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## List Voting's Travels: The Importance Of Being Independent In The Boardroom

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# LIST VOTING'S TRAVELS: THE IMPORTANCE OF BEING INDEPENDENT IN THE BOARDROOM

*Maria Lucia Passador\**

## ABSTRACT

The life of the law, especially with regard to corporations, is strongly influenced by experience and practice. The board, a living element of corporate law, is therefore one of the most noteworthy aspects to be studied, given its relevant implications and role as the lifeblood of scholarly debates.

This Article offers a novel contribution to the assessment of list voting, a fairly unique Italian system that has been increasingly appreciated by institutional investors. A hand-picked dataset that stretches from 2005 to 2015 shows a positive correlation between minority-appointed directors in the boardroom and dividend payouts. Furthermore, the findings shed light on the practice of appointing independent directors based on slates proposed by the minority of shareholders and provide evidence that list voting works, not only in closely-held corporations, but also on a global scale, despite the previous scholarship that argues that list voting makes more sense in concentrated ownership scenarios. Although the empirical analysis focuses on the Italian case, the insight gained in this analysis regarding the effectiveness of list voting is also useful for other jurisdictions.

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## INTRODUCTION

“Board composition is *the* issue for investors in 2017.”<sup>1</sup> This Article addresses the crucial interests linked to a sound appointment process of

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1. Paula Loop, *A Look at Board Composition: How Does Your Industry Stack Up?*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Mar. 6, 2017) (emphasis added), <http://corpgov.law.harvard.edu/2017/03/06/a-look-at-board-composition-how-does-your-industry-stack-up> [https://perma.cc/7MK5-JV6V]. For overviews on board matters and concerns, see Martin Lipton & Sebastian V. Niles, *The Spotlight on Boards 2017*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Jan. 29, 2017), <http://corpgov.law.harvard.edu/2017/01/29/the-spotlight-on-boards-2017-2> [https://perma.cc/V2VF-SA3G]; Stephen F. Arcano & Thomas H. Kennedy, *Directors Must Navigate Challenges of Shareholder-Centric Paradigm*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Feb. 22, 2017), <http://corpgov.law.harvard.edu/2017/02/22/>

key figures in corporate boards, with a special focus on independent directors. These independent directors are predominantly devoted to the supervision of a thoughtful long-term strategy and the needs of institutional investors.<sup>2</sup> This Article aims to enrich the existing literature with an in-depth analysis of the list (or slate) voting mechanism, one of the most well-known and appreciated peculiarities in the Italian corporate law framework.<sup>3</sup>

As is often the case in the field of business law, an analysis of a mechanism's function plays a crucial role in the supporting legal discussion.<sup>4</sup> This Article advances relevant literature by providing evidence that independent directors selected from lists presented by minority shareholders are quite effective in improving the governance of listed corporations.

To demonstrate that list voting represents an effective instrument of governance, this Article combines legal and empirical observations,

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directors-must-navigate-challenges-of-shareholder-centric-paradigm [https://perma.cc/5LUU-VXW4].

2. The average share capital possessed by institutional investors did not notably differ from previous years (2013 & 2014), as stated in the latest report issued by the Commissione Nazionale Per Le Società E La Borsa (CONSOB), which is an organization akin to an "Italian SEC." Commissione Nazionale per le Società e la Borsa, *Report on Corporate Governance of Italian Listed Companies*, 3, 11-13 (2017) [hereinafter CONSOB, *Report on Corporate Governance*].

3. List voting is a method in which shareholders of listed corporations reaching a minimum threshold of shares, which is calculated based on the capitalization of the issuer (often around 1.5%), present a "list" for the election of the board. Directors from the list receiving the greatest number of votes are elected, but a minimum number of directors (generally one) are taken from the list receiving the second highest number of votes, ensuring greater representation of minority shareholders. Lists are presented by both majority and minority shareholders (owning at least 2% of shares), but the terms "majority list(s)" or "minority list(s)" are used *as a result* of the appointment process, and not because of the fact that the lists are *presented* by majority or minority shareholders. See generally Marco Ventoruzzo et al., *Italian Boards and The Strange Case of the Minority Becoming Majority*, HARVARD L. SCH. FORUM ON CORP. GOV. & FIN. REG. (May 23, 2016), <https://corpgov.law.harvard.edu/2016/05/23/italian-boards-and-the-strange-case-of-the-minority-becoming-majority/> [https://perma.cc/3Z7U-XFD2].

4. See *id.* at 4-5. The interpretations provided in this Article pertain exclusively to listed companies, which are required to use list voting for the appointment of directors and must be limited to them; however, all companies may use this method to ensure effective protection of minority shareholders.

arguing that Enhanced-Independence Directors (EI Directors) are truly necessary.<sup>5</sup> From a methodological perspective, this Article offers a preliminary and essential description of list voting, while also undertaking a comparative assessment and evaluating the propensity of independent, and minority-appointed, directors to pay dividends.<sup>6</sup> In light of the literature, which suggests that independent directors are more concerned with the board's monitoring activity and that dividends in corporate governance aim to mitigate the free cash flow issue, boards with a significant number of minority-appointed directors are more likely to use dividend payouts as a corporate governance tool.<sup>7</sup>

Part I of this Article examines list voting and its main issues. Part II depicts the comparative scenario, providing the reader with an overview of the alternatives worldwide, contemplating similarities and differences that shareholders have at their disposal to appoint valuable directors. Part III presents the empirical analysis performed to evaluate whether the Italian list voting technique can succeed at an international level.

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5. Lucian A. Bebchuk & Assaf Hamdani, *Independent Directors and Controlling Shareholders*, 165 U. PA. L. REV. 1271, 1275, 1277 (2017). See generally Giovanni Strampelli, *How to Enhance Directors' Independence at Controlled Companies*, J. CORP. LAW (forthcoming) (discussing regulatory strategies that can be used to mitigate the distorting effects of the relational dimension of the board and to induce EI directors to undertake their supervisory functions in an independent way despite the presence of a controlling shareholder).

6. Brian R. Cheffins, *Dividends as a Substitute for Corporate Law: The Separation of Ownership and Control in the United Kingdom*, 63 WASH. & LEE L. REV. 1273, 1306-08 (2006).

7. "[T]he main role for such boards is to mediate between shareholders with conflicting preferences for dividends" and to "reconcile fundamental differences in owners' preferences and/or act as a referee when owners disagree on corporate policies, most notably on the dividend policies." Mike Burkart, Salvatore Miglietta & Charlotte Ostergaard, *Why Do Boards Exist? Governance Design in the Absence of Corporate Law*, 4, 6-7 (Eur. Corp. Governance Inst. Working Paper Series in Fin., Paper No. 504, 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2902617](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2902617) [<https://perma.cc/U4NW-2HP5>].

## I. LIST VOTING IN ITALY

### A. THE ROLE OF INDEPENDENT DIRECTORS

The United States began using the term “independent directors” in the 1970s.<sup>8</sup> The primary function of independent directors in the United States “has been clear: to monitor management on behalf of dispersed shareholders, who are hindered by collective action problems from monitoring management themselves.”<sup>9</sup> Also, it is “uncontroversial” that they “were not (and are not) primarily designed to be a mechanism for monitoring controlling shareholders . . . becom[ing] functionally redundant in companies with a controlling shareholder.”<sup>10</sup> Such a concept of “independence from managers” is not necessarily applicable elsewhere, since, in many leading economies, independent directors are designed to be “independent from the company’s management *and* significant shareholders.”<sup>11</sup>

In 2011, the Italian Corporate Governance Code also introduced independent directors.<sup>12</sup> The Code did not limit their role to the subtler

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8. Jeffrey N. Gordon, *The Rise of Independent Directors in the U.S., 1950-2005: Of Shareholder Value and Stock Market Prices*, 59 STAN. L. REV. 1465, 1477 (2007).

9. Dan W. Puchniak & Kon Sik Kim, *Varieties of Independent Directors in Asia: A Taxonomy*, in INDEPENDENT DIRECTORS IN ASIA: A HISTORICAL, CONTEXTUAL AND COMPARATIVE APPROACH 89, 97 (Dan W. Puchniak, Harald Baum & Luke Nottage eds., 2017).

10. *Id.* at 98.

11. *Id.* at 102; *see also* Robert M. Bowen, Shantanu Dutta, Songlian Tang & Pengcheng Zhu, *Inside the “Black Box” of Private In-House Meetings*, 23 REV. ACCT. STUD. 487 (2018) (emphasizing the association between the independence of the board and (1) the frequency of meetings, which suggests better communication with major external investors; (2) the promptness of public communications; and (3) the relatively small market response to such meetings, conveying that more independent boards could discourage managers from sharing price-sensitive information). A further association can be found between the independence of the board and the reduction of insider trading and its profitability in private meetings and, in general, among listed companies.

12. Codice di Autodisciplina [Corporate Governance Code] Luglio 2015, art. 2, Jul. 2015 (It.). *See* Lucia Calvosa, *Alcune Riflessioni Sulla Figura Degli Amministratori Indipendenti*, in IL TESTO UNICO DELLA FINANZA. UN BILANCIO DOPO 15 ANNI 45, 45–56 (Filippo Annunziata ed. 2015) (It.); Maria Luisa Di Battista, Andrea Lippi & Paola Schwizer, *Independent Directors and Governance Ratings: Evidence from Italian Listed Companies*, in RESHAPING COMMERCIAL BANKING IN ITALY: NEW CHALLENGES FROM LENDING TO GOVERNANCE 241 (2014); Francesco Chiappetta, *Gli amministratori*

U.S. meaning,<sup>13</sup> rather it fully recognizes that independent directors express the opinions, albeit subjective, of minority shareholders. Thus, the Italian recognition of independent directors has contributed to a constant and profitable dialogue, creating a correct, transparent, and efficient governance.<sup>14</sup>

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*indipendenti e gli amministratori di minoranza*, 4 RIV. DIR. SOC. 852, 857-58 (2009) (It.); Paolo Ferro-Luzzi, *Indipendente . . . Da Chi; Da Cosa?*, RIVISTA DELLE SOCIETÀ [RIV. SOC.] 204 (2008) (It.); Francesco Denozza, *L' 'Amministratore di Minoranza' e i suoi Critici*, 31 GIURISPRUDENZA COMMERCIALE [GIUR. COMM.] 767, 767 (2005) (It.); María Gutiérrez & Maribel Sáez, *Deconstructing Independent Directors*, 13 J. CORP. L. STUD. 63, 93 (2013) ("We think of the independents as a mechanism that would facilitate the effective exercise of many of the 'rights of the minority' granted by corporate law that are not enforced because of collective action problems. Therefore, they would use their privileged information to act as surrogates for the minority in all the matters where the role of the minority is already recognised by the law, such as information rights, voting in cases of conflicts of interest and the bringing about of lawsuits against the board."); Andrea Pisani Massamormile, *Appunti sugli Amministratori Indipendenti* 2 RIVISTA DI DIRITTO SOCIETARIO [RIV. DIR. SOC.] 237, 241-42 (2008) (It.); Duccio Regoli, *Gli Amministratori Indipendenti*, in 2 IL NUOVO DIRITTO DELLE SOCIETÀ, LIBER AMICORUM GIAN FRANCO CAMPOBASSO 385, 385-97 (P. Abbadessa & G.B. Portale eds., 2006) (It.); Umberto Tombari, *Amministratori Indipendenti, "Sistema dei Controlli" e Corporate Governance: Quale Futuro?*, 65 BANCA BORSA 506, 506-07 (2012) (It.). See generally Massimo Belcredi & Lorenzo Caprio, *Amministratori indipendenti e amministratori di minoranza: stato dell'arte e proposte evolutive*, in ATTI DEI SEMINARI CELEBRATIVI PER I 40 ANNI DALL'ISTITUZIONE DELLA COMMISSIONE NAZIONALE PER LE SOCIETÀ E LA BORSA 19 (G. Mollo ed., 2015) (It.); Guido Ferrarini & Marilena Filippelli, *Independent Directors and Controlling Shareholders Around the World* (Eur. Corp. Governance Inst. Working Paper Series in L., Paper No. 258, 2014) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2443786](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2443786) [<https://perma.cc/N5QY-VR53>]; Guido Ferrarini, *Funzione del Consiglio di Amministrazione, Ruolo Degli Indipendenti e Doveri Fiduciari*, in I CONTROLLI SOCIETARI-MOLTE REGOLE, NESSUN SISTEMA 51 (Margherita Bianchini & Carmine Di Noia eds., 2010) (It.); Umberto Tombari, *Verso uno "Statuto Speciale" degli Amministratori Indipendenti. (Prime Considerazioni sul d.lgs. n. 303/2006 e sulle Modifiche al Regolamento Consob in Materia di Emittenti)*, 3 RIV. DIR. SOC. 51 (2007) (It.).

13. Puchniak & Kim, *supra* note 9, at 97. ("[A] monolithic label obscures the reality that jurisdictional differences in the form and function of 'independent directors' . . . may be significant").

14. *Id.* at 98-99. The two figures differ significantly in terms of function and structure. While independent directors are needed in the boardroom, there is no rule requiring the presence of minority-appointed directors, in particular if: (1) no slate of candidates has been filed, and (2) the requirements contained in the bylaws or in the law have not been met.



It does not necessarily follow, however, that there is a clash between directors with different ideologies,<sup>15</sup> creating strong tension. In fact, list voting sometimes promotes effective monitoring and highly critical assessment of directors' behavior.<sup>16</sup>

#### B. ROLE OF DIRECTORS APPOINTED BY MINORITY SHAREHOLDERS IN THE BOARDROOM

It is clear that the free, unregulated, but nevertheless effective, balance among corporate interests is not conducive to the protection of minority shareholders.<sup>17</sup> Accordingly, the U.K. regulatory authority required that the election or re-election of independent directors would need a majority of both shareholders and independent shareholders of the listed company.<sup>18</sup> The Italian regulation introduced list voting,<sup>19</sup> in which the minority list can determine the election of at least one director (out of seven, or at least two directors if more than seven directors are on the

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15. Denozza, *supra* note 12, at 769.

16. *Id.* In large listed corporations, the role of the board is predominantly to monitor, approve the overall corporate strategy, ensure that officers and managers effectively and loyally pursue the best interest of investors, but do not manage day-to-day operation. *Id.* Thus, directors representing shareholders (especially minority ones) strengthen their monitoring function and critics related to managerial aspects.

17. Defining the concept of minority, *a priori*, is not easy. Only after voting, slates may be identified as "minority lists" or not, which can lead to paradoxical results, as some Italian cases may suggest. See Alberto Mazzoni, *Le Minoranze nella Tipologia della Realtà*, in LA TUTELA DELLE MINORANZE NELLE SOCIETÀ QUOTATE. STUDI IN MEMORIA DI ALESSANDRO CERRAI 13, 16 (Antonio Piras ed., 2004) (It.); C. Angelici, *La tutela delle minoranze*, 18 SOCIETÀ 786, 787 (1999) (It.); Paolo Montalenti, *Corporate Governance: La Tutela delle Minoranze nella Riforma delle Società Quotate*, 25 GIUR. COMM. 329 (1998) (It.); Niccolò Salanitro, *La Tutela delle Minoranze nelle Assemblee delle Società Quotate* 62 BANCA BORSA 681, 682 (1999) (It.). See also Marco Ventoruzzo et al., *Italian Boards and the Strange Case of the Minority Becoming Majority*, HARVARD L. SCH. FORUM ON CORP. GOV. & FIN. REG. (May 23, 2016), <https://corpgov.law.harvard.edu/2016/05/23/italian-boards-and-the-strange-case-of-the-minority-becoming-majority/> [https://perma.cc/3Z7U-XFD2].

18. FIN. CONDUCT AUTHORITY HANDBOOK, § 9.2.2.E (R) (UK).

19. It should be noted that list voting first appeared in the context of non-listed corporations as a political choice given the low access threshold required to present such minority lists. Already recognized a decade ago, the system is now increasingly relevant since the number of institutional investors is rapidly growing. See Codice civile [C.C.] [Civil Code] art. 2368 (It.); Decreto Legislativo 24 febbraio 1998, n.58 G.U. July 12, 2011 n.120 at art. 148 (It.).



board)<sup>20</sup> among the candidates not mentioned on the majority list.<sup>21</sup> This ensures a more balanced structure of the board, especially in cases of concentrated ownership. But, even before that, the possibility of deviating from the majority rule through list voting was derived from the Italian Civil Code, which enables the bylaws to regulate the appointment of directors.<sup>22</sup>

### C. IMPACT OF INSTITUTIONAL INVESTORS IN THE APPOINTMENT OF DIRECTORS: THE ITALIAN CASE

The problem of controlling the influx of private benefits is remarkable, especially in Italy, a country characterized by a stable control of the majority group, family ties, and shareholders' agreements. The provisions of the Italian Consolidated Law on Finance (TUF) must, therefore, necessarily aim to balance minority rights against the almost non-contestability of listed Italian issuers that hinder the creation of an ideal market for corporate control.<sup>23</sup> It is essential to make the company attractive to foreign investors as well, since their presence leads to economic and financial development. The perception of a well-functioning system is often deemed useful to encourage overall investments. Therefore, the impression of efficiency becomes essential to the final decisions of investors. In other words, appropriate governance functions as a signal to institutional investors, which enhances confidence

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20. See Lucian A. Bebchuk & Assaf Hamdani, *supra* note 5, at 1292 (explaining that “a recent amendment provided public investors with the power to reelect an external director” even if there are any objections). For a comparison, see the following for Israel’s approach. Companies Law, 5759-1999, § 239 (1999-2000) (Isr.); see also Itai Fiegenbaum & Amir N. Licht, *Corporate Law of Israel* 7–8 (Eur. Corp. Governance Inst., L. Working Paper Series No. 372, 2017) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3050329](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3050329) [<https://perma.cc/A9FM-RRSR>] (requiring public companies to have at least two external directors—not related to the controlling shareholder—on their boards, elected for a term of three years, and possibly re-elected for two additional terms of office of the same duration). Public investors have the right to veto the appointment of such directors, but are not allowed to nominate them. See Assaf Hamdani & Yishay Yafeh, *Institutional Investors as Minority Shareholders*, 17 REV. FIN. 691, 701 (2013).

21. Mario Notari & Mario S. Richter Jr., *Adeguamenti Statutari e Voto a Scrutinio Segreto nella legge sul Risparmio*, 5 SOCIETÀ 533, 533-34 (2006) (It.).

22. Codice civile [C.C.] [Civil Code] art. 2368 (It.).

23. D.Lgs. n.58 (1998) (It.). TUF is the fundamental law governing the financial markets in Italy.

in the valuation of investments, and consequently serves as a reference for shareholders with few shares, while simultaneously attracting new investors.<sup>24</sup>

List voting is an essential factor for shareholder activism, as well as for financial and institutional partners and hedge funds.<sup>25</sup> Assogestioni, a voluntary non-profit association of asset management companies created in 1984, promotes activist initiatives, including list voting, through means such as assisting institutional investors complete certain administrative procedures (e.g. the submission of lists and the selection of candidates).<sup>26</sup> All this is not sufficient, however, to address the marked weakness of the phenomenon that afflicts the geographical environment. Most asset management companies are relatively inactive, as they have strong links to funds, such as Azimut, Ersel, Fondaco Franklin Templeton Investments, and Kairos Partners, each of which plays a key role when they are independent.<sup>27</sup> Nonetheless, asset management companies' activities are growing over time,<sup>28</sup> mainly as a result of the implementation of the Shareholders' Rights Directive (as amended in 2017, also known as SHRD II).

Foreign institutional investors, who prefer to sit on the sidelines, may occasionally rely on the boards to submit the list(s), facilitating their participation in the governance of the listed companies in which they commit capital.

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24. Clifford G. Holderness & Dennis P. Sheehan, *Constraints on Large-Block Shareholders*, in CONCENTRATED CORPORATE OWNERSHIP 139, 144-55 (Randall K. Morck ed., 2000).

25. Although hedge funds are not particularly active in the Italian market, partially due to the presence of concentrated shareholding and the strong role of family businesses, their existence is confirmed by Algebris Investments in Assicurazioni Generali, Amber in Banca Popolare di Milano, and Centaurus in Marzotto. See Matteo Erede, *Governing Corporations with Concentrated Ownership Structure: an Empirical Analysis of Hedge Fund Activism in Italy and Germany, and its Evolution*, 3 EUR. COMPANY & FIN. L. REV. 328, 363-66 (2013). In spite of the tools that the regulator offers them, and through the appointment of directors, hedge funds did not gain any relevant role. *Id.* at 368-70.

26. Interview with Marcello Messori, Former President, Assogestioni, *L'attivismo dei Gestori e il Ruolo della Corporate Governance in Italia* (2017), [http://www.assogestioni.it/index.cfm/3,147,5305/messori\\_governance\\_0609.pdf](http://www.assogestioni.it/index.cfm/3,147,5305/messori_governance_0609.pdf) [https://perma.cc/F35A-LE94].

27. Erede, *supra* note 25, at 383-88.

28. *Id.* at 375.

## D. LIST VOTING TECHNIQUE: THE ITALIAN CASE

List voting is consistent with the already existing requirements with which directors must comply, influencing their ability to make up their minds, as well as strengthening integrity, ethics, loyalty, education, and experience.<sup>29</sup> Once a certain threshold of share capital has been reached, the lists would contribute to the appointment of the board, which would represent either the majority or the minority of shareholders. Bylaws can then meet the needs of their own shareholders.

Developing an effective list voting system can be accomplished in two ways: (1) through a procedure that grants a certain percentage of the board to minority shareholders, or (2) through ratios and percentages on the votes obtained by each list. Then, votes must be divided by the number of directors to be elected, with each director assigned a quotient according to the expected order on the list and, in the event of a tie, preferring the candidates appearing on the list that received the majority of votes or, in their absence, favoring the eldest ones.

The list voting system was introduced to protect minorities, encourage their participation,<sup>30</sup> avoid the presentation of empty or non-representative lists, and elect a suitably balanced board. These goals were the objectives of the 2005 Savings Law, implemented by the SHRD II

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29. On November 14, 2016, the European Central Bank launched a public consultation on the development of the guidelines that will regulate the verification of directors' eligibility under the Single Supervisory Mechanism. The Capital Requirements Directive (CRD IV) suggested to verify these requirements considering conflicts of interest, independent judgments and time constraints. The banking sector is proving to be an area in which regulation is advancing at a particularly fast pace. On the one hand, the board members must be people of true integrity and ensure a sound and prudent management. Council 2013/36, art. 91, 2013 O.J. (L 176) (EU). On the other hand, they must act with independence of judgment, assessing, in the absence of interest, that the conflict is not in itself a sign that the representative must act with the necessary independence of judgment. *Id.* In the event that the board is composed of the exponents of the main monitoring functions (e.g. risk management and compliance), the newly appointed directors responsible for overseeing these tasks will be assessed as board members while, in other cases, the guidance will also apply to those who hold important positions to the extent permitted by national legislation. *Id.*

30. Corrado Malberti & Emiliano Sironi, *L'Adeguamento delle Società Quotate alla Procedura di Nomina del Consiglio di Amministrazione mediante Voto di Lista: Un'Analisi Empirica*, 53 RIV. SOC. 724, 726 & n.3 (2008) (It.).

that introduced “gender quotas”<sup>31</sup> and bolstered by the codes of corporate governance.<sup>32</sup>

### *1. Slates Presentation and Connection Among the Lists*

The right to present a list may be correctly considered intimately linked to the voting right in the shareholders general meeting (GM),<sup>33</sup> depriving shareholders of their legitimate—and, indeed, existing—interest is not immune to consequences. Shareholder-investors have strong reasons for, and interest in, influencing profitability issues.

The “Italian SEC” has been asked to regulate how lists are presented and voted on, as well as the cases in which there are connections between them.<sup>34</sup> This has resulted in a series of hypotheses in which the phenomenon occurs.

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31. See M. Bianco, A. Ciaverella & R. Signoretti, *Women on Boards in Italy* 9 (Oct. 2011) <http://www.consob.it/documents/11973/204072/qdf70.pdf/92de8d75-ea5b-4d0e-aeac-6b91ef866ebc> [<https://perma.cc/36SD-J35C>]. See generally Lucia Calvosa & Serenella Rossi, *Gli Equilibri di Genere Negli Organi di Amministrazione e Controllo delle Imprese*, OSSERVATORIO DEL DIRITTO CIVILE & COMMERCIALE [OSS. DIR. CIV. & COMM.] 3 (2013) (It.); Massimo R. De Ritis, *L'Introduzione delle c.d. Quote Rosa negli Organi di Amministrazione e Controllo di Società Quotate*, 35 LE NUOVE LEGGI CIVILI COMMENTATE 309 (2012) (It.); Chiara Garilli, *Le Azioni Positive nel Diritto Societario: le Quote di Genere nella Composizione degli Organi della Società per Azioni*, in *EUROPA DIR. PRIV.* 885 (2012) (It.); Umberto Morera, *Sulle Ragioni dell'Equilibrio di Genere negli Organi delle Società Quotate e Pubbliche*, 112 RIV. DIR. COMM. 155 (2014) (It.).

32. Marco Baglioni & Giampaolo Grasso, *Nuovo Codice di Autodisciplina Delle Società Quotate*, 9 SOCIETÀ 1061, 1061 (2006) (It.).

33. This is strictly related to the fact that it is aligned to Decreto Legislativo 24 febbraio 1998, n.58 G.U. July 12, 2011, n.120 at art. 147-ter (It.), as well as to Decreto Legislativo 28 dicembre 2005, n.262 G.U. Dec. 29, 2006, n.303 at art. 4 (It.). It advances the possibility of supporting candidates during GMs, consistently to the right to set a *minimum quorum* for the election of directors taken from the minority list. The consideration cannot, however, be transposed without any variation or adjustment in dissimilar contexts, therefore, Assonime calls for a timely intervention by the Supervisory Authority with reference to one-tier and two-tier systems. See Nicoletta Ciocca, *IL VOTO DI LISTA NELLE SOCIETÀ PER AZIONI* 388–420 (Giufrè ed., 2018).

34. The connection by CONSOB mentioned under TUF Art. 148 is presumed, without providing a specific list. Decreto Legislativo 24 febbraio 1998, n.58 G.U. July 12, 2011 n.120 at art. 148 (It.).

The purpose of list voting is to ensure that independent minority-appointed directors<sup>35</sup> or auditors actually express the views of shareholders, not only the views of tricky majorities.<sup>36</sup> The list that obtained the highest number of votes must determine the directors in order to avoid excessive harmful penalizations, even for minority shareholders.<sup>37</sup> The *a priori* exclusion of potential directors who will touch upon the controlling shareholders, in fact, could dangerously exclude—due to a weak, even indirect, link—candidates of remarkable and specific professional standing.

Shareholders who are members of the same group or of a shareholders' agreement may not vote, not even through a third party, for more than one list.<sup>38</sup> Regardless of the specific reasons that led to the conclusion of any shareholders' agreements, this regulation increases the importance of the conduct of these key figures in company dynamics. Hence, it is fundamental to value the vote of those whom, although connected to the control group, are called upon to express an opinion on the election of minority-appointed directors included on a given slate. In practice, these votes show their significance when the vote of a related entity contributes to reach the minimum threshold required by the bylaws for the participation of a slate. Indeed, the need to know these

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35. On average, almost five directors, accounting for 47.6% of boards, are independent by TUF standards: these figures hit their highest values (respectively six and 53.6%) in financial companies in 2016. CONSOB, *Report on Corporate Governance*, *supra* note 2, at 18. Ninety-six firms count on average about two members appointed by minorities. CONSOB, *Report on Corporate Governance*, *supra* note 2, at 19.

36. Francesco Carbonetti, *Amministratori e Sindaci di Minoranza e «Rapporti di Collegamento»*, 10 SOCIETÀ 1186 (2007) (It.). See also Ciocca, *supra* note 33, at 429–42.

37. Although not crystal clear in its wording, which can potentially lead to inefficiencies, the second paragraph of TUF Art. 148 suggests that the people included in the list presented by minority shareholders should not be linked to majority shareholders, or to those who voted the list they presented. D. Lgs. n.58 (1998), n.120 at art. 148 (2011) (It.).

38. D.Lgs. n.58 (1998), n.120 at art. 148 (2011) (It.).

interrelations led to the elimination of secrecy in voting on directors,<sup>39</sup> prior to both the filing of the slate to the issuer<sup>40</sup> and disclosure.<sup>41</sup>

The board of directors, on the basis of a mere formal check, has to investigate any possible connection among slates. Consequently, the auditors are required to verify the accuracy of the directors' investigation in accordance with TUF Art. 149.<sup>42</sup> The Chairman may verify the requirements only *ex post*, checking the accuracy of the procedure, the identity and legitimacy of each person, and the voting mechanisms.<sup>43</sup>

## 2. Impacts of the Record Date

The differentiation between ownership and voting rights is certainly one of the Copernican revolutions that characterized corporate law over the last decade.<sup>44</sup> At the same time, the introduction of this legislation, following the implementation of the recently amended SHRD II, encourages short-term equity investments by those who are in a position—in terms of size and complexity of investment choices—to

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39. Simone Alvaro, Giovanni Mollo & Giovanni Siciliano, *Il voto di lista per la rappresentanza di azionisti di minoranza nell'organo di amministrazione delle società quotate*, QUADERNO GIURIDICI 1, 19 (2012) (It.); see also Antonio Blandini, *Riforma del Risparmio e Società Quotate: Voto Segreto, Voto di Lista e Dintorni* 3 SOCIETÀ 269, (2006) (It.).

40. D.Lgs. n.58 (1998), n.120 at art. 147-ter (2011) (It.).

41. D.Lgs. n.58 (1998), n.20250 at art. 144-octies (2018) (It.).

42. D.Lgs. n.58 (1998), n.120 at art. 149 (2011) (It.).

43. There is no doubt that Codice Civil Art. 2371 only draws a minimal list of powers, so that the prerogatives listed above cannot be taken away or varied due to bylaws or other corporate bodies. Codice civile [C.C.] [Civil Code] art. 2371 (It.). It is indisputable, however, that other powers can be attributed to the President according to the bylaws, shareholders' regulations, and resolutions. See Filippo Laurini, *Articolo 2371: Presidenza dell'assemblea*, in COMMENTARIO ALLA RIFORMA DELLE SOCIETÀ 147, 147–87 (Piergaetano Marchetti, Luigi Bianchi, Federico Ghezzi & Mario Notari eds., 2005) (It.).

44. Italian law provides that a statement must be made to the issuer confirming the attendance of shareholders' meetings and the exercise of voting rights by the end of the third trading day prior to the date of the shareholders' meeting on first call, or other deadline established in the Articles of Association of companies. D. Lgs. n. 58 (1998), n.120 at art. 83-sexies (2011) (It.). It is surely significant that after this deadline, all credits and debts entries shall not be considered for the purposes of voting rights at GMs. See *id.*

consciously carry out their roles as strategic members and, more generally, institutional investors.<sup>45</sup>

To ensure maximum certainty in identifying persons entitled to exercise these rights at the GMs, and to avoid the immobilization (even if temporary) of the shares, Article 83-sexies reveals the true owners of the shares and also reports the votes of those who no longer hold any interest in the company.<sup>46</sup> This prevents any abuse by hedge funds and, in broad strokes, by investors who intend to strategically influence the issuers.<sup>47</sup>

To present slates, it is necessary to establish “another” record date that affords shareholders a reasonable amount of time for their organization.<sup>48</sup> Such date is directly linked to the day the list is filed, approximately forty-five days before the date set for the GM.<sup>49</sup> It is not viable or acceptable to grant the right to file one’s own list, even if it is compliant with the rules on relationships and avoids risk of potential abuse.

The presentation of slates facilitates cooperation in an incontrovertible way.<sup>50</sup>

Some authors believe that shareholders’ agreements for the joint presentation of slates cannot be construed as a shareholders’ agreement aimed at exercising voting rights and requiring prior consultation among them, since they are not limited to shareholders’ vote.<sup>51</sup> In this case, no obligation is assumed with regard to the vote that will be cast at GMs.<sup>52</sup> Instead, one common decision is agreed upon based on the achievement of the minimum threshold of share ownership that the bylaws generally

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45. Matteo Maria Erede, *L’esercizio del Diritto di Intervento e Voto in Assemblea di Società con Titoli Quotati: Alcune Riflessioni in Tema di Legittimazione e Titorarietà in Seguito all’Introduzione della Record Date*, in SCRITTI GIURIDICI PER PIERGAETANO MARCHETTI 237–74, 240 (2011) (It.).

46. See D.Lgs. n.58 (1998), n.120 at art. 83-sexies (2011) (It.).

47. See Erede, *supra* note 45, at 248.

48. See D.Lgs. n.58 (1998), n.120 at art. 125-bis, 147-ter (2011) (It.).

49. See D.Lgs. n.58 (1998), n.120 at art. 125-bis (2011) (It.).

50. Chiara Mosca, *Attivismo degli Azionisti, Voto di Lista e “Azione di Concerto”*, 58 RIV. SOC. 118, 141 (2013) (It.).

51. See generally, Pietro M. Fioruzzi & Francesco Lione, *Il Problema delle Clausole Statutarie di Società Quotate che Attribuiscono al Consiglio di Amministrazione il Potere di Presentare una Lista per la Nomina di Amministratori o Sindaci*, 4 RIV. DIR. SOC. 85, 89-95 (2007) (It.).

52. Gian Franco Campobasso, *Voto di Lista e Patti Parasociali nelle Società Quotate*, 56 BANCA BORSA 125, 129 (2003).



provide for the submission of slates.<sup>53</sup> The power to vote for or against the list does not actually correspond to the duty to vote for or against it.<sup>54</sup> Accordingly, such arrangement creates a free and unplanned aggregation prompted by list voting; however, the arrangement cannot take the form of a consultation agreement that requires a prior discussion of the matter because it is far from achieving a spontaneous aggregation.<sup>55</sup>

Other authors, however, believe that such agreements should be related to TUF Art. 122, as it seems unlikely that they will lead to even minimal consultation on voting methods.<sup>56</sup> It would be difficult to imagine that such an arrangement, at least implicitly, does not include the obligation to vote for the list jointly submitted.

## II. LIST VOTING IN A COMPARATIVE PERSPECTIVE: AN OVERVIEW

The U.S. practice of list voting cannot be interchanged transnationally.<sup>57</sup> Even if list voting “offers greater certainty with respect to its impact on the composition of the board, and for this reason [it] can be, at the same time, less frightening to controlling groups and more reliable for qualified minorities,” evaluations need to be mindful of the

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53. *Id.*

54. *Id.*

55. *Id.* at 132; see also Mosca, *supra* note 50, at 139 nn.51 & 53.

56. Marco Ventrone, *La composizione del consiglio di amministrazione delle società quotate dopo il d.lgs. n. 303 del 2006: prime osservazioni*, 52 RIV. SOC. 225-26 (2005) (It.).

57. See generally Lucian Bebchuk & Assaf Hamdani, *The Elusive Quest for Corporate Governance Standards*, 157 U. PA. L. REV. 1263 (2009) (discussing the inadequacy of a myopic comparison, and of a blind ranking, between the rules of different jurisdictions with different shareholder structures). For an overview of the systems in the United States, United Kingdom, France, and Germany, see Belcredi & Caprio, *supra* note 12, at 26. As to legal transplants, the literature is certainly rich. See generally William Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43 AM. J. COMP. L. 489 (1995); Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1 (1974); Ugo Mattei, *Efficiency in Legal Transplants: An Essay in Comparative Law and Economics*, 14 INT'L REV. L. & ECON. 3 (1994); Eric Stein, *Uses, Misuses—and Nonuses of Comparative Law*, 72 NW. U. L. REV. 198 (1977); Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences*, 61 MOD. L. REV. 11 (1998); Alan Watson, *The Birth of Legal Transplants*, 41 GA. J. INT'L & COMP. L. 605 (2013).

operation of each legal system.<sup>58</sup> As recently suggested by leading authors in the field:

There is a convergent practice on the presence of independent directors on the board, whether in a two-tier board structure (for the supervisory board) or a one-tier structure. Yet the number of independent directors diverge; most common is two or three by law and [fifty] percent by voluntary measures (via a “comply or explain” Code). Jurisdictions vary on the numbers and ratios. Moreover, “national approaches on the definition of independence for independent directors vary considerably, particularly with regard to maximum tenure and independence from a significant shareholder.” These differences would predictably result in divergence on the independence-in-fact of nominally “independent” directors and indeed, their putative function.<sup>59</sup>

List voting would be beneficial to minority shareholders when there is a controlling shareholder, but not when the corporation exceeds a certain size. It is preferable to create a single list composed of independent directors, drawn up by the nomination committee of the outgoing board, to be submitted to shareholders with voting rights.<sup>60</sup> With a single list, the directors who obtained the highest number of votes would be elected, and, if the minimum number of directors required is not reached, the appointed directors would co-opt other directors, excluding those who have not obtained the vote of the activists. The selected names would then be submitted to the shareholders, thus allowing institutional investors to influence the composition of the board, even without making direct decisions.

Other authors allege that this change is simply a replication of the system that already exists in the United States, but in a radically different

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58. Marco Ventoruzzo, *Empowering Shareholders in Directors' Elections: A Revolution in the Making*, 8 EUR. COMPANY & FIN. L. REV. 105, 144 (2011).

59. Ronald J. Gilson & Jeffrey N. Gordon, *Board 3.0* (forthcoming 2018) (manuscript at 15) (citing ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT 2017 Corporate Governance Factbook at 95-96, 98-100, 108-111).

60. See Luca Enriques & Luigi Zingales, *Il Voto di Lista non Basta nei Big a Capitale Diffuso*, IL SOLE 24 ORE (May 21, 2015) (It.), [https://www.ilsole24ore.com/art/commenti-e-idee/2015-05-21/il-voto-lista-non-basta-big-capitale-diffuso—071129.shtm?uuid=ABwo71jD&refresh\\_ce=1](https://www.ilsole24ore.com/art/commenti-e-idee/2015-05-21/il-voto-lista-non-basta-big-capitale-diffuso—071129.shtm?uuid=ABwo71jD&refresh_ce=1) [https://perma.cc/689E-FDLP]. See generally Ciocca, *supra* note 33.

context.<sup>61</sup> Thus, institutional investors would be strongly encouraged to propose one-third or two-fifths of the board. If the list presented by institutional investors obtains the highest number of votes, a higher number of directors would somehow connect to it, even if the absolute majority was not elected.

Because a complete country-based study would be impossible for the purposes of this article, the overview provided herein should be seen as a background against which empirical findings should be placed.

In the United States, independent directors first appeared mainly as a result of the Penn Central scandal.<sup>62</sup> Whether minority shareholders should appoint independent directors is still subject to debate, due to varying corporate structures, the presence of stronger minority shareholders and more developed institutional investors, and the absence of abuse by majority shareholders.<sup>63</sup> More recently, Professors Goshen and Hamdani pointed out that:

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61. See *supra*, Part I.A.

62. See Jeffrey N. Gordon, *The Rise of Independent Directors in the U.S., 1950-2005: of Shareholder Value and Stock Market Prices*, 59 STAN. L. REV. 1465, 1515 (2007); see also NYSE Constitution, Rule 2495H (Jan. 6, 1977); NYSE Listed Company Manual, § 303A.01 (2015) (as amended on Nov. 25, 2009) (“Listed companies must have a majority of independent directors. Commentary: Effective boards of directors exercise independent judgment in carrying out their responsibilities. Requiring a majority of independent directors will increase the quality of board oversight and lessen the possibility of damaging conflicts of interest.”); NYSE Listed Company Manual, § 303A.02 (2015).

63. It is relevant to emphasize that, in the United States, the nomination committee requires listed companies to have an *ad hoc* committee entirely composed of independent directors, with a written regulation to tackle its purpose(s) and responsibilities, and whose annual performance is evaluated. See NYSE Listed Company Manual, § 303A.04 (2015). Recently, a relevant piece emphasized the need to re-define the concept and to assure a strong enforcement to it, since “‘regulating directors’ independence is at heart a means of empowering investors to make informed decisions about where to invest and how to vote.” Yaron Nili, *Out of Sight Out of Mind: The Case for Improving Director Independence Disclosure*, 43 UNIV. J. CORP. L. 35, 35 (2017). Nili posited:

The current framework can be summed up as being too much, too little, too late and too soft. It provides companies with too much discretion, as boards retain too much power to assert the independence of their peer directors [,] and they may suffer from behavioral bias in doing so. It provides investors with too little information regarding the factual context against which a director is considered to be independent. Further, even when a director’s independence designation is scrutinized through state law, it is often too late, as these assessments are done post-hoc when it is too late to address many of the issues that director independence is meant to protect against. Finally, it is too soft, as

These prophylactic measures may be necessary to enforce the rule against self-dealing . . . however . . . lawmakers should proceed cautiously when constraining controllers' power to appoint board or management positions . . . [since] asymmetric information and differences of opinion could prevent the controller-entrepreneur from credibly communicating her idiosyncratic vision not only to investors, but also to skeptical independent board members. Therefore, the need to balance controller rights and minority protection should also shape board reforms at firms with controlling shareholders. At a minimum, the controller should have the power to appoint a majority of the board, which in turn should have the power to appoint the CEO and other members of management.<sup>64</sup>

The voice of all shareholders is vital overseas as well. Until a few years ago, investors had a limited impact on the board composition due to their spread and currently decreasing apathy. NYSE Rule 452, abolished in 2009, allowed financial intermediaries to vote freely in the absence of direction from their clients.<sup>65</sup>

In the United States, regulations facilitating the access of shareholders to the proxy system ensure the presence of minorities on the board.<sup>66</sup> While the collection of proxies is rooted in the Securities and Exchange Act of 1934, minority shareholders could initiate an independent solicitation of proxies.<sup>67</sup> However, initiating an independent solicitation may result in disproportionate costs. A proportional reimbursement rule, adopted either contractually or in the bylaws, would

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companies' self-designations of director independence are left uncontested and without proper vetting by the stock exchanges or the SEC, as they have shown no effort to proactively enforce their own requirements.

*Id.* at 53 (emphasis omitted). *See also* Puchniak & Kim, *supra* note 9, at 98 (“[I]t makes perfect sense that the NYSE and NASDAQ definitions of ‘independence’ focus on ensuring that independent directors are independent from the managers of the corporation on whose board they sit”).

64. Zohar Goshen & Assaf Hamdani, *Corporate Control and Idiosyncratic Vision*, 125 YALE L. J. 560, 601 (2016).

65. NYSE Listed Company Manual, Rule 452 (Jan. 11, 1968).

66. *See, e.g.*, 17 C.F.R. § 240.14a-8 (2011). *See also* MARC. I. STEINBERG, THE FEDERALIZATION OF CORPORATE GOVERNANCE 184-190 (2018) (providing a brief overview of proxy access and Rule 14a-11); STEPHEN M. BAINBRIDGE & M. TODD HENDERSON, OUTSOURCING THE BOARD: HOW BOARD SERVICE PROVIDERS CAN IMPROVE CORPORATE GOVERNANCE 171-172 (2018) (providing a brief overview of proxy access in the United States).

67. *See, e.g.*, 17 C.F.R. § 240.14a-8 (2011).

allow the reimbursement of expenses, at least in part, by the company itself.<sup>68</sup>

In *CA, Inc. v. AFSCME Employees Pension Plan*, the court discussed a proposal to insert a clause in the bylaws to allow proxy access and reimbursement of soliciting proxies' costs, but ultimately held that such a clause was invalid, the approval of which would have violated the obligations of the directors toward the company.<sup>69</sup> Even though it was considered invalid, the inclusion of the clause in the bylaws, and the reimbursement of the expenses incurred by shareholders, were transposed into Delaware legislation.<sup>70</sup>

Pursuant to Rule 14a-11, any shareholder (or shareholder group) that held more than 3% of a public company's shares for more than three consecutive years was eligible to nominate candidates for up to 25% of the board seats.<sup>71</sup> A qualifying shareholder could exercise this privilege as long as she declared that she would continue to hold her shares after the annual GM and did not acquire them with the intention of changing control of the company or obtaining more representatives than those permitted by the law.<sup>72</sup> In the presence of either a staggered board or directors already elected by the minority in the context of the GM, the minority-appointed directors could be nominated only if they did not exceed 25% of the total directors.<sup>73</sup> When the slates submitted by minorities exceeded that limit, the company must, at the time of sending the proxy materials, give preference to shareholders with a higher share capital by listing the names presented by them only where still necessary to reach the 25% threshold.<sup>74</sup> The rule was debated but short-lived.<sup>75</sup> The U.S. Chamber of Commerce, and the defendant in *Business Roundtable*

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68. *See id.*

69. 953 A.2d 227, 239-40 (2008).

70. *See* DEL. CODE ANN. tit. 8, §§ 112-13 (2009)

71. *See* Facilitating Shareholder Director Nominations, 75 Fed. Reg. 56,667, 56,674, 56,706 (Sept. 17, 2010) (to be codified at 17 C.F.R. pts. 200, 232, 240, and 249); *see also* Reilly S. Steel, *Proxy Access and Optimal Standardization in Corporate Governance: An Empirical Analysis*, 23 FORDHAM J. CORP. & FIN. L. 173, 185-88 (2017); Jill E. Fisch, *The Destructive Ambiguity of Federal Proxy Access*, 61 EMORY L. J. 435, 466-67 (2012).

72. *See* Facilitating Shareholder Director Nominations, *supra* note 71, at 56,699.

73. *See id.* at 56,675.

74. *See id.* at 56,711-12.

75. *Bus. Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011). *See also*, Bernard S. Sharfman, *What Theory and the Empirical Evidence Tell Us about Proxy Access*, 13 J. L. ECON. & POL.'Y 1, 36-38 (2017).

v. *SEC*, opposed its application, arguing before the D.C. Circuit Court that the main problems of proxy access are the creation of interpersonal conflicts, the inefficient cost-benefit ratio calculated incorrectly by the Securities and Exchange Commission (SEC), and that it allows top management to exclude proposals concerning the election of shareholders.<sup>76</sup>

Rule 14a-8, however, remains unchanged, ensuring shareholders the right to propose through the proxy system the use of the proxy access in the bylaws, thus allowing a mechanism that would lead to the same result.<sup>77</sup> The bylaws, in fact, have created a very similar scheme to the one initially provided for by the SEC; in order to include names on the slates for one fifth of the eligible directors, the group of shareholders formed for this purpose should not exceed twenty directors and should possess at least 3% of corporate shares for three years.<sup>78</sup>

The first and, so far, the only attempt to actually use the proxy access rule for the appointment of directors occurred in the “Gabelli Funds—National Fuel Gas” case, in which Mario Gabelli and GAMCO Asset Management Inc. withdrew the initial nomination, dated November 9, 2016, due to alleged violation of the bylaws.<sup>79</sup> The latter claimed that only passive investors could submit it, however, the tool is meant for those directors who are not willing to influence or alter the governance of the company.<sup>80</sup> Gabelli evidently aimed to achieve a different goal, reiterated in several public statements and in the use of Form 13-D, instead of Form 13-G, revealing the intention to change the corporate structure.<sup>81</sup>

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76. See *Bus. Roundtable*, 647 F.3d at 1149.

77. See 17 C.F.R. § 240.14a-8 (2013); Danielle Vukovich, *Proxy Access Voting: Evaluating Proxy Access and the Recent Phenomenon of Corporations Adopting Shareholder Protective Policies*, 19 SAN DIEGO INT’L L. J. 437, 446 (2018).

78. See *Facilitating Shareholder Director Nominations*, *supra* note 71, at 56,772.

79. See *Notice of Proxy Access Director Nomination at the 2017 Annual Meeting of Stockholders of National Fuel Gas Company from Paula Ciprich to David Goldman*, (November 23, 2016), <https://www.sec.gov/Archives/edgar/data/70145/000119312516776709/d296488dex99.htm> [<https://perma.cc/9XEW-CPPC>].

80. See *id.*

81. *Id.* Mr. Gabelli believed that “the board still need[ed] an infusion of fresh thinking” and that “the company should be split up with the pieces spun off” even though a spin-off was not being considered by the company’s board. *Id.* “Mr. Gabelli’s statements continue[d] to reflect GAMCO’s desire to influence management on matters of control and [did] not disavow earlier support for splitting up the company’s business.” *Id.*

This situation poses several contentious issues for consideration: the appropriateness of the calculation methods of shares held by different funds under a single manager (SGR/Fund Manager), the limit to shareholders' aggregation set to access the proxy, the re-election procedure, the universal proxy ballot, and the exclusion of the proposal pursuant to Rule 14a-8(i)(10).<sup>82</sup>

Since the market's concern with escaping from the "dictatorship" of the CEO is strong, the implementation and effective use of this tool for the purposes of appointing directors is comparable to a loaded gun.<sup>83</sup>

The phenomenon of list voting is rather rare in other countries.<sup>84</sup> Although it has established its relevance and demonstrated its effectiveness by ensuring proportionality in the election of governing corporate bodies, list voting is undoubtedly an attribute of good corporate governance, limiting agency costs, and improving the balance between different interests, especially in cases of concentrated ownership structures.<sup>85</sup> Certain countries, however, provide for shareholder representation in various forms: (1) with the possibility of competing for a *mandatory* appointment (if provided in the bylaws) (Italy, the United States, Spain, Poland, and Brazil), (2) with the possibility of competing for an *optional* appointment (Germany and France), or (3) with the right of veto (the United Kingdom and Israel).<sup>86</sup>

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82. See 17 C.F.R. § 240.14a-8(i)(10) (2013).

83. Marco Ventoruzzo, Professor, Bocconi Univ., Introductory Speech at the Italian Corporate Governance Conference (Dec. 3, 2015), [http://icgconference.org/wp-content/uploads/2015/12/Introductory-speech\\_Marco-Ventoruzzo\\_3rd-Dec.pdf](http://icgconference.org/wp-content/uploads/2015/12/Introductory-speech_Marco-Ventoruzzo_3rd-Dec.pdf) [https://perma.cc/M2F2-CNWX].

84. See Marco Ventoruzzo, *Quante Sfide per la Consob*, L'AVOCE (May 6, 2016), <http://www.lavoce.info/archives/40937/quante-sfide-per-la-consob> [https://perma.cc/7GZN-Z2DW]. See also Vukovich, *supra* note 77, at 463-68 (providing a comparative overview of Canadian and Australian regulation).

85. See Nicolas L. Erhardt, James D. Werbel & Charles B. Shrader, *Board of Director Diversity and Firm Financial Performance*, 11 CORP. GOVERNANCE: INT'L. REV. 102, 107-08 (2003).

86. See, e.g., Decreto No. 6.404 de 15 dezembro 1976, Diário Oficial Da União [D.O.U.] de 15.12.1976 at art. 243 (Braz.). See generally Secretary of the Organization for Economic Co-Operation and Development, OECD CORPORATE GOVERNANCE FACTBOOK (2017).



The relevant law in Spain, which bears similarities to Italian law,<sup>87</sup> states the principle of minority shareholder protection based on the proportional composition of the board itself.<sup>88</sup> It should be noted that this technique is not widely used in Spain, due to the peculiar board composition,<sup>89</sup> the apathy of institutional investors, and the strong conflict of interests.<sup>90</sup> Shareholders, within both listed and unlisted corporations, may gather and appoint a number of directors equal to the ratio of the capital with voting rights and number of board members.<sup>91</sup>

In Poland, when a group of shareholders represents at least one-fifth of the total, such group can request the election of one director, without participating in the appointment of other directors.<sup>92</sup>

Since 2001, Brazilian corporate law allows 15% of shareholders with voting rights and 10% of shareholders without voting rights to apply the *voto múltiplo* technique, which resembles cumulative voting, though not expressly provided for in the bylaws.<sup>93</sup> Nonetheless, by virtue of a proportional board composition, in the event of the dismissal of one

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87. See Approving the Consolidated Text of the Corporate Enterprises Act (R.D.L. 2010, 1) (Spain) (declaring in Article 243 that in a public limited company, shares voluntarily grouped to constitute share capital equal to or more than the sum resulting from dividing the capital by the number of directors are entitled to appoint the number of directors deducted from the corresponding proportion; in the event that this option is invoked, the shares that have been gathered in this way are not entitled to vote on the rest of the board members).

88. See Javier Juste Mencia, *La Partecipazione Della Minoranza Nella Nomina Degli Amministratori di Società per Azioni: Sulla Possibilità di Introdurre un Sistema Proporzionale di Elezione*, 20 GIUR. COMM. 961, 975 (1994) (It.).

89. This is notably due to the presence of the “gray directors,” which are independent directors who still maintain roles on the board after serving the company. See generally Ana Gisbert Clemente & Begoña Navallas Labat, *Corporate Governance Mechanisms and Voluntary Disclosure: The Role of Independent Directors in the Boards of Listed Spanish Firms* 5-6 (2009), <http://webs.ucm.es/centros/cont/descargas/documento16048.pdf> [<https://perma.cc/7P7X-DWDL>].

90. See Mencia, *supra* note 88, at 966-67.

91. See *id.* at 970.

92. See THE COMMERCIAL COMPANIES CODE art. 385, § 3 (Pol.).

93. See Decreto No. 6.404 de 15 dezembro 1976, Diário Oficial Da União [D.O.U.] de 15.12.1976 at art. 141 (Braz.); see also Érica Gorga, Antonio Gledson de Carvalho & Bernard S. Black, *The Corporate Governance of Privately Controlled Brazilian Firms*, 7 REVISTA BRASILEIRA DE FINANÇAS 385, 398-99 (2009).

director, and in accordance with the *simul stabunt, simul cadent* rule, the entire board would cease to function.<sup>94</sup>

Other countries attach great importance to the voice of employees, including Germany,<sup>95</sup> Austria, Luxembourg, Denmark, Sweden, France, and Finland, albeit the latter two also have opt-in mechanisms that are weaker than those allowing employees holding more than 3% of the share capital to appoint one or more directors.<sup>96</sup> According to *Aktiengesetz*, the German Stock Corporate Code, the election of certain members may be reserved to certain shareholders or to specific categories of shares transferable with the consent of the company.<sup>97</sup> Also, shareholders may propose the name of a director, if any, and make it available (via the website, if the company is listed) at least fourteen days prior to the GMs.<sup>98</sup> Finally, each shareholder has the right to propose candidates for the appointment of the supervisory board.<sup>99</sup> This provision strengthens the position of employees, who are specially and specifically protected by this technique.

In the event that the bylaws mention the codetermination model, the board of a public company can be composed of four representatives selected by employees.<sup>100</sup> In non-public companies, there can be three such representatives if the board is composed of more than fifteen directors, and two representatives if the board has fewer than fifteen directors.<sup>101</sup> In public companies with more than two thousand employees, however, the employees' representatives should not exceed

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94. Piergaetano Marchetti, Gianfranco Siciliano & Marco Ventoruzzo, *Dissenting Directors*, (Eur. Corp. Governance Inst. Working Paper Series in L., Paper No. 332, 2016) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2854768](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2854768)## [<https://perma.cc/KT9Y-CPQM>].

95. See generally Gary Gorton & Frank A. Schmid, *Capital, Labor, and the Firm: A Study of German Codetermination*, 2 J. EUR. ECON. ASS'N 863 (2004) (explaining the effectiveness of the model, especially with regard to performance target).

96. Holly J. Gregory & Robert T. Simmelkjaer, II, *Comparative Study of Corporate Governance Codes Relevant to the European Union and Its Member States* (2002).

97. See *Aktiengesetz* [AktG] [Stock Corporation Act], Sept. 6, 1965 BGBl I § 101 (Ger.).

98. See *id.* § 1262.

99. See *id.* § 127.

100. See *Mitbestimmung* [MitbestG] [Law on Employee Participation], May 4, 1976 BGBl I at 1153, last amended, Apr. 24, 2015, BGBl I at 642, art 7 (Ger.).

101. *Id.*

half of the board.<sup>102</sup> On the other hand, in private companies and public companies with fewer than two thousand employees, employees' representatives can be a maximum of one third of the board, assuming the company is composed of at least twenty employees.<sup>103</sup>

France does not regulate the appointment of directors and, except as provided by law, does not select representatives of specific groups and interests.<sup>104</sup>

Russian law provides that the GMs may revoke the entire board, not just one of its members, and elect its *plenum* using cumulative voting, as provided for in the bylaws (or mandatorily for the corporations with more than a thousand shareholders).<sup>105</sup> The normative framework—which is careful in identifying, assessing, and managing conflicts of interest—allows minority-appointed directors to prevent any potentially dangerous action on the part of executive directors and controlling shareholders.<sup>106</sup>

Chinese legislation adopts cumulative voting, in which the voting rights attributable to each shareholder would be multiplied by the number of seats available and could converge in one person having many votes.<sup>107</sup>

102. See Gorton & Schmid, *supra* note 95, at 864.

103. See *id.*

104. Code de gouvernance d'entreprise des sociétés cotées [Corporate Governance Code of Listed Corporations] art. 2.3 (Fr.)

105. GRAZHDANSKII KODEKS ROSSISKOI FEDERATSII [GK RF] [Civil Code] art. 66 (Russ.).

106. *Id.* at art. 81-84.

107. Zhōnghuá rénmin gònghéguó gōngsī fǎ (中华人民共和国公司法) [Company Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 1993, effective Mar. 1, 2013) 2005 STANDING COMM. NAT'L PEOPLE'S CONG GAZ. art. 105, 106 (China). Until 2001, the cumulative voting system was not suggested for listed companies with controlling shareholders owning more than the 30% of the share capital. Zhōngguó shàngshì gōngsī zhìlǐ zhǔnzé (中国上市公司治理准则) [Code of Corporate Governance for Listed Companies in China] (promulgated by the China Sec. Reg. Comm. Jan. 1, 2001) art. 31, at 1, [http://www.ecgi.org/codes/documents/code\\_en.pdf](http://www.ecgi.org/codes/documents/code_en.pdf) [<https://perma.cc/5NAL-X3AU>] (China). Such companies shall implement their bylaws and are encouraged to adopt cumulative voting in the election of directors (including independent directors) and supervisors. In case a shareholder holds solely (or collectively with affiliated parties) over 50% of the equity interest of a securities company, cumulative voting shall be used in the election of directors (including independent ones) and supervisors. Zhèngquàn gōngsī zhàn dìng gōngsī zhìlǐ zhǔnzé (证券公司暂订公司治理准则) [Provisional Code of Corporate Governance for Securities Companies] (promulgated by the China Sec. Reg. Comm. 2004) art. 17, <http://www.ecgi.org>.

Japanese law has proven to be “quite strong” on this matter, even though foreign investors criticize Japanese law for not adequately protecting shareholders’ interests.<sup>108</sup> If the majority of voting shares are present at the GM, the board is elected by simple majority, allowing shareholders to take a decisive role, including the proposal of candidates.<sup>109</sup>

In light of the considerations outlined above, it is difficult to express an opinion on list voting and its “travels” in a clear and decisive global sense. It is therefore appropriate to seek a different tool to assess whether list voting deserves a chance to realize its full potential and be implemented in different jurisdictions.

### III. LIST VOTING AND DIVIDEND POLICIES: EMPIRICAL RESEARCH

#### A. OVERVIEW OF THE ISSUES

This part will present empirical data that shows the impact of list voting on corporate boards,<sup>110</sup> especially from those authors who are influenced by an Anglo-Saxon, rather than German, tradition.<sup>111</sup> Thus, the much-debated topic of dividend policies emphasizes how vital it is to balance interests and demonstrate the essential role of independent

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org/codes/documents/provisional\_cgcode\_csrc. pdf [https://perma.cc/82HR-TFDH] (China).

108. See Gen Goto, *Legally “Strong” Shareholders of Japan*, 3 MICH. J. PRIV. EQUITY & VENTURE CAP. L. 125, 126-27 (2014) (highlighting that the Japanese Code provides for particularly strong protective mechanisms for single shareholders and holders of special categories of shares).

109. *Id.* at 132, 135.

110. See, e.g., Robert C. Ellickson, *Trends in Legal Scholarship: A Statistical Study*, 29 J. LEGAL STUD. 517 (2000).

111. “Empiricism is also a unifying theme of several of the increasingly influential interdisciplinary approaches to the study of law.” Richard H. McAdams & Thomas S. Ulen, *Symposium: Empirical and Experimental Methods of Law: Introduction*, 2002 U. ILL. L. REV. 791, 791 (2002). Among scholars, in fact, there are three “species” of researchers (“clams, dolphins, and plankton”) that also differ in their approaches to studying: doers, users, or critics. This could lead to multiple combinations emerging: “a dolphin would include the ‘movers and shakers of the legal academy[,] grounded in traditional legal scholarship [but using] empirical research to increase our understanding of the law and to add to the tools available to legal researchers.’” *Id.* at 792-93; see also Shari Seidman Diamond, *Empirical Marine Life in Legal Waters: Clams, Dolphins, and Plankton*, 2002 U. ILL. L. REV. 803, 808 (2002).

minority-appointed directors.<sup>112</sup> Managers, in fact, can freely use (and abuse) cash flows for personal purposes through the manipulation of dividend distribution.<sup>113</sup>

The issue of dividend policies has recently been re-examined in different countries. Recent studies have found two correlations in particular: first, between the existence of dividend policies and the presence of women on boards,<sup>114</sup> and second, between the existence of dividend policies and certain key characteristics of independent directors, including tenure, functions, and remuneration.<sup>115</sup> This suggests that it

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112. Cf. Eugene F. Fama & Kenneth R. French, *Disappearing Dividends: Changing Firm Characteristics or Lower Propensity to Pay?*, 60 J. FIN. ECON. 3, 4 (2001); Jorge Farinha, *Dividend Policy, Corporate Governance and the Managerial Entrenchment Hypothesis: An Empirical Analysis*, 30 J. BUS. FIN. & ACCT. 1173, 1173-74 (2003); Aidong Hu & Praveen Kumar, *Managerial Entrenchment and Payout Policy*, 39 J. FIN. & QUANTITATIVE ANALYSIS 759, 759-61 (2004); Fuxiu Jiang, Yunbiao Ma & Beibei Shi, *Stock Liquidity and Dividend Payouts*, 42 J. CORP. FIN. 295, 295 (2017) (providing evidence that the “positive relation between stock liquidity and dividend payouts is more pronounced when the information environment is opaque, and when conflict between controlling shareholders and minority investors is severe”); Hao Wang, *Managerial Entrenchment, Equity Payout and Capital Structure*, 35 J. BANK. & FIN. 36, 36-37 (2011).

113. See Frank H. Easterbrook, *Two Agency-Cost Explanations of Dividends*, 74 AM. ECON. REV. 650, 651, 653 (1984); Michael C. Jensen, *Agency Costs of Free Cash Flow, Corporate Finance, and Takeovers*, 76 AM. ECON. REV. (PAPERS & PROC.) 323, 323 (1986); see also Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

114. See Jie Chen, Woon Sau Leung & Marc Goergen, *The Impact of Board Gender Composition on Dividend Payouts*, 43 J. CORP. FIN. 86, 87 (2017); María Consuelo Pucheta-Martínez & Inmaculada Bel-Oms, *The Board of Directors and Dividend Policy: The Effect of Gender Diversity*, 25 INDUS. & CORP. CHANGE 523, 526-28 (2016).

115. See Suba R. Yarram & Brian E. Dollery, *Corporate Governance and Financial Policies: Influence of Board Characteristics on the Dividend Policy of Australian Firms*, 41 MANAGERIAL FIN. 267, 268 (2015). See generally Timothy G. Coville & Gary Kleinman, *Independent Directors and Dividend Payouts in the Post Sarbanes-Oxley Era*, in 18 SUSTAINABILITY AND GOVERNANCE (ADVANCES IN PUBLIC INTEREST ACCOUNTING) 57 (Cheryl R. Leyman ed., 2015) (revealing a positive relationship between firms compelled by law to change boards and payout policies, when compared to firms that pre-adopted the Sarbanes-Oxley corporate board composition requirements); Amy E. Ji, *Board Financial Expertise and Corporate Payout Policy*, 19 J. APP. BUS. & ECON. 10 (2017) (finding that a greater percentage of financial experts on company boards leads to the adoption of payout policies based only on repurchases, instead of dividends); Lucas Setia-Atmaja, *Dividend and Debt Policies of Family Controlled Firms: The Impact of*

would be extremely difficult for minority shareholders to be adequately safeguarded, at least in most cases, without appointing independent directors. As this Article will investigate further, it appears that the link between the presence of minority-appointed independent directors and the propensity to distribute dividends is strong.

As a premise, it is worthwhile to illustrate the line of research. The following sections aim to clarify the research design and the sources used to retrieve the necessary information. Extensive literature was taken into account, both to recognize the historically significant contributions on the topic, and to identify the variables deemed essential to carry out the quantitative study and develop the arguments.

## B. OVERVIEW OF THE LITERATURE

Some corporate governance mechanisms are meant to increase “transparency, accountability and efficiency of corporate governance” in order to aid independent (and independent minority-appointed) directors.<sup>116</sup> Multiple international studies of these mechanisms demonstrate that there is an increased risk that shareholders holding less than 10 to 20% of the shares overly influence the board—even appointing its majority—thus, controlling the strategic decisions despite their limited investments.<sup>117</sup> Furthermore, independent directors are crucial in both

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*Board Independence*, 6 INT’L J. MANAGERIAL FIN. 128 (2010); Vineeta Sharma, *Independent Directors and the Propensity to Pay Dividends*, 17 J. CORP. FIN. 1001, 1002-04 (2011). A recent study also examined dividend payouts, but used a novel measure: co-opted directors, who are appointed after the incumbent CEO assumed office and their presence leads to a weaker tendency to pay dividends. See generally Pornsit Jiraporn & Sang M. Lee, *Do Co-Opted Directors Influence Dividend Policy?*, 47 FIN. MGMT. 349 (2018).

116. Nuria Reguera-Alvarado & Francisco Bravo, *The Effect of Independent Directors’ Characteristics on Firm Performance: Tenure and Multiple Directorship*, 41 RES. IN INT’L. BUS. & FIN. 590, 591 (2017).

117. See Sandra Cavaco, Patricia Crifo, Antoine Rebérioux & Gwenael Roudaut, *Independent Directors: Less Informed but Better Selected than Affiliated Board Members?*, 43 J. CORP. FIN. 106, 108-10 (2017); Yong Wang, Penjian Jin & Chongsheng Yang, *Relations Between the Professional Backgrounds of Independent Directors in State-Owned Enterprises and Corporate Performance*, 42 INT’L. REV. ECON. & FIN. 404, 405-06 (2016); see also Harald Baum, *The Rise of the Independent Director: A Historical and Comparative Perspective* 2, 5 (Max Planck Private Law Research Paper No. 16/20, 2017) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2814978](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2814978) [<https://perma.cc/>



dispersed and concentrated corporate structures,<sup>118</sup> looking to Italy as a leading example in terms of protection of the minority shareholders' rights, thanks to the Italian practice of list voting.

The discussion on independent directors and their propensity to pay dividends, initially proposed by Modigliani and Miller,<sup>119</sup> still remains a real "puzzle."<sup>120</sup> A prudent dividend policy could concretely mitigate conflicts of interest between controlling and minority shareholders.

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T5N4-CU4V] (claiming that independent directors are strongly connected to the context in which they operate, even though path dependence is not always considered in theoretical discussions and practice as a true *panacea* for governance issues); Wei Cai, *The Dilemmas of Independent Directors in China: An Empirical and Comparative Study*, 18 EUR. BUS. ORG. L. REV. 123, 147-48 (2017); Kobi Kastiel & Yaron Nili, "Captured Boards": The Rise of "Super Directors" and the Case for a Board Suite, 2017 WIS. L. REV. 19, 31-32; Yaron Nili, *The "New Insiders": Rethinking Independent Directors' Tenure*, 68 HASTINGS L. J. 97, 120 (2016). For studies about the link between investment and performance, see generally, Wei Jiang, Hualin Wan & Shan Zhao, *Reputation Concerns of Independent Directors: Evidence from Individual Director Voting*, 29 REV. FIN. STUD. 655 (2016); Yu F. Kuang & Gladys Lee, *Corporate Fraud and External Social Connectedness of Independent Directors*, 45 J. CORP. FIN. 401 (2017); Huilong Liu, Hong Wang & Liansheng Wu, *Removing Vacant Chairs: Does Independent Directors' Attendance at Board Meetings Matter?*, 133 J. BUS. ETHICS 375 (2016); Piergaetano Marchetti, Gianfranco Siciliano & Marco Ventoruzzo, *Dissenting Directors*, (Eur. Corp. Governance Inst. Working Paper Series in L., Paper No. 332, 2016) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2854768##](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2854768##) [<https://perma.cc/KT9Y-CPQM>]; Ronald Masulis & Emma Jincheng Zhang, *Preoccupied Independent Directors* (Eur. Corp. Governance Inst. Working Paper Series in Fin., Paper No. 522, 2017) [https://ecgi.global/sites/default/files/working\\_papers/documents/5222017.pdf](https://ecgi.global/sites/default/files/working_papers/documents/5222017.pdf) [<https://perma.cc/4ZMT-Z85F>]; Dan W. Puchniak & Luh L. Lan, *Independent Directors in Singapore: Puzzling Compliance Requiring Explanation*, 65 AM. J. COMP. L. 265 (2017); Jigao Zhu, Kangtao Ye, Jennifer W. Tucker & Kam C. Chan, *Board Hierarchy, Independent Directors, and Firm Value: Evidence from China*, 41 J. CORP. FIN. 262 (2016).

118. Ferrarini & Filippelli, *supra* note 12, at 30 (stressing that independent directors represent a tool to strengthen the role of the management, primarily in contexts of dispersed ownership). See also Bebchuk & Hamdani, *supra* note 5, at 1282-83; Strampelli, *supra* note 5, at 14-19.

119. See generally Merton H. Miller & Franco Modigliani, *Dividend Policy, Growth, and the Valuation of Shares*, 34 J. BUS. 411 (1961); see also S. Paulo & C. Gale, *The Miller-Modigliani 1961 Ponzi Scheme, Alias "Dividend Irrelevance"*, 54 INT'L J.L. MGMT. 234, 234-35 (2012) (emphasizing the crucial role that Miller & Modigliani's original paper continues to have in modern scholarly literature).

120. Sharma, *supra* note 115, at 1001.



Dividends may, in fact, curb agency problems and reduce agency costs.<sup>121</sup> A higher dividend policy would increase the likelihood of using external funds more frequently.<sup>122</sup> This could lead to conflicts of interest due to asymmetric information between shareholders and management when the company generates a cash flow that is not in line with its investment opportunities. Dividend policy is negatively correlated to close corporate structure<sup>123</sup> and close ownership,<sup>124</sup> and positively correlated to shareholders' agreements, confirming that the protection of minority shareholders' concerns remains an absolutely fundamental issue in Italian corporate law.<sup>125</sup>

### C. DATASET: SAMPLE CONSTRUCTION

During this research (the basic guidelines of which have been outlined above), it was difficult to identify all the independent directors<sup>126</sup> appointed in the period between 2005 and 2015, and to determine whether they were appointed from minority lists. In Italy, there is no comprehensive official database for figures on independent directors, as is also the case, unexpectedly, in China.<sup>127</sup> Accordingly, for the purposes

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121. See Michael S. Rozeff, *Growth, Beta and Agency Costs as Determinants of Dividend Payout Ratios*, 5 J. FIN. RESEARCH 249, 249-50 (1982). See generally Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J. L. & ECON. 301, 308 (1983) (discussing various means of mitigating agency costs).

122. See Easterbrook, *supra* note 113, at 656.

123. See Mara Faccio, Larry H. P. Lang & Leslie Young, *Dividends and Expropriation*, 91 AM. ECON. REV. 54, 55 (2001).

124. See Luciana Mancinelli & Aydin Ozkan, *Ownership Structure and Dividend Policy: Evidence from Italian Firms*, 12 EUR. J. FIN. 265, 267 (2006).

125. *Id.* at 269. Some possible pathways of causation must be emphasized: more independent directors will pay more dividends, whereas less independent directors lead to an increased need to signal with dividends. Thus, list voting should lead to fewer dividends.

126. Independent directors are defined pursuant to Codice di Autodisciplina [Corporate Governance Code] Luglio 2018, art. 3, Jul. 2018, (It.).

127. Many studies focus on the implications of independent directors because they serve as an important source of inspiration for further development in corporate governance. For examples, see generally Easterbrook, *supra* note 113; Murya Habbash, *Are Independent Directors and Supervisory Directors Effective in Constraining Earnings Management?*, 5 J. FIN. ACCT. & MGMT. 125 (2014); Guoqiang Hu, Rongli Yuan & Jason Zezhong Xiao, *Can Independent Directors Improve Internal Control Quality in China?*, 23 EUR. J. FIN. 626 (2014); Liu, Wang & Wu, *supra* note 117; Yi Quan & Sihai Li, *Are*

of this study, creation of such a database was an extremely important step. The relevant data, collected piece by piece, did not include the companies listed on the Italian Alternative Investment Market (the sub-market of the Milan Stock Exchange dedicated to SMEs), which is characterized by flexible regulation and for which publication on the website of both reports on governance and remuneration is not required.

DataStream, a well-known factual database in the financial and economic field worldwide, allowed for identification of all listed Italian companies. As of June 30, 2016, there were 273 listed companies on the Borsa Italiana's Main Market (MTA).<sup>128</sup> The study then evaluated the consolidated financial statements, the ownership structure, the reports on corporate governance, and remuneration of all companies identified by Datastream in order to choose all the independent directors to be examined.

Next, the study examined corporate governance and remuneration reports to determine whether the directors were selected from a slate submitted by majority or minority shareholders. If such information was not provided in those reports, then the study looked to the website of the company (where slates for the renewal of the board are uploaded), or inspected the minutes of the GMs for the appointment of directors (in which slates are mentioned in detail or to which slates are attached), for the years after the introduction of compulsory list voting systems.

Finally, the study extrapolated from DataStream financial data related to dividend distribution, mainly, payments, sales, cash flow, total assets, return on assets, and annual earnings, all of which are necessary to tackle the CEO duality issues. The study also evaluated M&A deals, which were retrieved from Thomson One. The sample consists of 1260 observations.

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*Academic Independent Directors Punished More Severely When They Engage in Violations?*, 10 CHINA J. ACCT. RES. 71 (2017); Xuesong Tang, Jun Du & Qingchuan Hou, *The Effectiveness of the Mandatory Disclosure of Independent Directors' Opinions: Empirical Evidence from China*, 32 J. ACCT. & PUB. POL'Y 89 (2013); Zhu, Ye, Tucker & Chan, *supra* note 117. Indeed, there is no shortage of studies regarding how to increase minority shareholders' protections in and related to the new form of cumulative voting in China. See Wenjia Yan, *Cumulative Voting: In the US (Declining), in China (Rising) and the EU (Not-Adopted)*, 12 EUR. COMPANY & FIN. L. REV. 79, 80 (2015).

128. There were two potential issues affecting, and even slightly distorting, the study: companies could have been listed at any time from 2005 to 2015, or companies could have been listed from 2005 but de-listed before the end of June 2016.

The analysis accounts for certain parameters normally used for data classification, which are linked to the sector in which each company operates (keeping in mind the Super Sector indices used by the Italian Stock Exchange that, in turn, refer to Industry Classification Benchmark aggregates).<sup>129</sup> This classification is informative given the significant differences among categories, and it serves to illustrate evolutionary developments and, *de iure condendo*, to identify the areas in which more emphasis should be placed in the regulation of list voting.

The following statistical analysis uses an Ordinary Least Squares (OLS) model, commonly used in the analysis of clustered data. It should be noted that the model does not include some variables that simultaneously determine both the independent variable (independent directors) and the dependent variable (payout dividends). Thus, the causal relationship between the two variables is not very close (and could even be reversed, whereby more independent directors may be appointed to distribute more dividends).<sup>130</sup>

#### D. RESEARCH QUESTIONS AND HYPOTHESES

This Article aims to investigate the role of independent directors, particularly minority-appointed independent directors, to verify their quality, the effectiveness of list voting, and the increase in the value of dividend payouts. Thus, the following assumptions are tested:

H<sub>1</sub>: Companies with a significant number of independent directors favor high levels of dividends. As previously stated, independent directors carry out monitoring functions to protect the interests of shareholders, overseeing the correct management of the dividend policy.

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129. See, e.g., *Borsa Italiana*, STOCK INDICES (Oct. 5, 2018), <https://www.borsaitaliana.it/borsaitaliana/statistiche/statistiche-indici/statistiche-indici.en.htm> [<https://perma.cc/9QB4-224Z>].

130. Based on a two-stage regression, the Heckman correction (which is commonly used to correct selection bias) allows for calculating the predicted values of the X variable, even before the regression analysis is applied. In other words, the Heckman correction purifies the X variable of those omitted variables that could blame the coefficient when carrying out the regression. Future research could refine this study with an Instrumental Variable approach.

H<sub>2</sub>: Companies with a high number of independent minority-appointed directors favor high levels of dividends. In light of the importance of independent minority-appointed directors, it is appropriate to verify how their presence leads to tangible benefits for shareholders.

H<sub>3</sub>: Independent minority-appointed directors are particularly effective in companies with a concentrated ownership structure. It is widely accepted that the controlling shareholders affect the appointment of independent directors.<sup>131</sup> If minority directors really intend to enrich and protect minority shareholders, their presence in closely-held companies should be more active. To the contrary, their role would be less significant in widespread ownership structures, where the gap between majority and minority shareholders is less perceived.<sup>132</sup>

#### E. METHODOLOGY

The analysis consists of two phases: the first phase focuses on the probability of distribution of the higher dividends if at least one-third of the board consists of independent directors, and the second phase evaluates such probability if the board consists of more than 15% of independent minority-appointed directors.

Two models are used to verify the first hypothesis: one model includes the fixed effects of each industry and the time horizon, while the second model does not. The same process is applied to the second hypothesis in order to understand these effects, even when the control variable is linked to the presence of directors taken from the minority list.

The analysis took into consideration the characteristics of the sample, noting that more than a third of the board is composed of independent directors, and that more than 15% of the board itself is composed of minority-appointed directors and the CEO-duality is

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131. Bebchuk & Hamdani, *supra* note 5, at 1286-87.

132. Although the hypothesis is verified with regard to the Italian context, the result is, of course, also applicable to other widely-held corporate scenarios, and, therefore, in the United States (where the number of public corporations halved in the last twenty years from more than 8,000 in 1996 to about 4,100 in 2012). Craig Doidge, G. Andrew Karolyi & René Stulz, *The U.S. Listing Gap*, 123 J. FIN. ECON. 464, 464 (2017); Gustavo Grullon, Yelena Larkin & Roni Michaely, *Are U.S. Industries Becoming More Concentrated?*, (Oct. 25, 2018) (unpublished manuscript) (on file with author) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2612047](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2612047) [<https://perma.cc/C8N6-K9DB>].

respected. Additional features linked to the likelihood of dividend distribution, such as dividend payout ratio, cash flow, return on assets (ROA), and annual profit, were also considered.

One would expect a positive impact on the distribution of dividends as a form of protection of shareholders' interests, especially those of minority shareholders. This would be verified if the dummy variables relating to independent directors taken from the list submitted by the majority or minority shareholders have positive coefficients.<sup>133</sup> The analysis therefore requires a preliminary verification of the presence of independent directors (and of minority-appointed directors) on the boards in the sample.

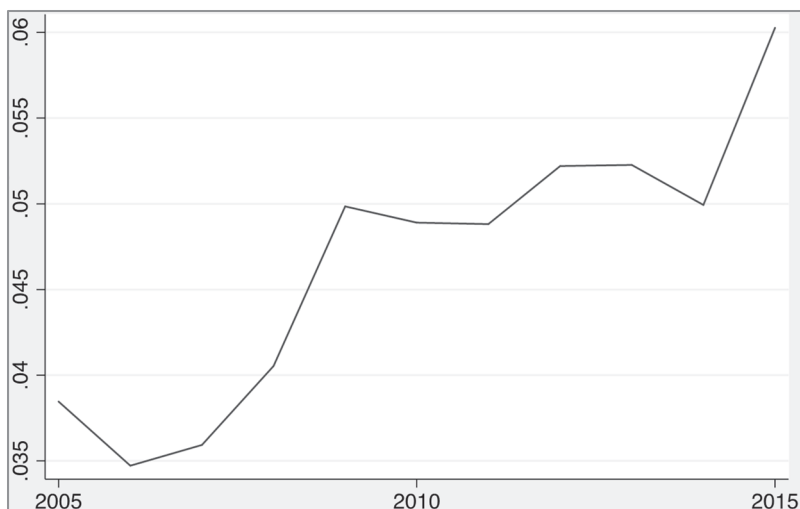
While the degree of independence of Italian directors has clearly increased over time since 2010, the number of directors chosen from the lists presented by minority shareholders increased in the period between 2006 and 2009, and then declined slightly until 2011 (Figure 1), confirming the data reported by CONSOB.<sup>134</sup> Probably, during the financial crisis, the significant costs of disclosing the lists led to the conclusion that the mechanism was unnecessary and inefficient.

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133. As to the former, the dummy variable is 1, if independent directors are more than a third of the entire board, and as to the latter, the dummy variable is 1, if independent minority-appointed directors are at least 15% of the board.

134. See CONSOB, *Report on Corporate Governance*, *supra* note 2, at 27-28. For the benefit of readers less familiar with Italian company law, it is worth highlighting that corporate bodies are generally appointed for a term of three years, but a company's bylaws can vary during this term. Codice di Autodisciplina [Corporate Governance Code] Luglio 2015, art. 5, Jul. 2015, (It.). The members of the corporate body may be re-elected, unless otherwise provided for in the bylaws. *Id.* Thus, staggered boards are extremely rare in listed companies.

**Fig. 1** Degree of independence of minority-appointed directors in Italian boards over time.



Interestingly, half of the sample is concentrated in the following sectors: banking (250 observations, 19.84%), construction and materials (119 observations, 9.44%), and automotive and electronic or electrical components (73 observations each, 11.58%).<sup>135</sup>

The distribution of observations seems constant during the period under consideration. In the aftermath of the introduction of the list voting technique, observations are as expected, albeit slightly lower.<sup>136</sup>

As to the variables, it is worth reinforcing the relevance of the average dividend payout ratio (0.02) (see also, the dividend payout variable), and its median (0.01).<sup>137</sup> More than half of the companies in the sample (59%) have a significant number of independent directors (at least one-third of the board), while 13% of them have at least 15% of minority directors.

Pearson's correlation coefficient, also known as the linear correlation coefficient, is also particularly significant in assessing the relationship between the distribution of dividends and (1) independent directors (= 1, if more than one third of the directors are independent); (2) minority-appointed independent directors (= 1, if the independent minority-appointed directors are more than 15%); (3) cash flow deriving

135. See *infra* Appendix – Table 1.

136. See *infra* Appendix – Table 2.

137. See *infra* Appendix – Table 3.

from operations over total assets; (4) CEO duality (= 1, if the CEO is also the Chairman of the board at the time of the payment of the dividend payout); (5) ROA (average annual return on total assets calculated as net income on total assets); (6) negative earnings (= 1, if earnings are negative).<sup>138</sup> A positive correlation exists in connection to independent minority directors, cash flow, and ROA, while a negative one exists in connection to the presence of independent directors, CEO duality, and negative earnings. Therefore, not only is the distribution of dividends more efficient with independent directors, but it is even more efficient with minority-appointed independent directors. This is neither obvious nor intuitive, but relevant. Finally, correlation with the financial variables is in line with the initial assumptions. Additionally, regarding the CEO duality (i.e. that it is negatively linked to dividends), the research once more suggests that the same person should not be both the CEO and the Chairperson.<sup>139</sup>

The tables below show the results of the regression, obtained by investigating the effect of independent directors and independent minority directors (Table 1) on the number of dividends paid. As anticipated, the two models (Column 1 and 2) differ in their assessment of industrial sectors and time period, the effects of which are only considered in Column 2.

Reading the coefficients of the regression model, it is clear that a high percentage of independent directors does not increase the value of dividends, even when taking into account the industrial segment and the period of time under examination. As to the effect of the independent minority directors, since results are meaningful when the level of trust or confidence is 95%, a large presence of minority directors does have a positive impact on dividend distribution, and, thus, on all shareholders.

Then, the regression also known as logit regression (Table 2) verifies whether the presence of independent minority directors increases the likelihood of distributing dividends, in terms of amount and frequency, with a dummy variable (= 1) if the dividend is paid. In particular, the coefficient is specified in Column 1, while the probability is specified in Column 2. The dummy variable relating to independent minority-appointed directors shows a remarkable positive correlation between the

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138. See *infra* Appendix – Table 4.

139. See Yarram & Dollery, *supra* note 115, at 268-69, 272 (distinguishing the empirical impact of CEO duality according to the stewardship theory and the agency theory).



probability of payment of dividends and independent minority-appointed directors in the boardroom.

The robust findings are also evaluated in light of the ownership structure through the examination of the “close” variable (the percentage of shares held by large investors in the year of the event). In the absence of a precise value of the variable above, its mean was calculated over the 2005-2015 time period, so that the average concentration value was determined for each company, and the value assumed by the central statistical unit was compared to distribution, thus computing the median.

After estimating the median of the value assumed by the central statistical units compared to distribution (55.64%), the impact of the presence of independent minority directors above and below this threshold was analyzed. The positive effect, assessed in relation to the fact that they distribute more dividends to minorities, appears more evident in concentrated ownership, while it is less significant, although still positive, in widespread ownership structures.<sup>140</sup> All of this data suggests that list voting makes more sense in the former environment, but list voting is an indicator—although, not necessarily the best—of agency costs. When looking at agency costs in both a dispersed ownership system and a concentrated ownership system, it is evident that, as to the former, (1) managers retain liquidity, (2) the actual conflict is between managers and owners, and (3) dividend payouts are really important because paying out more dividends means less cash for managers to divert. As to the latter, (1) owners force the company into party transactions to strip capital from minority owners, (2) the real conflict regards majority versus minority owners, and (3) dividend payouts matter less than related-party transactions.

Other relevant legitimate factors must be considered as well, namely: (1) the frequency of M&A activities, (2) leverage, and (3) the amount of Research and Development (R&D) and Sales. The results are not statistically significant, although the regression confirms that all outcomes are slightly positive in widespread ownership structures.

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140. Accounting for fixed effects would sensibly decrease the degrees of freedom to estimate the regression. In other words, it would (negatively) impact the degrees of freedom, thus impacting the difference between the number of observations and the number of variables in the model. Including firm fixed effects would certainly be preferable for a larger number of companies, but it would not be suitable in the case at hand.

As far as M&A activities are concerned, the outcome corroborates the findings of a recent U.S. study, which references 1,596 acquisitions between 2009 and 2013, and assesses how board independence, but also CEO duality and CEO compensation, positively influence the performance of mergers and acquisitions.<sup>141</sup>

As to the R&D activity, the result is certainly in line with the agency and resource dependence theories, which already predict a positive influence of the “independent director ratio on the financial slack-R&D investment relationship.”<sup>142</sup> Recent literature confirms the existence of a noticeable effect of sound governance, implicating independent administrators with regard to investment in innovation and innovation productivity. This effect can be attributed to a “quasi-natural experiment” on a sample of over 10,000 observations related to U.S. listed companies from 1996 to 2009, which included the shock effect of Sarbanes-Oxley.<sup>143</sup> R&D/Sales activities are also consistently used as proxies in the literature. Companies that heavily invest in development and innovation benefit most from the presence of a staggered board.<sup>144</sup> Additionally, the changes in governance arrangements are considerably more linked to changes in value for companies with a large customer.<sup>145</sup> With regard to a geographically different area (in this case, Taiwan), the idea that

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141. Emanuele Teti, Alberto Dell’Acqua, Leonardo Etro & Michele Volpe, *The Impact of Board Independency, CEO Duality and CEO Fixed Compensation on M&A Performance*, 17 CORP. GOV: INT’L J. BUS. SOC’Y 947, 947 (2017).

142. A. S. Ashwin, Rishikesh T. Krishnan & Rejie George, *Board Characteristics, Financial Slack and R&D Investments*, 46 INT’L STUD. MGMT. & ORG. 8, 8 (2016).

143. Pornsit Jiraporn, Sang Mook Lee, Kuen Jae Park & HakJoon Song, *How Do Independent Directors Influence Innovation Productivity? A Quasi-Natural Experiment*, 25 APPLIED ECON. LETTERS 435 (2018); see also Donald E. Bowen III, *Were Non-Independent Boards Really Captured Before SOX?* 4 (July 3, 2017) (on file with author) [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2979598](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2979598) [<https://perma.cc/GSL2-VMX4>] (“greater monitoring should discourage acquisitions with agency conflicts and opaque R&D, while reduced firm-specific knowledge makes it harder for the board to evaluate intangible and risky investments like R&D”).

144. K.J. Martijn Cremers & Simone M. Sepe, *The Shareholder Value of Empowered Boards*, 68 STAN. L. REV. 67, 128 (2016).

145. K.J. Martijn Cremers, Saura Masconale & Simone M. Sepe, *Commitment and Entrenchment in Corporate Governance*, 110 NW. U. L. REV. 727, 781-82 (2016) (defining Large Customer as “at least on customer accounting for 10% or more of [the company’s] sales”). On the determinants of R&D, see Edwin Mansfield, *R&D and Innovation: Some Empirical Findings*, in R&D, PATENTS, AND PRODUCTIVITY 127, 128-29 (Zvi Griliches ed., 1984).

independent choices can affect managerial decisions is confirmed: “firms competing on innovation through R&D investment may consider giving considerable weight to the nomination of more independent directors to the board.”<sup>146</sup>

**Table 1:** Effect on the distribution of dividends of the independent directors taken from the list submitted by majority shareholders compared to the list presented by minority shareholders.

VARIABLES	(1)	(2)	(3)	(4)
	DIVIDEND PAYOUT (on annual sales)			
DUMMY_ INDEPENDENT DIRECTORS	-0.08*	-0.008**	0.026**	0.018*
	(-1.86)	(-2.29)	(2.07)	(1.80)
CASH FLOW (OPERATIONS OVER TOTAL ASSETS)	0.033	0.059***	0.022	0.053***
	(1.59)	(3.32)	(1.24)	(3.01)
ROA	0.001***	0.001***	0.001***	0.001***
	(2.86)	(3.31)	(2.94)	(3.16)
CEO DUALITY	-0.011***	-0.006	-0.008**	-0.004
	(-2.72)	(-1.57)	(-2.09)	(-1.10)
NEGATIVE EARNINGS	-0.019***	-0.011***	-0.018***	-0.011***
	(-4.69)	(-3.77)	(-4.47)	(-3.81)
INDUSTRY FIXED EFFECTS	NO	YES	NO	YES
YEAR FIXED EFFECTS	NO	YES	NO	YES
CONSTANT	0.036***	0.052***	0.027***	0.042***
	(6.11)	(8.08)	(5.74)	(6.97)
Observations	1,260	1,260	1,260	1,260
R-squared	0.1416	0.2987	0.1798	0.3047

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146. Hsiang-Lan Chen, *CEO Tenure, Independent Directors and Corporate Innovation*, 3 J. APPLIED FIN. & BANK. 187, 187 (2013).

Adj. R-squared	0.1382	0.2715	0.1766	0.2778
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\*\*\* *significance at the 1% level, \*\* at the 5% level and \* at 10% level.*  
*Robust z-statistics in parentheses.*

**Table 2:** Results of the logit regression, considering the effect of independent directors taken from the minority shareholders’ list.

VARIABLES	(1)	(2)
	DEP. VAR. _DIVIDEND PAYOUT	
DUMMY_ MINORITY_ INDEPENDENT DIRECTORS	1.135***	0.239***
	(2.86)	(2.89)
CASH FLOW (OPERATIONS OVER TOTAL ASSETS)	4.126*	0.867*
	(1.79)	(1.79)
ROA	0.157***	0.033***
	(3.93)	(3.85)
CEO DUALITY	-0.749***	-0.157***
	(-2.87)	(-2.90)
NEGATIVE EARNINGS	-2.262***	-0.475***
	(-7.94)	(-7.83)
INDUSTRY	YES	YES
YEAR	YES	YES
CONSTANT	16.014***	
	(19.93)	
Observations	1,190	1,190
Pseudo r-squared	0.4227	

\*\*\* *significance at the 1% level, \*\* at the 5% level and \* at 10% level.*  
*Robust z-statistics in parentheses.*

**Table 3:** Ownership effect—concentrated versus widespread ownership structures.

VARIABLES	(1)	(2)	(3)	(4)
	PAY OUT	PAY OUT	PAY OUT	PAY OUT
	Coeff	Coeff	Coeff	Coeff
	(t-stat)	(t-stat)	(t-stat)	(t-stat)
LOT_INDEP	-0.003	-0.004		
	(-0.94)	(-1.56)		
LOT_MIN_INDEP			0.024**	0.022***
			(2.29)	(2.79)
CFO_TA	0.021	0.050***	0.016	0.041**
	(0.96)	(2.63)	(0.79)	(2.22)
ROA	0.001***	0.001***	0.001***	0.001***
	(2.83)	(3.17)	(3.36)	(2.95)
CEO_PRESIDENT	-0.008*	-0.007*	-0.006	-0.006*
	(-1.90)	(-1.86)	(-1.43)	(-1.70)
LOSS	-0.014***	-0.009**	-0.012***	-0.008**
	(-3.06)	(-2.10)	(-2.61)	(-2.28)
NUMBER_M&A				-0.000
				(-0.42)
LEVERAGE				-0.013
				(-0.69)
R&D				-0.047
				(-1.30)
CONSTANT	0.028***	0.050***	0.023***	0.048***
	(6.91)	(10.43)	(4.97)	(11.44)
INDUSTRY & YEAR F.E	NO	YES	NO	YES
Observations	690	690	690	690
Adj. R-squared	14.4%	30.3%	18.9%	33.3%

\*\*\* *significance at the 1% level, \*\* at the 5% level and \* at 10% level.*

*Robust z-statistics in parentheses.*

VARIABLES	(1)	(2)	(3)	(4)
	PAY OUT	PAY OUT	PAY OUT	PAY OUT
	Coeff	Coeff	Coeff	Coeff
	(t-stat)	(t-stat)	(t-stat)	(t-stat)
LOT_INDEP	-0.015*	-0.011**		
	(-1.88)	(-2.30)		
LOT_MIN_IN DEP			0.027	0.011
			(1.59)	(0.97)
CFO_TA	0.058	0.063	0.034	0.030
	(1.28)	(1.52)	(1.00)	(1.25)
ROA	0.000*	0.000	0.000*	0.001
	(1.66)	(1.26)	(1.87)	(1.61)
CEO_PRESID ENT	-0.016***	-0.002	-0.011**	0.003
	(-2.69)	(-0.46)	(-2.18)	(0.83)
LOSS	-0.025***	-0.020***	-0.026***	-0.018***
	(-4.87)	(-3.86)	(-4.87)	(-4.06)
NUMBER_M &A				0.001
				(0.735)
LEVERAGE				0.045*
				(1.80)
R&D				0.000
				(0.08)
CONSTANT	0.045***	0.040***	0.031***	0.014
	(4.60)	(5.77)	(4.92)	(1.53)
INDUSTRY & YEAR F.E	NO	YES	NO	YES
Observations	570	570	570	570
Adj. R- squared	15.0%	32.3%	17.4%	33.3%

\*\*\* *significance at the 1% level, \*\* at the 5% level and \* at 10% level.*  
*Robust z-statistics in parentheses.*

## F. LIST VOTING'S EMPIRICAL LESSON

In light of the literature reviewed above, this research investigates the impact of independent and minority-appointed directors on the distribution of dividends. Among the 273 Italian listed corporations in the period spanning from 2005 to 2015, there were 2,442 directors,<sup>147</sup> including those elected from a minority list, who then moved to the majority side, or vice versa.<sup>148</sup>

Overall, the findings partly confirm the starting assumptions. Contrary to what was predicted, the observations indicate that a significant number of independent directors in the boardroom (at least one-third of them) may reduce the dividend payout ratio, suggesting a negative impact on equity profitability. The study reaffirms the value of independent minority-appointed directors that, if equal to at least 15% of the board, affect dividend policies.<sup>149</sup>

At first glance, readers may be inclined to believe that there is no need for EI Directors, given the little differences among directors.<sup>150</sup> On closer inspection, however, it becomes clear that independent minority directors can exert influence on dividend payments and increase the likelihood of their distributions. The amount, as well as the probability of their distribution, increases in presence of independent minority-appointed directors, suggesting that data would answer the initial question positively. This effect is not limited to closely-held ownership structures, even if it makes more sense in that context.<sup>151</sup>

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147. Among them, 372 have been elected by minority shareholders and 2,070 by majority shareholders.

148. Without counting these shifts, the total amount of directors would have been 2,311 board members.

149. Results are in line with Hu and Kumar, *supra* note 112, at 773 (finding that board independence increases the dividend payout only if it exceeds 40%).

150. Directors appointed by majority shareholders are 57.6 years old (median = 57, min = 26.5, max = 91) and are part of 1.25 boards on average (median = 1, min = 1, max = 5), whereas directors appointed by minority shareholders are 57.42 years old (median = 58, min = 26.5, max = 81) and are part of 1.25 boards on average (median = 1, min = 1, max = 3). The former presents slightly more women (19% v. 14%). The latter are normally paid a little bit more, which is 61.654 € per year on average (median 45.084, min = 0, max 160.000) versus 58.117 € per year on average (median = 33.789, min = 0, max 180.000).

151. Cf. Maribel Sáez & María Gutiérrez, *Dividend Policy with Controlling Shareholders*, 16 THEORETICAL INQUIRIES L. 107, 127–29 (2015).



While board characteristics have no influence on the decision to pay dividends, they have a significant influence on their magnitude. Directors' independence, and the subsequent enhancement of effective board functioning, matters because it permits them to (1) continuously and effectively monitor corporate performances, requiring from them a remarkable time commitment and implying a limit on the number of board seats held; (2) cater to the needs of different investor groups; (3) determine the best interest of firms to pay dividends, signaling bright prospects when firms have promising projects in the pipeline; and (4) encourage firms to pay dividends when they are saddled with high free cash flow levels. As a result, it would seem that they are more willing to pay higher dividends, encouraging companies to raise money for future plans through capital markets. Minority-appointed directors can complement the role of dividends in the governance of a corporation, prevent managers from gaining personal benefit, and, at the same time, build their reputation by paying high dividends.

Interpreting these results, corporate players may come to conclusions we can offer from profiling the playing patterns of the most empirically effective contestants in the dividend distribution competition. Investors may finance firms that pay higher dividends and have more independent boards as a way to reduce agency cost. Corporations, therefore, may opt for paying higher dividends and increasing the number of independent directors in the boardroom to show their quality to the market. The results could also lead policy makers and regulators to require boards comprised of EI Directors and recommend that they pursue efficient policies, encouraging investments and economic growth.

### CONCLUSION

In conclusion, both *de iure condito* and *de lege ferenda*, we may paraphrase an expression used by the colonists just before the American Revolution: no participation without representation. Of course, corporations' problems cannot be resolved completely by appointing board members taken from the minority lists—that therefore cannot be described as a real panacea. Even if the differences among independent directors taken from the list submitted by the majority or the minority of shareholders are not that sharp in terms of age, remuneration, gender, or education, we can, looking at the results, undoubtedly state that list voting could travel and be effective even beyond Italian borders. This would lead to positive results in terms of dividend payments.

Nevertheless, there is a need to determine clear and unambiguous rules of play which frame the presentation of slates. The regulation needs to be improved, leading to systematic reflections, and to an open and constant dialogue, as demonstrated by the “Enriques-Zingales v. Marchetti-Ventoruzzo” debate.<sup>152</sup> On the one hand, scholars suggest that a binding re-deliberation of legislation would not only eliminate certain provisions, such as the inefficient double definition of independence, but also correct legislative aporias.<sup>153</sup> On the other hand, empirical evidence reinforces the belief that a large number of independent directors could only be beneficial to the corporation.

In order to evaluate whether the Italian technique can really “travel,” it would be crucial to also study the findings in the context of widely-held corporations in the United States, subject to a caveat. We should caution against drawing “overly strong conclusions from comparative data alone.”<sup>154</sup> The Italian example preserves its uniqueness, at least with regard to the technical solution it offers, although the U.S. system is apparently capable of aligning itself without difficulty with the Italian approach, which is mindful towards institutional investors, with the concrete involvement of the Council of Institutional Investors (CII). The CII, founded in 1985 with the goal of empowering institutional investors use their proxy power to hold public companies accountable, may play a similar role to that of Assogestioni.<sup>155</sup> Like the Assogestioni, the CII is a non-profit association that promotes the interests of institutional investors in the United States and aimed to educate its members, policy makers, and the public on corporate governance, shareholder rights, and related

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152. See generally Enriques & Zingales, *supra* note 60; Piergaetano Marchetti & Marco Ventoruzzo, *Ecco come si può rafforzare il voto di lista*, IL SOLE 24 ORE 1186 (2015) (It.).

153. Maria S. Richter Jr., *Appunti Sulla Evoluzione della Disciplina dell'Amministrazione delle Società Quotate e Sulle sue Prospettive di Riforma*, in ATTI DEI SEMINARI CELEBRATIVI PER I 40 ANNI DALL'ISTITUZIONE DELLA COMMISSIONE NAZIONALE PER LE SOCIETÀ E LA BORSA, 69, 75-76 (G. Mollo ed., 2015) (It.).

154. Holger Spamann, *Empirical Comparative Law*, 11 ANN. REV. L. & SOC. SCI. 131, 148 (2015).

155. About Us-History, COUNCIL OF INSTITUTIONAL INVESTORS (2018), [https://www.cii.org/cii\\_history](https://www.cii.org/cii_history) [https://perma.cc/8R9A-SPGN].

investment issues. By 2015, the CII already supported proxy access in the United States.<sup>156</sup>

There is a need for EI Directors. It seems appropriate to call for an increase in the number of independent directors, particularly in the case of (although undesirable) larger boards, where the applicable legal provisions do not appear to be sufficiently protective.

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156. Council of Institutional Investors, *Proxy Access: Best Practices 2* (2015), [http://www.cii.org/files/publications/misc/08\\_05\\_15\\_Best%20Practices%20-%20Proxy%20Access.pdf](http://www.cii.org/files/publications/misc/08_05_15_Best%20Practices%20-%20Proxy%20Access.pdf) [https://perma.cc/3KY7-XFC2] (describing proxy access as “a fundamental right of long-term shareowners.”).

**APPENDIX**

**Table A.1:** Distribution of the sampled companies (industry).

	<i>Obs.</i>	%
Aerospace & Defense	11	0.87
Automobiles & Parts	73	5.79
Banks	250	19.84
Beverages	12	0.95
Chemicals	21	1.67
Construction & Materials	119	9.44
Electricity	65	5.16
Electronic & Electrical Equipment	73	5.79
Financial Services (Sector)	64	5.08
Fixed Line Telecommunications	20	1.59
Food & Drug Retailers	15	1.19
Food Producers	43	3.41
Gas, Water & Multiutilities	53	4.21
General Industrials	39	3.1
General Retailers	35	2.78
Health Care Equipment & Services	17	1.35
Household Goods & Home Construction	60	4.76
Industrial Engineering	55	4.37
Industrial Metals & Mining	8	0.63
Industrial Transportation	10	0.79
Leisure Goods	8	0.63
Media	28	2.22
Mobile Telecommunications	10	0.79
Nonlife Insurance	1	0.08
Oil & Gas Producers	3	0.24
Oil Equipment & Services	7	0.56
Personal Goods	44	3.49
Pharmaceuticals & Biotechnology	13	1.03
Real Estate Investment & Services	7	0.56
Software & Computer Services	47	3.73
Support Services	20	1.59

Technology Hardware & Equipment	20	1.59
Travel & Leisure	9	0.71
<i>Total</i>	<i>1.260</i>	<i>100</i>

**Table A.2:** Distribution of observations in the period 2005-2015

<i>Year</i>	<i>Obs.</i>	<i>%</i>
2005	100	7.94
2006	102	8.1
2007	113	8.97
2008	108	8.57
2009	107	8.49
2010	115	9.13
2011	110	8.73
2012	130	10.32
2013	135	10.71
2014	125	9.92
2015	115	9.13
<i>Total</i>	<i>1.260</i>	<i>100</i>

**Table A.3:** Descriptive Statistics

<b>Variable</b>	<b>Mean</b>	<b>SD</b>	<b>P5</b>	<b>P25</b>	<b>Median</b>	<b>P75</b>	<b>P95</b>
DIVIDEND PAYOUT (on annual sales)	0.02	0.04	0	0	0.01	0.03	0.09
DUMMY_ INDEPENDENT DIRECTORS	0.59	0.49	0	0	1	1	1
DUMMY_MIN ORITY_ INDEPENDENT DIRECTORS	0.13	0.33	0	0	0	0	1
CASH FLOW (operations over total assets)	0.04	0.06	-0.05	0.01	0.04	0.08	0.14

ROA	1.75	6.18	-8.58	0.3	1.62	4.55	11.07
CEO DUALITY	0.41	0.49	0	0	0	1	1
NEGATIVE EARNINGS	0.28	0.45	0	0	0	1	1
# Obs = 1260							

Table A.4: Pearson correlation coefficient

	DIVIDEN D PAYOUT (on annual sales)	INDEP DIRECTO RS	MINORITY _INDEP DIRECTO RS	CASH FLOW (over total assets)	ROA	CEO DUALITY	NEGATIV E EARNIN GS
DIVIDEND PAYOUT (on annual sales)	1						
DUMMY _ INDEP DIRECTORS	-0.1158***	1					
DUMMY_M INORITY_I NDEP DIRECTORS	0.263***	0.0182	1				
CASH FLOW (over total assets)	0.1797***	-0.0259	0.0545**	1			
ROA	0.2684***	-0.0838***	0.0285	0.5694***	1		
CEO DUALITY	-0.1581***	-0.0726***	-0.1718***	0.0562*	0.0249	1	
NEGATIVE EARNINGS	-0.3255***	0.0861***	-0.0869***	-0.3467***	-0.6194***	0.1213***	1

\*\*\* significance at the 1% level, \*\* at the 5% level and \* at 10% level.