Michigan Business & Entrepreneurial Law Review

Volume 8 | Issue 2

2019

Should Shareholders Be Rewarded for Loyalty? European Experiments on the Wedge Between Tenured Voting and Takeover Law

Chiara Mosca
Università Bocconi

SHOULD SHAREHOLDERS BE REWARDED FOR LOYALTY? EUROPEAN EXPERIMENTS ON THE WEDGE BETWEEN TENURED VOTING AND TAKEOVER LAW

*by Chiara Mosca**

ABSTRACT

Corporate law reveals its democratic background when it comes to the general meetings of shareholders, finding, on both sides of the Atlantic, its most tangible expression in the "one share, one vote" principle. While, in the political landscape, the "one person, one vote" standard is absolute dogma and weighting votes according to people's preferences and interests has never proved feasible, in the corporate scenario the one share, one vote principle is constantly challenged by the incentives of companies and their shareholders to shape corporate rights according to specific needs. In this respect, some legislators (specifically in France and Italy) have provided mechanisms that allow more loyal shareholders to increase their voting power. Tenured voting (or time-phased voting rights) should be analyzed in light of the modern corporate governance debate, which calls for a stronger role for long-term investors. However, the other side of the coin should be considered: the increase in voting rights broadens the range of control-enhancing mechanisms, although specific sunset clauses (whether provided for by law or voluntarily opted in by companies) may restore the one share, one vote rule. The analysis suggests that the mechanism based on tenured voting is more transparent and potentially less stable than other common control-enhancing mechanisms and deserves to be considered in the debate. At the EU level, the possibility left to the Member States of weighting shareholders' voting power according to their long-term interests, leads to legislative fragmentation across Europe. Specifically, in Italy, the adoption of tenured voting coupled with a tradition of ownership concentration sharply empowers controlling shareholders. At the same time, European takeover regulation plays an exogenous role in indirectly selecting the companies that adopt time-phased voting rights. The final result is completely mistrusted, as tenured voting rights disappoint their expectations and are rarely used to meet a true need of long termism. The paper describes the paradox that emerges when tenured voting rights interact with the core principles of the EU financial market law system, and it offers various ways to alleviate this difficult coexistence.

---

* Assistant Professor of Corporate Law, Università Bocconi, Milano, Italy.

TABLE OF CONTENTS

*** ***

I. LOYAL SHAREHOLDERS AND LONG-TERMISM

A. *Introduction*

In the financial literature developed after the financial crisis of 2007–2009, loyal shareholders emerged as a possible instrument to mitigate the growing tendency toward short-termism by company directors. In the most pessimistic view, management decisions influenced by a short horizon were considered highly destructive, due to the excessive focus by directors of publicly-listed companies on quarterly earnings and share prices as performance benchmarks.

It is widely recognized that while stock markets place short-term pressure on corporate executives, firms should not neglect investment opportunities, innovation, and long-term planning.[1]

Excessive attention on short-term goals (i.e. short-termism) is unrelated to how efficiently companies are governed.[2] Efficient corporate governance is consistent with positive short-term results, especially if directors respond to the short-term attitude of shareholders themselves. Conversely, loyal shareholders are shareholders who are more concerned with the firm's long-term fundamental value than with share prices. It is often assumed that loyal shareholders are "buy-and-hold" investors who generally—but not necessarily—engage with the management of the company. Their loyalty therefore corresponds to their plan to hold shares for a prolonged period of time, even if market prices deviate from the firm's long-term fundamental value.

If we consider shareholders' investment duration the most immediate measure of their loyalty, two mechanisms may reinforce the tendency of shareholders to maintain their shares longer. The first involves a financial advantage for loyal shareholders. The second leverages the extra power that can be granted to shareholders in terms of increased voting rights. Although in theory a wide range of solutions is available, and the two loyalty privileges can be combined in the same financial instrument, their different natures suggest separate analyses.

In this regard, the array of financial benefits for loyal shareholders can be structured in several ways, such as equity warrants or loyalty shares (the latter, in this context, meaning shares allotted as a benefit to long-term investors), or a richer distribution of dividends. Increased dividends, in particular, are neutral from the companies' capital structure viewpoint; they involve the inclusion in the company's articles of association of an opt-in clause for a surplus in the distribution of dividends to shareholders who maintain their shares for a defined period.[3] However, despite being adopted by various jurisdictions—in France in 1994 and Italy in 2010—companies have rarely used this *dividend majoré*. Beyond the many ambiguities in the country-specific provisions, especially with regard to the conditions that shareholders must fulfill to receive additional dividends,[4] its low overall adoption[5] seems to indicate that long-termism cannot be

1. *See* Patrick Bolton & Frédéric Samama, *Loyalty-Shares: Rewarding Long-Term Investors*, 25 J. APP. CORP. FIN., 38, 40 (2013); P. Alexander Quinby, *Addressing Corporate Short-Termism Through Loyalty Shares*, 40 FLA. ST. U. L. REV. 389, 396 (2013); Mark J. Roe, *Corporate Short-Termism—In the Boardroom and in the Courtroom*, 68 Bus. Law. 977, 979 (2013).

2. *See* Bolton & Samama, *supra* note 1, at 38.

3. *See*, *e.g*., M.L. Lennarts & M.S. Koppert-van Breek, *Loyalty Dividend and the EC Principle of Equal Treatment of Shareholders*, 5 EUR. COMPANY L. 173, 174 (2008).

4. According to Art.127-*quater* of the Decreto Legislativo 24 febbraio 1998, n. 58, in G.U. 26 marzo 1998, n.71 and subsequent amendments (also known as Testo Unico della Finanza)(hereinafter the "Consolidated Law on Finance"), only 'minority' shareholders—namely, those who cannot exercise any significant influence over the company's management (a situation that is not always easy to ascertain)—and shareholders who do not confer their shares to a shareholders'

easily achieved by promising a long-term financial advantage when short-term trading opportunities are much more attractive to investors.[6]

The article will focus on the second loyalty incentive—an additional privilege to increase the voting power of long-term shareholders. The freedom of companies to implement this mechanism varies widely from one legal system to another, due to different approaches to dual-class shares that entitle shareholders to exercise multiple voting rights. Companies' ability to offer this incentive also depends on the extent to which national jurisdictions allow deviations from the "one share, one vote" principle. The economic literature has traditionally mistrusted any excessive disproportion of cash flows and control rights that exacerbates the incentives for controlling shareholders to extract private benefits from the company, to the detriment of other shareholders.[7]

Tenured voting rights—in particular, those that give the owner the right to mature time-phased voting rights—belong to this strand of reasoning, and their specific characteristics will ground this discussion. They reward shareholders with increased voting rights if they continuously hold their shares for a defined period.

In several jurisdictions, time-phased voting rights are not fantasy. Under US state law they are generally considered permissible if they are spelled out in companies' charters, and despite the Securities and Exchange Commission's traditional resistance toward multiple-voting structures, tenured voting is a reality for some public companies.[8] For non-public companies and companies about to go public, multiple voting securities and tenured voting are viable tools in the United States, but the NYSE prohibits listed companies from adopting these mechanisms once the company has issued stock with a certain package of voting rights. That said, the NYSE has allowed some exceptions that may im-

agreement—are entitled to receive additional loyalty dividends, corresponding to a 10% surplus if they retain their shares for a period of not less than one year, when the articles of association so provide. Moreover, the shares that can be entitled to the loyalty dividend cannot exceed 0.5% of the share capital for the shareholder entitled to the extra dividend. This limitation, which is provided also by Art. L. 232-14 of the French *Code de Commerce*, reflects the lawmaker's concern for a too-extensive derogation of the equality principle of shareholders, but it also implies a potential reverse effect on long-termism, since shareholders may decide to disinvest their holding exceeding the 0.5% that cannot receive the increased dividends (Richard Routier, *Primes de fidélité: le revers de la médaille*?, *Bulletin Joly Sociétés*1996, 23 § 3 and § 15).

5. Jeroen Delvoie & Carl Clottens, *Accountability and Short-Termism: Some Notes on Loyalty Shares*, 9 LAW & FIN. MARKETS REV. L., 19*,* 20 (2005); *see generally* Mario Stella Richter Jr., *I Troppi Problemi del Dividendo Maggiorato*, RIVISTA DEL DIRITTO COMMERCIALE E DEL GENERALE DELLE OBBLIGAZIONI, I 89 (2011) (It.).

6. *See* Lennarts & Koppert-van Breek, *supra* note 3, at 175, 179.

7. Ronald J. Gilson, *Controlling Shareholders and Corporate Governance: Complicating the Comparative Taxonomy*, 119 HARV. L. REV. 1641, 1648 (2006).

8. *See* COUNCIL OF INSTITUTIONAL INV'RS, *Dual-Class Stock*, www.cii.org/dualclass_stock (last visited Mar. 25, 2019); *see also* Lynne L. Dallas & Jordan Barry, *Long-Term Shareholders and Time-Phased Voting*, 40 DEL. J. CORP. L. 541, 548, 552 (2016).

pact stockholder voting rights if it finds that such actions have a "reasonable business justification."[9]

Italy and France have adopted tenured voting rights at the legislative level as regulatory tools to invite listed companies to find a contractual solution in the search for long-termism. Unlike the United States, where there is no limit to the time-weighing multiplier of the increase in voting rights, legislative reforms in Europe, including the recent review of Belgian company law (see *infra* Part I(5)), reward loyal shareholders of listed companies with no more than double voting rights. This privilege does not require any alteration in the capital structure of the company and takes the form of an individual advantage granted to long-term shareholders.

The focus on long-termism, as the ultimate goal pursued in both Italy and France, should not overshadow the fact that tenured voting rights represent control-enhancing mechanisms (CEMs). Like dual-class shares, these mechanisms grant extra voting power to the controlling shareholder. However, unlike from dual-class shares, the increase in voting rights dissolves if corporate control changes. Loyalty, in other words, is still a personal characteristic of the shareholder, and the voting rights that have increased accordingly cannot be passed on to less loyal third parties.

The analysis of this loyalty-enhancing tool is divided into three parts. Part I describes the legislative choices made in Italy, France, and Belgium, and elaborates the theoretical debate on the pros and cons of time-phased voting rights. Part II provides evidence in the form of empirical analysis. It helps to classify the Italian listed companies that have adopted a provision allowing long-term shareholders to obtain additional voting rights, and to verify the distribution of ownership and voting rights after maturity. The empirical exercise analyzed directors' pre-general meeting proposals, the articles of association of Italian companies, and the publicly available sections of the companies' registers in which tenured voting rights are recorded. It identifies common traits in the decision-making process to adopt tenured voting rights, and the typology of shareholders who welcomed the introduction of this loyalty-enhancing mechanism. Part III highlights the interference between this loyalty-enhancing mechanism and takeover law. The mandatory offer—a special feature of European law that

---

9. *See* Tamara C. Belinfanti, *Shareholder Cultivation and New Governance*, 38 DEL. J. CORP. L. 789, 833 (2014). On the historical reconstruction of the SEC's failed attempt to render a multiple-voting structure unsuitable for publicly traded companies; *see generally* Stephen M. Bainbridge, *The Short Life and Resurrection of SEC Rule 19C-4*, 69 WASH. UNIV. L. Q. 565 (1991); David J. Berger, Steven Davidoff Solomon & Aaron Benjamin, *Tenure Voting and the US Public Company*, 72 BUS. LAW. 295, 304 (2017); Jesse M. Fried, *The Uneasy Case for Favoring Long-Term Shareholders*, 124 YALE L. J. 1554, 1572 (2015); Grant M. Hayden & Matthew T. Bodie, *One Share, One Vote and the False Promise of Shareholder Homogeneity*, 30 CARDOZO L. REV. 445, 481 (2008); Edward B. Rock, *Shareholder Eugenics in the Public Corporation*, 97 CORNELL L. REV. 849, 903 (2012); Paul H. Edelman, Wei Jiang & Randall S. Thomas, Will Tenure Voting Give Corporate Managers Lifetime Tenure? 1, 11 (January 16, 2018) (unpublished manuscript) (ECGI Law Working Paper No. 348/2018, available at ssrn.com/abstract=3107225).

has no equivalent in the United States—operates as an exogenous constraint that represents the only concrete hindrance to disproportionate cash flows and voting rights. The current choice made by Italy to extend the existing mandatory offer rule to tenured voting is inconsistent with the premise that loyalty voting rights should increase shareholders' participation in the life of the company. The conclusion will draw attention to the urgent need to rethink the relationship between takeover law and tenured voting, moving toward less fragmentation across Europe. More reflection is needed at the European level, on specific rules applicable when, within the framework of the Takeover Directive,[10] the reaction to a large increase in voting rights is in the mandatory offer obligation.

B. *How Tenured Voting Impacts the Principles of Equal Treatment of Shareholders and "One Share, One Vote"*

Although it is a dominant principle in several jurisdictions, one share, one vote is not an entrenched rule. Not only are various approaches available for companies to alter the relationship between ownership and control (such as pyramid structures, cross-shareholdings, shareholders' agreements, and voting-right ceilings), but in many European Union Member States (Member States) different classes of shares are permitted, thus allowing companies to issue shares with limited or no voting rights.[11]

It is therefore surprising that, even where dual-class shares have historically been used, there has been much more discussion on the limits and the eligibility of shares with multiple voting rights. A possible explanation for this strong opposition lies in the observation—which seems to be contrary to any form of shareholder democracy[12]—that multiple voting rights shift the decision-making power within the (voting) shareholder group to a restricted fraction of powerful shareholders.

Quite often multiple voting securities are tightly linked to maintaining control by reducing the equity invested in the company. Agency costs, normally borne by shareholders to monitor managers, are amplified by the fact that placing multiple voting shares in the hands of a few powerful shareholders reduces transparency and increases the complexity of the principal-agent relationship.

---

10. Directive 2004/25 of the European Parliament and of the Council of 21 April 2004 on takeover bids, [hereinafter the Directive on Takeover Bids or Takeover Directive].

11. The complete array of control-enhancing mechanisms is listed in the internal study commissioned by the European Commission, 'Report on the Proportionality Principle in the European Union', (2006), https://ecgi.global/content/one-share-one-vote-2007; Simone Alvaro, Angela Ciavarella, Doina D'Eramo & Nadia Linciano, LA DEVIAZIONE DAL PRINCIPIO "UN'AZIONE-UN VOTO" E LE AZIONI A VOTO MULTIPLO. Quaderni giuridici, 30, 47 (Jan. 2014), http://www.consob.it/documents/11973/201676/qg5.pdf/a6a131f4-c307-404f-882d-e3dc1ab86c28.

12. *See* Arman Khachaturyan, *Trapped in Delusion: Democracy, Fairness and the One-Share-One-Vote Rule in the European Union*, 8 EUR. BUS. ORG. L. REV., 335, 337 (2007); *see also* David L. Ratner, *The Government of Business Corporation: Critical Reflections on the Rule of "One Share, One Vote"*, 56 CORNELL L. REV. 1, 23 (1970).

Minority shareholders have fewer instruments and bear a greater cost in monitoring those controlling shareholders who act as managers' allies.[13] Moreover, the ideal separation between active shareholders, who opt for high-voting shares, and passive ones, who settle for low-voting shares, is always highly theoretical, and does not reflect the real choices of investors.[14]

This last concern apparently dissolves when loyalty-enhancing mechanisms, as adopted in Italy and France, are considered. The reference to such instruments as "loyalty shares," despite its common use, is misleading. It is not necessary to issue a new class of shares; rather, all shareholders are equally granted as double voting rights as a premium for their long-term entitlement, irrespective of the number of shares those shareholders own. Any gain of voting right is therefore entirely forward-looking. Shareholders start with the "standard set" of rights, as spelled out in the company's articles of association, and only those who hold their shares for the period of maturity (or "loyalty period") are subject to an initial registration with double rights. Since these rights are not cemented into a specific class of securities,[15] it is preferable to refer to "tenured voting," or "time-phased voting," instead of "loyalty shares."

The potential availability of the loyalty reward to all shareholders should prevent any violation of the principle of equal treatment.[16] The principle laid out in Article 42 of the Second Council Directive[17] only requires that shareholders in *equal circumstances* be treated equally. The legislative reform in Italy allows companies to opt in for a reward mechanism that ultimately renders all shareholders eligible for bonus voting rights; conversely, in France listed companies can opt out of the default provision that enables all shareholders to mature similar bonus rights.[18] Hence, all shareholders who have held stock for the same amount of time are treated the same, the duration of individual share own-

13. Gilson, *supra* note 7, at 1651; Lucian A. Bebchuk & Michael S. Weisbach, *The State of Corporate Governance Research*, 23 REV. FIN. ST. 939, 948 (2010); John Armour, Henry Hansmann & Reiner Kraakman, 'Agency Problems and Legal Strategies', *in* THE ANATOMY OF CORPORATE LAW (Kraakman et al. eds.) 36, (2ed. 2009).

14. *See* Rock, *supra* note 9, at 901.

15. 2 MICHEL GERMAIN & VERONIQUE MAGNIER, *Les sociétés commerciales*, *in* TRAITE DE DROIT DES AFFAIRES 377 (21st ed. 2014). In France, however, after the maturity of double voting rights, the related shares are sometimes considered a separate class of shares. *See* Charles Goyet, Nicolas Rontchevsky & Michel Storck, *L'impact de la loi Florange sur le droit des offres publiques d'acquisition et les sociétés cotées françaises*, REVUE TRIMESTRELLE DE DROIT COMMERCIAL ET DE DROIT ECONOMIQUE 363, 367 (2014).

16. *Cf.* Berger et al., *supra* note 9, at 309, 311; Marco Lamandini, *Voto plurimo, tutela delle minoranze e offerte pubbliche di acquisto*, GIURISPRUDENZA COMMERCIALE, 491, 504-05 (2015).

17. The Second Council Directive 77/91/EEC of 13 December 1976, 1976 O.J. (L 26/1) has been repealed by Directive 2012/30/EU of the European Parliament and of the Council of 25 October 2012. *See* 2012 O.J. (L 315/74) (referring to the principle of equal treatment in Art. 46), recently replaced by the codification made by the Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017. *See* 2017 O.J. (L 169/46) (discussing certain aspects of company law and referring to "Equal treatment of all shareholders who are in the same position" in Art. 85).

18. GERMAIN & MAGNIER, *supra* note 15, at 377.

ership justifies unequal treatment in light of the decision to pursue long-termism as a specific company's interest.[19]

A different conclusion should be reached regarding the principle of one share, one vote. In the hypothetical situation in which all companies' shareholders maintain their investment for the loyalty period, all of them will be rewarded with double voting rights and thus tenured voting will have no effect on the distribution of power within the company. This scenario is unrealistic. Listed companies always need a liquid market for their securities, which are traded daily. This need makes it impossible for all shareholders to mature extra voting rights at the same time. The loyalty-enhancing mechanism should therefore be considered as a deviation from the principle of one share, one vote. Because of the potential on-going variability of the total voting rights of companies that have opted for these provisions, the concrete effect of the divergence in decision-making power and cash flows varies.[20]

In the European scenario, Italy and France have gone well beyond what was foreseen by the initiatives at the EU level. Belgium is following a similar path. Official documents date the Commission's interest in enhancing shareholder long-termism back to 2011, when the Reflection Group on the Future of EU Company Law recommended a clear framework for companies wishing to provide for preferential treatment for long-term shareholders that expressly considered increased voting rights or dividends. However, the documents that followed,[21] including the 2015 Shareholder Rights Directive, never met such expectations and, in line with the conclusion reached in the literature,[22] loyalty shares or similar loyalty-enhancing mechanisms have been left to Member States or companies themselves.

C. *Tenured Voting in Italy*

In Italy, where the ownership structure is traditionally concentrated, shares with limited voting rights have been historically allowed (within the limit of no more than half of the corporate capital), while shares with multiple voting rights were banned by a provision that specifically required that each share bear no more than one vote. This taboo suddenly disappeared in 2014 when Italy radi-

---

19. *See* Andrea Sacco Ginevri, *The Rise of Long-Term Minority Shareholders' Rights in Publicly Held Corporations and its Effect on Corporate Governance*, 12 EUR. BUS. ORG. L. REV. 587, 591, 615 (2011).

20. *See infra* Part III(3).

21. *Action Plan: European Company Law and Corporate Governance – a Modern Legal Framework for More Engaged Shareholders and Sustainable Companies*, COM (2012) 740 final (Dec. 12, 2012); *Commission Green Paper on Long-Term Financing of the European Economy*, COM (2013) 150 final (Mar. 25, 2013;by the Directive (EU) 2017/828, of the European Parliament and of the Council of 17 May 2017 Amending Directive 2007/36/EC as regards the Encouragement of Long-Term Shareholder Engagement (hereinafter Shareholder Rights Directive II).

22. *See* Delvoie, Clottens, *supra* note 5, at 24.

cally changed its approach toward multiple voting shares[23] as an immediate political reaction to the migration of Chrysler-Fiat from Italy to the Netherlands. The company cited the availability of multiple voting shares in the Netherlands as one of the key factors behind the decision.

The Italian Government invoked regulatory competition to avoid a trend of Italian companies moving abroad. Nonetheless, it is unlikely that the national adoption of multiple voting rights will also serve to attract foreign companies to reincorporate in Italy. Significant barriers still exist in Europe that minimize regulatory competition among jurisdictions and stock exchanges.[24]

Despite the friction with the traditional adherence to the one share, one vote principle, the need to participate in this regulatory competition[25] led to the unexpected withdrawal of the prohibition on issuing shares with more than one voting right, leaving room for the adoption of a twofold approach to multiple voting securities in unlisted and listed companies. Unlisted companies are now allowed to issue a specific class of shares that grants the owner the right to up to three voting rights (and to maintain those shares in case of listing), while time-phased voting rights have been specifically designed for companies whose securities are listed on a regulated market. Coexistence of the two mechanisms in listed companies is never permitted.[26]

The additional voting rights, granted as a premium for shareholder loyalty, are subject to a compulsory sunset clause that provides for their dissolution after the sale or donation of the underlying securities. Tenured voting rights always dissolve when the underlying shares are directly transferred within the group.[27] Italian law contains a strict provision, absent in French law, that nullifies additional voting rights in case of an indirect change in control of a shareholder who is entitled of double voting rights over a relevant threshold.[28]

Conversely, the transfer of shares in the event of succession is excluded from this clause (so tenured voting rights are transmissible to the descendants of

23. *See* Marco Ventoruzzo, *The Disappearing Taboo of Multiple Voting Shares: Regulatory Responses to the Migration of Chrysler-Fiat* 1–17 (European Corp. Gov't Inst. Working Paper No. 288, 2015), http://ssrn.com/abstract_id=2574236.

24. Augusto Santoro, Ciro Di Palma, Paolo Guarneri & Alessandro Capogrosso, *Deviation from the "one share—one vote" principle in Italy: recent developments—multiple voting rights shares and loyalty shares*, BOCCONI LEGAL PAPERS 141, 142 (2015); Delvoie & Clottens, *supra* note 5, at 19; for the historical perspective on multiple voting shares in Italy: Giulio Sandrelli e Marco Ventoruzzo, *Classes of shares and voting rights in the history of Italian corporate law*, in RESEARCH HANDBOOK ON THE HISTORY OF CORPORATE AND COMPANY LAW, Cheltenham-Northampton, (2018), 269–97, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2875724.

25. Piergaetano Marchetti, *Osservazioni e materiali sul voto maggiorato*, RIVISTA DELLE SOCIETÀ 448, 449 (2015); Ventoruzzo, *supra* note 24.

26. Consolidated Law on Finance, *supra* note 4, at Art. 127-sexies(2)(3).

27. Marchetti, *supra* note 25, at 456.

28. Consolidated Law on Finance, *supra* note 4, at Art. 127-quinquies(3). Relevant thresholds correspond to the percentage of shares stipulated for mandatory ownership disclosure, that currently corresponds to 3-5% if the company is a small or medium enterprise (SME) (*infra* note 111)).

loyal shareholders) unless the company voluntarily opts in. This exception—which, by default, allows the heirs of the company's founder to keep the extra voting rights—represents a missed opportunity for Italian legislators. A better solution would have been to exploit the main benefit of tenured voting rights—granting stability to the visionary founder and the company's management, particularly after the initial public offering (IPO),[29] leaving shares with single voting rights in the hands of her successors. One may argue that the possibility of registering inherited shares to restart the maturity period would lead to the same shareholder power distribution in the long run. On a deeper level, however, the preservation of double voting rights protects against an incursion of the mandatory offer obligation if the relevant threshold is newly raised at the maturity date.[30]

In this respect, the introduction of tenured voting has required significant amendments to the national rules on the mandatory offer obligation. Within the framework of the Takeover Directive and consistent with the system of thresholds triggering the mandatory offer, tenured voting rights should be counted, like any newly acquired shares, in the overall power available to the shareholder (or group of shareholders acting in concert) that incurs in the takeover obligation. Such a conclusion may seem revolutionary since, in the absence of any payment of a premium for corporate control and any impact on the number of tradable shares on the market, the maturity of increased voting rights may trigger the obligation to launch a public offer. A substantially similar approach has likewise been adopted in France.

D. *The* Loi Florange *in France*

The traditional French approach to double voting rights is somewhat cryptic. Multiple voting securities were banned in 1930[31] to reduce their use as a defense against hostile takeovers, thus subjecting national companies and their management to the monitoring effects of the market for corporate control. Shortly after, however, Article L. 225-123 of the *Code de Commerce* was amended to allow both listed and unlisted companies to reward certain shareholders with double voting rights.[32] At this early stage, a protectionist approach prevailed, and tenured voting rights were only granted to shareholders of French

29. Berger, Davidoff Solomon, & Benjamin, *supra* note 9, at 303; Santoro, Di Palma, Guarneri & Capogrosso, *supra* note 24, at 142, 148.

30. *See infra* Part III.

31. GERMAIN & MAGNIER, *supra* note 15, at 374 (explaining, more precisely, that the law of 26 April 1930 prohibited French companies from issuing new multiple voting securities while the law of 13 November 1993 suppressed existing multiple voting rights securities).

32. The law of 13 November 1933 provided that investors who have held their shares for at least two years can be given a double voting right: GERMAIN & MAGNIER, *supra* note 15, at 375; Pierre-Henry Conac, *The New French Preferred Shares: Moving Towards a More Liberal Approach*, 2 EUR. COMPANY & FIN. L. REV. 487, 498 (2005).

nationality.[33] This right was granted to shareholders identified in a company's register for a continuous period of at least two years; it appears French legislation may have inspired similar legislation in Italy.

The literature reports that until early 2014, of the 104 largest French companies by market capitalization listed in the SBF120 Index, the majority of them (57 percent) used the loyalty double voting system; moreover, among newly listed companies, the use of tenured voting rights was widespread, due to the possibility to retroactively consider the holding period prior to the IPO.[34]

While Italy aligned its tenured voting rights with the long-standing French voting regulations, France was implementing a fundamental revolution to the described mechanism. On March 29, 2014, the French Government promulgated the *Loi Florange*,[35] which reversed the way increased voting rights are assigned to loyal shareholders of listed companies.[36] This statute provides that, starting from April 3, 2014, all shares may potentially increase voting rights after a period of at least two years of uninterrupted ownership,[37] unless two-thirds of the company's stockholders vote to opt out. In other words, in France, tenured voting rights have become the default rule (attributed to investors who registered their shares as a condition of mature additional rights), and listed companies that want to adhere to the one share, one vote principle need to opt out of this default loyalty-enhancing mechanism.[38] At the same time, the *Loi Florange* has removed the nationality requirement that previously allowed only French shareholders to be rewarded with double voting rights.

On March 29, 2014, before the *Loi Florange* entered into force, the articles of association of forty-five companies within the aforementioned sample of 104 French companies did not contain the tenured voting rights clause. The shareholders in thirty-one of those forty-five companies approved the proposals to opt out of the new default rule, confirming their preference for the one share, one vote rule. The remaining fourteen companies then inevitably switched to the new default system. In seven of those cases, a blocking minority did not al-

---

33. CODE DE COMMERCE [C. COM.] [COMMERCIAL CODE] art. L225-123, para. 3 (2000) (Fr.).

34. *See* Marco Becht, Yuliya Kamisarenka & Anete Pajuste, *Loyalty Shares with Tenure Voting—A Coasian Bargain? Evidence from the Loi Florange Experiment* (ECGI Law Working Paper No. 398/2018, Apr. 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3166494; *see also* Yu-Hsin Lin, *Controlling Controlling-Minority Shareholders: Corporate Governance and Leveraged Corporate Control*, 2017 COLUM. BUS. L. REV. 453, 469 (2017) (providing empirical evidence from 2015 after the adoption of the *Loi Florange*).

35. Loi 2014-384 du 29 mars 2014 visant à reconquérir l'économie réelle [Law 2014-384 on Reclaiming the Real Economy March 29, 2014], (Journal Officiel de la République Française [J.O.] [Official Gazette of France], Apr. 1, 2014) [hereinafter *Loi Florange*].

36. Paul Le Cannu & Bruno Dondero, DROIT DES SOCIETES 625 (Paul Le Cannu & Bruno Dondero eds., 6th ed. 2015).

37. *CODE DE COMMERCE* [C. COM.] [COMMERCIAL CODE] art. L225-123 (Fr.).

38. Maurice Cozian, Alain Viandier & Florence Deboissy, *Le Droit De Vote*, 30 DROIT DES SOCIETES 411, 413 (2017).

low the shareholders' general meeting to revert to the one share, one vote rule; in the other seven companies, the directors simply refrained from calling the shareholders' meeting, aware that the necessary two-thirds majority was not attainable.[39]

French political interference also played a role in the outcome of the tenured voting rights legislation by contending that these loyalty-enhancing mechanisms could protect national enterprises against hostile acquisitions of corporate control.[40] In line with this goal, in 2015 the French Government increased its 15 percent stake in Renault by an additional 4.5 percent, to prevent shareholders from opting out of the default rule that rewarded loyal shareholders with double voting rights.[41] The Government also increased its holding in Air France-KLM to 17.6 percent in order to foil a one share, one vote proposal.[42]

Bonus voting rights lapse in the event of share transfers, and any provision to the contrary is null or void.[43] However, these rights do not dissolve in cases of merger or demerger of the shareholder entitled to double voting, nor in cases of inheritance or donation to certain family members.[44] While the maturity interval is fixed in most cases at two years, it sometimes varies in length, in one case for ten years.[45] These provisions have been replicated in Italy.

With regard to the mandatory offer, the French approach is similar to the Italian: since tenured voting rights could be used to achieve or consolidate corporate control, such rights are included in the triggering threshold of the mandatory offer. Beyond this general rule, the *Loi Florange*, fine-tuned by the *Loi Macron*,[46] has waived the obligation to announce a mandatory offer, applicable when the increase in voting rights is offset by a decrease in the overall amount of the underlying shares held.[47] Specifically, shareholders who on April 2, 2014 owned an interest greater than 30 percent of the share capital or voting rights are exempted from the mandatory offer obligation if they exceed the relevant

---

39. Becht, Kamisarenka & Pajuste, *supra* note 34, at 13.

40. Stéphane Torck, *L'attribution Automatique du Droit de Vote Double,* 65 DROIT DES SOCIÉTÉS, no. 7, 18 (July 2014) Mariana Pargendler, *The Grip of Nationalism on Corporate Law*, 8 (European Corp. Governance Inst., Working Paper No. 437, 2019), ssrn.com/abstract=3144451.

41. Renaud Mortier, *Coup double pour l'État!*, DROIT DES SOCIETES n°6, 1 (June 2015).

42. Becht, Kamisarenka & Pajuste, *supra* note 34, at 11–12.

43. GERMAIN & MAGNIER, *supra* note 15, at 376.

44. Art. 225-124 of the *Code de Commerce*; Cannu & Dondero, *supra* note 36, at 626.

45. Becht, Kamisarenka & Pajuste, *supra* note 34, Table 1 at 33.

46. C. CIV. 2015-990 (Fr.) [hereinafter the *Loi Macron*]. On the impact of the *Loi Macron* on the takeover waiver provided by the *Loi Florange*, *see Loi Florange et droits de vote double automatique—Nouvelles dispositions transitoires*, MAYER BROWN, www.mayerbrown.com/files/uploads/Documents/Paris/bloc-notes-7_2016.pdf (last visited Feb. 22, 2019).

47. Alain Pietrancosta, *The Latest Reform of French Takeover Law: The "Florange Act" of March 20, 2014*, REVUE TRIMESTRELLE DE DROIT FINANCIER 42, 47 (2014); Charles Goyet, Nicolas Rontchevsky & Michel Stork, *L'impact de la loi Florange sur le driot des offres publiques d'acquisition et les sociétés cotées Françaises*, REVUE TRIMESTRELLE DE DROIT COMMERCIAL ET DE DROIT ECONOMIQUE 363, 366 (2014).

threshold (30 percent or a further increase of 1 percent if the holding is greater than 30 percent but less than 50 percent)[48] due to the attribution of additional voting rights,[49] if the total amount of voting rights held in the period from April 3, 2014, to December 31, 2018, has stayed lower or equal to the percentage of voting rights on April 2, 2014. The goal pursued by French law, which has no equivalent in Italy, is to allow major shareholders to disinvest, thereby increasing liquidity while keeping their power by virtue of the double voting rights.

E. *The New Belgian Companies and Associations Code*

The bill to reform Belgian company law—presented to the Parliament on June 4, 2018, and approved by the Parliamentary Committee on Commercial and Business Law on October 23, 2018—documents the trend in Europe to move toward loyalty plans through legislation, based on tenured or multiple voting rights. Long-term shareholder bonuses are not applicable in Belgium yet, but will probably enter into force on May 1, 2019, for companies incorporated on or after that date, and on January 1, 2020, for existing companies.

The Belgian proposal departs from the traditional prohibition on issuing securities with multiple voting rights and allotting more than one vote per share. Unlisted companies will be able to issue dual-class shares without a limit on the number of multiple voting rights. Listed companies will dispose of an optional double loyalty voting right, as introduced by the new Companies Code, which mirrors the French regime. However, closer to the more cautious Italian model, tenured voting can be adopted by companies with a two-thirds majority, or with a simple majority if the decision is adopted within the first year of the law's entry into force. The holding loyalty period is fixed at twenty-four uninterrupted months;[50] but, contrary to Italy and France, registration may precede the tenured-voting shareholders' resolution.

Tenured voting rights are lost in the event of a transfer of shares, except for donations, inheritances, mergers without changes in final control, or for the cancellation of loyalty voting rights. As in Italy, and unlike France, Belgian law focuses on avoiding the circumvention of the mandatory sunset clause, which states that additional voting rights should dissolve during an indirect transfer of underlying shares. Loyalty voting rights likewise lapse in case of a change of the shareholder entitled to the bonus rights.[51]

---

48. CODE DE COMMERCE [C. COM.] [Commercial Code] Art. L433-3(1) (Fr.); Torck, *supra* note 40, at 21.

49. *Loi Macron* Art. L. 194, *supra* note 46.

50. Chambre des Representants de Belgique, Projet de loi introduisant le Code des sociétés et des associations et portant de dispositions diverses Art. 7:53 [Belgian House of Representatives, Draft Law Introducing the Code of Companies and Associations and Laying Down Various Provisions Art. 7:53] (Nov. 14, 2018).

51. Tom Vos, *Are Loyalty Voting Rights Effective? Some Reflections on the Belgian Proposals*, CORP. FIN. LAB (Jul. 13, 2018), https://corporatefinancelab.org/2018/07/13/are-loyalty-voting-rights-efficient/.

F. *Pros and Cons of Rewarding Shareholders' Loyalty Through a Bigger Say*

Deviations from the one share, one vote principle have found, over time, several arguments in favor and against. The purpose of this section is to provide a brief overview of these arguments and assess whether the loyalty-enhancing mechanism adopted in Italy and France for listed companies could alleviate some of the most controversial criticisms raised regarding dual-class shares with multiple voting rights.

1. The IPO Argument

It is widely accepted that a dual-class structure is efficient at the time of the IPO because it allows the talented founder, who is often most capable of running the company, to list the company while retaining control.[52] In light of this, multiple voting securities facilitate the transition of companies from the private to the public dimension. The literature in the United States suggests that controlling shareholders of newly listed companies do not necessarily extract private benefits from their control; rather, they pursue a strategy that the market would otherwise not let them achieve. The founders' role in companies such as Google, Facebook, and Snapchat reflects this idiosyncratic vision of corporate control.[53]

But the easy counterargument is that this view does not take into account the danger "of providing founders with perpetual or even lifetime control" when, years after the IPO, she (or her heir) "might eventually become an inferior leader due to aging or changes in the business environment."[54] To reduce the risk of excessive power in the hands of the founder's family, a possible solution is to link multiple voting classes of securities to sunset clauses that interrupt, after a certain period, the perpetual dual-class structure.[55] This solution is somewhat similar to the French and Italian approaches, which, in certain circumstances, remove the additional right to vote obtained as a loyalty bonus, even though the legislative intervention in both countries has not gone so far as

---

52. Joseph A. McCarey, Erik P.M. Vermeulen & Masato Hisatake, *The Present and Future of Corporate Governance: Re-Examinig the Role of the Board of Directors and Investor Relation in Listed Companies*, 10 EUR. COMP. FIN. REV. 117, 122, 127 (2013); Renée Adams & Daniel Ferreira, *One Share, One Vote: The Empirical Evidence* 11 (ECGI Finance Working Paper N°177/2007, 2007), https://papers.ssrn.com/abstract_id=987488; Guido Ferrarini, *One Share – One Vote: A European Rule?* 13 (ECGI Law Working Paper N°58/2006, 2006), https://papers.ssrn.com/abstract_id=875620.

53. Gilson, *supra* note 7, at 1669; Kirby Smith, *The Agency Costs of Equal Treatment Clauses*, YALE L. J.— FORUM 543, 550, (Dec. 4, 2017).

54. Lucian A. Bebchuk & Kobi Kastiel, *The Untenable Case for Perpetual Dual-Class Stock*, 103 VA. L. REV., 585, 590, 592 (2017). The costs related to the idiosyncratic vision, *see supra* note 53, are represented by the "controller's overvaluation of her strategy or execution of the strategy." Smith, *supra* note 53, at 551.

55. Bebchuk & Kastiel, *supra* note 54, at 590.

to require that loyalty voting rights lapse in cases of succession. Instead, companies are left with an opt-in decision.

A similar situation has been observed in the United States: in companies with dual-class securities, it is sometimes provided that high-vote shares automatically convert to low-vote shares upon transfer to a third party. The fact that, in the majority of these cases, the transfer of shares to the controller's family members or trust is exempted from the conversion mechanism demonstrates that, without legislative intervention, controlling shareholders will not spontaneously abdicate the privilege attributed to the company's founder.[56] Recently, on October 24, 2018, the Council of Institutional Investors (CII) submitted a petition to both the NYSE and Nasdaq, asking them to agree not to list dual-class shares with different voting rights in IPOs, unless a mandatory sunset clause makes all voting rights equal seven years after listing.[57] Such a solution would also hinder the alleged perpetual benefit to the company's founder.

2. Enhancing Shareholder Engagement

Recent developments in the traditional theory of agency costs support the favoring of shares with multiple voting rights to leverage the blockholder's power, thereby reducing managerial dictatorship[58] and improving the shareholders' ability to monitor and intervene on behalf of all shareholders.[59] This argument posits that in publicly held companies, increased voting power can reduce shareholder monitoring cost, creating a balance that may minimize the control costs of corporate governance.[60]

---

56. Lucian A. Bebchuk & Kobi Kastiel, *The Perils of Small-Minority Controllers*, GEO. L. J. (forthcoming 2019) (manuscript at 24) (https://ssrn.com/abstract=3128375).

57. John C. Coffee Jr., *Dual Class Stock: The Shades Of Sunset*, COLUM. L. SCH.: THE CLS BLUE SKY BLOG (Nov. 19, 2018), http://clsbluesky.law.columbia.edu/2018/11/19/dual-class-stock-the-shades-of-sunset/; The need for sunset provisions is also emphasized in Commonsense Principle, The Millstein Center, The Common Sense Principle Of Corporate Governance 2.0, 7 (Oct. 2018), https://millstein.law.columbia.edu/sites/default/files/content/images/Commonsense%20 Principles/CommonsensePrinciples2.0.pdf; For earlier highlights on the document, *see* Aabha Sharma, Howard Dicker, & Weil, Gotshal Manges LLP, *Commonsense Principles 2.0: A Blueprint for U.S. Corporate Governance?*, HARV. L. SCH. FORUM ON CORP. GOVERNANCE AND FIN. REG. (Oct. 30, 2018), https://corpgov.law.harvard.edu/2018/10/30/commonsense-principles-2-0-a-blueprint-for-u-s-corporate-governance/.

58. Lucian A. Bebchuk, *The Myth That Insulating Boards Serves Long-Term Value*, 113 COLUM. L. REV. 1637 (2013); Rock, *supra* note 9, at 900; George Dent, *The Essential Unity of Shareholders and the Myth of Investors Short-Termism*, 35 Delaware L. J. 97, 142, 150 (2013).

59. Mike Burkart & Samuel Lee, *One Share—One Vote: The Theory*, 12 REV. FIN. 1, 1–4 (2008); Ronald J. Gilson, *Evaluating Dual Class Common Stock: The Relevance of Substitutes*, 73 VA. L. REV. 807, 810 (1987).

60. Zohar Goshen & Richard Squire, *Principal Costs: A New Theory for Corporate Law and Governance*, 117 COLUM. L. REV. 767, 769, 774, 815, 826 (2017), Gilson, *supra* note 7, at 1651.

This view aligns with the latest global trend in corporate governance that calls for increased investor engagement in the company,[61] and is upheld specifically in relation to the loyalty-enhancing mechanisms adopted in France and Italy.[62] As long as the increased voting rights cannot be monetized—since they always dissolve at the time of sale— a tangible reason shareholders would accrue this benefit lies in their actual interest in attending the general meeting of shareholders. The last decade has seen European countries doing their utmost to revitalize the shareholders' general meeting as a constructive discussion forum. An example of this effort is the unique Spanish solution based on a special reward for shareholders, consisting of a monetary bonus granted for attending the general assembly.[63]

In this regard, tenured voting may also facilitate communication between companies and their shareholders. Thanks to the registration process—a necessary condition to accrue tenured voting—directors can easily reach out to the company's shareholders, knowing their identity, to send them relevant company information to attend and actively participate to the shareholders' general meeting.[64]

Moreover, tenured voting rights increase shareholders' importance to directors, both at the occurrence of the general meeting and outside and before the formalities of this appointment.[65] Directors will be more inclined to engage in constructive and ongoing relations with their long-term shareholders, without limiting dialogue to the formalities of the general shareholders' meeting. At the same time, retail investors or large passive shareholders have less incentive to gain double voting rights.

Even if shareholders who keep their shares for a longer period are not necessarily those who strive for long-term shareholder value creation,[66] this loyalty-enhancing mechanism should nevertheless be seen as a reasonable approximation of such behavior—which, by giving more rights to shareholders who appear to be more concerned in the long-term prospects of the company, essen-

---

61. McCarey, Vermeulen & Hisatake, *supra* note 52, at 163; Cristoph van der Elst & Erik Vermeulen, *Europe's Corporate Governance Green Paper: Do Institutional Investors Matter?* 1–16 (Tilburg Law Sch. Legal Studies Research Paper No. 14, 2011), ssrn.com/abstract=1860144.

62. Quinby, *supra* note 1, at 403.

63. Klaus J. Hopt, *Corporate Governance in Europe: A Critical Review of the European Commission's Initiative on Corporate Law and Corporate Governance*, 12 N.Y.U. J.L. & Bus. 139, 174, 177 (2015).

64. Lennarts & Koppert-van Breek, *supra* note 3, at 173; *see also* Therese Strand, *Short-Termism in the European Union*, 22 COLUM. J. EUR. L. 15, 56 (2015) (discussing the benefits of shareholders' identification).

65. Joseph A. McCahery, Zacharias Sautner & Laura Starks, *Behind the Scenes: The Corporate Preference of Institutional Investors*, 71 J. FIN. 2905, 2914, 2924 (2016); *see also* Florian Moslein & Karsten Engsig Sorensen, *Nudging for Corporate Long-Termism and Sustainability: Regulatory Instruments from a Comparative and Functional Perspective*, 24 COLUM. J. EUR. L. 391, 426 (2017).

66. *See* Lennarts & Koppert-van Breek, *supra* note 3, at 175.

tially weights voting rights on the basis of their interest.[67] When managers overlap with long-term controlling shareholders, tenured voting rights can effectively reinforce, from inside the firm, the long-term view of the former. From this perspective, tenured voting rights represent the experimental shifting of corporate democracy from the foundational principle of one share, one vote to a system that more finely calibrates voting rights. It allows a move from the proportional discrimination among shareholders to an attempt to weight the voting rights according to shareholders' long-standing interest in the company.[68]

One reasonable criticism here is that since granting additional voting rights takes a fairly long time—two years after shareholder registration—it discourages active investors who react quickly when they disagree with management strategy. However, in thoroughly examining the mechanism, shareholder registration may impact the strategic plans of the company. The knowledge of the voting rights' future distribution that emerges from the register available to directors allows them to identify the presence of stable investors who are interested in the long-term profitability of the company, and whose voice will prospectively be stronger in the future. It is assumed that long-term shareholders behave like residual claimants, on the basis of their interest in sustainably maximizing the profitability of the corporation.

Although less developed in the debate, it is worth mentioning the opinion that granting tenured voting rights to individual shareholders reduces insider trading.[69] More precisely, insiders (namely, shareholders that receive private information by virtue of their relationship with management) cannot sell and repurchase shares without losing the additional voting rights received as a reward for their loyalty. This view draws attention, in discussions of contractual mechanisms to increase shareholders' power, to the interrelation between corporate law and securities regulation: from this standpoint, "a powerful class of shareholders who have management's ear and attention" could induce management to give undue credence to them; at the same time, shareholders' long-term engagement—one of the supposed benefits of tenured voting—is discouraged by "imposing fiduciary duties on shareholder stewards and treating them as covered by insider trading rules."[70]

---

67. McCahery, Sautner & Starks, *supra* note 65, at 2914, 2924; *see also* Moslein & Sorensen, *supra* note 66.

68. *See* Collen A. Dunlavy, *Social Conceptions of the Corporation: Insights from the History of Shareholder Voting Rights*, 63 WASH. & LEE L. REV. 1347, 1366 (2006).

69. Edith Ginglinger & Jacques Hamon, *Ownership, Control and Market Liquidity*, 33 FIN. 61, 62 (2012) (Fr.).

70. Belinfanti, *supra* note 9, at 868; Mark J. Roe, *A Political Theory of American Corporate Finance*, 91 COLUM. L. REV. 10, 27 (1991).

3. Immunity From Takeover and Agency Costs

Looking at the drawbacks of multiple voting structures, one of the most frequently cited concerns regarding multiple voting shares as control-enhancing mechanisms is the consequent immunity from hostile takeover. This is coupled with the belief that a concentrated ownership structure makes it difficult for directors to exercise their legal duty to act in the best interest of all shareholders.[71]

On the first point, tenured voting rights seem preferable to dual-class shares since they lead to a weaker form of corporate control, associated with a lower degree of immunity to hostile takeovers.[72] Through time-phased voting all shareholders may mature additional rights on an ongoing basis, thus reducing the percentage of rights available only to majority shareholders. At the same time, investors can benefit from a high degree of secondary market liquidity that is not affected by the increase in shareholders' voting power as such increase does not require any further acquisition of shares.[73] However, an issue that has not yet been sufficiently analyzed by the economic literature is the extent to which tenured voting might have negative effects on the liquidity of trading markets, due to the reduction in the trading volume of loyal shareholders who are encouraged to keep their shares for longer.[74]

In addition, tenured voting rights may contribute to increased liquidity. Shareholders that gain control through these loyalty rewards can reduce their investment by retaining their original voting rights.[75] Consequently, if dispersion increases, the defensive shield from takeovers lightens. From a political standpoint, both the Italian and French[76] governments saw, in the adoption of tenured voting rights, an opportunity to generate cash by disinvesting from national enterprises without losing State ability to exercise control. It is also asserted that the market would not register a discount for "low-vote" shares as long as tenured voting rights are never attached to the company's shares, and any transaction restores the one share, one vote rule.[77]

On the second point, despite extensive analysis in the literature on the cost of corporate control (such as distortions in investment decisions, tunneling, and failure of the market for corporate control), there is still a certain ambivalence of views. The fact that disproportionate cash flows and voting rights may dis-

---

71. Johan Erik Eklund & Thomas Poulsen, *One Share-One Vote: Evidence from Europe*, 24 APPLIED FIN. ECON. 453 (2014).

72. *See* Becht, Kamisarenka & Pajuste, *supra* note 34, at 7.

73. *Id.* at 4.

74. Edelman, *supra* note 11, at 49.

75. Ginglinger & Hamon, *supra* note 69, at 27; Gilson, *supra* note 59, at 812; François Belot, Edith Ginglinger & Laura T. Starks, *Encouraging Long-Term Shareholders: The Effects of Loyalty Shares with Double Voting Rights*, 15 (2017) available at http://fmaconferences.org/SanDiego/Papers/loyaltysharesfmasubmission.pdf.

76. *See generally* Becht, Kamisarenka & Pajuste, *supra* note 34, at 11; Pietrancosta, *supra* note 47, at 47.

77. *See* Gilson, *supra* note 59, at 836.

play a negative effect on the final value of the firm does not prove that such unevenness leads to a less efficient use of resources. The explanation for this mixed effect lies in the delicate balance between better monitoring, on one side, and the persistent incentive to divert resources, on the other. In other words, the benefits of disproportionate ownership are seen in less effort wasted by the controlling shareholder in constant negotiations with minority shareholders; but this positive effect is counterbalanced by the risk that the former dilutes resources to the detriment of the latter. [78] In this respect, the political choice in favor of or against disproportionate cash flows and voting rights should consider that the entrenched problem of concentrating corporate control decreases in countries with greater investor protection, where owners divert fewer resources.[79] Tenured voting rights seem to better serve this purpose than a dual-class structure where the risk of insulating the controlling shareholder from market disciplinary is higher, and the stake owned may be small enough that the controlling shareholder lacks powerful ownership-based incentives.[80]

4. Increased Transparency

As a final but important remark, loyalty-enhancing mechanisms based on time-phased voting can improve transparency if used as an alternative to other CEMs. Dual-class shares and pyramidal structures do not generally allow for immediate knowledge of the distribution of cash flow and voting rights unless insights about the layers of corporate ownership, cross-ownership, and the distribution of shares within different classes are available. The same concern regards shareholders' agreements—which are often lacking transparency due to the uncertainties that, at the European level, surround the notion of shareholders' agreements and their legal form.[81] Instead, as will be analyzed, the main characteristic of tenured voting is, thanks to the registration process, a higher degree of transparency.[82] It is theoretically possible that the diffusion of tenured voting will provide a valuable substitute to the use of shareholders' agreements in continental Europe.

Within this theoretical framework, the empirical analysis presented in Part II aims to assess whether, in Italy, the double voting rights awarded to long-term shareholders reflect some of the positive outcomes expected. The role of loyalty-enhancing mechanisms, as an attempt to achieve a healthier balance be-

---

78. Morten Bennedsen & Kasper Meisner Nielsen, *Incentive and Entrenchment Effects in European Ownership,* 34 J. BANKING & FIN. 2212, 2213 (2010).

79. *See* Bobby V. Reddy, *The Fat Controller: Slimming Down the Excesses of Controlling Shareholders in UK Listed Companies*, 38 OXFORD J. LEGAL STUD. 733, 740 (2018); Bennedsen & Nielsen, *supra* note 78, at 2220; Ferrarini, *supra* note 52, at 12.

80. *See* Bebchuk & Kastiel, *supra* note 54, at 9–10.

81. Belot, Ginglinger & Starks, supra note 75, at 19; Bennedsen & Nielsen, *supra* note 78, at 2216.

82. Vincenzo Cariello, *Azioni a voto potenziato, "voti plurimi senza azioni" e tutela dei soci estranei al controllo*, *RIVISTA DELLE SOCIETÀ 164,* 184 (2015).

tween long- and short-term investment and governance, will be analyzed in practice.

II. Empirical Evidence

A. *From the Directors' Proposal to the Shareholders' Opt-In Resolution for Tenured Voting*

Since the reform that allowed tenured voting for Italian listed companies, 39 out of 256 issuers listed on the Italian stock exchange at the end of June 2018 have introduced a clause in their articles of association that awards loyal shareholders.[83] These companies represent 8.32 percent of all capitalized assets.[84]

Where additional voting rights for loyalty are not the default rule—as in France after the *Loi Florange*—their adoption into articles of association is subject to shareholder approval. Some interesting considerations can be drawn from the decision-making process, beginning with the proposal, advanced by the board of directors to the general meeting of shareholders, for the introduction of a tenured voting clause in the company's articles of association. An analysis of the reports submitted by directors and published on their companies' websites prior to shareholders' general meetings[85] reveals that in almost all cases, the proposal is justified with reference to the achievement of long-term objectives.[86] More precisely, a close link is established between the satisfaction of the company's interest and the adoption of tenured voting, as a device that encourages shareholders to keep their shares in the company for the long term; in some cases, the directors' reports also mention the aim of enhancing shareholders' loyalty. In other words, directors advised their shareholders to adopt a statutory

83. Consolidated Law on Finance *supra* note 4, at Art. 127 (establishing that only companies whose shares are listed in a regulated market can introduce tenured voting). The lack of consideration for companies with shares traded in multilateral trading facilities (so-called 'alternative trading venues') is reflected in the fact that, currently, none of the companies of AIM Italia provide for tenured voting. Conversely, in some cases, AIM's companies have issued dual-class shares with multiple voting rights; in other cases, their articles of association contain the tenured voting clause that will become applicable in case of listing at a future date.

84. Borsa Italiana, *Listed Companies Capitalisation June 2018*, https://www.borsaitaliana.it/borsaitaliana/statistiche/statistiche-storiche/capitalizzazioni/capitalizzazioni.htm (Showing that on June 29, 2018 the average capitalisation of Italian listed companies was 2.447,06 (in Euro M), and 1.321.82 (in Euro M) for companies with tenured voting. These figures exclude foreign companies listed in Italy; moreover, they exclude one company whose shares were suspended from trading by Borsa Italiana (in Table A, row 39). The capitalisation of Fiat Chrysler on 29 October 2014, when the company decided to reincorporate to benefit from the Netherlands' more permissible legislation on multiple voting securities, was US$19.7 billion.).

85. Directive 2007/36 of the European Parliament and of the Council on the exercise of certain rights of shareholders in listed companies, art. 5(4)(d), 2007 O.J. (L 184) 17, 21 (EC) (hereinafter Shareholder Rights Directive, or SHRD).

86. *See* "Statements" column *infra* Table A.

mechanism capable of increasing the holding period of the investment, so as to place the board in a better position to plan and implement long-term strategies and consequently to relieve directors from the pressure to deliver short-term results—in the proposals analyzed, reference to long-term strategies is, where not explicitly stated, always implied.

It is worth noting that in 30 companies out of 39, the proposal presented to the general meeting of shareholders clarifies that it received the approval of all board members, and that the presence, in seven cases, of at least one independent director appointed by minority shareholders did not interfere with the unanimity of views on tenured voting.[87]

In Italy, the introduction of tenured voting is subject to the approval of the extraordinary meeting of shareholders with a two-thirds majority.[88] In such a system, where controlling shareholders are often in a position to influence the resolution, it would have been appropriate to provide for the so-called "white-wash" procedure (the additional requirement that the resolution receives the favorable votes of the majority of minority shareholders). Even if already known and used in Italy, the Consolidated Law on Finance does not impose this mechanism as a necessary condition for approving tenured voting resolutions. Looking at the outcomes of the general meetings where tenured rights were proposed and approved, the resistance of the dissenting or abstaining shareholders emerges, in some cases despite them not succeeding in blocking the final approval.[89] Instead, in France, as already noted, the results of the general shareholders' meetings varied, since in a few cases they failed to revert from the default tenured voting provision to the one share, one vote rule.[90]

The empirical evidence confirms that the majority rule with no correction, leads to a sort of natural selection of the types of companies that allow shareholders to mature additional voting rights. It is intuitively easier for firms with a strong controlling shareholder (lacking a "blocking" minority) to approve such a clause, particularly in the absence of significant stakes owned by institutional investors (or asset managers), who traditionally tend to disregard directors' proposals for tenured voting and to vote against its adoption.[91] In Italy, the asset managers' association has expressly supported the recommendation of leading proxy advisors for their clients to vote against the introduction of loyalty vot-

87. *See* "Independent Directors/Minority" and "Board Unanimity" columns *infra* Table A.

88. Art. 2368(2) C.c. (requiring a two-thirds majority of the voting share capital represented in the extraordinary meeting of shareholders, and the shareholders' meeting is regularly convened with the presence of the majority of the share-voting capital. However, in the period after the entry into force of the Law No. 116/2014 and until the end of December 2015, the adoption of the tenured voting rights clause was eased by reducing to a simplified majority the percentage of voting rights required to approve directors' proposals. By exploiting this provision, only three companies adopted tenured voting rights). *See* "General Meetings" column *infra* Table A.

89. *See* "Quorum" column *infra* Table A.

90. *See supra* Part I(4).

91. Belot, Ginglinger & Starks, *supra* note 75, at 5, 20.

ing.[92] In France, the position of proxy advisors is quite similar, as they support the proposals to opt out of the default rule that implemented tenured voting in all listed companies.[93] These considerations seem consistent with the finding that family firms are the most likely (and almost only) users of the new CEMs, and where the existence of a dominant shareholders' group makes it difficult for other shareholders to resist the transaction.[94]

B. *Failure of the Voluntary Adoption of Sunset Clauses*

A close examination of the sample companies' articles of association reveals substantial homogeneity in corporate choices. Specifically, in all cases the vesting period for double voting is two years and always consists of a drastic doubling of the voting right;[95] thus, companies neither used the freedom to extend the vesting period of maturity (as has been observed in French companies)[96] nor provided for a gradual enhancement of voting rights over time.[97]

The option of inserting the most significant sunset clause—the revocation of increased voting rights in the event of heredity—has also been ignored, and under no circumstances will additional voting rights dissolve in case of succession by virtue of an opted-in provision. When double voting rights are granted as a reward to the company's founder, this benefit can easily and permanently pass to heirs.[98] It is then clear that the advantages claimed by the supporters of tenured voting (allegedly enhancing the benefit of non-permanent and non-transmissible CEMs) remain theoretical in this debate.

With regard to the other opt-in and opt-out choices, the range of possible solutions is wide, even if no significant differences result from the observations of the companies' articles of association. There is a notable absence of opting-out cases from the provisions allowing double voting rights to be maintained in case

92. ASSOGESTIONI, NOTA TECNICA SUL VOTO MAGGIORATO IN ITALIA E ALL'ESTERO (Dec. 23, 2014), http://www.assogestioni.it/index.cfm/1,147,10681,49,html/voto-maggiorato-e-voto-plurimo-un-vulnus-al-principio-di-one-share-one-vote.

93. Goyet et al., *supra* note 15, at 367.

94. Ettore Croci, *Controlling-Enhancing Mechanism: Loyalty Shares and Multiple-Voting Shares in Italy*, EUROPEAN CORPORATE GOVERNMENT INSTITUTE 1 (June, 2018), www.ecgi.global/sites/default/files/6._controlling-enhancing_mechanisms-_loyalty_shares_and_multiple-voting_shares_in_italy.pdf.

95. *See infra* Columns '*Multiplier*' and '*Loyalty*' of Table A.

96. *See infra* Part. I.

97. In Table A rows 4, 8 correspond to cases where articles of association state that the right to double voting is not generally applicable; but it only concerns specific resolutions identified in the articles of association.

98. Consolidated Law on Finance *supra* note 4, at Art. 127–*quinquies* (3)(a). Some of the companies' articles of association allow the preservation of bonus voting rights also in cases of donation to the heirs or constitution of a trust, whose beneficiaries are the shareholder's heirs; others preserve these rights when the holding is transferred from one fund to another, if both are managed by the same investment management company.

of a merger or demerger of the shareholder entitled to double voting,[99] as well as a free share capital increase.[100] Conversely, all companies opted in, as permitted by law, to allow a proportional extension of the double voting right in the event of a capital increase by payment.[101]

Tenured voting rights were adopted in four cases, in connection with the IPO of the company. The opportunity, available to companies that go public, to date back the maturity period of additional voting rights before the listing, was exploited in three cases.[102] With regard to the other incentives for companies to go public, multiple voting rights as a specific class of securities do not seem to boost this limited trend. Although shares carrying multiple voting rights can be maintained after the listing process, only two newly listed companies have dual-class shares and, because of this choice, will not be entitled to introduce tenured voting in the future.[103]

C. *Power Distribution Before Maturity: Identikit of the Registered Shareholders*

At the end of 2016, the average percentage owned by controlling shareholders of Italian companies was 46.9 percent, which is in line with the country's traditionally concentrated ownership structure.[104]

The data in Table B reflects in the companies with tenured voting rights into four groups in descending order of controlling power. Group a) represents the companies that, at the starting date of the maturity period, were controlled by a single shareholder with statutory control—i.e., who held more than 50 percent of the voting rights (in most cases this shareholder was the first—often the only—one who asked for registration); Group b) is made up of companies in which the "*Registered Shareholder*" held an ownership interest in the company of between 45 and 50 percent of the voting rights. Group c) is characterized by the presence of a shareholder holding between 30 and 45 percent of the voting rights; and Group d) consists of companies in which no shareholder owns more

---

99. *Id.* The default provision—that additional voting rights do not dissolve in case of merger or demerger of the entitled shareholder—provides fertile ground for elusion Ventoruzzo, *supra* note 23, at 14. Mergers or demergers may result in a substantial change of ownership for the shareholder, who can keep their double voting rights unless the company has opted out. However, in this respect, the clauses of the articles of association should be carefully examined; in fact, in some cases contained in Table A, rows 1, 4, 31, & 36, the clause excludes that double voting rights can be maintained when, as result of the merger or demerger, a change of control occurs. One single complete opt-out has been registered. (*See* Table A at row 38.)

100. Consolidated Law on Finance, *supra* note 4 at Art. 127–*quinquies* (3)(b).

101. Consolidated Law on Finance, *supra* note 4 at Art. 127–*quinquies* (4).

102. Consolidated Law on Finance, *supra* note 4. at Art. 127–*quinquies* (7).

103. Consolidated Law on Finance, *supra* note 4, at Art. 127–*sexies* (2)(3).

104. CONSOB, REPORT ON CORPORATE GOVERNANCE OF ITALIAN LISTED COMPANIES 9 (2017) (showing the weighted mean decreases to 34 percent, data does not include cooperatives).

than 30 percent.[105] This analysis shows that Group a) is unequivocally the largest, since it includes 23 companies; seven companies are then included in Group b); four companies in Group c); and, finally, in only five companies does the first shareholder hold an interest of less than 30 percent, as classified in Group d) (although in one of these cases this shareholder participates in a controlling shareholders' agreement; in another is the member of the controlling family). Three of the four newly listed companies belong to Group a).

As discussed, directors' reports always advise shareholders to adopt tenured voting on the basis of the need to enhance shareholders' long-termism and, implicitly, long-term strategies. At the same time, the clear dominance of strong, controlling shareholders in the ownership of companies with tenured voting seems to contradict this urgency. Such an ownership structure, in other words, already gives a clear indication of the presence of stable and long-term shareholders,[106] and the effectiveness of introducing tenured voting for retaining shareholders over the long term is questionable. Given the close proximity of the controlling shareholder to the board of directors, the latter is typically reassured by the former before engaging in any long-term strategies; likewise, directors' proposals to shareholders' meetings (including the proposal to adopt tenured voting) already reflect the *ex ante* approval received from the controlling shareholders. From this viewpoint, the Italian legislation seems to do little to encourage long-term shareholders—it rather allows companies to empower existing long-term shareholders.[107] The findings presented in Part II(5) are consistent with this logic.

---

105. This division into groups, reflecting different levels of concentration in the ownership structure, is derived from the mandatory offer regulation. Although adopted in Europe with degrees of variability, the most typical takeover bid threshold is 30 percent (and it has been the only one in Italy until 2014), presumptively considered a clear indication of strong corporate control. (*See* Christoph van der Elst, *The influence of shareholder rights on shareholder behaviour*, 124 REVUE TRIMESTRIELLE DE DROIT FINANCIER 50–62, 52 (2010)). Italy has also introduced a threshold for 'creeping acquisitions', which imposes a mandatory offer when, over a 12-months period of time, a certain percentage of shares is purchased (or matured) by a shareholder owing more than 30 percent but less than 50 percent of the company's voting rights; as a consequence, a shareholder owing more than 45 percent can increase her holding without incurring the obligation of mandatory offer.

106. Ginevri, *supra* note 19, at 595, 608, 617.

107. There is some evidence of the assessment undertaken by Italian companies with dispersed ownership structures, on the introduction of tenured voting, also involving in a dialogue with major shareholders. It was the case, in particular, of Generali. The financial press reported that a 'survey' on the opportunity to introduce voting rights was carried out in 2015, in response to pressure from a number of significant non-financial shareholders, while the main institutional investors opposed the amendment of the articles of association in this respect. *Generali, per BlackRock il voto multiplo é <<problematico>>*, INTERMEDIA (May 26, 2018), (http://www.intermediachannel.it/generali-per-blackrock-il-voto-multiplo-e-problematico/). In the end, the company did not adopt tenured voting.

D. *Potential (and Unpredictable) Variation in the Total Number of Voting Rights, and the Limits of Transparency*

The empirical evidence presented in Table B predicts the distribution of voting rights among shareholders in each company with tenured voting rights. As of the observation date (June 2018), in some cases, double voting rights had already matured in relation to all or part of the shares registered, while in other cases the maturity period was still due. For this reason, the overview provided should be considered with some warnings. First, given certain circumstances (the number of shares issued and the own shares held by the company), the number of voting rights can evolve over time because other shareholders (as distinct from the "*Registered Shareholder*") may have applied or may apply for registration to mature their voting rights at different times, while others may lose the benefit of double voting, or lose the right to mature this benefit, if they transfer their shares. In addition, shareholders are always allowed, by a clause provided in all companies' articles of association, to renounce all or part of the additional voting rights attributed to them, or they can withdraw their registration to interrupt the maturity period.[108]

In this scenario, requiring companies with tenured voting to disclose the total number of rights on the fifth day of each calendar month after the monthly period in which the total stock of voting rights has increased or decreased enhances transparency.[109] This information is necessary for shareholders to assess the percentage of voting rights held (which fluctuate alongside decreases or increases in total voting rights), and to comply with the transparency regulation of mandatory ownership disclosure.[110]

The mechanism relies upon the companies to keep a special register, with the support of intermediaries acting as depositaries on behalf of shareholders. Following the shareholders' registration, the depositary will provide the company with the certificate of ownership and inform the company of any transfer in-

---

108. The withdraw is definitive, but the shareholder can always apply for a new registration that corresponds with the starting date of a new maturity period. (*See* Art. 127 c.c. –*quinquies* (1) Italian Consolidated Law on Finance). Renouncing (both before and after the attribution of additional voting rights) is a useful tool when, by virtue of the reward for loyalty consisting of additional voting rights, the shareholder may incur the obligation to announce a mandatory offer. *See* Part III Section (2).

109. Art. 143 –*quarter* (5) of Regulation No. 11971 of 14 May 1999 and subsequent amendments [hereinafter Consob Regulation].

110. Art. 9 of Directive 2004/109/EC of the European Parliament and of the Council, amended by Directive 2013/50/EU of 22 October 2013 on the harmonization of transparency requirements [hereinafter Transparency Directive] requires the shareholders of the Italian companies to disclose their holdings when they pass, because of acquisition or because of tenured voting the 3 percent threshold (it was 2 percent until the end of 2016), or the 5 percent threshold for small and medium enterprises (SME)—Art. 120(2) of the Consolidated Law on Finance, *supra* note 4 (the so called mandatory ownership disclosure). Hereinafter 'Relevant shareholders' are those shareholders whose holding is above these relevant percentages. As will be analyzed in Part III, knowledge of the total amount of voting rights is also necessary for shareholders to assess the implications arising from the mandatory offer obligation.

terrupting the maturity period. The register is a key tool for transparency. The right to access the register allows directors and shareholders to predict the most likely future distribution of voting power at each maturity date.[111]

Such transparency cannot, however, be considered complete, as the entire content of the register is not technically public—it is available only to directors and shareholders by request. Disclosure on company websites is limited to the identity of the relevant registered shareholders.[112] Hence, the market can predict how voting rights will vary over time, with a degree of error given that non-relevant shareholders might also have registered their shares to gain bonus rights.

This system impacts the present empirical analysis. The ability to understand the long-term intentions of the registered shareholders suffers a certain degree of inaccuracy from the fact that not all registrations are publicly available before their maturity date. However, even considering this warning, tenured voting rights are presented with a high degree of transparency. The public availability of the company's register can be considered a good proxy of relevant shareholder intentions regarding tenured voting.[113] An equivalent level of transparency is not found in other common CEMs.[114]

E. *Voting Distribution After Maturity: The Achievement of a Supermajority*

The entry date of Table B shows that in 20 cases at least one shareholder had, by June 2018, already earned the reward of decoupling the voting rights related to their registered shares. Thanks to the transparency requirements, the voting rights owned by each *"Registered Shareholder"* are publicly available on the Consob website.[115] Moreover, since companies must disclose monthly variations in the total amount of their voting rights, it was possible to identify if other registered shareholders have matured additional voting rights. As a consequence, the information in the column "*Empowerment*" includes this dilutive effect. Looking at the company register, it was also possible to discern the registration of other relevant shareholders—in the column "*Dilution Post-Empowerment*"—who will soon mature new additional voting rights.

When the maturity period is "still due," the picture of the future distribution of power is instead taken from the directors' report (prepared for the general meeting of shareholders), which contains information about the most predictable effect on the company's voting structure after rewarding the majority shareholder with additional bonus rights.[116] When this information is not available,

111. Consob Regulation, *supra* note 109, at (4).

112. Consob Regulation, *supra* note 109.

113. *See infra* Table B, in the column "Dilution Post-Empowerment".

114. *See supra* Part I(6.4); *see also* Belot, Ginglinger & Starks *supra* note 75.

115. *See infra* Table B, "[OS]" in the column "Empowerment".

116. *See infra* Table B, "[D]" in the column "Empowerment".

or other relevant shareholders have simultaneously registered their shares, the voting distribution is a projection of its level at these registrations' date of maturity.[117] As explained, this result may underestimate the dilutive effect of the voting rights to be attributed to non-relevant shareholders, whose registration is not public.

Despite these warnings, which are due to the potential ongoing variability of voting rights, the findings show a sharp increase in the voting power of shareholders who matured (or prospectively will mature) tenured voting rights. In several cases, the achievement of double voting rights enables the controlling shareholder to exercise decisive influence over the extraordinary general meeting, empowering this shareholder to the point that amendments to the company's articles of association, or mergers and acquisitions where the shareholders' voice is required, only depends upon her vote.

In Italy, any decision of the extraordinary meeting of shareholders is taken with a two-thirds majority of the share capital represented at the meeting. In 19 of 39 cases, thanks to the maturity of additional voting rights, the decision of the controlling shareholder will necessarily correspond to the final outcome of the extraordinary shareholders' meeting.[118] In 12 other cases, it is likewise reasonable that the controlling shareholder's vote will be the determinant in the assembly. The conclusion can be inferred by considering that 70 percent is the average capital represented at the shareholders' meetings of Italian listed companies;[119] consequently, all shareholders with voting rights above two-thirds of this percentage impose their vote in shareholders' meetings.[120] In these cases, a double check was made: upon maturity, the empowered shareholder also disposes of two-thirds of the voting rights of the presence quorum at the general shareholders' meeting that introduced the tenured voting (in some cases, such presence was higher than the above-mentioned 70 percent).

As shown in Table B, the dilutive effect of such pronounced empowerment is marginal. Controlling shareholders did not take the opportunity presented by the increase in voting rights as a chance to reduce their stake in the company while maintaining control. This is not surprising: as the literature predicted for family-owned companies, this finding is consistent with the use of tenured voting by shareholders as a means of empowering existing long-terms shareholders, rather than encouraging new long-term shareholders.[121] In other words, strong shareholders used their tenured voting rights to become highly dominant in all corporate decisions. In this context, the dilution effect also appears to be overall marginal because of the registration of other shareholders. This might

117. *See infra* Table B, "[F]" in the column "Empowerment" (forecast generated by calculating all the voting rights attributed to the first shareholder/the amount of the company's voting rights).

118. *See infra* Table B, "Absolute Dominance" in the column "Empowerment".

119. Consob Regulation, *supra* note 109.

120. *See infra* Table B, "Dominance" in the column "Empowerment".

121. Dallas & Barry, *supra* note 8, at 548, 552.

hypothetically change in the subsequent months if other shareholders are awarded double voting rights.

The lack of institutional investors and asset managers among the relevant beneficiaries of time-phased voting[122] is consistent with the traditional view alleging their indifference toward the opportunity to increase their power in the general meeting of shareholders. This is due to their short-term perspective, based on the need of institutional investors to constantly show their beneficiaries successful investment strategies and positive returns.[123] This observation supports those skeptical opinions that advocate against tenured voting as a solution to a perceived short-termism problem.[124] Indeed, it seems that these investors have no incentive to apply to register their shares, lacking any interest in demonstrating, either publicly or to the company's directors, their long-term view. In light of this, contrary to some intuitive expectations, time-phased voting rights have not been shown to improve visible forms of engagement or activism by shareholders. Many believe that the preferred form of activism for professional investors takes place outside the general meeting. These investors are likely to be much more interested in engaging in informal dialogue with directors, raising concerns that they often "operate outside the limits of shareholder power defined by regulation," and that they try "to circumvent the existing legal devices regulating shareholder voice."[125]

III. Explaining Why Takeover Law is Involved

A. *Tenured Voting and European Takeover Law*

The mandatory offer, a burdensome obligation for anyone wishing to acquire corporate control of a European listed company, does not find an equivalent rule in US corporate law and securities regulation. Among the few compulsory rules, the Takeover Bids Directive[126] requires Member States to adopt the mandatory offer provision—namely, the obligation to announce a public offer in the case of controlling acquisitions.

This piece of legislation, dating back to 2004, provides for only a minimum level of harmonization, thus allowing for a wide margin of flexibility at the Member State level.[127] However, it established two main pillars that national legislators should consider when developing more technical rules. Under the first pillar, the acquisition by a shareholder (or group of parties acting in concert) of a percentage of the voting rights conferring control requires the an-

122. *Id.* at 620.

123. Quinby, *supra* note 1, at 391, 397; Sacco Ginevri, *supra* note 19, at 601.

124. Fried, *supra* note 9, at 1574.

125. McCahery et al., *supra* note 65, at 2912; van der Elst & Vermeulen, *supra* note 61, at 7.

126. Takeover Directive, *supra* note 10.

127. Pargendler, *supra* note 40, at 20–22.

nouncement of a mandatory offer, in the form of a total offer to other shareholders with voting rights.[128] The second pillar consists of the adoption of a straightforward definition of corporate control—based on a specific percentage of voting rights settled by the Member States —for the purposes of takeover bids,[129] in response to the uncertainties that may arise from the use of an indefinite notion of control. When the EU enacted this solution, it was not revolutionary, but rather replicated the long-standing and successful experience of the UK City Code on Takeovers and Mergers, where the threshold level was set at 30 percent of voting rights by a rule still in force.[130] Many Member States have adopted this solution,[131] including Italy, where the 30 percent threshold still applies in certain circumstances (particularly if it is exceeded by a shareholder entitled, after maturity, to loyalty voting rights).

The mandatory offer is a powerful tool for the protection of minority shareholders, consisting of a special right of withdrawal, which operates in case of a change of corporate control, coupled with the right to receive part of the premium paid by the offeror.[132] Regarding the first point, the mandatory offer regulation embodies the implicit promise to shareholders that, in case of a change in the ownership structure of the company, they will get the opportunity to disinvest.[133] In other words, minority shareholders are granted a special exit right when the controlling threshold is exceeded as a result of a private transaction involving corporate control or market shares acquisitions. This is a *particularly market-oriented solution*[134] that gives each individual shareholder the possibility to decide whether or not to remain in the company. Moreover, the provision that the offer be announced at "the highest price paid for the same securities"[135] by the offeror deploys a redistributive effect in favor of minority shareholders, who will get the same premium paid (if a premium had been paid) for acquiring control of the company.

128. *See* Takeover Directive, *supra* note 10, at Art. 5(1).

129. *See id.* at Art. 5(3).

130. PANEL ON TAKEOVERS AND MERGERS, THE TAKEOVER CODE, Rule 9.1 (12th ed. 2016); Mathias Habersack, *Non-frustration Rule and Mandatory Bid Rule – Cornerstones of European Takeover Law*, 15 EUR. COMPANY FIN. L. REV. 1, 29 (2018).

131. *See* Klaus J. Hopt, *European Takeover Reform of 2012/2013—Time to Re-examine the Mandatory Bid*, 15 EUR. BUS. ORG. L. REV. 143, 173 (2014).

132. Nuria Alcade & Inés Pérez-Soba, *Has the EU Takeover Directive Improved Minority Shareholder Protection? The Spanish Evidence*, 17 EUR. BUS. ORG. L. REV. 261, 263, 283 (2016); *see* Hopt, *supra* note 63, at 198.

133. *See* Jennifer Payne, *Minority Shareholder protection in takeovers: A UK perspective*, 8 EUR. COMPANY FIN. L. REV. 145, 150 (2011); Jonathan Mukwiri, *Takeovers and Incidental Protection of Minority Shareholders*, 10 EUR. COMPANY FIN. L. REV., 432, 442 (2013).

134. *See* Hopt, *supra* note 131, at 169; Georgios Psaroudakis, *The Mandatory Bid and Company Law in Europe*, 10 EUR. COMPANY FIN. L. REV. 550, 553 (2010); Habersack, *supra* note 130, at 32.

135. *See Takeover Directive*, *supra* note 10.

In this context, the entry into force of tenured voting rights in Italy was followed, a few months later, by a complex revision of the system of thresholds that identify when the obligation to announce a mandatory offer arises. Even if a decisive boost to the reform was also driven by the widespread belief that a lower threshold—lower than the 30 percent traditionally adopted in the country—was a necessary tool to reinforce investor protection,[136] the sudden appearance of tenured voting rights in corporate law imposed a significant redrafting of the rules on mandatory offers.

It is questionable to what extent tenured voting rights should be included in calculating the relevant threshold. This choice, made by the Italian legislator (and by the French one), imposes the obligation to launch a bid when the 30 percent threshold is exceeded as a result of increased voting rights.[137] Despite the obvious consideration that voting rights similarly affect the corporate decision on whether or not the shareholder owns the same percentage of shares, the two situations cannot be considered equivalent for several reasons. First, increasing voting rights as a reward for shareholder loyalty is less stable than disposing of the same percentage as property rights in a company without tenured voting. Second, the maturity of tenured voting rights does not alter the number of shares on the market available to shareholders interested in acquiring a relevant stake in the company (in other words: with tenured voting the contestability of corporate control changes less than in the case of share acquisition). Finally, since the tenured voting rights are cost-free, there is no premium for corporate control—thus, minority shareholders are not entitled to any price distribution. However, the latter is a weak argument, as it is now fairly established that the mandatory offer consists of a special exit right for minority shareholders, whereas the redistribution of corporate control occurs only eventually.[138]

136. The 1998 Italian takeover regulation was modified in 2014, when a complex system of thresholds replaced the single one fixed at 30%, still in force for tenured rights. The result achieved by the reform was, in most cases, to lower the relevant threshold to 25% in companies that are not classified as SME (small medium enterprises); while the applicable threshold is 30% in the (rare) case of an existing controlling shareholder already owing more than 25% and less than 50%. At the same time, SME were granted the freedom to provide in their articles of association for a different threshold, not lower than 25% and not higher than 40%: *see* Art. 106(1)(1-*bis*)(1-*ter*) of the Consolidated Law on Finance, *supra* note 6. As the literature points out, the discussion on the optimal level of threshold is not simple. When a certain threshold is settled, control packages below this percentage may be transferred without involving the obligation to launch an offer. In Italy in 2014, the proposal to lower the takeover threshold found fertile ground, thus increasing the costs of corporate acquisition in line with the view that considers mandatory offers the most effective takeover defence. Johannes W. Fedderke & Marco Ventoruzzo, *The Biases of an 'Unbiased' Optional Takeovers Regime: The Mandatory Bid Threshold as a Reverse Drawbridge* 4, 12 (European Corp. Governance Inst., Working Paper No. 304, 2016), (https://ssrn.com/abstract=2706602); Luca Enriques & Matteo Gatti, *Creeping Acquisitions in Europe: Enabling Companies to Be Better Safe than Sorry* 30 (European Corp. Goveranance Inst., Working Paper No. 264, 2014), (https://ssrn.com/abstract_id=2492158; Payne, *supra* note 133, at 151.

137. Consolidated Law on Finance *supra* note 4, at Art. 106(1).

138. Psaroudakis, *supra* note 134, at 554, 557.

The Takeover Bids Directive explicitly provides that the mandatory offer threshold be exceeded in the event of an *acquisition* of shares by a single shareholder or by a group of shareholders acting in concert. In line with this, shareholders' agreements, whose impact on corporate control is undeniable, are not explicitly included in the directive as events triggering the mandatory offer obligation.[139] In Italy, while such agreements are commonly considered a stable means of exercising corporate control, they do not necessarily require the announcement of a mandatory offer obligation unless acquisitions occurred in the 12 months preceding the agreement.[140] The approach is different when it comes to tenured voting rights: in Italy and France, the maturity of the additional voting rights, even without any further share acquisitions, is not costless to the loyal shareholder if the mandatory offer is triggered.

The results of the empirical analysis outlined in Part II support some general conclusions about this setting. The optimum takeover threshold is a complex political choice left by the directive to the Member States; the adoption of tenured voting has made the taxonomy even more intricate. The issue has become, then, not only whether a greater degree of uniformity across Europe is needed,[141] but also whether the case of tenured voting rights should not be treated differently.

B. *Mandatory Offer and Tenured Voting: Obligations and Exemptions*

The Italian system is a complex balance between obligations and waivers. On the one hand, it imposes a mandatory offer if one shareholder (or a group acting in concert) matures voting rights above the relevant threshold, but the same threshold has not been exceeded for share capital. Conversely, the acquisition of a holding corresponding to the relevant threshold does not necessarily imply the obligation to announce a mandatory offer if, due to the dilution effect caused by other loyal shareholders, the acquirer does not have voting rights exceeding the relevant threshold. [142]

---

139. Hopt, *supra* note 131, at 180; Psaroudakis, *supra* note 134, at 557; Martin Winner, *Active Shareholders and European Takeover Regulation*, 11 EUR. COMP. & FIN. L. REV. 364, 369, (2014).

140. The maximum duration for shareholder agreement settlement is three years, but renewal is always possible. *See* Articles 101-bis(4), 109 and 123 of the Consolidated Law on Finance, *supra* note 4; Winner, *supra* note 139, at 370.

141. *See* Marco Lamandini & David Ramos Muñoz, EU FINANCIAL LAW. AN INTRODUCTION, 344, (2016).

142. The two situations can be better represented through numerical examples. In the first case, a shareholder owning 18% of the share capital, if awarded with double voting rights (where no other shareholder mature double voting), will have the right to exercise 30.05% of the total voting rights; thus triggering the mandatory offer. In the second example, the acquisition of 30% of the voting share capital (assuming this is as a relevant takeover threshold) allows the exercise of 27% of the voting rights of a pre-existing shareholder—owning, for example, 10% of the share capital—has doubled her voting rights. According to the Consob regulation, the mandatory offer will trigger only

The creeping acquisition—namely, the "surreptitious building of a stake large enough to secure control"[143]—may also require the announcement of a mandatory offer. Such a provision, which is not common to all Member States,[144] is present in Italy, France, and the United Kingdom; it operates when, from a weaker level of corporate control, the majority shareholder approaches statutory control in a limited period of time. Specifically, in Italy, it occurs if a shareholder who holds more than 30 percent but less than the statutory control (50 percent) acquires (or matures) more than 5 percent of voting shares or voting rights in 12 months (the equivalent rule in France provides that the increase must not exceed 1 percent).[145]

This rigorous system, which broadened takeover regulation in the case of tenured voting rights, prioritizes investor protection as the main goal of the European financial market framework. It assumes that minority shareholders will withdraw their investment in case of significant change (or consolidation) in the company shareholding (and power) structure.[146] Such change or consolidation can occur after share acquisition or because of the maturity of tenured voting. Therefore, it is also consistent with the two main exemptions to the obligation to announce a mandatory offer, which apply when increased voting rights cause only temporary changes in the distribution of voting powers among shareholders.

The first exemption is based on the fact that the threshold is exceeded only temporarily when the shareholder decides not to exercise the voting rights above the relevant percentage and to instead sell or reduce them within 12 months. Such a reduction may also be caused by an expected dilution of voting rights, which can be predicted through access to the company's register or by the shareholder's decision to waive, even partially, the additional matured voting rights. This exemption explains why all the Italian companies allowed their shareholders to renounce the additional matured rights. The second exemption applies if the relevant mandatory offer threshold is unintentionally exceeded by a loyal shareholder, due to a decrease in the total amount of the company's vot-

---

if the majority shareholder will accrue—due to a decrease in the number of the company's voting rights—her percentage above the relevant threshold, an event that may never occur or occurs long after the acquisition. Such a regulatory solution is questionable as the realignment of the share capital with voting rights and the voting rights can take place considerably after the acquisition of the relevant shareholding; *see* Chiara Mosca, *La maggiorazione del voto, il presupposto dell'obbligo di offerta pubblica di acquisto e le altre novità in materia di soglie opa,* LE NUOVE LEGGI CIVILI COMMENTATE 863, 873 f (2015).

143. Enriques & Gatti *supra* note 136, at 3.

144. *See* Hopt, *supra* note 131, at 161.

145. Consolidated Law on Finance, *supra* note 4 at Art. 106(3), (b); Art. 46 of Consob Regulation, *supra* note 111; Art. L433-3(1) of the CODE MONÉTAIRE ET FINANCIER [C. MON. FIN.] [MONETARY AND FINANCIAL CODE] art. L433-3(1) (Fr.) (corresponding to France); CITY CODE ON TAKEOVERS AND MERGERS 2016, Rule 9.1 (UK), http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/code.pdf?v=8Jan2018.

146. *See* Psaroudakis, *supra* note 134, at 559.

ing rights, depending on other shareholders' behavior (as in the case of transfer of the underlying shares).[147]

No exemption reduces the powerful deterrent effect that the mandatory offer has on the adoption of loyalty-enhancing mechanisms based on a voting power reward. Within the system of European takeover law there is no reasonable expectation that companies without a highly concentrated ownership structure will adopt tenured voting; as a matter of fact, their shareholders would not be interested in tenured voting insofar as they would be affected by the mandatory offer. Takeover regulation, as an exogenous factor, hinders the goal of empowering long-term shareholder. The situation radically changes, though, for existing controlling shareholders, to whom the described mechanism of takeover thresholds does not apply. The empirical evidence supports this conclusion.

C. *How Takeover Regulation Shapes the Selection of Companies with Tenured Voting*

Takeover regulation demonstrates the strong relationship between securities regulation and corporate law, and the mandatory offer obligation becomes a decisive exogenous factor that interferes with the choices of companies to reward their shareholders with tenured voting.

On the one hand, because of the obligation to launch an offer, achieving double voting rights is no longer cost-free above the relevant threshold. It *de facto* curbs the maturity of additional voting rights, hindering shareholders from exploiting this benefit when the threshold will be exceeded. They are unlikely to accept the high cost of the mandatory offer to achieve voting rights without market value due to the sunset clause providing that these rights lapse in the event of a transfer of underlying shares. It is not by chance that, in Italy, no cases of mandatory offers occurred after tenured voting rights matured, and this trend is not likely to change.

Table B illustrates the implications of such interference. Given the ownership structure, all shareholders holding greater than 30 percent of the voting rights in a company can reach a position of absolute centrality in all corporate decisions without incurring the obligation of mandatory bidding. Not even the creeping acquisition rule can hinder the power of controlling shareholders. Since additional voting rights require 24 months to mature, and while by definition creeping acquisition is intended to capture the rapid increases in voting rights (occurring in under 12 months), it is theoretically impossible for the shareholders of Group *a)*, *b)* and *c)* of Table B to trigger the mandatory offer

147. In this situation more than one shareholder is entitled of additional voting rights but, when some of them suddenly dissolve one of the loyal shareholders may see her voting power rise above the relevant threshold. The exemption requires that two conditions are met: the increase in the voting power was involuntarily and shareholder—who has voting rights above 30%—does not dispose of voting shares above this same percentage. Insert citation here; *see* Art. 49(1), d-*bis* and c) of Consob Regulation, *supra* note 109; Mosca, *supra* note 142, 880.

obligation solely by the attribution of increased voting rights, without share acquisition. In addition, these shareholders tend to keep their holdings above the relevant takeover thresholds, thus limiting the alleged positive impact of tenured voting rights on the liquidity of the company's shares.

A different result has been observed in France, where the state maintained the same degree of control due to the role of tenured voting rights but reduced its capital stakes.[148] In Italy, on the contrary, "*Registered shareholders*" are almost always private owners or entities. Moreover, in France takeover regulation provided, a special derogation from the mandatory offer obligation for the four years following the *Loi Florange*, applicable when the maturity of the additional voting rights was offset by a reduction in the stake owned. In Italy, which did not have a similar provision, a comparable dilution was not observed.

The selective effect determined by takeover regulation is clear and depends on the ownership structure of the individual company. Shareholders with less than 30 percent of the voting rights would bear the cost of the mandatory offer if, by maturing their time-phased voting rights, they exceed this relevant percentage. In that case, they will not pressure the board of directors to consider and propose the adoption of tenured voting rights.

It could be argued that a different fine tuning of takeover bid thresholds would be more appropriate. One possible course of action entails setting variable thresholds depending on whether the triggering event involves the purchase of shares or the maturity of tenured voting rights. Italy is currently using this solution, where a 25 percent threshold is applied in the majority of cases if exceeded because of acquisition, while a 30 percent threshold applies to tenured voting. But, as the empirical evidence has shown, 30 percent—despite being the most widespread percentage assumed in several Member States to indicate corporate control—is not the most suitable threshold in cases of tenured voting rights. A higher threshold would capture situations in which the controlling shareholder, upon the award of bonus voting rights, achieves a sharp increase in voting power.

As shown in Table B, thirty-two shareholders achieved the majority necessary to dominate (or nearly dominate) in their general shareholders' meetings without incurring the mandatory offer obligation.[149] By contrast, the thirty percent threshold discourages the shareholders with shares below this level from pushing for the adoption of this loyalty-enhancing mechanism. The final result is contrary to the original expectation. For tenured voting rights to benefit corporate governance, they must offer a genuine incentive for relevant (although non-controlling) shareholders to increase their engagement and participation in the company's life. They are instead those more affected by the mandatory offer obligation, and thus not interested in a reward for their loyalty, in terms of voting power.

---

148. Becht et al., *supra* note 34, at 27.

149. In Table B there are eighteen cases of 'Absolute dominance', twelve of 'Dominance', and one of 'Near dominance' out of thirty-eight observations.

The proposal of raising the takeover threshold for tenured voting rights deserves to be considered at the European level as Member States strive for more uniformity in their corporate law. It serves a valid political purpose—to limit controlling shareholders from exploiting tenured voting to gain indisputable and absolute power over all corporate decisions. This option would credibly revitalize corporate democracy, specifically addressing the fact that, in highly concentrated ownership structure, tenured voting can completely mute the voice of minority shareholders. At the same time, when the ownership structure is less concentrated, a more balanced system of exemptions from the mandatory offer obligation (or simply a higher takeover threshold) would not inhibit the adoption of tenured voting to encourage shareholders' active involvement in the company's life.

IV. Conclusions

Unlike in politics, where the one person, one vote principle dominates,[150] corporate law has offered several solutions for shaping shareholders' voting rights according to their preferences, and the question of the persistent primacy of the one share, one vote principle has shifted to theoretical debate.[151] Companies have been allowed, with varying degrees of freedom in each jurisdiction, to select and shape their optimal shareholder base within the boundaries of corporate law's default rules.[152]

In the age of empowered shareholders, "shareholder cultivation"[153] has found fertile ground. The pressure toward short-termism, highly debated over the last decade, has prompted companies to view crafting an optimal shareholder base as a strategic decision. In this scenario, tenured voting rights, although unanimously listed in the literature on CEMs, have been considered a more flexible and suitable tool than dual-class shares to rewrite the terms and dynamics of shareholders' engagement and ownership. By rewarding long term shareholders, tenured voting rights empower insiders to a lesser extent than dual-class stocks and treat all shareholders equally by granting all the same option to mature additional voting rights.

Tenured voting rights are likely to be at the heart of the discussion on voting rights for a long time. Not only are they a default rule in France, and can be voluntarily adopted by Italian companies (and soon by Belgian companies), but recently, in the US, a group of technology entrepreneurs requested regulatory approval to set up the Long-Term Stock Exchange which would only list shares

150. Hayden & Bodie, *supra* note 9, at 446, 456.

151. *Id.* at 472.

152. Rock, *supra* note 9, at 903.

153. Belinfanti *supra* note 9, at 872.

with tenured voting.[154] However, the empirical evidence has shown that in Continental Europe the importance of tenured voting as a necessary tool to improve the long-term position of shareholders should not be overestimated, particularly in companies with pre-existing long-term (controlling) shareholders. In Italy "long-termism" was the most-used slogan cited by the board of directors to propose the adoption of tenured voting, but a close examination reveals they actually pursued the goal of empowering the controlling shareholders, placing them in a position to dominate the general shareholder meetings. The US has experienced a similar result—although in a smaller sample of companies with time-phased voting rights— where a group of long-term shareholders can guarantee the outcome of any shareholder vote, due to factors that multiply voting rights by more than the double vote allowed by the Member States.[155]

Assessing the advantages and drawbacks of tenured voting rights is complex. They occupy an intermediate step on a spectrum between one share, one vote and dual-vote class stock. Likewise, on both sides of the Atlantic, tenured voting has shown to be particularly suitable and appealing to controlled firms, or by other public firms with relatively concentrated ownership.[156] There is no evidence, though, on the use of this loyalty-enhancing mechanism by widely held companies.

Tenured voting also represents a response to regulatory competition within Member States. In this respect, however, Europe is a special environment, where regulation—specifically, takeover regulation—strongly influences companies and shareholders to efficiently bargain in shaping the most appropriate structure of their voting power. Deviations from the one share, one vote principle at the level of single Member States may require a tailor-made adaptation of the law, touching sensible areas for the integrity of the European market and bearing the risk of excessive fragmentation across Europe.

---

154. Alexander Osipovich & Dennis K. Berman, *New Stock Exchange to Take Long-Term View*, WALL ST. J. (Oct. 17, 2017) https://gcalhoun.files.wordpress.com/2017/10/17-10-16-wsj-new-stock-exchange-to-take-long-term-view.pdf.

155. *See* Dallas & Barry, *supra* note 8, at 635.

156. *See id.* at 645.

DEFINITIONS

N°	Progressive order identifying companies in Table A.
Companies	Thirty-nine companies included in the sample are listed in descending order according to capitalization as of June 29, 2018 (each had tenured voting as of June 2018).
Proposal	The directors' proposal, submitted before the general meeting of shareholders; when this document was not available, data were gathered from the minutes of the general meetings, or from the IPO registration documents. In a few cases the report was not available [NA].
Main Statements	Main statement of the directors' proposal to explain why tenured voting supports the interest of the company. Beyond slight differences in wording, four main statements that focus on the alleged benefits of tenured voting rights were identified and summarized. Specifically: Statement A **[A]** (26 observations)—in this case, directors emphasize tenured voting rights aimed at "increasing the loyalty/long-termism of the shareholder base"; Statement B **[B]** (20 observations)—underlines a more direct effect of tenured voting as the opportunity given to directors to 'enhance long-term strategies'; 'Statement C' **[C]** (9 observations)—the most concealed one, it simply focuses on the 'rewarding effect of tenured voting rights,' and some companies add that such a reward is 'necessary to maintain the preeminence of long-term shareholders'; finally, 'Statement D' **[D]** (8 observations)—suggests that tenured voting rights may 'increase loyalty of minority shareholders.'
Ind. Directors/Minority	The number of independent directors /and the number of directors appointed by minority shareholders. When this information on board composition is not contained in the pre-general meeting proposal prepared by directors, it was taken from the corporate governance report, or the remuneration report, or the minutes of the general meeting when the board was appointed. In a few cases, the information was not given [NG].

Board Unanimity	The board's support for the proposal on tenured rights. When unanimity of the board cannot be derived from the pre-general meeting report drawn up by directors, the information is inferred from the minutes of the general shareholders' meeting, if it provides such evidence. In a few cases, the information was not given [NG].
General Meeting	Date of the shareholders' general meeting that approved the introduction of tenured voting in the articles of association. [**S**] indicates that the decision was adopted when a facilitating quorum was applicable. **[IPO]** indicates that the company introduced the clause relating to tenured voting rights prior to listing.
Quorum	Percentage of shares represented at the shareholders' general meeting (presence quorum)/and percentage of those voting in favor of the adoption of tenured voting rights.
Multiplier	Multiplying factor of tenured voting rights after maturity. In Italy, the maximum is 2.
Loyalty	Maturity period, in Italy, should be set at not less than 24 months.
Registration Date	Date of registration of the Registered Shareholder who applied to mature additional voting rights for all or a portion of her shares. **[Pre-IPO]** indicates that the company introduced the clause relating to tenured voting rights prior to listing.
Registered Shareholder	Shareholder who registered the largest holding. They are classified into four groups for each company, depending on the percentage of share ownership ***a)*** >50%, ***b)*** > 45%, ***c)*** > 30%, ***d)*** and ≤ 30%).
Registered Shares	Registered shareholders may have registered, to mature tenured voting, all their shares or only *some* of them, sometimes at different times.
Stake Reduction	Dilution of the voting rights that occurred when, after registration, the first shareholder reduced part of the holding.
Maturity Date	Maturity date of the first portion of shares registered by the Registered Shareholder.

Empowerment	The power distribution after maturity is provided on the Italian Financial Supervisory Authority (Consob) website, once the first shareholder has matured additional voting rights; this official source **[OS]** also considers the dilution effect resulting from the maturity of double voting gained by other shareholders registered and accounts for the very rare cases in which some shareholders renounced the maturation of additional voting rights. When maturity is still due, the source is either the directors' pre-general meeting report, if it contains such information **[D]**, or a forecast generated by calculating all the voting rights attributed to the first shareholder/the amount of the company's voting rights **[F]** (in this case, the projection is made assuming that the total number of issued shares will not change, or, if they do, the benefit of additional voting rights is extended to them as provided by all companies' articles of association). **Moreover, power was categorized as follows:**
Absolute dominance	The result of tenured voting empowerment: the shareholder can impose her vote in all ordinary and extraordinary shareholders' meetings.
Dominance	The result of tenured voting empowerment; when two condition are met: *i)* considering that the average participation in the general shareholders' meeting in Italian companies is 70 percent, the *Registered Shareholder* is entitled to two-thirds of these voting rights; *ii)* considering the Presence Quorum in the general meeting that introduced the tenured voting in Table A, the registered shareholder is or will be entitled to two-thirds of these voting rights.
Near dominance	The result of tenured voting empowerment: the shareholder already possessing statutory control gets very close to the *Dominance* position.
Control	The result of tenured voting empowerment: thanks to tenured voting, the shareholder is entitled to more than 30% of the voting rights.
Non-controlling shareholder	The result of tenured voting empowerment: the shareholder is entitled to less than 30% of the voting rights.

Dilution Post-Empowerment	Other relevant shareholders have registered who will mature additional voting rights after June 2018. It is unknown whether other non-relevant shareholders were also registered, as this information was not publicly available.

TABLE A

39 COMPANIES INCLUDED IN THE SAMPLE
(ALL COMPANIES WITH TENURED VOTING IN JUNE 2018)
COMPANIES LISTED IN DESCENDING ORDER ACCORDING TO THEIR CAPITALIZATION ON JUNE 29, 2018

N°	Company	Proposals	Statements	Ind. Directors/ Minority	Board Unanimity	General Meetings	Quorum	Multiplier	Loyalty	Registration Date
1	Davide Campari	X	[C]	9/3	X	28.01.2015 [S]	81,23/76,05	Double voting	2 Years	09.04.2015
2	Diasorin	X	[B]	4/0	X	28.04.2016	82,41/73,36	Double voting	2 Years	07.07.2016
3	Amplifon	X	[A]	5/1	X	29.01.2015 [S]	83,63/69,90	Double voting	2 Years	02.04.2015
4	Hera	X	[A][B]	11/3	X	28.04.2015	74,68/81,60	Double voting	2 Years	01.06.2015
5	De' Longhi	X	[C][B]	5/0	NG	11.04.2017	88,01/73,81	Double voting	2 Years	21.04.2017
6	Salvatore Ferragamo	X	[A][B]	3/0	X	20.04.2018	88,20/85,82	Double voting	2 Years	02.07.2018
7	I.M.A.	X	[A]	3/0	NG	21.04.2017	79,06/76,19	Double voting	2 Years	01.06.2017
8	Iren	X	[B][D]	9/2	X	09.05.2016	72,72/79,44	Double voting	2 Years	01.06.2016
9	Reply	X	[C][D]	3/0	X	13.09.2017	75,42/77,53	Double voting	2 Years	31.10.2017
10	Technogym	NA	[A]	Na	X	16.02.2016 IPO	100/100	Double voting	2 Years	04.05.2016 pre-IPO
11	Datalogic	X	[A]	2/0	NG	04.05.2017	83,91/81,41	Double voting	2 Years	27.07.2017
12	Tod's	X	[D]	6/0	X	21.04.2017	63,13/85,09	Double voting	2 Years	15.05.2017
13	Maire Tecnimont	X	[B][D]	5/1	X	18.02.2015	76,14/87,62	Double voting	2 Years	31.03.2015
14	Gima tt	NA	[A]	NG	X	26.06.2017 IPO	100/100	Double voting	2 Years	12.10.2017
15	Biesse	X	[A]	2/0	NG	24.04.2018	80,02/64,57	Double voting	2 Years	NA
16	Carel Industries	NA	NA	Na	NG	27.02.2018 IPO	100/100	Double voting	2 Years	06.06.2018 pre-IPO
17	Zignago Vetro	X	[A][C]	7/0	X	28.04.2015	69,86/93,32	Double voting	2 Years	22.02.2016
18	Gruppo Mutuionline	X	[A][B]	7/NG	X	24.04.2018	64,33/90,32	Double voting	2 Years	29.08.2018
19	Cairo Communication	X	[A][C]	4/0	NG	18.07.2016	78,43/97,25	Double voting	2 Years	29.12.2016

20	Saes Getters	X	[A][B]	4/0	X	03.03.2016	53,15/95,16	Double voting	2 Years	23.03.2016
21	DeA Capital	X	[A][B]	3/0	X	17.04.2015	62,10/93,93	Double voting	2 Years	05.06.2015
22	Nice	X	[A][C]	3/0	X	24.04.2015	81,39/99,59	Double voting	2 Years	02.12.2015
23	Mondadori	X	[A][B]	4/0	X	27.04.2017	73,72/89,34	Double voting	2 Years	17.05.2017
24	Cofide	X	[B][C][D]	6/0	X	27.04.2015	58,17/94,23	Double voting	2 Years	01.06.2015
25	Carraro	X	[B][C]	3/0	X	15.04.2016	65,30/100	Double voting	2 Years	29.04.2016
26	Sabaf	X	[A][B][D]	5/1	X	28.04.2016	56,82/90,59	Double voting	2 Years	01.08.2016
27	Astaldi	X	[A][B][C][D]	8/0	X	29.01.2015 [S]	75,02/71,47	Double voting	2 Years	01.03.2015
28	Intek Group	X	[A][B]	3/0	X	19.06.2015	47,10/97,83	Double voting	2 Years	15.06.2016
29	Landi Renzo	X	[B]	2/0	X	24.04.2015	68,15/86,72	Double voting	2 Years	07.10.2015
30	Openjobmetis	NA	[B]	Na	NG	12.10.2015 IPO	100/100	Double voting	2 Years	20.01.2016 pre-IPO
31	Exprivia	X	[A]	4/0	X	22.04.2015	46,49/100	Double voting	2 Years	23.02.2016
32	Centrale del Latte d'Italia	X	[A]	5/0	NG	13.06.2016	63,05/99,99	Double voting	2 Years	02.01.2017
33	Fidia	X	[A]	3/0	NG	28.04.2017	56,29/100	Double voting	2 Years	09.04.2018
34	Class Editori	X	[A][B]	6/0	X	30.04.2015	70,81/100	Double voting	2 Years	27.10.2016
35	Lventure Group	X	[A]	2/1	X	27.04.2017	43,76/100	Double voting	2 Years	03.08.2017
36	Ternienergia	X	[B][D]	3/0	X	16.03.2015	63,00/99,94	Double voting	2 Years	31.03.2015
37	Conafi Prestitò	X	[A][B]	2/0	X	29.04.2015	56,13/100	Double voting	2 Years	05.06.2015
38	Poligrafica San Faustino	X	[A]	3/0	X	24.04.2015	45,06/100	Double voting	2 Years	07.07.2015
39	Gruppo Waste Italia	X	[A]	2/NG	X	05.05.2015	37,44/100	Double voting	2 Years	13.07.2015

TABLE B (38 COMPANIES ANALYZED UP TO THE END OF JUNE 2018)

				Dilutions				
N°	**Company**	**Registered Shareholder**	**Registered Shares**	**Stake Reduction**	**Other Registered Shareholders**	**Maturity date**	**Empowerment**	**Dilution Post-Empowerment**
a) *Tenured voting matured by first registered shareholder After maturity date*								
1	Davide Campari	>50	All	No	Yes	09.04.2017	Dominance [OS]	Yes
3	Amplifon	>50	All	Yes	Yes	02.04.2017	Dominance [OS]	No
10	Technogym	>50	All	Yes	No	07.10.2016	Absolute dominance [OS]	No
13	Maire Tecnimont	>50	All	No	Yes	07.04.2017	Absolute dominance [OS]	No
16	Carel Industries	>50	All	Yes	Yes	23.05.2018	Near dominance [OS]	No
17	Zignago Vetro	>50	All	No	Yes	22.02.2018	Absolute dominance [OS]	No
21	DeA Capital	>50	All	No	Yes	05.06.2017	Absolute dominance [OS]	Yes
24	Cofide	>50	All	No	Yes	01.06.2017	Dominance [OS]	No
27	Astaldi	>50	Some	No	Yes	01.03.2017	Absolute dominance [F]	No
29	Landi Renzo	>50	All	No	Yes	07.10.2017	Absolute dominance [OS]	No
37	Conafi Prestitò	>50	All	No	Yes	05.06.2017	Absolute dominance [OS]	No
Maturity date still due								
5	De' Longhi	>50	All	No	Yes	21.04.2019	Absolute dominance [F]	Yes
6	Salvatore Ferragamo	>50	All	No	No	02.07.2020	Absolute dominance [D]	No
7	I.M.A.	>50	All	No	No	01.06.2019	Absolute dominance [D]	No
11	Datalogic	>50	All	No	No	27.07.2019	Absolute dominance [D]	No
12	Tod's	>50	All	No	No	15.05.2019	Absolute dominance [D]	No

14	Gimatt	>50	All	No	No	12.10.2019	Absolute dominance [D]	No
15	Biesse	>50	All	No	No	18.05.2020	Absolute dominance [F]	No
19	Cairo Communication	>50	All	No	No	29.12.2018	Absolute dominance [F]	No
22	Nice	>50	Some	No	No	02.12.2017	Absolute dominance [D]	No
23	Mondadori	>50	All	No	No	17.05.2019	Absolute dominance [D]	No
33	Fidia	>50	All	No	No	09.04.2020	Absolute dominance [D]	No
34	Class Editori	>50	All	No	Yes	27.10.2018	Dominance [F]	Yes
b) *Tenured voting matured by first registered shareholder After maturity date*								
20	Saes Getters	>45	All	Yes	No	09.04.2018	Dominance [F]	Yes
25	Carraro	>45	Some	Yes	Yes	29.04.2018	Dominance [F]	No
28	Intek Group	>45	All	No	Yes	15.06.2018	Dominance [OS]	No
31	Exprivia	>45	Some	No	No	01.03.2018	Dominance [OS]	No
Maturity date still due								
9	Reply	>45	All	No	No	31.10.2019	Absolute dominance [D]	No
32	Centrale del Latte d'Italia	>45	All	No	No	02.01.2019	Dominance [F]	No
36	Ternienergia	>45	All	No	Yes	NA	Dominance [F]	No
c) *Tenured voting matured by first registered shareholder After maturity date*								
8	Iren	>30	All	Yes	Yes	01.06.2018	Non-controlling shareholder [C]	No
Maturity date still due								
2	Diasorin	>30	All	No	No	07.07.2018	Dominance [D]	Yes
18	Gruppo Mutuionline	>30	Some	No	No	29.08.2020	Control [F]	No
35	Lventure Group	>30	Some	No	No	03.08.2019	Dominance [F]	No

d) *Tenured voting matured by first registered shareholder After the maturity date*								
4	Hera	≤30	All	No	Yes	01.06.2017	Non-controlling shareholder [OS]*	No
30	Openjobmetis	≤30	All	No	Yes	23.12.2015	Non-controlling shareholder [OS]	Yes
38	Poligrafica San Faustino	≤30	All	No	Yes	07.07.2017	Non-controlling shareholder [OS]	No
39	Gruppo Waste Italia	≤30	Some	No	No	13.07.2017	Control [OS]	No
Maturity date still due								
26	Sabaf	≤30	All	Yes	No	01.08.2018	Control [F]	Yes