# Rereading the “One Share, One Vote” Principle: Is It Also a Matter of Competition?

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*Despite being a cumbersome principle of corporate governance, the “one share, one vote” principle à la Easterbrook and Fischel is constantly challenged by several attempts to circumvent the original structure of capitalism democracy, based on the provision (often a default provision) that no more and no less than one vote is attributed to each share.*

*The possibility of adopting categories of shares with multiple voting rights and that of resorting to mechanisms that multiply voting rights upon the occurrence of specific conditions (oftentimes linked to a loyalty bonus for long-term shareholders), depends on the articles of association’s autonomy granted to joint-stock companies. Rigidly adopting the one share one vote principle de facto entails limiting such autonomy, and where not arising from the applicable regulations, such a limitation can be required by the listing market rules.*

*And it is precisely the advisability of such exceptions—which Easterbrook and Fischel would have strongly refuted—that is the subject of the current debate in both Europe and the United States.*

*Our paper attempts to examine the arguments put forward by those who do not condemn the tool of shares with multiple voting rights, either by issuing class shares or by awarding bonus mechanisms that enhance votes per share. On a closer look, the current debate highlights, even for listed companies, the benefits deriving from stable control and from strengthening those shareholders who are interested in long-term results. Nevertheless, as Easterbrook and Fischel would have stated, the need to protect the minority shareholders lingers in the background, as does the issue of when and to what extent these shareholders can express their views on the choice of the company in which they have invested to derogate from the “one share, one vote” principle.*

*This is the reason for the interest in the Italian case, which is noteworthy both for the risks and the peculiarities of its shareholding corporate structure (and its effect on the increase of the voting right) and for the interesting and singular report*

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*that the Antitrust Authority sent to the Prime Minister last year, advising on the use of multiple voting shares as a tool even for (already) listed companies.*

I. INTRODUCTION ........................................................................................158
II. A COMPARATIVE VIEW OF MULTIPLE VOTING AND LOYALTY SHARES (TENURE VOTING RIGHTS) ..............................................................161
A. The US Experience ..................................................................161
1. Tenure voting as something in-between..........................164
2. The brand-new long-term stock exchange to leave room for dual voting rights ..........................................................165
B. The "One Share, One Vote" Experience Outside the US: A Race to Attract Start-Ups and Fast-Growing Firms ....................170
III. ITALY ........................................................................................174
A. The Italian Competition Authority and Its Peculiar Support for the Issuing of Multiple Voting Shares by Listed Corporations ..................................................................................177
IV. MULTIPLE VOTING SHARES AND COMPETITION AMONG JURISDICTIONS: COMPETITION AMONG JURISDICTIONS, COMPETITIVENESS, OR CORPORATE SUSTAINABILITY? ........................................................182
V. IN FAVOR OF MULTIPLE VOTING SHARES: INCENTIVES FROM ENHANCING CONTROL AND RAISING CAPITAL.....................................................184
VI. SOME MORE CONCRETE REASONING—ON THE STABILIZATION OF OWNERSHIP STRUCTURES WHERE COMPANIES WITH CONCENTRATED OWNERSHIP OR TENDING TO DO SO PREVAIL...................................186
VII. HOW TO INTRODUCE MULTIPLE VOTING SHARES: CORPORATE LAW ISSUES ..........................................................................................189
VIII. CONCLUDING REMARKS .....................................................................192

## I. INTRODUCTION

The debate over whether stock corporations should be provided with multiple voting shares has not been nearly as lively as it is today. Historically, the application of the "one share, one vote" rule has been considered an expression of an implicit principle of shareholder democracy. In a context in which only the number of shares held allows for a multiplication of voting rights, this principle corresponds, in fact, to a rigid proportionality between risk and power. The risk is represented by the size of the capital investment in the company, while the power corresponds to the ability to affect the decisions taken at the general shareholder meeting and, therefore, the appointment of the board of directors. Since company law entrusts directors with the corporate management and strategic choices, after all, the market is called upon to assess the results of such an entrepreneurial

activity. The market enjoys a deterring power to the extent that, when facing the share price depreciation—which is considered a sign of inadequate managerial choices—it may be advisable to foster market acquisitions aimed at changing control. For this reason, numerous studies of law and economics have always highlighted the power of the market of control as a device to replace non-performing directors through successful hostile takeovers. The discussion therefore shifted from company law to financial markets law: a strong tie to the one share one vote principle was seen as the essential tool underlying the functioning of the market for corporate control.

But plenty of water has passed under the bridge. Careful considerations have been advanced—from several points of view, in Europe as well as in the United States—with regard to the benefits of regulatory choices increasingly departing from the one share one vote principle. On both shores of the Atlantic, the absence of an express prohibition on providing shares with multiple voting rights has made it possible to make room for some corporate law experiments, sometimes reflected in the bylaws of listed companies. Furthermore, in Europe, the absence of a common rule on the issue granted member states discretion in this matter, offering an example of regulatory competition between countries: some of them were capable of attracting companies on the premise of more discretion in drawing up share categories, depending precisely on the number of voting rights they award. In fact, exceptions to the one share one vote principle do not always involve the creation of share classes since in some cases, following the French tradition, tenure voting rights are attributed as a bonus to shareholders who prove their loyalty to the investment (usually shown by the uninterrupted holding of shares for a prolonged time period, as set out in the bylaws) without the need to create share classes with tenure voting rights.

Besides regulatory competition issues, since it is not fully proven that flexibility in terms of shares is, by itself, sufficient to push companies to relocate their corporate headquarters, the proponents of multiple voting shares stress the importance of this mechanism in convincing reluctant entrepreneurs to bring companies to the market. Particularly in the European context, populated by small and medium-sized companies, mostly with family shareholders, it has been claimed that multiple voting share classes would protect the founder from losing control of the company by going public. At a policy level, increasing the number of IPOs is a desirable outcome insofar as it allows companies to grow and

be more competitive in global markets. The Capital Markets Union's push towards the development of European markets (including both the regulated market and other recognized trading platforms) is the origin of growing favor towards greater flexibility in the field (also raising the European issue of harmonization in this respect).

Indeed, multiple voting rights constitute, for all intents and purposes, a control-enhancing mechanism, albeit a more transparent one than those widely used by companies in continental Europe.[1] Therefore, it is surprising that little attention has been paid so far to the influences that company law has on the complex mechanisms of financial markets law. In Europe, the obligation of a takeover bid when thresholds (measured in terms of voting rights) are exceeded imposes an implied limit on the adoption of multiple voting rights by listed companies with a strong shareholder base who might enjoy an above-threshold percentage of voting rights thanks to said vote-enhancing instruments. Therefore, from this standpoint, multiple voting rights would seem to be particularly suitable for unlisted companies planning to file for IPOs, a process that can be approached with a predefined set of shares that will enable companies to raise capital without sacrificing a stable control.

In the framework of the above-mentioned extensive debate, this Article is structured as follows: after an examination of the main characteristics of the US legal system and the European scenario in this area (Section II), attention focuses on the Italian scenario. This scenario is characterized, as is known, by a peculiar shareholding composition but also by an unusual incursion of the Antitrust Authority into the law of financial markets: in a report dated March 23, 2021, in fact, it proposed to allow recourse to the instrument of multi-voting shares for companies that are already listed (Section III). This approach aims to increase flexibility in our country with respect to multiple-vote shares (Section IV) since the mechanism at stake is an antidote to short-termism (Section V), but the approach must also be assessed through the eyes of institutional investors, who provide valuable resources for the growth of companies and in light of the ownership of Italian companies (Section VI). The conclusion thus attempts to imagine Easterbrook and Fischel as jurists of 2022, in a profoundly

[1] *See, e.g.*, INST. S'HOLDER SERVS. ET AL., REPORT ON THE PROPORTIONALITY PRINCIPLE IN THE EUROPEAN UNION (Nov. 11, 2016); Ettore Croci, *Controlling-Enhancing Mechanisms: Loyalty Shares and Multiple-Voting Shares in Italy* (June 2018) (unpublished manuscript), https://perma.cc/C2R5-SEPY.

changed environment, untangling between pros and cons, between European and US views, between shareholder democracy and market instances (Section VII).

## II. A COMPARATIVE VIEW OF MULTIPLE VOTING AND LOYALTY SHARES (TENURE VOTING RIGHTS)

### A. The US Experience

Despite the rather continued use of dual-class shares in the US, their existence has been subject, throughout the years, to several amendments and divergent approaches. In the mid-nineteenth century, three major structures were used in US corporations' articles of association. The rule of one share one vote, which could be adopted (thus making control rights proportional to cash flow rights), was not the only system allowed. In fact, one vote per shareholder could also be prescribed (regardless of the number of shares held); quite often, the voting rights of large shareholders were limited with a maximum number of votes for each individual shareholder. Only in 1852 did Maryland's first general incorporation statute adopt the modern standard of one vote per share.[2] In 1909, New York's General Business Corporation Law entitled each shareholder to one vote per share "[u]nless otherwise provided in the certificate of incorporation."[3]

If we move to the modern history of US equity markets, traditionally the New York Stock Exchange (NYSE) did not list companies with dual-class voting, in line with an ideological commitment to corporate democracy and accountability. Such a rigorous ban—which was in force from 1940 until 1986—not only involved multiple voting shares but also non-voting stocks.

In the midst of the takeover battles of the 1980s, it became clear that multiple voting rights could reduce companies' vulnerability to takeovers; the context was ideal to put forward the

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[2] Stephen M. Bainbridge, *Understanding Dual Class Stock Part I: An Historical Perspective*, PROFESSORBAINBRIDGE.COM (Sept. 9, 2017), https://perma.cc/GU4X-CZE6; *cf.* JOSEPH S. DAVIS, ESSAYS IN THE EARLIER HISTORY OF AMERICAN CORPORATIONS 324, 340–41 (Harvard Univ. Press, 1912); Samuel Williston, *History of the Law of Business Corporations Before 1800 (Part II)*, 2 HARV. L. REV. 149, 156–57 (1888); Jeffrey Kerbel, *An Examination of Nonvoting and Limited Voting Common Stock: Their History, Legality and Validity*, 15 SEC. REG. L.J. 37, 47 (1987); David L. Ratner, *The Government of Business Corporations: Critical Reflections on the Rule of "One Share, One Vote,"* 56 CORNELL L. REV. 1, 9–11 (1970); Williams H.S. Stevens, *Stockholders' Voting Rights and the Centralization of Voting Control*, 40 Q.J. ECON. 353, 354 (1926).

[3] 1909 N.Y. Laws, ch. 28, § 23, *reprinted in* JOSEPH A. ARNOLD, NEW YORK BUSINESS CORPORATIONS 39 (4th ed. 1911).

discussion for more liberal rules on shareholder voting rights attached to each share. So—partly due to competitive pressure from "the more libertarian Nasdaq"[4]—the NYSE and Amex relented to this and filed a request with the SEC to modify their listing requirements by allowing dual-class structures, albeit not without subsequent reconsideration that led to the introduction of some limitations in later years.[5]

Taking a look at the numbers over the last few years, "[b]etween 2005 and 2015, the number of US companies with dual class share structures increased by 44 percent. . . . The prevalence of dual class share structures has further increased since then: according to one measure, more than 20 percent of the companies listing shares on US exchanges between 2017 and 2019 had a dual class structure."[6]

In assessing the legitimacy and the convenience of allowing a corporation to deviate from the one share one vote rule, a distinction still exists between listed and unlisted companies. If, for unlisted companies, the choice is a matter of the articles of association, for US listed companies, regulation is strongly linked to the listing rules, which do not favor the inclusion of multiple voting rights and tenure voting clauses in the articles of association for already listed companies (similar limitations can exist only if already provided in the articles of association before the IPO).

Supporters of multiple voting structures believe that they can be beneficial, at least for a defined period of time. In this perspective, a dual-class structure insulates entrepreneurs from short-term pressure and allows them to engage in long-term strategies and business innovation. The underlying assumption is that short-term incentives prevail if managers are at the mercy of daily stock market pressure.

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[4] Marco Ventoruzzo, The Disappearing Taboo of Multiple Voting Shares: Regulatory Responses to the Migration of Chrysler-Fiat 4 & n.14 (Eur. Corp. Governance Inst., Law Working Paper No. 288/2015, 2015) (citing to S.M. Bainbridge, The Short Life and Resurrection of SEC Rule 19C–4, 69 WASH. U. L.Q. 565, 576 (1991)).

[5] *Id.* at 5.

[6] Comm. on Cap. Mkt. Regul., The Rise of Dual Class Shares: Regulation and Implication 2–3, 2 n.4 (Apr. 2020) (citing to Inv. Advisory Comm., U.S. Sec. & Exch. Comm'n, Dual Class and Other Entrenching Governance Structures in Public Companies 1 & Figure 1 (Feb. 27, 2018), https://perma.cc/7ZDF-KZUD); *see also* Paul H. Edelman et al., *Will Tenure Voting Give Corporate Managers Lifetime Tenure?* 24–25, 25 n.105 (Eur. Corp. Governance Inst., Law Working Paper No. 384/2018, 2018), https://perma.cc/PT74-XB6H ("[T]welve publicly-listed companies . . . adopted tenure voting between 1985 and 1987, during the brief window after the NYSE abolished mandatory one share/one vote and before the current NYSE rule barring adoption of tenure voting post-IPO, and which still remained on the NYSE."); *cf.* Lynne L. Dallas & Jordan M. Barry, *Long-Term Shareholders and Time-Phased Voting*, 40 Del. J. Corp. L. 541, 548, 552 (2016).

According to Gilson and Gordon, "[a] significant number of technology companies have gone public with dual class common stock, on the contention that the current corporate governance framework with single class common is insufficiently protective of the company's ability to innovate and to pursue a founder's 'idiosyncratic vision' that may not be appreciated by the market."[7] It is assumed that the founder's capacity can beat the overall performance of a very well-resourced board, composed of highly motivated directors, able to credibly monitor managerial strategy and operational tasks.[8]

Clearly enough, the drawbacks of the approach in favor of multiple voting shares emerge when the founder loses her irreplaceable capacity and insight, as well as dedication and long-term view.[9]

It is worth noting that dual-class structures, once adopted, should last forever. The empirical evidence shows that nearly half of the companies who went public with dual-class structures over the last fifteen years in the US gave corporate insiders outsized voting rights in perpetuity.[10]

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7 Ronald J. Gilson & Jeffrey N. Gordon, *Board 3.0 – An Introduction*, 74 BUS. LAW. 351, 360 n.18 (2019); *see also* Zohar Goshen & Assaf Hamdani, *Corporate Control and Idiosyncratic Vision*, 125 YALE L.J. 560 (2016) (recounting the theory about idiosyncratic vision).

8 Gilson & Gordon, *supra* note 7, at 353.

9 See Lucian A. Bebchuk & Kobi Kastiel, *The Untenable Case for Perpetual Dual-Class Stock*, 103 VA. L. REV. 585 (2017); Ronald J. Gilson, *Controlling Shareholders and Corporate Governance: Complicating the Comparative Taxonomy*, 119 HARV. L. REV. 1641 (2006); Jeffrey N. Gordon, *Dual Class Common Stock: An Issue of Public and Private Law*, CLS BLUE SKY BLOG (Jan. 2, 2019), https://perma.cc/62WH-J8BF; see also Dhruv Aggarwal et al., The Rise Of Dual-Class Stock IPOs 1 (Eur. Corp. Governance Inst., Finance Working Paper No. 806/2021, 2021), https://perma.cc/98ZM-AUHR (confirming that "founders' wedge is greater when founders have stronger bargaining power. The increase in founder control over time is due to greater availability of private capital and technological shocks that reduced firms' needs for external financing. Stronger bargaining power is also associated with a lower likelihood of sunset provisions that terminate dual-class structures").

10 Robert J. Jackson Jr., Comm'r, U.S. Sec. & Exch. Comm'n, Speech at the University of California, Berkeley, School of Law: Perpetual Dual-Class Stock: The Case Against Corporate Royalty (Feb. 15, 2018), https://perma.cc/33KX-677L; *see* Jinhee Kim et al., *Multi-Class Shares Around the World: The Role of Institutional Investors* 2 (Nov. 2018) (unpublished manuscript), https://perma.cc/8DFY-CCD7 ("The U.S. equity market has historically been the paradigm of the 'one-share one-vote' model, but this has been changing in the past decades with the trend of technology companies tapping markets while limiting the voting rights of public shareholders."); *id.* at 2 n.3 ("The NYSE historically prohibited multi-class structures but, after AMEX allowed voting ratios of up to 10:1 in 1976, it allowed low-vote shares in 1985 and, in 1994, it permitted non-voting shares if these exist prior to going public."); *id.* at 2 ("Gompers, Ishii, and Metrick (2010) documented that only 6% of U.S. publicly-listed firms had dual-class share structures in 2002. However, over the last decade, more than 15% of companies that went public had

However, also the opportunity to counterbalance short termism by allowing multiple voting structures has been supported by some empirical data. According to the New York Stock Exchange, between 1960 and 1980, the average holding period of public company stocks ranged from about three to five years. It then significantly declined in the early 1980s in correspondence to the rise of the takeover boom, falling by 1990 to about two years, and by the mid-2000s, it was less than a year. Currently, the average holding period for individual stocks across all US markets is about seventeen weeks. In these decades, the ownership of stocks by institutional investors increased from between 7 and 8 percent in 1950 to 67 percent in 2010. Such a decline in holding periods for large investors (mutual funds, institutional investors, and activist hedge funds) has been cited in support of claims that shareholder pressure is forcing companies to take short-term actions to the detriment of investment and growth.[11] One possible remedy, as an alternative to the dual-class structure (whose main feature is perpetuity of its characteristics), has been envisaged in the adoption of tenure voting as a premium in terms of voting rights awarded to the most loyal and long-term shareholders. Tenure voting can be subject to a sunset clause or (as in the European model) could lapse when the underlying shares are sold.

1. Tenure voting as something in-between

Dual-class stocks (also defined as "unequal shares"[12]) therefore provoke a strong hostility among shareholders, which would be mitigated by the use of a time-phased voting system (also known as tenure voting). This system rewards shareholders not on the grounds of pre-acquired positions, but according to the period of time in which they will retain their stakes. Time-phased voting systems were used by only a few companies in the recent past of the US,[13] while they are extensively examined and often

multiple classes of shares (Ritter (2017)). Multi-class shares have featured in high-profile IPOs such as Google (2004), Facebook (2012), Square (2015), and the recent issuance of non-voting shares by Snap (2017). These IPOs have attracted much debate, from both regulators and market participants.").

[11] On the average holding period trends, see David J. Berger et al., *Tenure Voting and the U.S. Public Company*, 76 BUS. LAW. 295, 298–300 (2017).

[12] James Surowiecki, *Unequal Shares*, NEW YORKER (May 28, 2012), https://perma.cc/8PC7-QNGG.

[13] Berger et al., *supra* note 11, at 16–17 ("A recent study identifies twelve U.S. companies that used tenure voting in the last 30 years. Of these twelve, seven no longer have tenure voting plans. The companies' primary reasons for adopting tenure voting were

used in Europe.[14] Resurrecting this technique from the 80s would mean building "a bulwark against short-termers who roam the markets" with several implications: settling differences and concerns of both sides, thereby allowing a company to benefit not only from the presence of its founders and rewarding long-term holders (by giving them more say in the corporate decisions than short-term hedge fund activists who may favor short-term profits over long-term goals)[15] but also from the valuable long-term support of its investors.[16]

Tenure voting represents a middle ground for corporate managers and investors;[17] while it does not guarantee control as dual-class structures do, it permits managers to "maintain control of the company even in the face of an attempted change of control transaction by a highly motivated dissident shareholder."[18] In the meantime, institutional investors see it as a device granting greater corporate governance rights and financial incentives over time, in case the investors are engaged enough to retain a substantial stake in the company.[19]

2. The brand-new long-term stock exchange to leave room

to 'decrease the influence of short-term investors' and 'increase the relative influence of long-term investors.'").

14 For a comparison with double-voting shares, see INST. S'HOLDER SERVS. ET AL., *supra* note 1, at 11 ("Time-phased double voting shares resemble dual-class shares in that they consolidate an incumbent's control by favouring her in a control contest. But in contrast to dual-class shares, they impair control transfers even when the incumbent is willing to sell. The reason is that a sale of double voting shares dissipates their additional votes.").

15 *See* Dennis K. Berman, *Seeking a Cure for Raging Corporate Activism*, WALL ST. J. (Mar. 17, 2015), https://perma.cc/ZGH6-J4SF; Cydney Posner, *Is "Tenure Voting" a Possible Cure for "Raging Corporate Activism"?*, COOLEY PUBCO (Mar. 19, 2015), https://perma.cc/AM8D-7D3P.

16 Pros and cons are detailed in the white paper by Berger et al., *supra* note 11, at 18–30.

17 Scott Kupor, *Limit Dual-Class Share Structures Rather than Shun Them*, FIN. TIMES (Nov. 20, 2018), https://perma.cc/8N75-HXS2 ("We must stop seeing this battle between chief executives and institutional investors as a zero-sum game. Instead, let's set up a system that gives company leaders the chance to build long-term value and investors a fair say in governance.").

18 Paul H. Edelman et al., *Will Tenure Voting Give Corporate Managers Lifetime Tenure?* (Eur. Corp. Governance Inst., Law Working Paper No. 384/2018, 2018), https://perma.cc/PT74-XB6H.

19 *Id.* (arguing that tenure voting has many pros, but it truly works only if managers hold a substantial block of shares over time, while it does not work if long-term passive institutional investors have a greater role in these companies' corporate governance; its two main drawbacks are the liquidity of trading markets and proxy plumbing, which makes it difficult to decide whether it is really preferable compared to the dual-class stocks system.).

for dual voting rights

The issue deserves to be examined further, especially with regard to a certain US state and to an interesting proposal involving tenure voting (or, rather, making it one of its distinctive hallmarks). We are talking about California, being well aware of its pioneering role throughout the country and of the fact that as California goes, so goes the nation.

Corporations located in Silicon Valley traditionally delayed focus on short-term earnings or profitability, trying to build foundations for their businesses that, in the future, might result in valuable results (*e.g.,* the commercialization of technologies) for their owners over time. CEOs and boards believe that they will benefit from being insulated from short-termism even when they go public[20] and call for protections to safeguard their long-term thinking, which is necessary to foster innovation: "[W]hat's happening in governance is somewhat at odds with that kind of DNA and the challenge is where's the balance going to be found."[21]

The proposal to create a long-term stock exchange (LTSE)—which was embraced by Asana and Twilio[22]—was initially put forward at the end of a book written by Eric Ries and entitled *The Lean Startup*.[23] Afterwards, the bestselling author

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[20] Panel Interview by Abe Friedman with Joseph Grundfest, William A Franke Professor of L. & Bus., Stan. L. Sch., ICGN, Silicon Valley Boardrooms: Distinctive Dynamics in Corporate Governance, https://perma.cc/9FG2-7Z6S (last visited Feb. 7, 2022) ("[I]f you look at Silicon Valley companies, the general ethos in the Valley is you want to stay private for as long as you possibly can. One of the reasons why companies want to stay private can [sic] is that the people in charge of building these companies aren't looking forward to doing business with public equity investors. . . . For an increasing number of companies they'll say we would rather be bought by Intel, or we'd rather be bought by Facebook, we'd rather be bought by Google, than do an IPO on our own. Founders in companies have a choice, people vote with their feet and what you're seeing, not only in Silicon Valley, but throughout the United States, is an increasing number of entrepreneurs saying, it's not worth it being public, given all of the fixed costs and all of the governance hassles and everything else associated with that.").

[21] *Id.*

[22] *Companies*, LONG TERM STOCK EXCH., https://perma.cc/WU3A-KX23; Declan Harty, *Silicon Valley's Long Term Stock Exchange Finally Lists Its First Companies: Twilio and Asana*, FORTUNE (Aug. 26, 2010), https://perma.cc/3ZKT-DRXY. For the broker-dealers that are approved members of Long-Term Stock Exchange, see LONG TERM STOCK EXCH., https://perma.cc/HR9P-BBKR (last visited July 7, 2022).

[23] ERIC RIES, THE LEAN STARTUP: HOW TODAY'S ENTREPRENEURS USE CONTINUOUS INNOVATION TO CREATE RADICALLY SUCCESSFUL BUSINESSES 282 (2011) ("Beyond simple research, I believe our goal should be to change the entire ecosystem of entrepreneurship. Too much of our startup industry has devolved into a feeder system for giant media companies and investment banks. Part of the reason established companies struggle to invest consistently in innovation is intense pressure from public markets to hit short-term profitability and growth targets. Mostly, this is a consequence of the accounting methods we have developed for evaluating managers . . . . What is needed is a new kind of stock

concretely pursued the idea, bringing together engineers, finance and legal experts, as well as investors in order to understand how this can be achieved. This is intended to relieve the pressure of the short-term stock market and shareholders on the CEOs of publicly traded companies, thereby allowing them to focus on innovation instead.[24]

The plan has gradually gathered the consensus of capitalists in Silicon Valley, precisely because of the presence of tenure voting. However, the project was initially met with skepticism: it would be, according to its opponents, a way finalized exclusively to the preservation of control to the detriment of other shareholders. It would be a tool "to duck accountability."[25]

IEX Group Inc. was one of the first companies to announce its partnership with the LTSE in December 2017 and formalized its position through formal filing with the SEC on March 27, 2018.[26] More specifically, Article 14A.412 proposed by IEX would require LTSE Listings Issuers to assign a higher level of voting rights to newly issued shares than the initial voting power of such shares, since shares listed on LTSE Listings may accumulate additional voting rights ("long-term voting") over time, as detailed in the third Exhibit.

This was certainly a wonderful chance to discuss deviations to the one share one vote principle, especially in light of the valuable contributions made by experts in the field. A key—though quite predictable—view was expressed by the CEO of CalPERS, the largest defined benefit plan public pension fund in the US (*i.e.*, a significant institutional investor with a long-term investment horizon), who strongly relies upon the integrity, stability, and efficiency of the capital markets. In this respect, the CEO expressed herself as follows:

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exchange, designed to trade in the stocks of companies that are organized to sustain long-term thinking. I propose that we create a Long-Term Stock Exchange (LTSE).").

[24] *Cultivating Enduring Value in the Public Markets*, LONG TERM STOCK EXCH., https://perma.cc/Z8DS-KA6A (last visited Feb. 11, 2022).

[25] Matt Levine, *The Long-Term Stock Exchange Is Worth a Shot*, BLOOMBERG (Oct. 16, 2017), https://perma.cc/P83Z-B2W4.

[26] "Pursuant to the provisions of Section 19(b)(1) under the Act of 1934, and Rule 19b-4 thereunder, IEX is filing with the Commission a proposed rule change to establish a new optional listing category on the Exchange, which provides a differentiated choice for issuers and investors that prefer listing standards explicitly designed to promote long-term value creation." Notice of Filing of Proposed Rule Change to Establish a New Optional Listing Category on the Exchange, "LTSE Listings on IEX," 83 Fed. Reg. 14,074 (proposed Apr. 2, 2018) (citations omitted); *see also* Sec. & Exch. Comm'n, Exhibit 3 of Release No. 34–8398 (Mar. 27, 2018), https://perma.cc/J4WR-UM4E; Sec. & Exch. Comm'n, Exhibit 5 of Release No. 34–8398 (Mar. 27, 2018), https://perma.cc/RSF3-QUUW.

> Listing standards explicitly designed to promote long-term value creation serve an important purpose in compelling sound corporate governance practices by publicly listed companies. Key features of the Long-Term Stock Exchange (LTSE's) framework include: a long-term voting system and new company disclosures focused on long-term growth strategy, human capital, executive compensation, auditing and accounting, environmental impact, and diversity all of which are vital to investment decision-making. These features are meant to give long-term shareowners a greater role in a company's corporate governance and to provide shareowners with relevant information for evaluating long-term success.
>
> In our view, more long-term thinking is needed in the markets. To that end, we believe the long-term focus that will be promoted through LTSE listing on IEX will help ensure that company governance standards and policies are better aligned with shareowner interests. Specifically, the long-term focus will serve the interests of long-standing shareowners by providing a mechanism by which key governance issues are more transparent and subject to regular disclosure. We believe that the Proposal will help to capture various governance dimensions relevant to a long-term investor such as CalPERS.[27]

Investors Exchange LLC shared the same view, and in their response to the consultation, they largely referred to the comments made by Glass Lewis, which is generally in favor of the creation of LTSE since it is an option, an innovative solution, to bring long-term value to shareholders. Notwithstanding that Article 14A.413(b) does not seem to be consistent with Glass Lewis's view that "double-class" voting structures without alignment of ownership and voting rights may be the cause of agency risks, Glass Lewis acknowledges—and the observation is echoed by Investors Exchange LLC—that the proposal for the long-term voting structure of shareholders with voting rights may be preferable to some investors over the other unequal voting structures available.[28]

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[27] Cal. Pub. Emp. Retirement Sys., Comment Letter on Notice of Filing of Proposed Rule Change to Establish a New Optional Listing Category on the Exchange, "LTSE Listings on IEX," (Apr. 23, 2018), https://perma.cc/K3GS-XXZN.

[28] Invs. Exch. LLC, Comment Letter on Notice of Filing of Proposed Rule Change to Establish a New Optional Listing Category on the Exchange, "LTSE Listings on IEX," (Apr. 16, 2018), https://perma.cc/9X68-LR6G. In the sense of supporting the vision of the "further option" it would offer in the investment landscape, see Aspen Inst., Comment

However, the balanced discussion that took place at the roundtable also highlighted many of the drawbacks of loyalty share structures as they currently exist in the market. These included arguments about reduced transparency, loyalty share structures being more opaque and difficult to calculate, which creates an obstacle for securities lending (thereby making it difficult for index funds to use them); the fact that control-enhancing mechanisms can also protect incompetency, insulate management, and deter outside ideas; the fact that the registration practicalities in some existing structures can make immediate liquidity impossible; and that direct client ownership would be an issue for institutional investors. In addition, regulators could decide to prevent the largest institutional investors from taking up extra voting power.[29]

Among the scholars who addressed the issue, Chris Brummer participated in the consultation with a contribution of considerable interest: on the one hand, he reviewed the state-of-the-art in terms of the position of both the market players and the authors who addressed the issue; on the other hand, he analyzed the elements that make the LTSE Listings option a viable and distinct alternative for market participants who favor a greater emphasis on long-term value creation, identifying them in (i) long-term growth strategies, (ii) transparency, (iii) long-term management compensation, and (iv) long-term voting aligned with corporate governance with long-term objectives of all stakeholders.[30] Focusing our attention on the first point, it is worth stressing that the LTSE listing rules require listed issuers to create a committee specifically dedicated to overseeing the Issuer's strategic plans for long-term growth, which is also responsible for providing explicit

Letter on Notice of Filing of Proposed Rule Change to Establish a New Optional Listing Category on the Exchange, "LTSE Listings on IEX," (Apr. 23, 2018), https://perma.cc/96WP-3QNF, and, although preferring and supporting single-class shares, see also Inherent Grp., Comment Letter on Notice of Filing of Proposed Rule Change to Establish a New Optional Listing Category on the Exchange, "LTSE Listings on IEX," (Apr. 19, 2018), https://perma.cc/8J8B-MRXV ("Finally, while we generally prefer single-class share structures, we support mechanisms that reward long-term shareholders with a greater say in corporate governance issues than short-term shareholders. However, such mechanisms must maintain management accountability, preserve adequate liquidity in the public markets, and balance the interests of small and large—and short-term and long-term—shareholders.").

29 *Loyalty Shares: Limited Use Structure or Corporate Game Changer?*, EUR. CORP. GOVERNANCE INST. (Feb. 28, 2019), https://perma.cc/YAZ4-WA7B.

30 Chris Brummer, Professor, Georgetown U. L. Ctr., Comment Letter on Notice of Filing of Proposed Rule Change to Establish a New Optional Listing Category on the Exchange, "LTSE Listings on IEX," (Apr. 22, 2018), https://perma.cc/G5D9-N8UL.

information on the growth strategy, thus providing shareholders with information vital to understanding the policy in place.

While the positive comments led the SEC to be in favor of the establishment of the LTSE,[31] the SEC suspended under Rule 431(e) any decision pending compliance with the supplement to the answer to the consultation proposed by Investor Exchange LLC.[32] The decision held on June 29, 2018, is therefore stayed until the Commission orders otherwise. Unexpectedly, on August 15, 2018, IEX decided to abandon the project by formally withdrawing its proposal to the SEC while continuing to support the vision in the direction of long-termism.[33]

### B. The "One Share, One Vote" Experience Outside the US: A Race to Attract Start-Ups and Fast-Growing Firms

Even outside the United States, there has been an ongoing swing between a pugnacious defense of the one share one vote principle and positions that are more open to a greater differentiation of voting rights.[34] It is a well-known and widely

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31 Letter from Brent J. Fields, Sec'y, U.S. Sec. & Exch. Comm'n, to Sophia Lee, Gen. Couns., Invs. Exch. LLC (June 29, 2018), https://perma.cc/LU4W-29F4.

32 For further notes on it, see Investors Exch. LLC, Comment Letter on Notice of Filing of Proposed Rule Change to Establish a New Optional Listing Category on the Exchange (June 27, 2018), https://perma.cc/4Z94-YTLX (attaching Amendment No. 1 to the proposed rule change).

33 Investors Exch. LLC, Comment Letter on Notice of Filing of Proposed Rule Change to Establish a New Optional Listing Category on the Exchange (Aug. 15, 2018), https://perma.cc/UT96-NEY5 (withdrawing the proposed rule change); *cf. Long-term Investors*, PRINCIPLES FOR RESPOSIBLE INV. (Aug. 31, 2018), https://perma.cc/EH2Q-MKGW; Nicole Bullock, *IEX-LTSE Listings Partnership in Doubt*, FORTUNE (Aug. 17, 2018), https://perma.cc/ZSM9-QN24.

34 At the EU level, we assisted to a very lively debate between experts, courts and institutions on the principle of proportionality and, therefore, on the desirability of control enhancing mechanisms, starting with the results of the High Level Group of Company Law Experts. The High Level Group of Company Law Experts underlined in particular the need for a harmonization of European company law around the "one share-one vote" rule. A MODERN REGULATORY FRAMEWORK FOR COMPANY LAW IN EUROPE (Nov. 4, 2002), https://perma.cc/QXU6-L4DM. Indirectly, this principle had also found some support in the European case law on golden share, with the Court of Justice condemning the provisions of the Italian civil code allowing the State or public bodies to enjoy a power of control disproportionate to the shareholding held privately. *See* Joined Cases C–463/04 & C–0464/04, *Federconsumatori v. Comune di Milano*, 2007 E.C.R. I–10434. However, for an example of other judgments on the principle of equal treatment which did not pose obstacles to the deviation from the one share one vote rule, see Case C–101/08, *Audiolux SA v. Groupe Bruxelles Lambert SA* (GBL), 2009 E.C.R. I–09823. On this latter judgment, see Andrea Sacco Ginevri, *The Rise of Long-Term Minority Shareholders' Rights in Publicly Held Corporations and Its Effects on Corporate Governance*, 12 EUR. BUS. ORG. L. REV. 587 (2011), and Federico M. Mucciarelli, *Equal Treatment of Shareholders and European Union Law*, 7 EUR. COMP. FIN. L. REV. 165 (2010). Moreover, in 2007, the Report on the Proportionality Principle in the European Union, prepared for the European Commission,

discussed fact that the enthusiasm for the Holy Grail of one share one vote,[35] formulated in the *Report of the High Level Group of Companies Law Experts* of January 2002 (also referred to as the *Winter Report*),[36] quickly subsided and faded.[37] Recently, above all because of the need to thwart the so-called short-termism, the criticisms about it—or, more precisely, the openings in the opposite direction—gradually led to the recognition and appreciation of loyalty.[38] The recent ECGI Roundtable at NYU recognizes that the concept "is gaining traction in Europe with the support of the European Commission," but is also attracting interest in the US, where "loyalty shares with 'tenure voting' or 'time-phased voting' have appeared in a small number of companies and are included in the listing requirements for the newly proposed 'Long Term Stock Exchange.'"[39]

The process of gradually opening up to loyalty shares and multiple voting shares can be explained by resorting to the paradigm of regulatory competition. In fact, looking at the international context, since the early 2000s, there has been a growing tolerance as to the possibility of listing the companies which, in addition to ordinary shares, envisage shares with tenure or multiple voting rights. From a time perspective, as already mentioned, this regulatory competition began in the United States, thanks to the successful listing of some high-tech companies, whose founders retained management power through the issuance of unlisted categories of multiple voting shares

Commission, highlights how the favor towards the "one share, one vote" principle has been subject to rethinking, even given the lack of consistency in the rules throughout the various Member States and the underlying economic circumstances. Instead, in the most recent EU Commission's Communication, *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), and in the Green Paper on long-term financing, *Long-term Financing of the European Economy*, COM (2013) 150 final (Mar. 25, 2013), the adoption of instruments to increase the vote and of categories of shares with multiple votes has been encouraged in order to incentivize shareholders to make long-term investments.

35 Viviane de Beaufort, *One share-One vote, le nouveau Saint Graal* (ESSEC Bus. Sch., Working Paper No. DR06019, 2006).

36 Jaap W. Winter et al., *Report of the High Level Group of Company Law Experts on Issues Related to Takeover Bids in the European Union*, *in* GUIDO FERRARINI ET AL., REFORMING COMPANY AND TAKEOVER LAW IN EUROPE, ANNEX 2, 825–924 (Oxford Univ. Press, 2004).

37 Guido Ferrarini, *One Share – One Vote: A European Rule?* (Eur. Corp. Governance Inst., Law Working Paper No. 58/2006, 2006), https://perma.cc/8BYT-WZCH.

38 Piergaetano Marchetti & Chiara Mosca, *Note sparse sulle loyalty shares*, 63 RIV. SOC. 1549 (2018).

39 TOM VOS, EUR. CORP. GOVERNANCE INST., LOYALTY SHARES (Dec. 7, 2018), https://perma.cc/HDP9-TV24 (referring to the speech held by Professor Becht).

dedicated to them.[40] Thus, even in Europe, the relocation of the Fiat Group's headquarters to the Netherlands, which provided the possibility of having shares with a different voting power,[41] prompted an amendment to the issuance of shares with multiple and tenure voting rights.[42] In the very same year, there was internationally a common trend, heading in the same direction albeit for different reasons: France—which was already contemplating the possibility for listed companies to reward shareholders with increased voting rights as part of a regulatory scheme designed to protect the interests of both national businessmen and workers—imposed tenure voting rights as the default rule for listed companies. By this means, the aim to reduce the potential obstacles to the approval of the amendments to the bylaws for the adoption of such tenure voting shares could be reached.[43]

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[40] Some companies, predominantly from the high-tech and media sectors, have adopted dual-class structures prior to IPO (Meta Platforms (Facebook), Snapchat, Lyft, Groupon, TripAdvisor, Nike, Levi Strauss, Ford, CBS, Comcast, News Corporation, and Berkshire Hathaway among others) or triple-class (i.e., with multiple voting shares, ordinary and non-voting, such as Alphabet, Snap and Under Armour) with significantly high multipliers, (i.e., with multiple voting shares of ten but also twenty times the ordinary shares). On the reasons for the successful listing of these companies, which was deemed "the most important issue in corporate governance today", see John C. Coffee, *Dual Class Stock: The Shades of Sunset*, CLS BLUE SKY BLOG (Nov. 19, 2018), https://perma.cc/MQ8V-QNDE, and, for example, Bernard S. Sharfman, *A Private Ordering Defense of a Company's Right to Use Dual Class Share Structures in IPOs*, 63 VILL. L. REV. 1, 3 (2018), and Zohar Goshen & Assaf Hamdani, *Corporate Control and Idiosyncratic Vision*, 125 YALE L. J. 560 (2015).

[41] In particular, on the cross-border merger of Fiat Spa into its Dutch subsidiary Fiat Investment N.V., which then took the name of Fiat Chrysler Automobiles N.V., see Piergaetano Marchetti, *Le fusion transfrontaliere del Gruppo Fiat-Chrysler*, 59 RIV. SOC. 1124 (2014).

[42] *See infra* Section IV.

[43] The so-called Loi Florange (Loi 2014-384 du 29 mars 2014 visant à reconquérir l'économie réelle [Law 2014-384 of March 14, 2014 on Aiming to Regain the Real Economy], JOURNAL OFFICIEL ÉLECTRONIQUE AUTHENTIFIE [JORF] [OFFICIAL JOURNAL OF THE FRENCH REPUBLIC], Apr. 1, 2014, p. 11), approved as a result of the shut-down of certain production units by Acelor-Mittal (including one, precisely, in Florange) modified Article 225-L123 of the Code du commerce to provide that "(d)ans les sociétés dont les actions sont admises aux négociations sur un marché réglementé, les droits de vote double prévus au premier alinéa sont de droit, sauf clause contraire des statuts adoptée postérieurement à la promulgation de la loi n° 2014–384 du 29 mars 2014 visant à reconquérir l'économie réelle, pour toutes les actions entièrement libérées pour lesquelles il est justifié d'une inscription nominative depuis deux ans au nom du même actionnaire." Thus, the change that occurred in 2014 consisted of the transition from an opt-in regime to an opt-out regime. As a result, the legislation now stipulates that all the French listed companies' shares potentially could double their voting rights, after a period of uninterrupted holding by the same shareholder, without prejudice to the decision of the general shareholders' meeting to opt out of this regime, which is therefore applicable by default.

Other European legal systems have also taken their cue from France and Italy, such as Belgium[44] and, most recently, Spain.[45] A similar phenomenon was experienced in Asia after the Alibaba group chose to list in the United States, also thanks to a corporate architecture capable of retaining control in the hands of the founder of the world's largest e-commerce platform.[46] The reaction of major Asian countries was swift, leading Singapore and Hong Kong (respectively in 2017 and 2018) to allow deviation from the "one share, one vote" rule and, therefore, the presence of listed companies with multiple voting shares.[47]

This trend is still ongoing. Just to recall a European case, in early 2021, following an initiative by the British Treasury Minister, the UK Listing Review was released. The document, in order to increase the attractiveness of the UK stock exchange for the most innovative companies with high growth potential in the complex post-Brexit scenario, also recommended, albeit with an asymmetry, that "rules should be changed to allow dual class share structures in the premium listing segment."[48]

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[44] The Loi 2019–222 du 23 mars 2019 de programmation 2018–2022 et de réforme pour la justice [Law 2019–222 of March 23, 2019 of 2018–2022 Programming for Reform and Justice], JOURNAL OFFICIEL ÉLECTRONIQUE AUTHENTIFIÉ [JORF] [OFFICIAL JOURNAL OF THE FRENCH REPUBLIC] March 24, 2019, p. 11 (introducing the new Code de sociétés et des associations and stipulating the one share, one vote rule as the default rule (Article 7.51) and, more specifically, for unlisted and listed companies respectively, providing for the possibility to derogate from the one share, one vote rule without any limitation (Article 7.52) and to issue tenure voting shares under a regulation that resembles the Italian one).

[45] Also, the Ley 5/2021 about the "fomento de la implicación a largo plazo de los accionistas en las sociedades cotizadas" was introduced to govern shares with tenure voting rights. Ley de Sociedades de Capital (B.O.E. 2021, 88) (Spain).

[46] *Cf.* Jesse M. Fried & Ehud Kamar, *Alibaba: A Case Study of Synthetic Control* (Eur. Corp. Governance Inst., Law Working Paper No. 533/2020, 2021), https://perma.cc/FKJ8-G597 (explaining how the founder Jack Ma controls Alibaba as a permanent member—through Ant Group—of a Partnership Committee which, in turn, has a substantial weight within a Partnership that has the right to appoint most directors of the listed company).

[47] In China, the listing of companies with a dual-class structure is generally not permitted, except for certain exceptions on the ChiNext Market and for given types of companies. Among other things, following the Hong Kong stock exchange's reform of listing rules, Alibaba also decided to list on this stock exchange. *See* Robin Hui Huang et al., *The (Re)introduction of Dual-class Share Structures in Hong Kong: a Historical and Comparative Analysis*, 20 J. CORP. L. STUD. 121 (2020).

[48] JONATHAN HILL, UK LISTING REVIEW (Mar. 3, 2021), https://perma.cc/QPC5-LH6W. It is well known that the London Stock Exchange rules allow companies with a dual-class share structure to be listed in the standard segment, but not in the premium segment, and this severely penalizes companies and investors as it does not allow them to be included in the main FTSE indices, such as the FTSE 100 and the FTSE 250. For an in-depth comment on the constraints commonly proposed to be attached to dual-class shares, which seem to be too rigid to prevent such measures from dissuading the very

In the context of a highly nuanced panorama that still features notable exceptions, namely countries that do not allow any deviation from the principle equalizing the power of influence over the company and the amount of paid-in share capital,[49] the most recent studies show that around 45 percent of the main western countries now allow companies to be listed with dual or multi-share structures or to adopt shares with tenure voting rights.[50] In some cases, the listing of multiple voting stock companies—precisely allowed to attract tech companies (or companies with high growth potential) to the listing—comes with various limits with respect to the multiplier, the resolutions to be taken, the duration, or to specific circumstances which, if verified, cause the loss of the voting rights' multiplication.[51]

## III. ITALY

The Italian corporate governance system is characterized by a high degree of concentration of direct ownership, both for listed and unlisted companies. Moreover, during the second half of the 20th century, the Italian stock market was known as one of the European realms of control reinforcement mechanisms, where a shareholder owning the minority of shares could take advantage of pyramid schemes, shareholder agreements, and nonvoting share issuances to retain control over listed companies.[52] In this scenario, characterized by a lack of confidence in the market mechanisms of control, there was one exception, since—up until recently (as the provision remained unchanged from the drafting

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same companies they wish to entice, see Bobby V. Reddy, *Up the Hill and Down Again: Constraining Dual-Class Shares*, 80 CAMBRIDGE L.J. 515 (2021).

49 This is the case in Germany, which explicitly banned tenure voting shares in 1998. *See* Aktiengesetz [AktG] [Stock Corporation Act], Sept. 6, 1965, BGBl. I at 1089, last amended by Gesetz [G], BGBl. I at 2446, art. 9 (Ger.), https://perma.cc/HK89-HSU8.

50 Org. for Econ. Co-operation & Dev., OECD Corporate Governance Factbook 2021 (2021), https://perma.cc/84CS-EXNM.

51 This is the case of the recent Singapore, Hong Kong, and Chinese regulations. *See* M. Yan, *The Myth of Dual Class Shares: Lessons from Asia's Financial Centres*, 21 J. CORP. L. STUD. 397 (2021). The subject of sunset clauses is particularly studied by English-speaking scholars. *See, e.g.*, Lucian A. Bebchuk & Kobi Kastiel, *The Untenable Case for Perpetual Dual-Class Stock*, 103 VA. L. REV. 585 (2017); Jill E. Fisch & Steven Davidoff Solomon, *The Problem of Sunsets*, 99 BOS. U. L. REV. 1057 (2019); Marc T. Moore, *Designing Dual-Class Sunsets: The Case for a Transfer-Centered Approach*, 12 WM. & MARY BUS. L. REV. 93 (2020). On the undesirability of a provision imposing a precise expiration date on the duration of the multiple voting shares, see also Luca Enriques & Alessandro Romano, *Rewiring Corporate Law for an Interconnected World* 37 (Eur. Corp. Governance Inst., Law Working Paper No. 572/2021, 2022), https://perma.cc/7FN8-45AF.

52 See, e.g., Magda Bianco & Paola Casavola*, Italian Corporate Governance: Effects on Financial Structure and Firm Performance*, 43 EUR. ECON. REV. 1057 (1999).

of the 1942 Civil Code)—the Italian legislature had always prohibited multiple and/or tenure voting shares.

The hostility towards voting right enhancement instruments, which were referred to as a real taboo in Italian corporate law,[53] has only partially disappeared with the 2014 reform brought in with the express purpose of enhancing the competitiveness of Italian companies.[54] The reform opened up the possibility of issuing multiple voting shares only to unlisted joint-stock companies, allowing listed companies to issue tenure voting shares instead.

In particular, Art. 2351 of the Italian Civil Code now enables unlisted joint-stock companies to provide for the creation of share categories with multiple voting rights with a maximum of three votes. However, it should be noted that, if these companies subsequently intend to list on a regulated market, multiple voting shares will retain their pre-listing rights. Therefore, if a company wished to "armor" its pre-IPO majority in order to then collect resources at the time of listing, it could already do so today, preserving this structure after listing even in the event of a subsequent share issuance.[55]

However, for previously listed companies, the law retained the prohibition on issuing multiple voting shares.[56] Nevertheless, listed companies may introduce so-called tenure voting. Article 127 *quinquies* of the Consolidated Law on Finance permits up to a maximum of two votes per share, owned by the same person for an uninterrupted period of time longer than twenty-four months commencing from the date of registration in a list that has to be kept by the issuer.[57]

The scenario regarding the possible multiplication of voting rights attributed to shares has been further enriched lately. First, as part of the measures taken during the pandemic to boost

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[53] *See* Ventoruzzo, *supra* note 4.

[54] *See* Legge 11 agosto 2014, n.116, G.U. Aug. 20, 2014, n.192 (It.).

[55] Among public companies listed after 2014, only four issuers (Aquafil, Fila and Guala, Philogen) introduced multiple voting class shares prior to listing and retained them post-IPO.

[56] The first paragraph of Article 127 *sexies* of the Consolidated Law on Finance provides that, as an exception to Article 2351, paragraph four, the listed companies' bylaws may not provide for the issuance of shares with multiple voting rights. Decreto legislativo 24 febbraio 1998, n. 58, G.U. Mar. 26, 1998, n.71 (It.).

[57] In order to avoid excessive vote concentration, if a listing company issued multiple voting shares, it cannot then issue tenure voting shares. On the use of loyalty shares in Italy, see Chiara Mosca, *Should Shareholders be Rewarded for Loyalty? European Experiments on the Wedge Between Tenured Voting and Takeover Law*, 8 MICH. BUS. & ENTREPRENEURIAL L. REV. 245, 254 (2019).

economic recovery, in 2020, the Government proposed to broaden the possibility of issuing multiple voting shares to companies previously listed on regulated markets.[58] This proposal was clearly affected by considerations pertaining to competition between legal systems and, specifically, by the desire to hinder the migration of certain Italian listed companies towards more liberal systems as far as multiple voting shares are concerned. Indeed, various foreign legal systems, both within and outside the EU, allowed listed companies to depart from the one share one vote rule by providing for categories of shares with multiple voting rights. The prohibition for listed companies to issue shares with multiple voting rights, established by Article 127 *sexies* of the Consolidated Law on Finance, could thus have resulted in an "unfair" misalignment between legal systems to the detriment of the Italian stock market.[59] The preamble to the bill also pointed out that, in many cases, the decisions to relocate Italian companies with shares listed on a regulated market abroad or to opt for a foreign system for companies resulting from mergers involving Italian listed companies, were also prompted by the possibility of resorting to a legal regime conducive to the direct or indirect provision of multiple voting shares.[60]

Given the possible risks of extracting private benefits that the introduction of multiple voting shares could have raised,[61] in any event, certain safeguards were established in favor of minority shareholders when adopting the resolution to issue shares with multiple voting rights. In fact, the draft provided the right of withdrawal for dissenting shareholders in the case of approval of the resolution to implement multiple voting. Moreover, it provided for the chance of blocking the resolution by the majority of the shareholders present at the general meeting, other than the shareholder(s) who (even jointly) held a majority

58 The original intention, which was never followed through, was to include it in Law no. 77 of July 17, 2020, converting with amendments Decree-Law no. 34 of May 19, 2020. *See* Legge 17 luglio 2020, n.77, G.U. July 18, 2020, n.180 (It.) (converting and amending Decreto legge 19 maggio 2020, n.34, G.U. May 19, 2020, n.128 (It.)).

59 In reality, the international landscape shows that the possibility of issuing shares with multiple voting rights, where envisaged, usually concerns companies that plan to subsequently propose an initial public offering.

60 See the preamble to Article 45 of the draft "Relaunch Decree." Draft of D.L. Rilancio (May 13, 2020), https://perma.cc/9RBM-ZPH7.

61 The same Report, however, judged these risks to be insignificant, to the extent that the opening up to statutory autonomy and market valuations was justified in the absence of proven negative effects that this multiple voting may generate for the companies that adopt it.

(or relative majority) stake, provided that such dissenting votes amount to at least 10 percent of the voting capital.

However, this proposal was not reflected in the final text of the law due to possible constitutional breaches.[62]

The second reforming impulse is unexpectedly due, instead, to the Italian Competition Authority, and this aspect is worth further investigation because according to the conventional wisdom, competition authorities should favor the market for corporate control as one of the fundamental mechanisms that could magnify efficiency and welfare.

### A. The Italian Competition Authority and Its Peculiar Support for the Issuing of Multiple Voting Shares by Listed Corporations

The main task of the Italian Competition Authority (ICA) is to enforce antitrust rules to protect competition in the market. In addition, it should also promote competition by advising the Government, Parliament, and regional entities on how to shape and/or amend existing laws and regulations to increase existing competition by lowering unnecessary barriers to entry, discriminatory rules, or prohibitions that are not justified by other general legitimate interests.[63] The ICA can advise the Government, Parliament, and regional and local bodies both on existing laws and on draft legislation. In this context, the authority can daily issue a general recommendation to the Government and Parliament to amend or introduce laws and regulations to foster market competition.

In March 2021, the ICA adopted a new recommendation[64] suggesting several measures aimed at stimulating the competitiveness of the Italian economic system and affecting the

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[62] In all likelihood, the lack of transposition of Article 45 in the final text of the Decree-Law n. 34/2020 is due to the absence of significant links between the provision on multiple voting shares and the objectives of the decree, containing urgent measures regarding health, support for work and the economy, and social policies linked to the epidemiological emergency caused by COVID-19.

[63] *See* Legge 10 ottobre 1990, n. 287, at art. 21–24, G.U. Oct. 13, 1990, n. 240 (It.) (as amended).

[64] Autorità Garante della Concorrenza e del Mercato, proposte di riforma concorrenziale, ai fini della legge annuale per il mercato e la concorrenza anno 2021 (Mar. 22, 2021), https://perma.cc/MZ4H-QCXW [hereinafter PROPOSTE DI RIFORMA 2021]. The Antitrust Authority's annual report and reports represent the basis for the Government's drafting of the annual bill for the market and competition (Art. 47, Law no. 99 of July 23, 2009). Other competitive reform proposals had been sent by the Authority in 2010, 2012, 2013, 2014.

governance models of Italian listed companies.[65] In this context, it proposed to allow the use of multiple voting shares by already listed companies. According to the ICA, the ban on issuing multiple voting shares for listed companies would represent an undesirable limitation on the organization of economic activity, prompting foreign companies not to locate their headquarters in Italy and causing Italian companies to move abroad. The ban on issuing multiple voting shares would therefore create a competitive discrimination with respect to other jurisdictions' companies, which are not subject to the same restrictions.[66] According to the ICA, the reform, aimed at recreating a level playing field (especially) in Europe, would not represent a race to the bottom. On the contrary, by strengthening the stability of control, multiple voting shares would incentivize a more attentive management in a medium-long term perspective. In short, a more open view towards issuing multiple voting shares by listed companies would represent a philosopher's stone to transform the DNA of Italian companies and their objectives, while at the same time attracting new capital and resources to the Italian financial ecosystem from abroad.

In the past, in its role as a competition advocate, the ICA had also dealt with corporate governance and financial markets, for instance in relation to minority shareholdings and interlocking directorates in the banking, insurance, and financial markets.[67] However, the intervention in favor of the introduction of multiple voting shares by listed companies is, at least at first glance, difficult to frame in the ICA's activity. The task of the authority is to protect (and promote) competition, i.e., maintaining and possibly fostering adequate competitive pressure on the relevant product and geographic markets. Therefore, it appears that, contrary to its mandate, the ICA supports the introduction of a provision that does not foster the contestability of listed companies, but that rather protects incumbent (private or public)

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[65] PROPOSTE DI RIFORMA 2021, *supra* note 64.

[66] Proposte Di Riforma 2021, *supra* note 64.

[67] Autorità Garante della Concorrenza e del Mercato, Proposte di riforma concorrenziale ai fini della legge annuale per il mercato e la concorrenza 5 (Feb. 9, 2010), https://perma.cc/G4YG-Y7GK. The Authority criticized the spread of shareholding and personal links between competing operators and the independent directors, both of which contribute to hindering the establishment of real competition in the final services markets. The report then helped to urge the introduction of a ban on interlocking in the banking, insurance, and financial sectors.

shareholders.[68] In a wider perspective, the ICA stance appears not to be completely isolated: globalization; greater interconnection between markets and companies; economic, financial and, nowadays, social and health crises; and the substantial change in the composition of the shareholders of large listed companies led the ICA to rethink the "objectives" of company law and the instruments for achieving them. In this context, and under certain conditions, it has been stated, for example, that multiple voting shares could misalign the objectives of the company with those of institutional investors, who are more attuned to financial strategies than to enduring corporate results.[69]

It is, therefore, interesting to look at the reasons invoked by the ICA in relation to its proposal. On the one hand, the unhinging of the one share one vote rule also depends on the attempts of the various legal systems to encourage the listing of companies with higher growth potential. On the other hand, the ICA proposal seems not to have this purpose. Companies seeking to list in Italy can already adopt categories of shares with different voting rights (ordinary and limited voting shares, multiple voting shares if included prior to the listing, or tenure voting shares) to allow the founding shareholders to remain in control of the company and, at the same time, open up to the risk capital market. In addition, the proposal does not actually seem to have the aim of stimulating a reform of company regulations in the direction of greater private autonomy. Greater flexibility in modulating voting rights could lead majority shareholders not to inhibit growth and to instead strengthen operations on the markets because of the possibility of losing the power to manage the company.[70] This would also be in line with the recent OECD recommendation to the Italian government in its report on the

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68 *See* Rafael La Porta et al., *Law and Finance*, 106 J. POL. ECON. 1113, 1126–27 (1998) (footnote omitted) (citation omitted) ("To begin, investors may be better protected when dividend rights are tightly linked to voting rights, that is, when companies in a country are subject to one-share–one-vote rules. When votes are tied to dividends, insiders cannot have substantial control of the company without having substantial ownership of its cash flows, which moderates their taste for (costly) diversion of cash flows relative to payment of dividends.").

69 Some interesting considerations and proposals on this matter are formulated in Luca Enriques & Alessandro Romano, *Rewiring Corporate Law for an Interconnected World* (Eur. Corp. Governance Inst., Law Working Paper No. 572/2021, 2022), https://perma.cc/7FN8-45AF.

70 For similar considerations, referring to the prohibition to list companies with dual-class structures in the Premium segment of the English stock exchange, see Bobby V. Reddy, *Finding the British Google: Relaxing the Prohibition of Dual-Class Stock from the Premium-Tier of the London Stock Exchange*, 79 CAMBRIDGE L.J. 315 (2020).

Italian capital market: in short, greater flexibility in shaping voting rights could make our capital markets more attractive and make it easier for our listed companies to raise venture capital. But this rationale is not reflected in the ICA's reporting. In fact, the ICA apparently confers on the multiple voting shares a different objective, ascribing (also) to the lack of this option the loss of competitiveness of Italian companies when compared to those operating elsewhere. In short, Italian companies would be affected by regulatory constraints that do not seem truly essential and proportionate. This would result not only in unjustified costs, but would even entail a competitive differential with respect to companies not bound by the same limitations, since shares with more votes, by reinforcing the stability of control, promote a management that is more attentive to a medium-long term perspective.

Now, the Authority clearly mixes plans that are not entirely compatible, as will be clarified in the following paragraphs. In the first place, the level of the attractiveness of our system as a choice of seat by foreign enterprises is taken into consideration. From this standpoint, company law is certainly one of the factors considered when choosing to invest or locate an entrepreneurial activity, even though the relevant elements and constraints that keep foreign firms away from Italy appear to be quite different, starting with fiscal and financial incentives and ending with issues such as the slow pace of our judicial system, the burden of bureaucracy, and the uncertainty of the general regulatory framework.[71] Secondly, there are the specific rules and incentives or, vice versa, obstacles to listing. Costs and benefits are distributed differently among players. In this sense, the presence of categories of shares with multiple voting rights, which may incentivize certain companies to be listed, could, at the same time, be a strong disincentive for institutional investors, who should be responsible for directing the resources allocated to company growth. Finally, a third plan seems to merge with the reasoning

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[71] Some doubt may be cast on the reliability of the World Bank's customary rankings on the attractiveness of the various countries for entrepreneurial activity, but the data emerging is very clear. Italy's placing in these charts has always been rather low (in the 2020 edition of the publication, Italy dropped further to 58th place). What is noticeable, however, is that the areas that significantly lower Italy's ranking are related to bureaucracy (Italy is 98th in the field of "Starting a Business," 97th in that of "Dealing with Construction Permits," and 128th in that of "Paying Taxes") and the justice sector (in particular, Italy is 122nd in that of "Enforcing Contracts"). The report dedicated to Italy for 2020 is available at *Doing Business: Italy*, WORLD BANK (2020), https://perma.cc/XD6W-NWUT.

developed by the Authority; namely, the plan looks at multiple voting shares as an instrument that is, if not strictly necessary, at least appropriate for the purpose of reinforcing the stability of control and providing an incentive for a management that is more careful with a medium-long term perspective. This would allow our companies to recover the competitiveness gap as compared to other subjects which, instead, can (among other things) issue categories of shares with multiple voting rights, facilitating sustainable growth.[72]

The core of the reasoning of the Authority could therefore be summarized as follows: multiple voting shares would make it possible to steer the management of the company towards medium/long-term objectives, stabilizing control and leading to more solid and sustainable business growth.[73] This would be achieved by reinforcing control groups, but also by securing the loyalty of other shareholders to the company and its business plan. In other words, the tools for strengthening the vote would represent an excellent antidote to short-termism, because they would prompt managers and directors to look away from the stock market price trend of the shares and from the claims of those who speculate (in the short term). Multiple voting shares, by granting greater administrative power to stable investors, would encourage management to pursue forward-looking conduct, given that their fate (and directors' confirmation) would depend on stable shareholders willing to hold on to their positions.[74]

72 Org. for Econ. Co-operation & Dev., *OECD Capital Market Review of Italy 2020: Creating Growth Opportunities for Italian Companies and Savers* (2020), https://perma.cc/642Y-KWUX. The document states that "[r]eforms in this respect should also consider efficiency gains with respect to the process and requirements for secondary equity offerings by already-listed companies that, in addition to strengthening the balance sheets of individual companies, also will lead to higher free-float ratios and help attract the growing pool of capital from global institutional investors. In this context, policy makers may consider taking steps to stimulate an increase in the free-float by allowing more flexible structures of voting rights to address concerns among founders and long-term shareholders about the effectiveness of decisions that are of key importance to the future direction of the company, without compromising safeguards for minority shareholder protection. This may include an evaluation of the effectiveness, and possible unintended consequences for the free-float, that may arise from supermajority requirements for certain decisions by the shareholder meeting. It may also include a more flexible default framework for deciding on the introduction of loyalty shares." *Id.*

73 PROPOSTE DI RIFORMA 2021, *supra* note 64.

74 Furthermore, it has never been empirically or definitively demonstrated that long-term management is always preferable. *See* Jesse M. Fried, *The Uneasy Case for Favoring Long-term Shareholders*, 124 YALE L.J. 1554 (2015). On a different level, see Mark Roe & Roy Shapira, *The Power of the Normative in Corporate Lawmaking* 13 (Eur. Corp. Governance Inst., Law Working Paper No. 554/2020, 2020), https://perma.cc/Z6TG-RS4G

Moreover, the issuance of such shares could lend itself to encouraging new investments when current shareholders are unable to cope with new capitalization on their own. Shareholders who currently control the company could dilute their ownership without the risk of losing corporate control if provided with multiple voting shares.[75]

Lastly, several hints that lie in the background in the document could suggest that the ICA, if not directly promoting protective measures, was not against the introduction of such measures for the Italian entrepreneurial system, especially during a period of weakness due to the economic and health crisis. In this sense, we could read the statement according to which multiple voting shares could lead to the strengthening or, anyhow, to the preservation of management power in the hands of leading shareholders, avoiding their escape abroad in the search for more protective regimes. On the other hand, the history of multiple voting shares teaches that these tools have been introduced and used in times of crisis with the aim of protecting national companies.

At the moment, the proposals of the Authority have not been adopted by the Government and the Parliament. However, on a theoretical and empirical level, the interest in assessing whether or not the reasons supporting the introduction of multiple voting shares by already listed companies are well-founded.

## IV. Multiple Voting Shares and Competition among Jurisdictions: Competition among Jurisdictions, Competitiveness, or Corporate Sustainability?

Emblematically, in Italy, the issue of the introduction of multiple voting shares was raised by the Antitrust Authority with the aim of calling on lawmakers to reconsider their closed-minded

(considering the negative connotation of short-termism "rooted in deep-seated cultural norms" to be valued as a matter more of narrative than of substance).

[75] In the Report, the Authority states its awareness of the numerous criticisms against the introduction of multiple voting share classes; however, it deems these criticisms to be overridable in light of a comparison with other existing and widely used mechanisms for strengthening control, that are both less verifiable and less transparent. In fact, the improvement of this multiple voting tool should be accompanied by the introduction of "adequate control mechanisms, implemented also through concrete and effective information to the markets on the ownership structures and business plans of the companies." PROPOSTE DI RIFORMA 2021, *supra* note 64. This Article does not propose to discuss these objections in depth, but it should be pointed out that the replacement effect of multiple voting tools with respect to other control-enhancing mechanisms is not to be taken for granted, and it could even be the case that such mechanisms are strengthened (*e.g.*, shareholders' agreements among owners of unlisted multiple voting shares).

the aim of calling on lawmakers to reconsider their closed-minded attitude towards this tool. As is natural for an antitrust authority, it focused on the need to overcome the risks of forum shopping to the detriment of the country's competitiveness. In order to approach this issue, it is essential to ponder the needs behind this reform. As already noted, the overturning of the "one share, one vote" principle is driven by the desire to encourage the listing of firms with higher growth potential in Europe. This implies an evaluation of the inadequacy of the current rules given that companies wishing to be listed in Italy (as in other EU countries) already have the possibility of introducing share categories with different voting rights (common shares and shares with limited voting rights, shares with multiple voting rights if included prior to listing, or loyalty shares).

However, if we think in terms of competition among legal systems, there are many corporate law mechanisms to bear in mind, such as the extent of the multiplying factors with which to equip shares and any possible rewarding systems for shareholder loyalty, the possibility of listing all categories of shares (either multiple-voting shares or not), and the regulatory implications of mandatory takeover bids.

Such a reform—especially if undertaken by individual Member States and not at the EU level—would clearly require the needed safeguards in favor of minority shareholders, which must be consistent with the company law systems concerned. In this case, the same attention must be paid to the harmonization of the rules as a whole so that the game plan is truly aligned. The point we are trying to make is that the discussion cannot be limited to introducing multiple voting shares or not: if the European debate involves competition among legal systems, then the elements that contribute to enlivening such competition have to be examined one-by-one. We should just recall that the debate has gained momentum in Italy in the wake of the relocation of some listed companies to the Netherlands, where they adopted multiple voting shares with high multipliers.

Thus, two different viewpoints arise. On the one hand, there is a need to strengthen the growth of companies and their access to the market, which can be examined at both the Member State and EU levels.[76] On the other hand, competition among jurisdictions, which is limited, instead, to the goal of enhancing

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[76] Consider, similarly, the considerations—referring to the ban on listing companies with dual class structures in the premium segment of the UK stock exchange—by Reddy, *supra* note 70.

the attractiveness of an individual Member State within the EU (although there has been no lack of cases of companies choosing the US as their listing market in recent years). The recent OECD recommendation to our government for greater flexibility in the shaping of voting rights could make our capital markets more attractive and ease the raising of risk capital for our listed companies.[77]

The Italian Antitrust Authority's perspective is, as mentioned above, aimed at highlighting the second approach, i.e. the appropriateness for Italy to increase flexibility with respect to the multiple voting shares scenario. In fact, the Authority has even managed to attach the lack of this option to the loss of competitiveness of Italian companies compared to foreign ones because Italian companies would be suffering from regulatory constraints that are not truly essential and proportionate. The strong underlying assumption is that multiple voting shares, which reinforce the stability of control, encourage management to pay more attention to the medium-long term outlook.

In our view, it is also necessary to assess whether the multiple voting mechanism is welcomed by institutional investors since they play a major role in providing companies with resources for growth. Finally, the Authority views multiple voting shares as an appropriate tool for reinforcing the stability of control, encouraging management to pay more attention to a medium-long term horizon. This is why we deem it relevant to compare this statement with the current ownership structures of Italian companies.

## V. In Favor of Multiple Voting Shares: Incentives from Enhancing Control and Raising Capital

Expressing support for multiple voting shares implies substantial acceptance of them as tools for enhancing control.

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[77] ORG. FOR ECON. CO-OPERATION & DEV., *supra* note 72, at 19 ("[R]eforms in this respect should also consider efficiency gains with respect to the process and requirements for secondary equity offerings by already-listed companies that, in addition to strengthening the balance sheets of individual companies, also will lead to higher free-float ratios and help attract the growing pool of capital from global institutional investors. In this context, policy makers may consider taking steps to stimulate an increase in the free-float by allowing more flexible structures of voting rights to address concerns among founders and long-term shareholders about the effectiveness of decisions that are of key importance to the future direction of the company, without compromising safeguards for minority shareholder protection. This may include an evaluation of the effectiveness, and possible unintended consequences for the free-float, that may arise from supermajority requirements for certain decisions by the shareholder meeting. It may also include a more flexible default framework for deciding on the introduction of loyalty shares.").

Supporting multiple voting shares implies considering them as an accepted tool of enhancing control. Multiple voting shares would in fact make it possible to steer the management towards medium/long-term results, stabilizing control and allowing for more robust and sustainable corporate growth.[78] This happens not only by reinforcing the control groups, but also by fostering the loyalty of other shareholders to the company and its business plan. From this angle, vote-strengthening tools are an antidote to short-termism as they encourage managers and directors to divert their gaze from share price movements and the claims of speculative (short-term) investors. By giving greater power to stable investors, multiple voting shares encourage managers to pursue forward-looking policies, given that their confirmation as such (i.e. the length of their tenure) depends on the shareholders' willingness to stay with the firm.[79]

Meanwhile, the issuance of multiple voting shares can encourage the flow of additional capital when owners are unable to cope with new capitalization. They may agree to dilute their shareholding without the risk of losing control of the company.[80]

Furthermore, some allusions that are not too far beneath the surface in the Antitrust Authority document may suggest that the introduction of multiple voting shares could help with protecting Italian listed firms from hostile takeovers from abroad during a period of particular share price weakness due to a persistent economic crisis. This is how one might read the assertion that, at least in the context of the rather small number of non-controlled listed companies, multiple voting shares could assist in strengthening the power of major industrial shareholders over short-term funds, nipping in the bud the temptation to leave Italy in search of more protective regimes.

Lastly, initially in France (but also in Italy when the tenured voting mechanism was introduced), it was argued that the possibility of having multiple voting shares allows the public shareholders to sell (further) tranches of shareholdings and thus raise cash without reducing the State's control over companies. From a

[78] Proposte Di Riforma 2021, *supra* note 64.

[79] Moreover, it has never been empirically and conclusively shown that long-term management is to be preferred over short-term management. *See* Fried, *supra* note 74; *see also* Roe & Shapira, *supra* note 74, at 13 (considering the negative connotation of short-termism "rooted in deep-seated cultural norms" to be evaluated as a matter of narrative rather than substance).

[80] In the Report, the Antitrust Authority expresses its awareness regarding the numerous criticisms leveled at the introduction of multiple-voting share classes but considers these objections to be surmountable. *See* discussion *supra* note 75.

protectionist point of view, multiple voting shares can also represent a less intrusive instrument than the "golden power" (namely, that power the Italian government has to impose conditions on, or even veto, investments by foreign persons in Italian companies and assets in strategic sectors in case this might jeopardize national security or public interests) to avoid foreign raiders' acquisitions.

## VI. Some More Concrete Reasoning—On the Stabilization of Ownership Structures Where Companies with Concentrated Ownership or Tending to do so Prevail

Oftentimes, the validity of theoretical arguments is not matched by the desired concrete outcome. For this reason, we wish to try to compare the hypothetical benefits discussed in the preceding paragraphs with the actual scenario of Italian listed companies.

The theory that listed companies are marked by unstable ownership structures, which leads directors to privilege short-term objectives, induced by the strong pressure exerted by institutional investors,[81] should now be verified.[82] Actually, even the latter statement is inaccurate insofar as it discounts a uniform view of institutional investors; it is worth thinking, for example, that index funds—which widely invest in Italian companies[83]—cannot easily dispose of the shares included in the indices, so their perspective is not a short-term one.[84] More generally, in Italy all institutional investors have a lower presence than in Anglo-Saxon countries. A recent OECD study shows that in 2018 the presence of institutional investors in Italian listed companies (26.9%) was less than half the rate registered in the UK (61%) and the US (70.9%).

Table 1. Average shareholder composition by different categories of investors, weighted by market capitalization, end-2018.

81 This concern is expressed in Recital 15 of the Directive 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.

82 Giovanni Strampelli, *Can BlackRock Save the Planet? The Institutional Investors' Role in Stakeholder Capitalism*, 11 HARV. BUS. L. REV. (2021).

83 See the section of Consob's institutional website dedicated to the communications received with regard to significant shareholdings. *Società Quotate – Azionariati Attuali* [Listed Companies –Current Shareholders], Commissione Nazionale per le Società e la Borsa, https://perma.cc/26XS-XYYN (last visited Feb. 7, 2022).

84 Giovanni Strampelli, *Are Passive Index Funds Active Owners? Corporate Governance Consequences of Passive Investing*, 55 SAN DIEGO L. REV. 803 (2018).

| | ***Private corp.*** | ***Public sector*** | ***Strategic individuals*** | ***Institu-tional investors*** | ***Other, free-float*** |
|---|---|---|---|---|---|
| **Italy** | **13.5%** | **12.0%** | **11.0%** | **26.9%** | **36.6%** |
| Finland | 6.7% | 12.9% | 6.6% | 32.1% | 41.7% |
| France | 16.1% | 7.8% | 12.6% | 27.5% | 36.1% |
| Germany | 18.4% | 5.9% | 8.0% | 28.3% | 39.3% |
| Norway | 8.4% | 33.9% | 8.1% | 23.1% | 26.6% |
| Spain | 10.2% | 6.3% | 13.6% | 26.5% | 43.4% |
| Sweden | 12.9% | 6.3% | 10.8% | 38.3% | 31.7% |
| Canada* | 6.7% | 3.7% | 2.5% | 46.7% | 40.5% |
| China* | 10.9% | 38.8% | 12.7% | 8.8% | 28.7% |
| Japan* | 22.8% | 4.8% | 4.2% | 27.2% | 41.0% |
| UK* | 5.0% | 6.8% | 2.6% | 61.0% | 24.6% |
| USAs* | 3.0% | 3.1% | 4.2% | 70.9% | 18.9% |

Source: OECD, OECD Capital Market Review of Italy - Creating Growth Opportunities for Italian Companies and Savers, OECD Capital Market Series, 2020.

Recent data processed by Consob confirm those published by the OECD. In the latest Corporate Governance report, an increase in the presence of institutional investors in 2019 compared to 2018 was pointed out,[85] but when looking at the ten-year trend (Table 2) the average percentage of capital held by institutional investors is steadily around 26–31 percent.

Table 2. Percentage of capital and number of listed companies with institutional investors

| | ***Private corp.*** | ***Public sector*** | ***Strategic individuals*** | ***Institu-tional investors*** | ***Other, free-float*** |
|---|---|---|---|---|---|
| **Italy** | **13.5%** | **12.0%** | **11.0%** | **26.9%** | **36.6%** |
| Finland | 6.7% | 12.9% | 6.6% | 32.1% | 41.7% |
| France | 16.1% | 7.8% | 12.6% | 27.5% | 36.1% |
| Germany | 18.4% | 5.9% | 8.0% | 28.3% | 39.3% |
| Norway | 8.4% | 33.9% | 8.1% | 23.1% | 26.6% |

[85] Commissione Nazionale per le Società e la Borsa, Rapporto Consob sulla corporate governance delle società quotate italiane 2020, at 16 (2021).

| | | | | | |
|---|---|---|---|---|---|
| Spain | 10.2% | 6.3% | 13.6% | 26.5% | 43.4% |
| Sweden | 12.9% | 6.3% | 10.8% | 38.3% | 31.7% |
| Canada* | 6.7% | 3.7% | 2.5% | 46.7% | 40.5% |
| China* | 10.9% | 38.8% | 12.7% | 8.8% | 28.7% |
| Japan* | 22.8% | 4.8% | 4.2% | 27.2% | 41.0% |
| UK* | 5.0% | 6.8% | 2.6% | 61.0% | 24.6% |
| USAs* | 3.0% | 3.1% | 4.2% | 70.9% | 18.9% |

Source: Consob Report on Corporate Governance of Italian Listed Companies 2020.

The hypothesis of instability in the ownership structure clearly clashes with Consob's data showing that at the end of 2019, out of 228 companies based in Italy listed on the regulated market managed by Borsa Italiana, the vast majority (196 out of 228) were controlled by one or more shareholders. In particular, 115 firms were controlled by a single shareholder owning more than half of the votes that can be exercised in the general shareholders meeting (*de jure* control); fifty-seven were controlled by a single shareholder that, although owning less than 50% of the votes, was able to exercise a decisive influence over the decisions of the general shareholders meeting (*de facto* control), and, finally, twenty-four were controlled by a coalition of shareholders linked by shareholders' agreements.[86]

We replicated the exercise with data as of June 22, 2021,[87] and ended up finding that the numbers and percentages do not differ significantly from those of 2018. Out of the 225 Italian listed companies, as many as 127 are controlled *de jure* and seventy-four are controlled *de facto* (by a single shareholder or through a coalition). Only twenty-four listed companies can thus be classified as widely held firms (not subject to dominant influence by one or more shareholders).

However, in Italy some companies, including some of the main Italian banks (Unicredit, Intesa San Paolo, Mediobanca), and other companies with high capitalization, such as Assicurazioni Generali, Telecom and Prysmian, have a more dispersed shareholder base. The absence of a shareholder exercising a dominant influence does not always imply the exclusive presence of

[86] *Id.* at 8.

[87] Specifically, we used data available on Consob's website, in the section on listed issuers, about current shareholdings. *Società Quotate* [Listed Companies], COMMISSIONE NAZIONALE PER LE SOCIETÀ E LA BORSA, https://perma.cc/C2RW-LZRU (last visited Feb. 15, 2022).

funds and other institutional investors. Among the twenty-four listed companies without a controlling shareholder,[88] only seven are prevalently represented by institutional investors; in the other cases, the relevant shareholders are individuals—usually, but not necessarily, the founders—or public investors, banking foundations, banks, and industrial partners. Therefore, these shareholders cannot necessarily be considered, a priori, as affected by short-term prospects.

It is possible to deepen the analysis by questioning the stability of control. As is well known, companies subject to *de facto* control (and, even more so, those without controlling subjects) could be more prone to interference by more activist shareholders (such as institutional investors) moved by short-term ambitions. But, as already noted, this is a hypothesis that is not easy to verify empirically. However, it is quite conceivable to develop a few categories by listing companies into three groups: legally controlled companies, *de facto* controlled companies, and non-controlled companies.

The first group, which is the largest, is populated by legal subsidiaries, which tend to be less affected by the concerns of minority shareholders. In contrast, at the opposite extreme there are companies that are not controlled *de jure* or *de facto*, even though—as noted—sometimes there are groups of stable shareholders (founders, industrial partners, financing banks). For those companies belonging to this subset, at least in some cases (for example, in the absence of key shareholders) multiple voting shares could—hypothetically—bolster management stability. By contrast, in the case of public companies, the effect of multiple voting shares would be nearly neutral, given that, by definition, there would be no "stable" shareholders whose participation could be consolidated through the issuance of multiple voting class shares.

## VII. How to Introduce Multiple Voting Shares: Corporate Law Issues

Reform hypotheses frequently clash with corporate law issues. How is it possible to achieve the purpose of reinforcing the role of stable shareholders only by introducing multiple voting share categories in listed companies without compromising the protection of minority shareholders?

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[88] All data (as of June 22, 2021) have been extracted as detailed above.

In the Italian and EU literature, there are three generally-recognized cornerstones of minority shareholder protection: the pre-emptive right, the withdrawal right, and the white-wash mechanism.

The first means of protecting minorities envisages that in a share issuance, newly issued shares are offered to all shareholders. In the event of the issuance of shares with multiple voting rights, there could be a proportional distribution to all shareholders, leaving the relative percentages of voting rights unchanged. In such a scenario, there seems to be no strong incentive to use the instrument, which cannot offer a guaranteed outcome of strengthening the majority shareholder. However, corrective measures may be devised, such as, for example, the exclusion of newly issued multiple voting shares from listing.[89] However, the resolution for the increase and/or conversion must be approved in the special general shareholder meeting, where the majority of shareholders could object to the introduction of exceptions to the one share one vote rule.

The second tool for protecting minority shareholders that could be invoked in response to a resolution to issue shares with multiple votes is the right of withdrawal, which would entail, following the share issuance, the need to liquidate the shareholders requesting exit. It should also be noted that the issuance of multiple voting shares can lead to a reduction in the value of common shares, which has already been observed with regard to savings shares.[90]

Finally, yet importantly, comes the regulation of takeover bids. In the European context, in the hypothesis of a successful share issuance of multiple voting shares largely subscribed to by the leading shareholders, there is no reason to believe that the regulation of compulsory takeover bids does not apply when thresholds are exceeded, just as is the case with the increase in voting rights provided for by Article 127 *quinquies* of the

[89] Moreover, one could think of a resolution to issue shares without pre-emptive rights in favor of stable shareholders only because the interest of the company requires it, even though in such circumstances the company's reason for excluding other shareholders from participating in the share issuance is not immediate. In addition, one could hypothesize the consolidation of the loyalty bonus consisting in the enhanced vote for the shares due to the shareholders benefiting from the double voting rights. So, although deferred in time and in compliance with equal treatment, multiple voting rights would become a steady component of the power structure of the listed company.

[90] See Luigi Zingales, *The Value of the Voting Right: A Study of the Milan Stock Exchange Experience*, 7 REV. FIN. STUD. 125 (1994).

Consolidated Law on Finance.[91] Therefore, either the reinforcement due to the issuance of multiple voting shares is contained within the limits allowed by the takeover regulations, or alternatively the cost associated with the strengthening of control could be so high as to make this option unfeasible.

In this sense, the adoption of tenure voting by listed companies, introduced by the 2014 reform, is exemplary. As of June 22, 2021, there are sixty-eight listed companies whose bylaws provide for tenure voting rights, representing approximately 30% of the listed companies. These are mostly family-owned and medium-to-small companies; only four of them are included in the FTSE Mib index,[92] and the first in terms of capitalization is Amplifon, currently ranked as the 20th in that index.[93] However, for our purposes, the most relevant data is that out of the sixty-eight listed companies whose bylaws allow for the increase in voting rights, fifty-two are *de jure* controlled, ten by shareholder agreements that group together more than half of the voting rights, and two by the very same family that, considering each shareholding portion, jointly accounts for more than half of the voting rights. Therefore, sixty-four out of sixty-eight (over 94% of companies) are subject to *de jure* control and are, hence, stable by definition. As for the remaining four issuers, all these are *de facto* controlled companies (in one case through a shareholder agreement), whose first shareholder holds more than 30% of the capital.[94] What needs to be underlined is that, for the sixty-four firms who have adopted the voting enhancement system, the subsequent increases following the implementation of the double vote (often such as to allow a majority to be held in the company's special shareholder meetings as well) cannot entail any duty to launch an offer, since the initial shareholding of the parent company is

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[91] In the hypothesis of a share issuance in which the shareholder exercises the preemptive rights to which she is entitled, but nevertheless finds herself exceeding the offer thresholds, the application of the exemption from the duty to make a bid for the entire share capital cannot always be taken for granted due to causes beyond the control of the offeror. *Cf.* Chiara Mosca, *Le opa obbligatorie*, *in* 2 IL TESTO UNICO FINANZIARIO: MERCATI ED EMITTENTI 1441 (Mario Cera & Gaetano Presti eds., 2019); Letter from Luigi Spaventa, President, Commissione Nazionale per le Società e la Borsa (June 28, 2002) (It.), https://perma.cc/5B6C-6TBF; Letter from Giuseppe Vegas, President, Commissione Nazionale per le Società e la Borsa, to Istituto Ligure Mobiliare S.p.A. et al. (Mar. 16, 2011) (It.), https://perma.cc/MRN6-XKL7.

[92] This is the case of the following companies: Amplifon, Diasorin, Hera and Unipol Gruppo.

[93] *Capitalisation FTSE MIB Basket on 31.05.2021*, BORSA ITALIANA, https://perma.cc/38P4-MJ8Y (last visited Feb. 7, 2022).

[94] Under Italian law, a takeover bid must be launched by anyone holding more than 30% of the capital of a listed company.

already above the threshold—in other words, over the absolute majority of voting rights.[95]

These are the issuers whose shareholders have been able to benefit from a (further) strengthening of power due to the presence of tenure voting shares; a strengthening that does not seem to have been used for the purpose of further growth, not even through an expansion of the shareholding structure, but to rather allow a diversification of the financial portfolio by the parent companies.[96] All the other companies (with *de facto* control or without a controlling party or coalition) have not, at least up to now, contemplated amending their bylaws to allow for tenure voting rights. In these cases, proposals have not been taken into consideration because of the real danger of rejection by the special general shareholder meeting,[97] or because of the said risks of incurring the obligation of a full takeover bid once the increase in voting rights has accrued.

## VIII. CONCLUDING REMARKS

If they were brought up to date, even Easterbrook and Fischel—and we believe it is highly likely—would take more open views than the (perhaps only ideal) paradigm of perfect shareholder democracy they formulated. They would certainly have taken an active role in the discussion about the possible effects of introducing multiple-vote shares, which for many years has been an evergreen in the corporate law literature of both the United States and Europe (and not just of the European Union, as shown by the latest British updates and discussions).

On the one hand, the possible consequences in terms of contestability, excessive disproportion between risk and management power, and the extraction of private benefits, led scholars to view the possible introduction of multiple-vote shares with

[95] Mosca, *supra* note 57, at 270.

[96] Emanuele Bajo et al., *Bolstering Family Control: Evidence from Loyalty Shares*, J. CORP. FIN. 1, 16 (2020) (arguing that families use loyalty shares to further reinforce their position in the company and then divest part of the shares—while retaining control—to diversify their portfolio and mitigate the idiosyncratic risk, and reaching the conclusion that the only outcome of the shares with tenure voting rights was to further strengthen the shareholders already in a position of control); *cf.* Mark J. Roe & Federico Cenzi Venezze, *Will Loyalty Shares Do Much for Corporate Short-Termism?*, 76 BUS. LAW. 467, 484 (2021).

[97] Not coincidentally, some proxy advisors had advised their clients to vote against resolutions relating to amendments to the bylaws aimed at introducing tenure voting in the general shareholder meetings of listed companies. This recommendation could have influenced precisely those companies whose ownership structures are less concentrated. *See* Reddy, *supra* note 70.

particular skepticism. In light of the typical shareholder concentration of Italian listed companies, the intrinsic weakness of the national market, and the existence of many other tools for the protection of incumbents made available following the 2008 crisis, the introduction of multiple voting shares would indeed risk transforming our market into a petrified forest.

On the other hand, multiple voting shares can also create beneficial effects, like favoring the growth of companies and gathering of risk capital on the markets of highly innovative companies, thereby allowing founders to retain control beyond the listing.[98]

The fact is, nevertheless, that the Report of the Antitrust Authority concerns companies that are already listed and does not, hence, appear to be geared towards achieving said benefits. Moreover, it does not mention reasons linked to the necessity of widening the room for private autonomy in adjusting shareholder rights, ensuring the necessary degree of protection for minority shareholders, in order to incentivize companies to further differentiate financial instruments to cover their risk capital needs. The reasons that the report provides for the introduction of multiple-vote shares are manifold and concern, rather, the attempt to pursue sustainable growth in the long term, stabilizing control, and linking shareholders more closely to the company's plans. The fears that seem to underlie the proposal (instability of control, high percentage of short-term shareholders) do not seem to be justified, but should they ever become so in the near future, in the existence of the usual instruments for safeguarding minority shareholders (option rights, reinforced majorities, regulations governing the takeover bid), a review of the current regulations aimed at permitting the issue of shares with multiple voting rights for listed companies would not always be feasible.

Finally, other perspectives (which cannot, of course, be referred to the Report of the Antitrust Authority) see multi-voting shares as a tool at the disposal of controlling shareholders and incumbents to keep a firm grip on their control and avoid the risk of takeovers without adding any economic or financial cost on their part. In other words, contestability and the market would be immolated on the altar of the protection of Italian listed companies. This result could only be achieved by sacrificing, or rather temporarily annulling, the rights of minority shareholders. And

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[98] This incentive could be important, more generally, for small and medium-sized Italian companies, which would thus find, especially during times of liquidity crisis, alternative financing instruments to the banking system.

it is perhaps not excessive to predict that, if this were the case, the loss of investor confidence in our market would outweigh the potential benefits.