### **3.3 UNIPOL's initiative**

On 11 May and 30 June UNIPOL Assicurazioni and its parent company Holmo S.p.A. requested authorization to increase their holding of BNL shares first to 9.99 per cent and then to 14.99 per cent. The stated purpose of these purchases was to acquire a large, stable holding in order, among other things, to safeguard the investment in BNL Vita, an insurance joint venture controlled by UNIPOL and BNL. In relation to each application, the Bank of Italy asked ISVAP, the supervisory authority for the insurance industry, for information on the strength of the insurance group. On 25 May and again on 13 July ISVAP pronounced a judgement of "suitability", attesting the sustainability of UNIPOL's planned investment in financial and capital terms.

Authorizations to increase the holding were issued on 27 May and 15 July. A copy of each decision was also transmitted to Consob.

On 17 July 2005 the boards of directors of UNIPOL and its parent company Holmo resolved to acquire control of BNL. The explanation adduced for this initiative was the impossibility of reaching a satisfactory agreement with BBVA on the operation of BNL Vita and establishing forms of cooperation with the parties to the counterparty.

In the course of the contacts following the prior notification of this intention the Bank of Italy had emphasized the desirability of extending the project to include banking or financial partners of high standing in a position to contribute to the growth of the volume of business.

The acquisition of control is to be achieved by means of a mandatory tender offer for 59 per cent of BNL's ordinary share capital following the conclusion on 18 July of a shareholders' agreement, notified to the market on the same day, between UNIPOL and other BNL shareholders (some cooperatives, Banca Carige, Nomura and Hopa). The agreement, which covers 30.86 per cent of BNL's share capital, makes a tender offer mandatory under Article 109 of the Consolidated Law on Finance. The offer is to be made exclusively by UNIPOL, with the other parties to the shareholders' agreement jointly and severally liable.

Other shareholders' and bilateral agreements, also entered into on 18 July 2005, govern the acquisition and sale of BNL shares by the parties thereto. The agreement with Crédit Suisse First Boston International also outlines joint business and financial plans.

On 4 August the UNIPOL insurance group submitted its formal request to the Bank of Italy for authorization to acquire control of BNL. As UNIPOL specified, the aim of the transaction is to create a highly integrated banking and insurance conglomerate of uniquely large size in the Italian financial market.

The Bank of Italy requested the opinion of ISVAP concerning the civil law implications of the transaction and the operating and financial adequacy of the insurance group and its ability to create an organizational and operational framework meeting the needs of the reorganization and relaunching of BNL.

The Bank of Italy informed UNIPOL that the time limit for responding to the request for authorization was suspended pending receipt of ISVAP's opinion. The Bank's relations with

ISVAP are conducted under the principle of cooperation laid down in Article 7 of the Consolidated Law on Banking. If the takeover succeeds, the provisions of Community law on the supplementary supervision of financial conglomerates, recently transposed into Italian law (Legislative Decree 142 of 30 May 2005), will apply.

On 16 August UNIPOL submitted its draft offer document to Consob for the latter's evaluation prior to clearance for publication and issued a press release summarizing the characteristics of the tender offer.

On 19 August the Bank of Italy asked UNIPOL for supplementary information on its business plan, with reference among other things to the strategic and operating and financial aspects, the distribution networks, and the information procedures and systems.

#### **4. The merger of Unicredit with the German bank HVB**

On 12 June 2005 the Boards of Directors of Unicredit and Bayerische Hypo- und Vereinsbank AG (HVB), with a preliminary notification to the Bank of Italy, approved the integration of the two groups. The plan envisages an exchange tender offer by Unicredit for all of HVB's share capital. The Italian and German supervisory authorities, after a top-level meeting in Rome on 28 June, coordinated their respective procedures for authorization, which was granted on 21 July after a thorough technical investigation that in some parts included joint work by the two institutions.

The exchange tender offer is expected to start at the end of August and close at the end of October.

The HVB group consists of the German parent company (the country's second largest bank in terms of assets) and a number of subsidiary banks, mostly located in Central and Eastern Europe; the most important are Bank Austria (the largest bank in Austria) and BPH (the fourth-largest bank in Poland).

The combination would create one of the largest banking groups in the euro area. It would have total assets of €730 billion and yearly operating profits of around €8 billion. The new group would be highly diversified both geographically and by customer segment. Forty per cent of its credit risk would stem from exposures in Germany, 30 per cent in Italy, 15 per cent in Austria and 10 per cent in the Central and Eastern European countries.

Since Unicredit already boasts a major presence in Central and Eastern Europe, the new group would have especially large market shares in Croatia (34 per cent), Bulgaria (24 per cent), Bosnia (22 per cent) and Poland (17 per cent). Thanks to the future synergies laid out in the operating and financial plan, it is expected that in 2007 the new group will have a gross operating profit of €11.8 billion and net profits of €6 billion. ROE would be 18 per cent. A specific agreement between the parties settles the principal questions regarding the management of the new group: the registered office and most of the administrative headquarters of the parent company will be in Italy; the chairman of the board of the parent company, with non-executive functions, will be the present chairman of the management board of HVB; the CEO will be the present CEO of Unicredito Italiano; and the chairman and the majority of the members of the HVB Supervisory Board will be designated by Unicredit.

Under European law, the Bank of Italy will exercise consolidated supervision over the new group, in accordance with the guidelines issued recently by the Committee of European Banking Supervisors for cooperation between authorities in the supervision of international banking groups.<sup>3</sup>

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<sup>3</sup> CEBS CP 09, *Guidelines for co-operation between consolidating supervisors and host supervisors*, July 2005.

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The description of the bids for control of Banca Antonveneta and Banca Nazionale del Lavoro presented to this Committee, which is the institutionally competent forum, has highlighted in particular the timing of the exercise of powers of authorization and control.

The correctness of the decisions and conduct has to be gauged by their conformity with the law. No other parameters exist. Anything beyond this does not pertain to the set of factors to be taken into consideration, especially in an institutional forum such as this. The Bank of Italy has complied scrupulously with Community and Italian law and with the relevant regulatory and supervisory provisions. The ruling of the Lazio Administrative Court, with its description of the criteria that constantly guided the Bank's action, fully recognizes this.

Without in any way infringing on the powers or organs of the State, first and foremost Parliament, to which we pay the most respectful attention, we believe that detailed knowledge of the steps taken by the Bank of Italy will help to foster agreement on the consistency of the course that the Bank has followed. The Bank of Italy performs its activity of monitoring and oversight, always ready, when the conditions require, to activate its specific powers.