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Dissenting Directors

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We wish to thank Borsa Italiana s.p.a., and specifically Livia Gasperi and Alessandro Delle Donne, for making available important public data in a manageable form; Massimo Menchini for reading an earlier draft and offering precious suggestions; and Duccio Regoli for sharing some ideas on independent directors with the Authors. We are particularly grateful to Maria Lucia Passador for excellent research assistance.

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Abstract

Expressions of dissent by corporate directors are a valuable, indeed vital, attribute of good corporate governance. Vocal opposition by a director, for example, might help correct a good-faith mistake or, in more serious and extreme circumstances, warn the market of possible abuse and other risks for investors. If acquiescence and conformism are negative, however, dissent is not necessarily a sign of independence, and can be disruptive and ill-motivated. Notwithstanding the potential importance of director dissent, the subject has been largely neglected in the academic literature, also due to the scarcity of empirical or anecdotal evidence. As a result, we know virtually nothing about why, when, and with what consequences directors dissent from their fellow board members.

We examine empirically dissent of directors - expressed either voting against a resolution of the board, or resigning from the board - using handpicked data from the Italian market. Differently from the few other works on this issue, we also consider dissent expressed by non-independent directors. The Italian system offers a particularly interesting case in light of the prevailing ownership structures and of the legal rules governing the composition of the board. The paper is organized as follows. After an overview of the existing literature on directors' dissent, we discuss the legal framework of dissent under Italian law, clarifying the relevance and effects of split votes on the board, and resignation of board members. We then present our dataset and discuss some methodological issues we encountered. In our empirical analysis, we address four questions: (a) What are the topics directors more often dissent on? (b) What are the characteristics of dissenting directors in terms of age, gender, education, compensation, who appointed them, but also organization of the board (e.g. if the positions of President and CEO are separated); (c) In what types of corporations is dissent more common, with respect in particular to economic performance; (d) What are the consequences of dissent in terms of cumulative abnormal returns and volatility of the shares. Based on the results of the analysis, we offer some conclusions and raise some policy questions.

Keywords: Corporate governance, board of directors, independent directors, dissent, resignation

JEL Classifications: K22

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Dissenting Directors †

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"*I never feel unsafe except for when the majority is on my side.*"
— Criss Jami, Healology

I. INTRODUCTION

Expressions of dissent by corporate directors are a valuable, indeed vital, attribute of good corporate governance. Vocal opposition by a director, for example, might help correct a good-faith mistake or, in more serious and extreme circumstances, warn the market of possible abuse and other risks for investors. Notwithstanding the potential importance of director dissent as a governance tool, the subject has been largely neglected in the academic literature, also due to the scarcity of empirical or anecdotal evidence. As a result, we know virtually nothing about why, how often, and with what consequences directors dissent from their fellow board members.

Several legal systems in the world provide specific incentives or requirements to ensure corporations benefit from a diverse board, composed of directors with different backgrounds, perspectives, and personal characteristics. In some jurisdictions, Boards are or can be appointed by different stakeholders to ensure that directors are more or less independent from the corporation its controlling shareholders, and its executives. Consider, for example, proxy access in the U.S.,[1] list voting in Italy,[2] and co-determination in Germany and other European countries.[3] Notwithstanding the profound

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[1] Jonathan B. Cohn, Stuart L. Gillan & Jay C. Hartzell, *On Enhancing Shareholder Control: A (Dodd-) Frank Assessment of Proxy Access*, 71 J. FINANCE 1623–1668 (2016); Joanna Tochman Campbell *et al.*, *Shareholder Influence over Director Nomination via Proxy Access: Implications for Agency Conflict and Stakeholder Value*, 33 STRATEG. MANAG. J. 1431–1451 (2012); Thomas Stratmann & J. W. Verret, *Does Shareholder Proxy Access Damage Share Value in Small Publicly Traded Companies?*, 64 STANFORD LAW REV. 1431–1468 (2012); Marcel Kahan, Edward Rock, *The Insignificance of Proxy Access*, 97 VA. LAW REV. 1347 (2011); Brett H. Mcdonnell, *Setting Optimal Rules for Shareholder Proxy Access*, 43 ARIZ. STATE LAW J. 67–123 (2011); Joseph A. Grundfest, *The SEC's Proposed Proxy Access Rules: Politics, Economics, and the Law*, 65 BUS. LAWYER 361–394 (2010); Barry Genkin & Jane Storero, *Proxy Access: A Monumental Pendulum Swing*, 26 FINANC. EXEC. 18–21 (2010).

[2] Matteo Erede, Federico Ghezzi, *Regolazione pubblica e autonomia privata nella composizione del consiglio di amministrazione di società quotate: un'indagine empirica*, RIV. SOC. (2016) Forthcoming; Mario Stella Richter *jr.*, *Il quadro legislativo italiano in materia di nomina ed elezione del consiglio: un modello o un'anomalia?*, Speech held during the Assonime-OECD Conference NOMINA ED ELEZIONE DEI CDA IN ITALIA: NUOVI *TREND* E PROSPETTIVE FUTURE (Milan, July 13th, 2016); ID., *Appunti sulla evoluzione della disciplina dell'amministrazione delle società quotate e sulle sue prospettive di riforma*, RIV. DIR. COMM. (2015) II, 47 ff.; SIMONE ALVARO, GIOVANNI MOLLO, GIOVANNI SICILIANO (eds.), *IL VOTO DI LISTA PER LA RAPPRESENTANZA DI AZIONISTI DI MINORANZA NELL'ORGANO DI AMMINISTRAZIONE DELLE SOCIETÀ QUOTATE*, *QUADERNO GIURIDICO CONSOB N. 1* (2012); Corrado Malberti, Emiliano Sironi, *L'adeguamento delle società quotate al procedimento di nomina del consiglio di amministrazione mediante voto di lista: un'analisi empirica*, RIV. SOC. 724-759 (2008); Mario Stella Richter *jr.*, *Voto di lista per la elezione delle cariche sociali e legittimazioni dell'organo amministrativo alla presentazione di candidati,* RIV. DIR. SOC. 36-48 (2007); Giuseppe Guizzi, *Voto di lista per la nomina degli amministratori di minoranza nelle società quotate: spunti per una riflessione*, 24 CORR. GIUR. 301-304 (2007); Marco Ventoruzzo, *La composizione del consiglio di amministrazione delle società quotate dopo il d.lg. n. 303 del 2006: prime osservazioni*, RIV. SOC. 205-259 (2007); Andrea Zoppini, *Determinazione della quota di partecipazione per la presentazione delle liste per la nomina degli amministratori*, *in* VALERIO DE LUCA, FRANCESCO S. MARTORANO, DISCIPLINA DEI MERCATI FINANZIARI, Giuffrè (2008) 3 ff.

[3] Klaus J. Hopt, *The German Law of and Experience with the Supervisory Board*. European Corporate Governance Institute (ECGI) - Law Working Paper No. 305/2016 (2016) *available at* http://ssrn.com/abstract=2722702; Ewan Mcgaughey, *The Codetermination Bargains: the History of German Corporate and Labour Law*, IDEAS WORK. PAP. SER. REPEC (2015); MARCO BIASI, IL NODO DELLA PARTECIPAZIONE DEI LAVORATORI IN ITALIA: EVOLUZIONE E PROSPETTIVE NEL CONFRONTO CON IL MODELLO TEDESCO ED EUROPEO (2013); Martin Höpner, *Corporate Governance in Transition: Ten Empirical Findings on Shareholder Value and Industrial Relations in Germany*. Max-Planck-Institute for the Study of Societies Working Paper No. 05/2001 (2001), *available at* http://ssrn.com/abstract=287460; Markus Roth, *Employee Participation, Corporate Governance and the Firm: A Transatlantic View Focused on Occupational Pensions and Co-Determination*, 11 EUR. BUS. ORGAN. LAW REV. 51-85 (2010); Viet D. Dinh, *Codetermination and Corporate Governance in a Multinational Corporation.* Georgetown University Law Center, Business, Economics and Regulatory Law Working Paper No. 169870 (1999),

differences, all these rules aim at opening the boardroom to representatives of different constituencies who have diverse viewpoints and, possibly, priorities. The underlying assumption is that a diverse board promotes good governance by facilitating debate, discussion, and even dissent, rather than conformism and acquiescence.

Just as Montaigne said, "There is no conversation more boring than when everybody agrees," lawmakers and commentator apparently believe that "There is no board meeting more ineffective than when everybody agrees." From this perspective, dissenting directors can add real value.

This is not an endorsement of dissent for dissent's sake. Conflict can, of course, be disruptive or counterproductive. Dissent is not in itself a sign of independence, integrity or intellectual honesty. Not differently than conformism, dissent can be motivated by a personal agenda rather than the best interest of the corporation, and it can be inspired by individual selfish goals and an unhealthy desire of visibility. Moreover, dissent can have perverse effects such as fostering group polarization and reducing mutual trust among directors. The counterpoint to Montaigne's quote above is the clever statement of A. A. Milne, the British writer who created Winnie-the-Pooh, who quipped that: "The third-rate mind is only happy when it is thinking with the majority. The second-rate mind is only happy when it is thinking with the minority. The first-rate mind is only happy when it is thinking."

Given the potential benefits and risks of dissenting directors, and the corporate governance rules that seem to be built around assumptions about how these benefits and risks play out, it is remarkable that there has not been more scholarship on investigate the many important questions implicated. Who are dissenting directors? Do they share common features in terms of how they have been elected, their qualifications as independent or minority-appointed directors, their education and professional status, their gender? What do they generally dissent on? What are the effects of dissent for the corporation, and in which corporations is dissent more frequent?

A nascent, but intriguing line of research is now attempting to examine these questions.[4] One of the major challenges for such research is the difficulty in collecting meaningful and reliable data. Most legal systems do not require full disclosure on the inner workings of boards of directors, for good reasons such as preserving confidential information and giving directors more freedom to discuss delicate issues openly.

The result, however, is that information concerning individual votes of directors is scant. Meanwhile, even when available, information is often lacking sufficient detail to understand, from the outside, what precisely happened. For example, a corporation might simply disclose that a majority of the board, without clarifying who voted how and why there was a disagreement. As a result, dissent is often visible only when a particularly profound fracture develops among corporate insiders, dissenting directors want their votes specifically noted and announce them publicly (if confidentiality allows it), and the financial press turns a spotlight on the underlying decision.

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available at http://ssrn.com/abstract=169870; Mark J. Roe, *German Co-Determination and German Securities Markets*, *in* KLAUS HOPT (ed.) COMPARATIVE CORPORATE GOVERNANCE: THE STATE OF THE ART AND EMERGING RESEARCH, Oxford University Press 361-372 (1998); ID., *German Codetermination and German Securities Markets.(Cross-Border Views of Corporate Governance)*, 1998 COLUMBIA BUS. LAW REV. 167-183 (1998); Elmar Gerum, Helmut Wagner, *Economics of Labor Co-Determination in View of Corporate Governance*, *in* KLAUS HOPT (ed.) COMPARATIVE CORPORATE GOVERNANCE: THE STATE OF THE ART AND EMERGING RESEARCH, Oxford University Press 341-360 (1998); HANS G. NUTZINGER & JÜRGEN G. BACKHAUS, CODETERMINATION: A DISCUSSION OF DIFFERENT APPROACHES (1989).

[4] See Wei Jiang, Hualin Wan, Shan Zhao, *Reputation Concerns of Independent Directors: Evidence from Individual Director Voting*, 29 REV. FINANC. STUD. 655–696 (2016), *available at* http://www.columbia.edu/~wj2006/director_voting.pdf and Juan Ma, Tarun Khanna, *Independent Directors' Dissent on Boards: Evidence from Listed Companies in China* (Harvard Business School, Working paper, Paper No. 13-089, 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2252200.

Empirical studies, so far, have somehow unexpectedly – but for regulatory reasons we will mention below – focused on China.[5] In this Article, we seek to broaden the scope of such research by investigating dissenting directors in Italian listed corporations. Italy presents an interesting case study, with relevance far beyond the borders of the country. First, Italian corporations are characterized as having relatively concentrated ownership structures.[6] With few exceptions, Italian listed corporations have a strong controlling shareholder. For this reason, we might expect to find a limited number of dissenting directors, since they could be easily removed by a controlling shareholder. On the other hand, in 2005 Italy adopted a unique process called "list voting," which allows minority shareholders – generally organized institutional investors – to appoint one or more directors on the board.[7] In addition, other statutory reforms and self-imposed industry best practices have mandated or facilitated a diverse composition of the board.[8] For example, corporations must have a minimum number of non-executive, outside directors, and a 2010 statute imposes gender-quota in favor of the least-represented gender (not surprisingly, women)[9]. These reforms gave greater voice to minority shareholders and outside viewpoints, and possibly made dissent more frequent.

Finally, another reason why the Italian system presents an opportunity for a uniquely fruitful empirical research is that information concerning education, professional background, and compensation of board members is available from different sources. In this context, the research questions briefly anticipated are both relevant and promising.

The Article is organized as follows. First, we offer a quick overview of the existing but still limited empirical legal literature on dissenting directors. Second, we discuss the relevant legal framework: after a few remarks on the rules applicable to board elections in Italy, we examine the legal scope and effects

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5 See *supra* note 4.

6 See Carlo Bellavite Pellegrini, *An Empirical Analysis of 'Corporate Italy': Legal Entities, Financial and Ownership Structure and Corporate Governance 2004-2012* (2013), *available at* http://ssrn.com/abstract=2274102 and Alexander Aganin, Paolo F. Volpin, *History of Corporate Ownership in Italy* (ECGI - Finance Working Paper No. 17/2003, 2003), *available at* http://ssrn.com/abstract=391180.

7 Fabrizio Clemente, *Le Raccomandazioni della CONSOB in tema di nomina dei componenti gli organo di amministrazione e controllo da parte della minoranza*, RIV. DIR. SOC. 586-600 (2009); Giuseppe Guizzi, *Il voto di lista per la nomina degli amministratori di minoranza nelle società quotate: spunti per una riflessione*, CORR. GIUR. 301-304 (2007); Marino Perassi, *Consiglieri indipendenti e di minoranza*, ANALISI GIUR. ECON. 343-354 (2007); Francesco Carbonetti, *Amministratori e sindaci di minoranza e "rapporti di collegamento",* SOCIETÀ 1185-1190 (2007); Gustavo Olivieri, *Amministratori "indipendenti" e "di minoranza" nella legge sulla tutela del risparmio*, ANALISI GIUR. ECON. 23-32 (2006); Andrea Tucci, *Modifiche del diritto societario e nuove forme di tutela delle minoranze*, *in* FRANCESCO CAPRIGLIONE (ed.) *LA NUOVA LEGGE SUL RISPARMIO*, Cedam (2006) 77 ff.

8 The Italian Code of Corporate Governance openly states that: «[n]ella valutazione della composizione del consiglio, occorre verificare che siano adeguatamente rappresentate, in relazione all'attività svolta dall'emittente, le diverse componenti (esecutiva, non esecutiva, indipendente) e le competenze professionali e manageriali, anche di carattere internazionale, tenendo altresì conto dei benefici che possono derivare dalla presenza in consiglio di diversi generi, fasce d'età e anzianità di carica» (Article 1, Comment).

9 See, in a national and international perspective, Eva Desana, Marcella Sarale, Mia Callegari, *Dai "soliti noti" alla "gender diversity": come cambiano gli organi di amministrazione e controllo delle società (I parte),* GIUR. IT. 2245 (2015); Eva Desana, Marcella Sarale, Mia Callegari, *Dai "soliti noti" alla "gender diversity": come cambiano gli organi di amministrazione e controllo delle società (II parte),* GIUR. IT. 2515 (2015); Umberto Morera, *Sulle ragioni dell'equilibrio di genere negli organi delle società quotate e pubbliche*, RIV. DIR. COMM. (2014) II, 155 ff.; Paola Monaco, *Le quote di genere nei* corporate boards*: profili di diritto comparato*, *in* FABIO SPITALERI, L'EGUAGLIANZA ALLA PROVA DELLE AZIONI POSITIVE, Giappichelli (2013) 85 ff.; Lucia Calvosa, Srenella Rossi, *Gli equilibri di genere negli organi di amministrazione e controllo delle imprese*, OSSERVATORIO DIR. CIV. COMM. (2013) 3 ff.; Chiara Garilli, *Le azioni positive nel diritto societario: le quote di genere nella composizione degli organi delle società per azioni*, EUROPA DIR. PRIV. 885-916 (2012); *The quota-instrument: different approaches across Europe. Working Paper European Commission's Network to Promote Women in Decision-making in Politics and the Economy* (2011), *available at* http://ec.europa.eu/justice/gender-equality/files/quota-working_paper_en.pdf e *Women on Boards* (2011), *available at* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31480/11-745-women-on-boards.pdf.

of dissent and resignation of a director. Third, we present our data, which involves a unique set of handpicked data concerning various corporate events in the period 2003-2016, to explain some methodological issues, and finally focus on the empirical analysis. In this part, we consider four basic sets of questions: (1) Who are dissenting directors, and do they share identifiable features that might explain why they dissent? (2) What issues most often prompt directors to dissent? For example, are there certain types of corporate transactions or decisions that appear to be more contentious and more likely to trigger dissenting opinions? (3) What are the consequences of dissent for the corporation, especially on market prices? Do investors pay attention to these events? (4) What are the features of corporations in which dissent is more common, especially in terms of economic performance? Finally, in our conclusion, we consider the implications of the evidence for corporate governance.

II. Overview of the Existing Literature

In the last few years, scholars have turned their attention to dissent on the board, in an effort to understand better the inner workings of corporate governance. The literature is still limited, probably also due to difficulties in obtaining and coding the data in a reliable fashion. As mentioned before, in fact, legal systems generally do not mandate full disclosure on board decisions or, more precisely, on the deliberations occurring behind the closed doors of boardrooms and on the positions of individual directors, for obvious and largely sensitive reasons.

A few studies have, however, tackled this issue with interesting results. Juan Mu and Tarun Khanna of the Harvard Business School, for example, have explored dissent in Chinese listed corporations, one of the very few – if not the only – system in which directors' dissent is partially subject to significant disclosure obligations.[10] The profound legal and economic differences existing among jurisdictions, and the specific methodologies adopted by the authors of different studies, advise against generalizations; in addition, this specific issue is more intertwined than others are with cultural and social norms and psychological factors that can be country-specific. Notwithstanding these warnings, the results of Mu and Khanna offer valuable insights and command attention.

To briefly recap them (and directing readers to their contribution for further details), we should first of all mention the peculiar situation of Chinese listed corporations, often controlled by the State. Since 2001, it is mandatory for Chinese listed corporations to appoint a minimum number of independent directors, pursuant to an "Opinion" issued by the China Securities Regulatory Commission ("CSRC"). This requirement has been strengthened in 2003, and independent directors – defined as the ones without specific connections with the corporation and its controlling shareholders or insiders – have a veto power on certain transactions with related parties, and must issue an opinion on major corporate decisions *after* the board meeting and resolution. It should be pointed out, however, that in the Chinese system the chairperson of the board of directors, who is expressed by the dominant shareholders, almost always handpicks the independent directors from his or her own social entourage.[11]

The empirical evidence gathered by Mu and Khanna – they looked at over 24,000 opinions issued by independent directors from 2001 to 2010 – indicates, first of all, that generally directors offer "mild" reasons for dissent: an overt, confrontational, explicit position of disagreement with the management and the majority of the board is – unsurprisingly – not common. With respect to the characteristics of board members most likely to dissent, the authors – again unsurprisingly – find a negative correlation with the social ties linking the independent directors and the chairperson who appointed them, and that they are more likely to dissent if the chairperson has left the board. Specific professional backgrounds

[10] "In addition, China's independent director institution is at its early stage. Both boards and independent directors have gradually learned how to play the board "games". A fascinating research avenue is to examine independent directors' voting patterns in a wide range of institutional settings, in particular, in advanced institutions where disclosure of dissent is not mandatory", Ma, Khanna, *supra* note 4, at 31.

[11] Ma, Khanna, *supra* note 4, at 18.

and positions do not seem to affect the propensity to dissent: specifically, academics, accountants and lawyers are not statistically more likely to dissent than other professionals are. Having had experiences abroad, on the other hand, makes dissent more likely, and once again the reasons are intuitive, since these experiences often facilitate a more independent judgment and might also be a proxy for education, solid professional and financial positions, more opportunities and less dependency on self-referential national business, professional and academic circles.

Particularly interesting is also the analysis of the consequences of dissent. According to Mu and Khanna, dissent negatively affects the price of the shares of the corporation, with statistically significant cumulative abnormal returns of -0.97 percent at the announcement of dissent. But dissent also has negative consequences for dissenting directors: they often end up leaving the "job market" for corporate directors, and their annual income might decrease of over 10%.

Although the authors are careful in disclosing the methodological limitations and complexities of the research, this work seems to confirm some features (some might say, stereotypes) of the Chinese business and social climate: a certain aversion to conflict, and a capitalist systems heavily based on personal relationships and close-knit social circles.

Different, and partially opposite results are suggested by another study on Chinese corporations by Jiang, Wan and Zhao.[12] These scholars, using a unique dataset of 859 board resolutions involving dissent from 2004 to 2012, first find that roughly 4% of corporations experience at least one dissent event per year. Even more interestingly, their analysis shows that directors more likely to dissent are younger, and have a better reputation, measured on positive media coverage and the prestige of the colleges they attended, something the authors interpret as a greater concern for career developments. Dissent has an impact on managers, influences market prices and attracts scrutiny by the press and corporate stakeholders but – even more importantly, and here a difference with the previous work emerges – Jiand, Wan and Zhao observe that dissent is rewarded in two ways: more board appointments at different corporations, and avoidance of regulatory sanctions.

Cassandra Marshall has also conducted an interesting research on U.S. registered corporations.[13] In her work, she focuses on resignations based on an open dissent, reported in 8-K filings pursuant to a 2004 SEC rule, and investigates the consequences of this decision in the labor market for directors. Based on 287 observations (1995-2006), the study finds that dissent does not pay off in terms of new appointments: resigning directors suffered an 85% net loss of board seats in a five-year period following the event.

The line of research we have briefly illustrated shows, first of all, how difficult it is to obtain reliable empirical evidence in this area, and to establish the causes and consequences of dissent. Dissent is however a relevant corporate event, with mixed effects on the issuer and the shareholders. Similarly ambiguous are the costs and benefits of dissent for the individuals not preaching to the choir: while some authors suggest that they might alienate themselves from the business community in countries as different as the U.S. and China, at least one study reaches the opposite conclusion with respect to the latter country. Let us therefore consider Italy, a jurisdiction not only geographically somehow half-way between these two economic giants.

III. THE ITALIAN LEGAL FRAMEWORK FOR DISSENT

A. *Board Composition in a Nutshell*

To put our analysis in the correct framework, we need to illustrate briefly some economic and legal aspects concerning how boards of directors of Italian listed corporations are composed.

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[12] Jiang *et al.*, *supra* note 4.

[13] Cassandra D. Marshall, *Are Dissenting Directors Rewarded?* (2010), *available at* http://ssrn.com/abstract=1668642.

The starting point is that, among Italian listed corporations, a concentrated ownership structure prevails. One controlling shareholder, sometimes owning more than 50 percent of the voting shares, or a small group of shareholders linked by a shareholders' agreement or family ties are often present, even if in the most recent years ownership concentration seems to have decreased, and some "public companies" exist.[14] Large Italian shareholders have also traditionally used other control enhancing devices to strengthen their controlling position in addition to shareholders' agreements, from pyramid structures to limited voting shares, to the more recently introduced multiple voting shares.[15] This ownership structure, which is in fact the most common throughout the world, is quite distinct from the more widespread ownership structure typical of common law countries, and especially of the U.S. and U.K., even if it is debated how really dispersed the voting power in U.S. listed corporations is.[16]

Another phenomenon that must be mentioned discussing ownership structures and board elections, however, is the growing presence and activism of institutional investors.[17] As we will see below, the role of institutional investors as an organized minority is both a cause and a consequence of "list voting," a peculiar mandatory statutory mechanism allowing minority shareholders to appoint some of the members of the board of directors introduced in Italy some years ago.[18]

A complex set of legal rules and different sources govern the composition of the board under Italian law. The issue is regulated by at least three major sources: the Italian Civil Code, applicable to all corporations; the so-called "Consolidated Law on Financial Markets" ("Testo Unico della Finanza", hereinafter also "TUF"), a statute dealing with a broad range of subjects, which includes a section on the governance of listed corporations; and the constantly updated Corporate Governance Code,[19] a technically not mandatory source (based on a "comply or explain" principle),[20] which is however

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14 CONSOB, 2015 *Report on Corporate Governance of Italian Listed Companies*, at 14, Table 1.3, at 14.

15 See Marco Ventoruzzo, *The Disappearing Taboo of Multiple Voting Shares: Regulatory Responses to the Migration of Chrysler-Fiat* (Bocconi Legal Studies Research Paper No. 2574236, 2015); (Penn State Law Research Paper No. 3-2015, 2015); (ECGI - Law Working Paper No. 288/2015, 2015), *available at* http://ssrn.com/abstract=2574236); Piergaetano Marchetti, *Osservazioni e materiali sul voto maggiorato*, RIV. SOC. 448 (2015); Marco S. Spolidoro, *Il voto plurimo: i sistemi europei*, RIV. SOC. 134 (2015); Angelo Busani, Marco Sagliocca, *Le azioni non si contano, ma si "pesano": superato il principio* one share one vote *con l'introduzione delle azioni a voto "plurimo" e a voto "maggiorato"*, SOCIETÀ 1048 (2014).

16 Clifford G. Holderness, *The Myth of Diffuse Ownership in the United States*, 22 REV. FINANC. STUD. 1377–1408 (2009).

17 See MARCO MAUGERI (ed.), GOVERNO DELLE SOCIETÀ QUOTATE E ATTIVISMO DEGLI INVESTITORI ISTITUZIONALI, Giuffrè (2015); ANTONIA IRACE, IL RUOLO DEGLI INVESTITORI ISTITUZIONALI NEL GOVERNO DELLE SOCIETÀ QUOTATE, Giuffrè (2001).

18 CONSOB, 2015 *Report on Corporate Governance of Italian Listed Companies*, at 15-17, Tables 1.6-1.11.

19 See Assonime, Circolare n. 31/2015, *Le novità del Codice di autodisciplina 2015 per la* governance *delle società quotate*, RIV. SOC. 445 (2016); C. PISTOCCHI, *Appunti sul codice di autodisciplina delle società quotate*, GIUR. COMM. 171 (2016); Simone Alvaro, Paola Ciccaglioni, Giovanni Siciliano (eds.), L'AUTODISCIPLINA IN MATERIA DI *CORPORATE GOVERNANCE*. UN'ANALISI DELL'ESPERIENZA ITALIANA, QUADERNO GIURIDICO CONSOB N. 2, (febbraio 2013); Piergaetano Marchetti, *Il nuovo codice di autodisciplina delle società quotate*, RIV. SOC. 38 (2012); Niccolò Abriani, *Il nuovo codice di autodisciplina delle società quotate e la* governance *del nuovo millennio*, RIV. DIR. IMPR. 197 (2012); Carmine Di Noia, Emilia Pucci, *Il nuovo Codice di autodisciplina delle società quotate: motivazioni e principali novità,* RIV. DIR. SOC. 115 (2012); Mario Stella Richter *jr.*, *Il nuovo codice di autodisciplina delle società quotate e le novità legislative in materia di autoregolamentazione*, RIV. DIR. COMM. 419 (2007); Alessandra Zanardo, *La nuova versione del codice di autodisciplina delle società quotate: alcune osservazioni alla luce delle contestuali esperienze internazionali in materia*, CONTR. IMPR. 400 (2004); Maria De Mari, *Il Codice di autodisciplina delle società quotate in materia di* corporate governance, RIV. DIR. PRIV. 141 (2000).

20 Michail Nerantzidis , *Measuring the quality of the "comply or explain" approach*, 4-5 MANAGERIAL AUDITING J. 373 (2015); Yan Luo, Steven E. Salterio, *Governance Quality in a "Comply or Explain" Governance Disclosure Regime*, 22 CORPORATE GOVERNANCE - AN INT'L REV. 460 (2014); Roger Carr, *Adherence to the Spirit*, COMPLY OR EXPLAIN. 20TH ANNIVERSARY OF THE UK CORPORATE GOVERNANCE CODE (2012), *available at* https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/Comply-or-Explain-20th-Anniversary-of-the-UK-Corpo.pdf.

adopted and followed by most issuers.[21] Another important piece of legislation worth mentioning is the "Golfo-Mosca Act" of 2010, which mandates a minimum number of directors selected from the "least represented gender": obviously enough, a system to ensure a minimum quota of women in top governance position.[22] Corporations operating in regulated industries, such as banks, insurance companies and other financial intermediaries must abide additional governance principles and rules enacted by their supervising authorities. In this perspective, for example, the so-called "fit and proper" rules included both in Article 9 Directive 2014/65/EC (MiFID II) and in Article 13 Directive 2013/36/EC (Capital Requirements Directive, also known as CRD), and overseen by the European Central Bank, are particularly important.[23] For readers less familiar with the Italian system, in addition,

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21 For an overview of these requirements, see Guido Ferrarini, Gian Giacomo Peruzzo, Marta Roberti, *Corporate Boards in Italy, in* PAUL DAVIES, KLAUS HOPT, RICHARD NOWAK, GERARD VAN SOLINGE (eds.), CORPORATE BOARDS IN LAW AND PRACTICE: A COMPARATIVE ANALYSIS IN EUROPE, Oxford University Press (2013); Marco Ventoruzzo, *La composizione del consiglio di amministrazione delle società quotate dopo il d. lgs. n. 303 del 2006: prime osservazioni*, SOCIETÀ 205 (2007); Filippo Rossi, *La nuova disciplina dei diritti degli azionisti. - IV. - Modifiche alla parte IV del Decreto legislativo 24 febbraio 1998, n. 58 (Art. 3 d.lgs. n. 27/10). - Sezione II bis. - Società cooperative. - Art. 147 ter. - Elezione e composizione del consiglio di amministrazione; Art. 148. – Composizione*, 34 NUOVE LEGGI CIV. COMM. 775 (2011); Luca Enriques, *Modernizing Italy's Corporate Governance Institutions: Mission Accomplished?* (ECGI - Law Working Paper No. 123/2009, 2009), *available at* http://ssrn.com/abstract=1400999, at 10; FRANCO BONELLI, GLI AMMINISTRATORI DI S.P.A. A DIECI ANNI DALLA RIFORMA DEL 2003 (2013).

22 B. Espen Eckbo, Knut Nygaard, Karin S. Thorburn, *Does Gender-Balancing the Board Reduce Firm Value?* (April 21, 2016) (European Corporate Governance Institute (ECGI) - Finance Working Paper No. 463/2016, 2016); (Tuck School of Business Working Paper No. 2746786, 2016), *available at* http://ssrn.com/abstract=2746786; Roberta Provasi, Patrizia Riva, *Women in the boardroom: the Italian experience of law vs. embedded tradition*, 9 INT. J. ECONOMICS BUSINESS RESEARCH 274 (2015); Barnali Choudhury, *Gender Diversity on Boards: Beyond Quotas,* 26 EUR. BUS. LAW REV. 229 (2015); Eva Desana, Marcella Sarale, Mia Callegari, *Dai "soliti noti" alla "gender diversity": come cambiano gli organi di amministrazione e controllo delle società (I parte)*, GIUR. IT. 2245 (2015); Eva Desana, Marcella Sarale, Mia Callegari, *Dai "soliti noti" alla "gender diversity": come cambiano gli organi di amministrazione e controllo delle società (II parte)*, GIUR. IT. 2515 (2015); Nada K. Kakabadse, *Gender Diversity and Board Performance: Women's Experiences and Perspectives*, 54 HUMAN RESOURCE MANAGEMENT 265 (2015); Stefanie Sonnabend, *Gender Diversity in the Corporate Boardroom*, 24 J. MANAG. INQUIRY 212 (2015); Larelle Chapple, Jacquelyn Humphrey, *Does Board Gender Diversity Have a Financial Impact? Evidence Using Stock Portfolio Performance*, 122 J. BUS. ETHICS 709 (2014); Nuria Alvarado, Joaquina Briones, Pilar Fuentes Ruiz, *Gender Diversity on Boards of Directors and Business Success*, 1 INVEST. MANAG. FIN. INNOV. 199 (2011); Renee B. Adams, Patricia Funk, *Beyond the Glass Ceiling: Does Gender Matter?* (2009) (UPF Working Paper Series; ECGI - Finance Working Paper No. 273/2010, 2010), *available at* http://ssrn.com/abstract=1475152; Claude Francoeur, Réal Labelle, Bernard Sinclair-Desgagné, *Gender Diversity in Corporate Governance and Top Management,* 81 J. BUS. ETHICS 83 (2008); Ferdinand A. Gul, Bin Srinidhi, Anthony C. Ng, *Does Board Gender Diversity Improve the Informativeness of Stock Prices?*, 5 J. ACCOUNTING AND ECONOMICS 314 (2011); Katherine Watson, *Gender Diversity on Corporate Boards*, 7 J. AUSTRALASIAN LAW TEACHERS ASSOCIATION 1 (2014), *available at* http://ssrn.com/abstract=2586354; Muhammad Ali, Carol Kulik, *Board Age and Gender Diversity: A Test of Competing Linear and Curvilinear Predictions*, 125 J. BUS. ETHICS 497 (2014); Jasmin Joecks, Kerstin Pull, Karin Vetter, *Gender Diversity in the Boardroom and Firm Performance: What Exactly Constitutes a "Critical Mass?"*, 118 J. BUS. ETHICS 61 (2013); María del Carmen Triana, Toyah L. Miller, Tiffany M. Trzebiatowski, *The Double-Edged Nature of Board Gender Diversity: Diversity, Firm Performance, and the Power of Women Directors as Predictors of Strategic Change*, 25 ORGANIZATION SCIENCE 609 (2013); Massimo Rubino De Ritis, *L'introduzione delle c.d. quote rosa negli organi di amministrazione e controllo di società quotate*, NUOVE LEGGI CIV. COMM. 309 (2012); Angelo Busani, Giuseppe Ottavio Mannella, *"Quote rosa" e voto di lista*, 31 SOCIETÀ 53 (2012); Nuria Alvarado, Joaquina Briones, Pilar Fuentes Ruiz, *Gender Diversity on Boards of Directors and Business Success*, 1 INVEST. MANAG. FIN. INNOV. 199 (2011); Claude Francoeur, Réal Labelle, Bernard Sinclair-Desgagné, *Gender Diversity in Corporate Governance and Top Management*, 81 J. BUS. ETHICS 83 (2008); Stephen Brammer, Andrew Millington, Stephen Pavelin, *Gender and Ethnic Diversity Among UK Corporate Boards*, 15 CORPORATE GOV.: AN INT. REV. 393 (2007); Coral Ingley, Nicholas van der Walt, *Board Dynamics and the Influence of Professional Background, Gender and Ethnic Diversity of Directors*, 11 CORPORATE GOV.: AN INT. REV. 218 (2003).

23 Nadege Jassaud, *Reforming the Corporate Governance of Italian Banks* (September 2014). (IMF Working Paper No. 14/181), *available at* http://ssrn.com/abstract=2513266; Julie Dickson, *Member of the Supervisory Board of the European Central Bank Discussion organized by the Centre for European Reform: Will the Eurozone Caucus on Financial Regulation?* (2015), *available at* https://www.bankingsupervision.europa.eu/press/speeches/date/2015/html/se150901.en.html.

it is worth mentioning that under Italian law corporate bodies are generally appointed for a term of three years, and staggered or classified board, while not technically prohibited, are rare in listed corporations.

The interplay of these different statutory, regulatory and self-regulation provisions depict a complex (one might argue *too complex*) picture detailing how boards of directors of listed corporations must be composed. Rather than a lengthy and analytical discussion of the single provisions, let us take a look at how, based on this regulatory structure, the board should be composed.

First, however, we must mention that after a 2003 reform, the bylaws of Italian corporations can opt for one among three different governance models: the "traditional" Italian one, in which the shareholders appoint both a board of directors and a board of statutory auditors with the task of overseeing the legality of corporate activities and the effectiveness of internal control and administrative systems; a two-tier model inspired by the German experience, in which shareholders appoint a supervisory board with control functions (and possible responsibilities in the definition of general strategic goals), and a managing board appointed by the supervisory board and composed of different individuals; and a one-tier model more akin to Anglo-Saxon structures, in which the shareholders' meeting simply appoints a board of directors, and within this board a control committee composed of independent directors must be formed.[24] For the sake of simplicity, we focus on the first model only, which is by far the most commonly adopted by Italian issuers.[25]

Generally speaking, there are three types of directors – or, more precisely, directors with different characteristics must be appointed: executive, non-executive and "independent" directors. Executive directors are, obviously enough, the ones with delegated managing powers, who are usually also executives of the corporation: the CEO, the CFO when she is also a board member, and so on; conversely, non-executive directors are obviously the ones lacking these powers and functions.[26] In terms of composition, the only rule concerning the proportion between executive and non-executive directors can be found in the Corporate Governance Code, which simply states as follows: "The number, competence, authoritativeness and time availability of non-executive directors must guarantee that their opinion has a meaningful weight in board's decisions" (Principle 2.P.3).

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24 For a brief description of these models, see Federico Ghezzi, Corrado Malberti, *The two-tier model and the one-tier model of corporate governance in the Italian reform of corporate law*, 5 EUROPEAN COMPANY FINANCIAL LAW REV. 1 (2008); Carlo Bellavite Pellegrini, Laura Pellegrini, Emiliano Sironi, *Alternative vs Traditional Corporate Governance Systems in Italy: An Empirical Analysis* (Paolo Baffi Centre Research Paper No. 2010-80), *available at* http://ssrn.com/abstract=1554047 Carlo Bellavite Pellegrini, Laura Pellegrini, Emiliano Sironi, *The Choice of Alternative Corporate Governance Systems: Ownership Structures and Performance in Italian unlisted firms in 2008*, 6 INT'L J. TRADE AND GLOBAL MARKETS 242 (2013). The one-tier model is currently increasing its own relevance in the academic debate, also in the light of the fact that, recently, one of the most widespread bank of the country opted for embracing it: a decision which did not go unnoticed. *See* Piergaetano Marchetti, *Tanto tuonò che piovve. Intesa Sanpaolo e il monistico*, ANALISI GIUR. ECON. 9 (2016); Luigi Arturo Bianchi, *Il modello monistico è più efficiente di quello tradizionale? Appunti per una ricerca*, ANALISI GIUR. ECON. 23 (2016); Raffaele Lener, *Monistico come modello «ottimale» per le quotate? Qualche riflessione a margine del rapporto Consob sulla «*corporate governance*»*, ANALISI GIUR. ECON. 35 (2016); Gian Domenico Mosco, Salvatore Lopreiato, *Brevi note su opportunità e limiti attuali del sistema monistico*, ANALISI GIUR. ECON. 51 (2016); Andrea Guaccero, Tommaso Di Marcello, *Codice civile, società quotate, banche, intermediari e assicurazioni: un solo monistico?*, ANALISI GIUR. ECON. 103 (2016); Eva Desana, *Sistema monistico, voto di lista e rappresentanza delle minoranze*, ANALISI GIUR. ECON. 195 (2016); Marcella Sarale, *Quote di genere e sistema monistico: precisazioni e omissioni nella legge Golfo Mosca*, ANALISI GIUR. ECON. 213 (2016).

25 CONSOB, 2015 *Report on Corporate Governance of Italian Listed Companies*, at 24, Table 2.1.

26 An interesting question has emerged: if directors members of an executive committee should be considered non-executive, because "executive" directors must have specific individual executive responsibilities; of whether they are non-executive, with the somehow paradoxical consequence that in a corporation having an executive committee but no executives on the board all directors are non-executive. We believe the first interpretation to be preferable, but also the opposite opinion has been expressed. See Filippo Maria Federici, *L'organo di amministrazione: ripartizione di funzioni gestorie*, ANNAPAOLA NEGRI-CLEMENTI, IL SISTEMA DELLE DELEGHE DI FUNZIONI GESTORIE 23 (2013).

It is not necessary, for the purposes of this Article, to dwell into the technicalities of the definition – better, the *definitions* – of independent directors scattered in the legal system.[27] It is sufficient to point out directors can be qualified as independent if they are not close relatives or family members of other sitting directors, or do not have, directly or indirectly, relationships with the corporation – with the exception, obviously, of their directorship – and the corporate group it belongs to that might affect their independence. The requirement should be intended in a substantive way, and its application is fact-intensive. There are at least two important definitions of independence for our purposes, one set forth by Article 148 TUF, and one included in the Corporate Governance Code (art. 3), the second one being somehow more detailed and rigorous. Typical examples of individuals that cannot be considered independent are controlling shareholders, professionals that have meaningful ties with the corporation (*e.g.*, its lawyers whose professional income depends significantly on the corporation), or relevant creditors and debtors. Of course, this does not mean that directors lacking these qualifications cannot be appointed, or that their competences and contributions to the corporation cannot be valuable: simply, if appointed, they will not be qualified as "independent."

It should also be pointed out that only non-executive directors can be considered independent. The idea is that executives are so profoundly intertwined with the life of the corporation, so invested in its success, that they might not have the detachment of a director without managing responsibilities. In this perspective, the U.S. distinction between "inside" and "outside" directors captures the idea. Interestingly enough, pursuant to the Corporate Governance Code, also a director meeting all the requirements of independence, can is no longer considered independent after the corporation has employed him or her for a long period (specifically, nine years within the previous twelve).[28]

From a statutory perspective, based on Article 147-*ter*, Paragraph 4, TUF, at least one director, or two if the Board has more than seven members, should be independent. The Corporate Governance Code should however also be kept into account: while it does not indicate directly a minimum number of independent directors, this number derives from the requirement to appoint different committees within the board (in particular, control, remuneration, appointments committees) each with a minimum

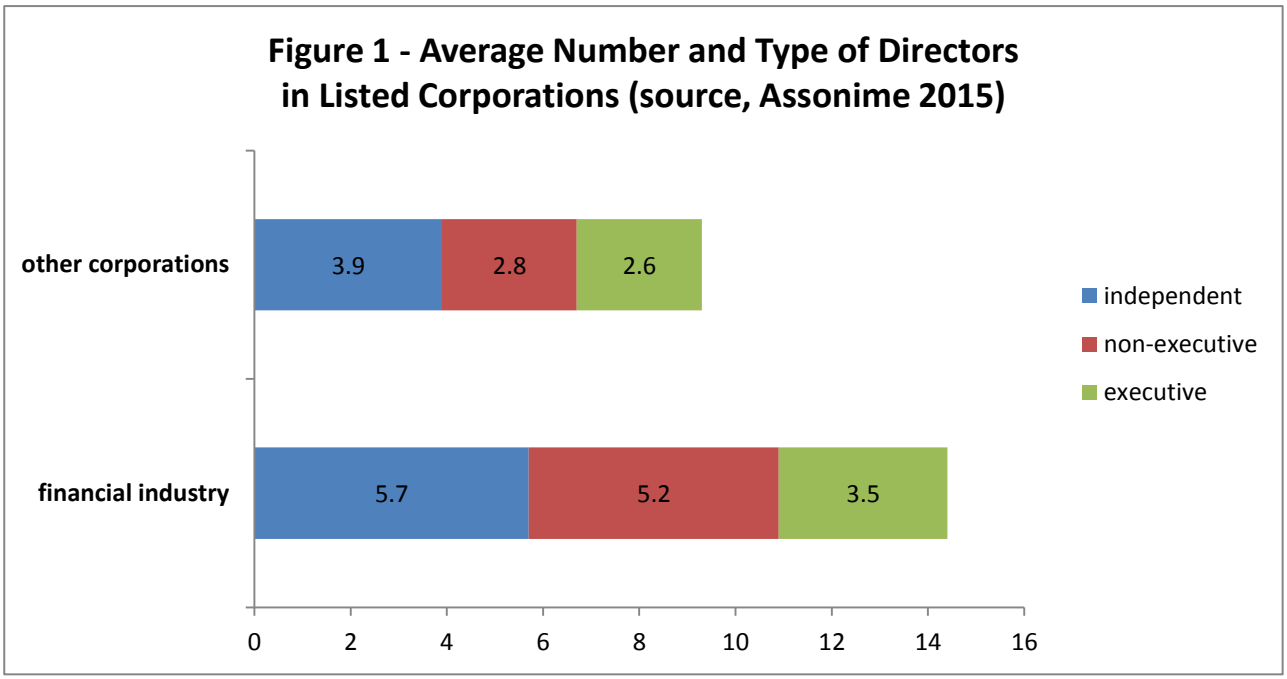
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[27] See Mario Stella Richter *jr., Appunti sulla evoluzione della disciplina dell'amministrazione delle società quotate e sulle sue prospettive di riforma,* ORIZZONTI DIR. COMM. RIV. TELEMATICA*,* 2014, n. 2, 10, *available at* http://rivistaodc.eu/edizioni/2014/2/osservatorio/appunti-sulla-evoluzione-della-disciplina-dell%E2%80%99amministrazione-delle-societ%C3%A0-quotate-e-sulle-sue-prospettive-di-riforma/; Lucia Calvosa, *Alcune riflessioni sulla figura degli amministratori indipendenti*, *in* FILIPPO ANNUNZIATA (ed.), IL TESTO UNICO DELLA FINANZA. UN BILANCIO DOPO 15 ANNI, Egea 45–56 (2015); Paolo Ferro-Luzzi, *Indipendente... da chi; da cosa?*, RIV. SOC., 204 (2008); Duccio Regoli, *Gli amministratori indipendenti*, *in* PIETRO ABBADESSA, GIUSEPPE B. PORTALE (eds.), IL NUOVO DIRITTO DELLE SOCIETÀ, LIBER AMICORUM GIAN FRANCO CAMPOBASSO, 385-438 (2006); Francesco Denozza, *I requisiti d'indipendenza,* Speech held during the Conference GLI AMMINISTRATORI INDIPENDENTI NELLE SOCIETÀ DI CAPITALI (Milan, November 28th 2005), *available at* http://www.emagazine.assonime.it/upload/Intervento%20Denozza%20Borsa%2028%20novembre.pdf and, in a comparative perspective, Gaetano Presti, *Gli amministratori indipendenti: mito e realtà nelle esperienze anglosassoni*, ANAL. GIUR. ECON. 97-114 (2003) and Andrea Pericu, *Il ruolo degli amministratori indipendenti nei paesi dell'Europa continentale*, ANAL. GIUR. ECON. 115-134 (2003).

[28] ASSONIME, LA *CORPORATE GOVERNANCE* IN ITALIA: AUTODISCIPLINA, REMUNERAZIONI E *COMPLY-OR-EXPLAIN*. NOTE E STUDI N. 10/2015 (2015), in which the problematic issues related to the appointment of independent directors are considered: "[p]er mantenere l'analisi entro limiti di complessità ragionevoli si è scelto di censire i casi in cui l'amministratore era in carica 9 anni fa. Ciò comporta la rinuncia a verificare la continuità della carica; sono possibili, quindi, sporadici errori di classificazione. Sono stati considerati esplicitamente anche i (pochi) casi in cui la persona è passata dall'incarico di sindaco a quello di amministratore (e viceversa, quando si è replicata l'analisi sui sindaci)" (55 and fn. 55). Similarly, looking at the UK Code of Corporate Governance, «[i]n the UK any performance based pay for independent directors renders them presumptively non-independent, as does nine years continuous service», David Kershaw, *Corporate Law and Self-Regulation* (LSE Legal Studies Working Paper No. 5/2015, 2015), *available at* http://ssrn.com/abstract=2574201. *Cf.* Christopher Pass, *The Revised Combined Code and Corporate Governance*, 48 MANAGERIAL LAW 476 (2006); BRENDA HANNIGAN, COMPANY LAW (2012) at 118.

percentage of independent directors. Consequently, most listed corporations that comply with the Governance Code have more than two independent directors.[29]

To give a general sense of the composition of the board with respect to these distinctions, consider the following Figure.[30]



The other interesting – and unique – feature of Italian boards, is the system we mentioned above called "list voting" or "slate voting", regulated by Article 147-*ter*, Paragraph 1, TUF[31] and by secondary provisions enacted by Consob, the Italian financial markets supervisor. In brief, list voting is a mandatory system designed to allow minority shareholders to appoint a minimum number of directors. It injects an element of proportionality in the appointment of the board, not differently – in terms of substantive results – from cumulative voting in the United States, even if the specific legal technique used is more simple, straightforward and predictable.

In brief, the system works as follows: all shareholders of listed corporations reaching a minimum threshold of shares dependent on the capitalization of the issuer, generally between 1 and 2%, can present a "list" of candidates for the election of the board before the shareholders' meeting, in which the proposed candidates are listed in a precise order. All lists presented are then put to a shareholders' vote, and the TUF mandates that all directors will be picked from the list receiving the highest number of votes, but a minimum number (generally one, but bylaws can increase this number) of directors will be taken from the list receiving the second highest number of votes. As long as this minimum

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29 *Inter alia*, Mario Stella Richter *jr.*, *I comitati interni all'organo amministrativo*, RIV. SOC. (2007) 260 ff. (who also focused on the main committee in the Italian scenario in a more recent piece: Mario Stella Richter *jr*, *Il comitato controllo e rischi, già comitato per il controllo interno*, OSS. DIR. CIV. COMM. 59-72 (2012)) and Massimo Belcredi, *Amministratori indipendenti, amministratori di minoranza, e dintorni*, RIV. SOC. 853-878 (2005), in particular, at paragraph 3. See also Kevin D. Chen, Andy Wu, *The Structure of Board Committees* (2016), *available at* http://ssrn.com/abstract=2646016; Pornsit Jiraporn, Manohar Singh, Chun I. Lee, *Analyzing Ineffective Corporate Governance: Director Busyness and Board Committee Memberships* (2008), *available at* http://ssrn.com/abstract=1133584 and David Carter, Frank P. D'Souza, Betty J. Simkins, W. Gary Simpson, *The Diversity of Corporate Board Committees and Financial Performance* (2008), *available at* http://ssrn.com/abstract=1106698.

30 Assogestioni, *supra* note 28, at 43.

31 For a wider discussion of the issues raised by the rule under analysis, see Mario Stella Richter *jr.*, *Article 147*-ter *TUF*, *in* PIETRO ABBADESSA, GIUSEPPE B. PORTALE (eds.), LE SOCIETÀ PER AZIONI. CODICE CIVILE E NORME COMPLEMENTARI, vol. II, Giuffrè (2016) 4190 ff.

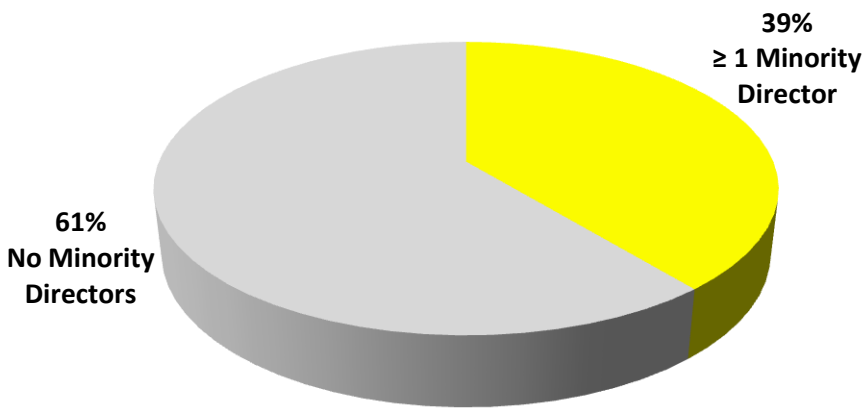
requirement is met, in theory, bylaws can also allow the selection of candidates from a third or fourth list, but corporations tend to avoid this additional complication.

For example, a controlling shareholder owning 45% of the voting shares, and a group of institutional investors owning 16%, can both present their lists. If, at the shareholders' meeting, the first list receives 53% of the votes cast (the ones of the shareholders who presented the list, plus of some other investors), and the second one 20%, at least one director of the nine hypothetically forming the board must be picked from the candidate of the institutional investors.

One important addition is a rule against elusions. The list receiving the second highest number of votes is not considered, and its candidates cannot be elected, if connections are established between the shareholders presenting and voting the two lists or the candidates listed in them. The rationale is to prevent the presentation of "decoy" minority lists, in fact expressed by the controlling shareholders, therefore nullifying the goal of list voting of enhancing "corporate democracy."[32]

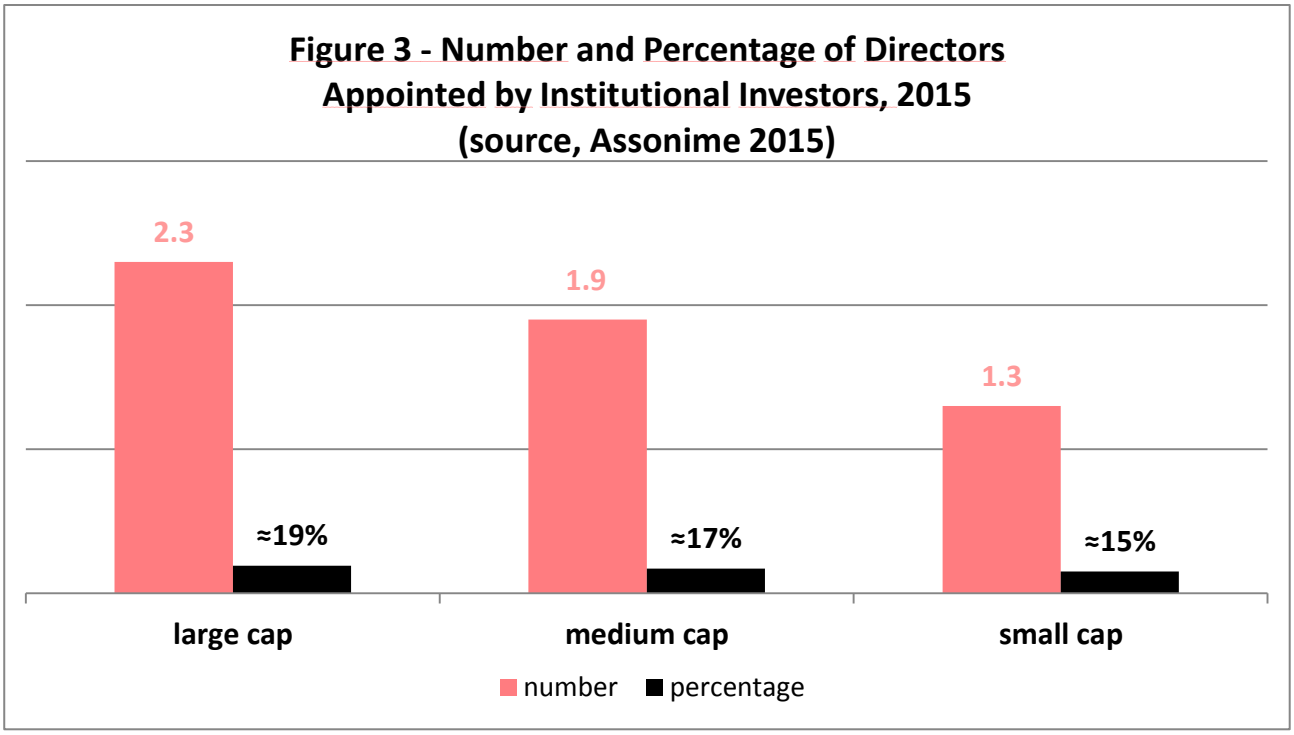
Institutional investors, coordinated by their professional association, Assogestioni, generally prepare and vote the list ranking second. Consider the following graphs, illustrating the impact of this system.[33]

Figure 2 - Percentage of Corporations with at least one Director appointed by Minority Shareholders, 2014 (source, Assonime 2015)



[32] From an historical perspective, it is interesting to note that this system was firstly experimented with respect to state-owned corporations that were privatized in the 1990s, in order to inject an element of "corporate democracy" in their governance. Later, in 1998, with the enactment of the already mentioned TUF, list voting was adopted generally for the appointment of the board of statutory auditors, based on the idea that a controlling body should also include representatives of minority shareholders. In 2005, also as a consequence of financial scandals, the legislature extended the system also to the board of directors.

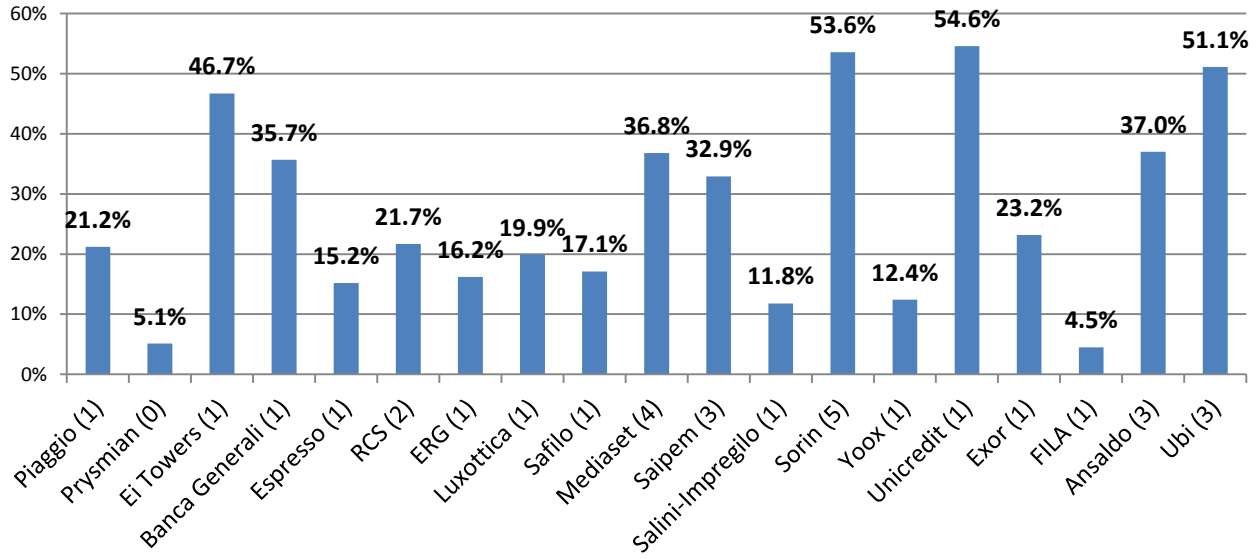
[33] *See* also Assogestioni, *supra* note 28, at 59.



More recently, a new phenomenon has emerged in some listed corporations. The list presented by institutional investors often receives a quite significant number of votes, also capturing the votes of dispersed minorities. In some instances, it has received even more votes than the ones received from the list presented by the allegedly "strong" shareholders.[34] The somehow paradoxical consequence might be that the most-voted list elects a small minority of directors, either because of statutory and bylaws limitations, or because institutional investors prefer to present a limited number of directors (*e.g.*, 2 for a board of 12) in order not to be considered in control of the corporation. The data in Figure 4 below exemplify this situation with respect to the last "proxy season:" the percentage of votes received is indicated in the bars, and the number of directors appointed in parenthesis next to the name of the corporation (elaborations on data from Assogestioni and Consob):

[34] A clarification can be helpful. A corporation can be considered "controlled" by a single shareholder owning 40% of the shares, who generally invests in a long-term perspective and is actively involved in the managing of the corporation. The group of institutional investors supporting some candidates, on the other hand, is by definition temporary and unstable: it might be that, all together, they attract 51% of the votes, but these votes are controlled by a single shareholder, or by a stable coalition aiming at controlling the corporation.

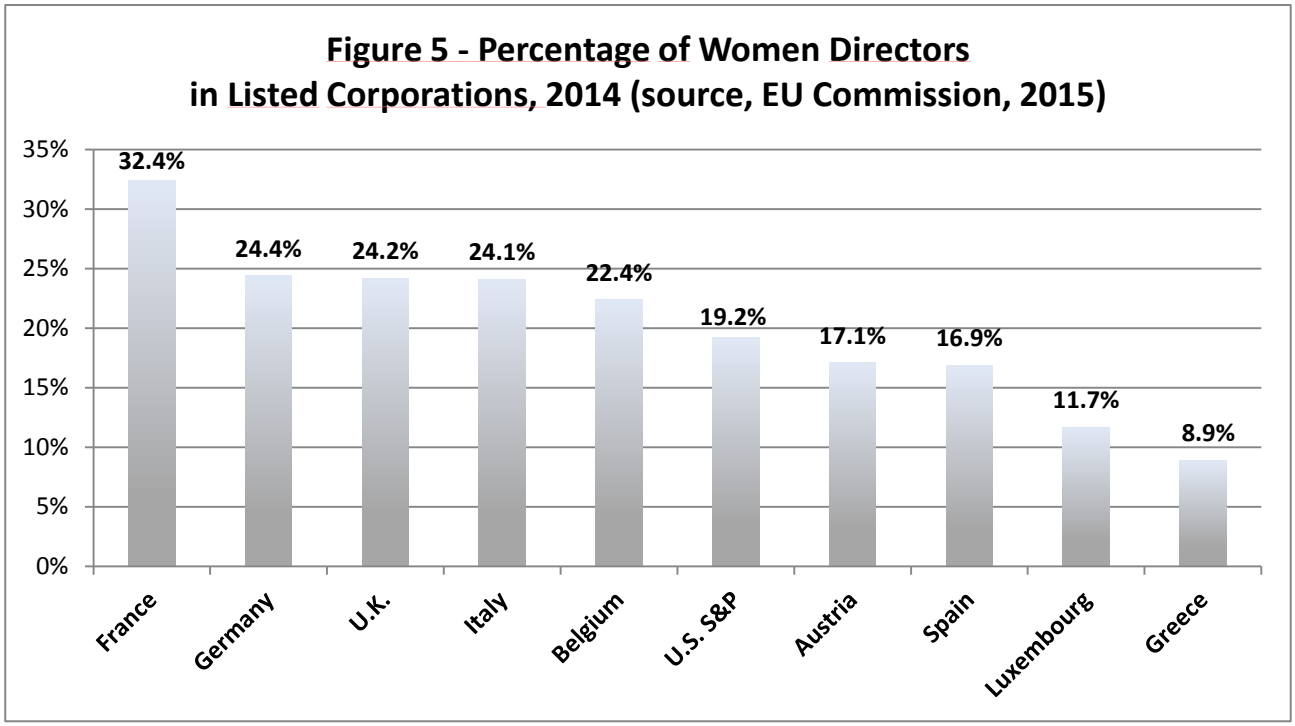
Figure 4 - 2015 and 2016 Proxy Season: Percentage of votes received by Institutional Investors' Lists and Directors Appointed (source, elaborations from Consob, Assogestioni and newspapers, 2015)



All directors, once appointed, owe fiduciary duties to the corporation and to all shareholders: they are not and should not act as the "advocates" of the group appointing them. In practice, however, it is inevitable that directors feel a stronger "affection" for the shareholders that have more contributed to their election. This element is important for our analysis of dissent, for example in order to consider if minority-appointed directors take more often a position not aligned with the one of controlling shareholders and their directors.

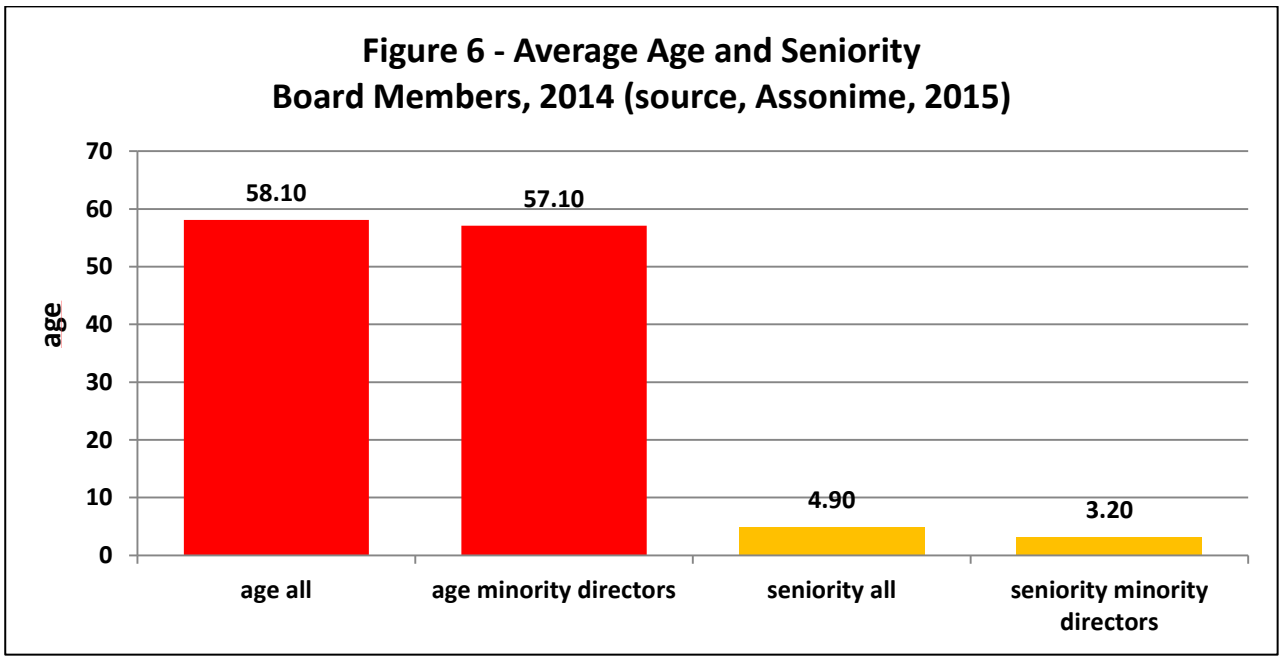
We should also add that, formally, directors included in a "minority list" should not necessarily be independent in the sense defined above, or non-executive. However, on the basis of rules established by the Association of institutional investors that facilitates the composition of the lists, nominees of institutional investors must be independent not only from the investors that have selected and supported them, but also undertake the obligation to remain independent and not accept executive positions in the issuer during their tenure as directors.

Another set of rules that we need to mention, also affecting the composition of the board, concerns gender quotas. A 2010 statute, the Golfo-Mosca Act, mandates that until 2022, when the law will cease to be applicable, a growing percentage (from 20% to 33.3%) of board members must belong to the "least represented" gender. The rule has been quite effective in improving gender equality in Italian listed corporations, also in comparison to other jurisdictions, as the following Figure shows:



Also in this respect, it is interesting to consider – as we will do below – if male or female directors are more inclined to voice their dissent, voting either against the majority, or – in extreme circumstances – resigning from the board.[35]

We have offered in this paragraph a brief and general, but hopefully helpful description of the major rules governing the composition of the boards of Italian listed corporations. To complete the analysis, the following self-explanatory graph shows the average age and seniority of board.



B. *Legal Implications of Dissenting Votes*

[35] Extensive literature on whether effect on performances or the opposite: see *supra* note 22 and, in particular, B. Espen Eckbo, Knut Nygaard, Karin S. Thorburn, *supra* note 22.

Under Italian law, as in most legal systems, there is no general mandatory requirement to disclose routinely how single board members vote. Board minutes, in fact, are not public, also for obvious confidentiality reasons. Even when a disclosure to the market concerning a certain transaction or the adoption of a specific resolution is necessary, corporations can often simply inform that "the board has approved" the issue, without offering too many details on how single directors voted. In relatively rare circumstances corporations might voluntarily, or based on a specific request of supervising authorities or directors themselves, specify if the approval was unanimous or with a majority vote, and even in this case they do not always clarify how many directors voted against or abstained, and who they were. There are good solid reasons for this approach, in light of the speculations this information might trigger, and also to maintain a level of desirable confidentiality concerning the inner working of the corporate bodies dealing with the most sensitive and delicate business information. We will see, in the empirical part of our research, how this affected our data collection, but we can anticipate that, in this context, dissent becomes publicly known when particularly relevant, for example because dissenting directors wanted to inform the public about their position, or because of a specific interest of the press on corporate events, or due to the activity and requests of regulators.[36]

The meaning of dissent is not always easy to interpret or, more precisely, its real substantive reasons might be ambiguous. For example, it can express an actual disagreement on the economic desirability of a proposed transaction, but it can also indicate a broader distrust of the managing approach of other board members and, of course, can be inspired by more selfish and conflicted interests.

Whatever the real motivations of dissent, we need to spend a few words on some of the possible legal implications, under Italian law, of directors voting against the majority of the board, or resigning.

As a general default rule, valid board resolutions require, pursuant to Article 2388 of the Italian Civil Code, a quorum of a majority of the serving directors, and an absolute majority of directors participating in the meeting. In this perspective, a director who is present at the meeting but abstains from a vote has the same effect of a dissenting vote. The bylaws can however opt for a higher quorum or majority, and this occasionally happens especially for particularly important decisions. It should also be mentioned that sometimes a stronger quorum and majority might be mandated by statutory provisions, for example in certain potentially conflicted transactions in the banking industry, Article 136 of the "Consolidated Law on Banking" ("Testo Unico Bancario" or "TUB") requires a unanimous decision.[37]

One of the most relevant legal consequences of dissent concerns directors' liability. The last Paragraph of Article 2392 of the Italian Civil Code, regulating directors' liability toward the corporation (but the principle should be applicable also to a direct claim brought by single shareholders against directors, or to a lawsuit by creditors), provides that dissenting directors cannot be held liable for the prejudice caused by a board resolution, provided they were not negligent, and that their dissent is promptly noted in the minutes of the board meetings, and that they inform the chairperson of the board of statutory auditors (or the equivalent figure in case of adoption of the two-tier or one-tier systems).[38]

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36 It shall also be observed that it might also be necessary to publicly disclose information concerning a dissenting vote if it could be considered a price-sensitive information pursuant to the regulation of market abuses (insider trading and market manipulation), as amended by European law with the New Market Abuse Regulation. See, Commission Implementing Directive (EU) 2015/2392 of 17 December 2015 on Regulation (EU) No 596/2014 of the European Parliament and of the Council as regards reporting to competent authorities of actual or potential infringements of that Regulation, OJ L 332, 18.12.2015, *available at* http://data.europa.eu/eli/dir_impl/2015/2392/oj and, in a comparative perspective, MARCO VENTORUZZO, INSIDER TRADING: RECENT DEVELOPMENTS IN THE US AND THE EU, Speech held during the Conference THE NEW EU MARKET ABUSE REGIME (Milan, April 1st, 2016).

37 For a discussion of these rules see Marco Ventoruzzo, *Article 2388*, *in* PIERGAETANO MARCHETTI, LUIGI A. BIANCHI, FEDERICO GHEZZI, MARIO NOTARI (eds.), COMMENTARIO ALLA RIFORMA DELLE SOCIETÀ, FEDERICO GHEZZI (ed.), AMMINISTRATORI, Egea-Giuffrè (2005) 299 ff.

38 Francesco Vassalli, *Article 2392. Responsabilità verso la società*, *in* FLORIANO D'ALESSANDRO (ed.), COMMENTARIO ROMANO AL NUOVO DIRITTO DELLE SOCIETÀ. COMMENTO AGLI ARTICOLI 2380-2451, vol. II, II, Piccin, 141 ff., at

For the purposes of our research, therefore, it is worth underlying how a dissent not only might send a clear signal to other corporate insiders and, if made public, to the market, and might have a "reputational" effect for directors, but might also have specific legal consequences exculpating from civil (and also criminal) liability. In this perspective, we shall also point out how the same protection is not offered to a director that, without an explicit dissent, simply resigns from the board due to diverging views on how the corporation should be managed.

C. *Legal Implications of Resignations as an Expression of Dissent*

A deeper and more general dissent, possibly still originating from a specific transaction or corporate decision, can also be expressed with the more dramatic option of resigning from the board. While resignations must obviously be publicly disclosed – the statutory auditors have an obligation to indicate it in the registry of businesses, which is publicly accessible and implies constructive knowledge of the event –, it is always possible for departing directors to hide or embellish the real motivations of their decision with "personal reasons" or similar formulas, whose truthfulness is virtually impossible to ascertain. Notwithstanding this, as we will see in the empirical part of this work, in a number of cases directors clearly express their substantive dissent.

As mentioned above, resigning, in itself, obviously does not excuse from liability in the period in which the director was on the board; and actually in some occasions, especially if not coupled with a clear vote against certain resolutions, a judge might derive negative inference from a resignation coloring the behavior of the director: the idea, clearly enough, is not to encourage directors to jump ship when it is in troubled waters, but rather to remain on board and try to do what is possible to safely reach a port.

Vacancies on the board must be filled according to rules that it is not necessary to examine here. We should however mention that, if the majority of the board is still serving, the resignation has immediate effect, and the board can fill the vacancy. The person picked by the other directors will be confirmed – or not – at the next shareholders' meeting. If this is not the case, however (such as, *e.g.*, in the rare but not impossible situation in which five directors over nine resign simultaneously), resigning directors remain in office until when the majority of the board has been replaced pursuant to the applicable rules. One should also keep in mind bylaws provisions adopting the "*simul stabunt, simul cadent*" (Latin for "together they serve, together they fall") approach, according to which the resignation of one or some directors has the effect of terminating the entire board, and makes a new shareholders' vote necessary (shareholders of course can re-appoint some of the same directors). While not very common especially in listed corporations, these contractual provisions are designed to ensure that directors are always

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157; Alessandro De Nicola, *Article 2392*, *in* PIERGAETANO MARCHETTI, LUIGI A. BIANCHI, FEDERICO GHEZZI, MARIO NOTARI (eds.), COMMENTARIO ALLA RIFORMA DELLE SOCIETÀ, FEDERICO GHEZZI (ed.), AMMINISTRATORI, Egea-Giuffrè 545 (2005); Dario Scarpa, *Specificazione di responsabilità e segmentazione gestoria nell'amministrazione di s.p.a.*, RESP. CIV. 7 (2011); Trib. Milano Sez. VIII, May 12 th, 2010, GIUR. IT. 119 (2011) ("se dissenziente per motivi non pretestuosi, avrebbe potuto fare annotare il proprio dissenso nelle forme prescritte dalla legge, per andare esente da qualsivoglia responsabilità"); Trib. Napoli, April 26th, 2000, *available at* http://studiolegale.leggiditalia.it/ ("La responsabilità *de qua* ha natura contrattuale (cfr. in tal senso Cass. 9.7.87, n. 5989) e non ha carattere oggettivo, sicché non si estende all'amministratore che sia immune da colpa e che abbia fatto annotare senza ritardo il suo dissenso nel libro delle adunanze e delle deliberazioni del consiglio di amministrazione, dandone notizia per iscritto al presidente del collegio sindacale"); Trib. Perugia Sez. III, February 25th, 2015, *available at* http://studiolegale.leggiditalia.it/ ("in mancanza della esplicita dissociazione di taluno degli amministratori dall'operato dell'organo collegiale (escluso quanto sopra già detto per la posizione di B.) da farsi constare nelle forme previste dall'art. 2392, co. 3, c.c., tutti gli amministratori debbano ritenersi responsabili, *ratione temporis*, in via solidale fra loro, per i danni eventualmente arrecati con il loro comportamento alla società (cfr. art. 2392, co. 1 e 2, c.c.) e ai creditori sociali (cfr. art. 2394 c.c.)").

As to one-tier and two-tier models, see GIANLUCA RIOLFO, IL SISTEMA MONISTICO NELLE SOCIETÀ DI CAPITALI E COOPERATIVE, Cedam (2010), in particular, Chapter 1, and ID., IL SISTEMA DUALISTICO (2013), in particular, Chapter 3.

expressed by shareholders, but can also give to some directors a very strong leverage, since they can cause the entire board to be dismissed.

One final observation is that, when a system of list voting is in place, resignations cause one additional and interesting problem. In order to respect the proportionality principle underlying list voting, in fact, in theory the new directors should be the expression of the same shareholders who appointed the one who left. This might be achieved by picking the non-elected director listed immediately after the one resigning, in the original lists from which he or she was selected. Such a solution, however, has its own limitations: these people, several months after the election, might no longer be available because they have accepted other professional obligations. It is also possible that the ownership structures have changed, and shareholders who presented that peculiar list might no longer own shares, with the consequence that it would be questionable to select the new members of the board based on an old and no longer meaningful list. Without indulging in these important, but for our purposes not central issues, we can simply say that bylaws often regulate the matter enhancing certainty and offering more effective solutions.

IV. EMPIRICAL EVIDENCE

A. *Our Dataset*

As discussed in Part II, a limitation emerging from prior empirical works is represented by the paucity of data on the inner workings of boards of directors, such as on individual votes, abstentions or even the real reasons of resignations. This feature is attributable not only to the infrequency of these events, but also to the lack of legal requirements in most jurisdictions mandating disclosure on the voting of individual directors. Italy is no exception in this respect, but despite this limitation, we started our data collection searching firms' corporate filings. We complemented our investigation by hand-picking financial press articles in the Factiva database spanning the period January 2003 - February 2016. For this step we used as strings several forms of the words "independent director", "resign", "abstain", "vote against." We obtained an overall sample of 139 independent director events.

Next, we identified within this group a subsample of 37 events involving 54 independent directors who resigned, abstained or dissented in open conflict with specific decisions. We refer to this group of observations as the *divergence* subsample. Within the divergence subsample, we identify: 26 cases of resignation, 23 cases of dissent, and 5 cases of abstention, involving 26 different corporations (approximately 10 percent of the Italian listed corporations) and 43 single directors, among which 38 "diverged" once, three "diverged" twice, and two "diverged" three or more times. [39]

From our sample, we identified also a second subsample of 85 observations (hereinafter, *peaceful* subsample) including cases in which independent directors abstained without indicating any specific disagreement with the rest of the board or, more often, resigned "peacefully," *i.e.* without expressing a disagreement with fellow board members or managers, and instead offering reasons such as the number of positions simultaneously held in multiple boards, family or personal commitments, or health reasons. These observations involve 85 independent directors, serving on the boards of 71 companies. From these 85 peaceful observations, we removed 12 observations involving corporations in which, at least once, a divergence event *also* occurred. This selection procedure allows us to control for possible confounding omitted factors at the firm-level that might generate *pseudo* peaceful events.

Our final sample includes 127 observations: 54 divergence observations and 73 peaceful observations, for 37 and 63 events (a total of 105 events) involving 26 and 60 corporations, respectively. In some of the following sections, we will present comparative tests using both subsamples.[40] This methodology allows us to hold constant contextual industry-, and time-factors of these events with respect to a sample of events that involve the same type of director that is not in open conflict with the management.

B. *Topics on Which Independent Directors Diverge*

The empirical analysis begins by investigating the topics on which independent directors diverge. Table 1 illustrates the distribution of board proposals by topic and type of event (*i.e.*, abstention, dissent or resignation) for our divergence subsample. Please, note that many actual corporate issues might overlap, for example a merger decision can also be a transaction with related parties. In coding the events, we attempted to capture the topic that triggered the dissent.

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[39] The limited size of our dataset is not a unique feature of the Italian stock market. For example, in the much larger US stock market, L. Paige Fields, Manu Gupta, *Board Independence and Corporate Governance: Evidence From Director Resignations*, 36 J. BUS. FIN. & ACC. 161 (2009) identify 133 resigning outside directors. Similarly, Anup Agrawal, Mark A. Chen, *Do Analyst Conflicts Matter? Evidence from Stock Recommendations*, 51 J. LAW ECON. 503–537 (2008) use 8-ks to construct a sample of 168 outside directors' resignations in the period 1995-2006.

[40] Please note that, although in the remainder of the text we use the words "sample" or "subsample", our data reflect the *universe* of observations.

Table 1: Distribution of topics by type of divergence action (abstention, dissent and resignation)

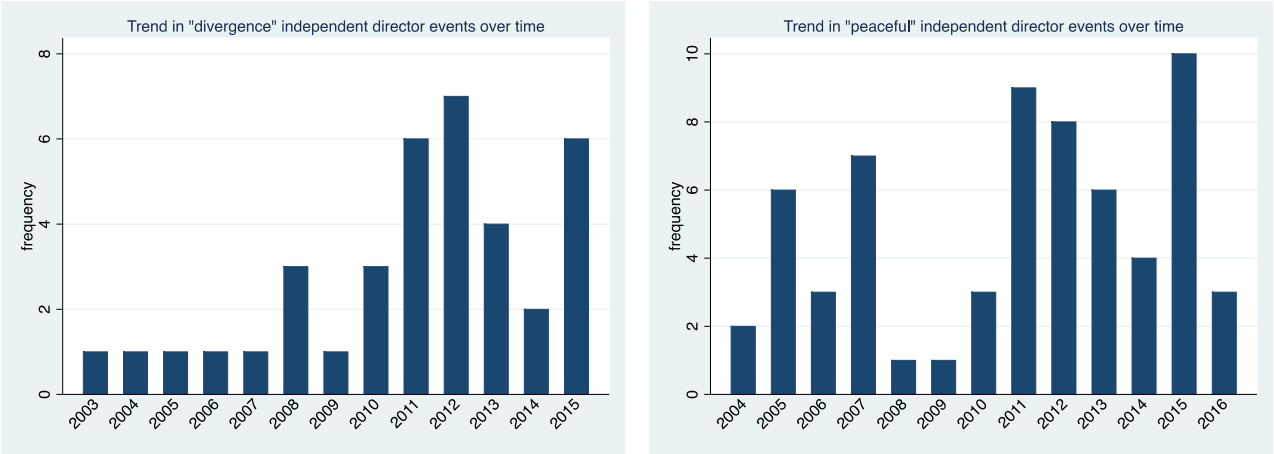
Topics	Events							
	Abstention		Dissent		Resignation		Total	
	Obs	*Perc*	*Obs*	*Perc*	*Obs*	*Perc*	*Obs*	*Perc*
Information disclosure	1	20%	5	22%	5	19%	11	20%
Board or shareholder meeting agenda	0	0%	1	4%	0	0%	1	2%
Director and officer selection	0	0%	1	4%	3	12%	4	7%
Financing and capital structure	1	20%	2	9%	1	4%	4	7%
Internal corporate governance	0	0%	3	13%	16	62%	19	35%
Investment, M&A, and restructuring	2	40%	1	4%	0	0%	3	6%
Payout policies	0	0%	0	0%	1	4%	1	2%
Related-party transactions	1	20%	10	43%	0	0%	11	20%
Total	5		23		26		54	

Table 1 shows that the most common issues on which dissent emerges are: 1) internal corporate governance (35 percent), 2) information disclosure and 3) related-party transactions (both at 20 percent). Specifically, independent directors mostly resign in connection to internal corporate governance issues (62 percent, out of 26 events), while they mostly dissent on related-party transaction topics (43 percent, out of 23 events).

C. *Time and Industry Trends*

In this Section, we provide evidence both on the sample time and on industry characteristics. In this regard, Figure 7 displays the distribution of our divergence and peaceful subsamples (N = 54 and N = 73, respectively) over the period 2003-2016.

Figure 7: Time trend for the divergence and peaceful subsamples of independent directors



Diverging events become more frequent from 2011. As the left panel shows, about 74 percent of all diverging events (*i.e.*, resignations, abstentions, and dissents) occur after this date. In contrast, we observe that, while there is variation in the distribution of independent directors' peaceful events over time, there is no clear clustering around a specific year. This is consistent with the randomness of peaceful events, thus validating the choice of the peaceful subsample as a control group in our analysis.

There are different possible explanations for this result. First, in 2005, a statutory reform introduced more rigorous rules concerning the adoption of the Corporate Governance Code. While issuers remained free to "comply or explain" on a voluntary basis, more detailed provisions clarified the necessary disclosure on the governance options of the corporation, and more generally intensified controls over information released to the public with respect to the Code. Throughout the years, in addition, the Corporate Governance Code has further specified the definition of independence for board members. In addition and possibly even more importantly, also in 2005 the Italian legislature, also in response to some corporate scandals, adopted mandatory list voting, allowing the appointment of minority directors on the board, and also strengthened the requirements in terms of independence of outside directors (Law No. 262 of 2005). Since these innovations take some time before producing their effects (corporate bodies, under Italian law, are generally elected every three years), it is possible that only after a few years the different composition of boards leads to more open dissent. An additional and possibly concurring explanation for more frequent dissent after 2010 is linked to the negative effects of the financial crisis, which in Italy persisted and even intensified after 2011. As we will see below, in fact, dissent is more likely when the corporation is not performing well or in times of economic stress.

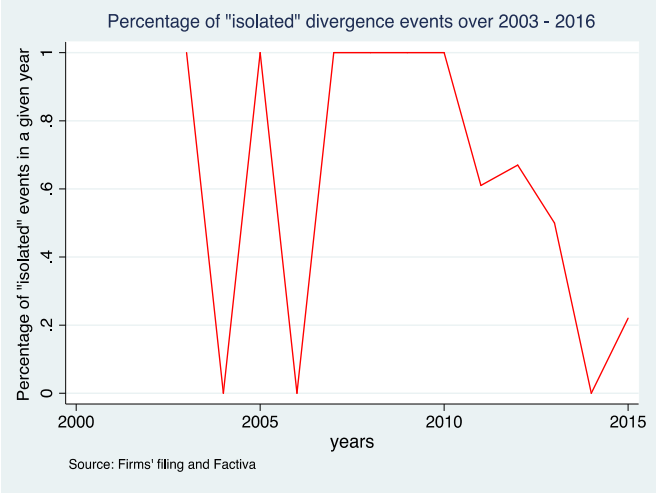
To probe deeper, we conduct an additional analysis. We investigate whether this change occurs through a general increase in the number of isolated events (*i.e.*, one independent director per firm/year), rather than with a generalized increase of dissent by several directors in the same board meeting (or even more board meetings) for the same company in the same year. In short, we seek to offer evidence of the *group dynamic* effects which might as well explain the trend shown in the left panel of Figure 7.

We define "isolated events" as the percentage of divergence events that, in any given year, involve only one independent director in the board of a specific corporation. For instance, if, for a given year, we observe five unique divergence events involving five different corporations and only one independent director per event, the variable will take the value of (5/5) 1. This result indicates the absence of spill-over effects across boards of different companies, or across board meetings of the same company in the same year.

Alternatively, if, for a given year, we observe only one divergence event involving five different independent directors in one single corporation, the variable be (0/1) 0. For our purposes, the same result would occur if we were to observe multiple instances of one (or more) diverging director in the *same* corporation in the *same* year. This is because independent directors' diverging actions may not

only be correlated across boards (*e.g.*, two or more independent directors resigning, abstaining, or voting against in the same day), but also across time within the same company (*e.g.*, two or more independent directors of the same corporation resigning, abstaining, or voting against within the same year, but at different times). The results for the divergence subsample are illustrated in the following figure.

Figure 8: Time trend of isolated events for the divergence subsample



In our divergence subsample the number of diverging events up until 2009 is relatively low, *i.e.*, on average 1.71 events per year. This compares to an average of seven events in the period 2010-2015, on a yearly basis. We note this distinction to make clear that the trend in isolated events becomes more generalizable only after 2010, as it is based on a relatively larger number of observations. Moreover, we intend to provide an explanation for the irregular pattern that our measure of isolated divergence events takes on in the 2003-2009 period.

Most importantly, the figure indicates that the percentage of isolated events generally decreases starting in 2011 (from 100 percent to 60 percent) and it reaches its minimum value in 2014, when we find no isolated dissents. The results illustrated in Figure 8 suggest that as dissent became more common after 2010, the number of directors dissenting "in isolation" decreased, something that might be indicative of some form of group dynamics (a larger number of independent / minority-appointed directors reinforced each other in the inclination to voice dissent).

This section concludes by graphically summarizing descriptive evidence about the industry where diverging events occur, relative to peaceful events.

Figure 9: Distribution of the divergence and peaceful subsample events by industry

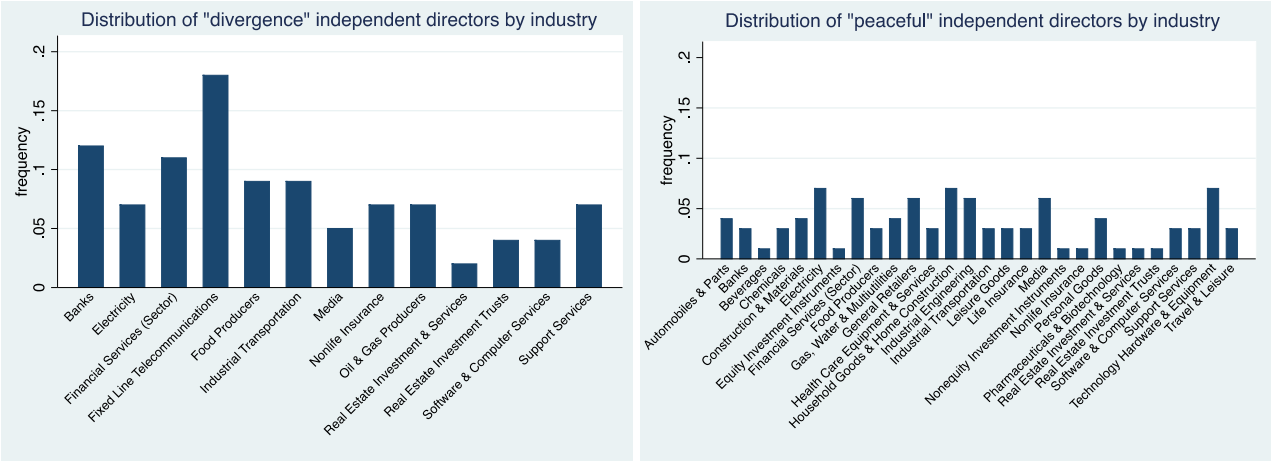


Figure 9 shows that, compared to the peaceful events, divergence events are clustered around a relatively smaller number of industries (*i.e.*, 13 and 28, respectively). Specifically, the industry in which divergence events are more likely to occur is telecommunication (18%) – largely due to the positions taken by one single director –, but also banks and financial institutions register dissent more frequently than other industries (dissent is least likely is corporations active in real estate (2%)). In contrast, and in keeping with our comments to Figure 7, we observe that events in the peaceful sample are equally distributed across industries, again due to the randomness with which these events occur.

D. *Dissenting Directors: Who Are They?*

We next examine the characteristics of independent directors at the time of the event. In doing so, we also consider board and ownership characteristics that might also be associated with the likelihood of dissent. We will return to this analysis in Section IV.F.

In Table 2 we present the results of this analysis and we report mean and median estimates for a set of independent director-level variables (detailed in the Appendix) across both subsamples. The table also shows the corresponding *p*-values resulting from *t*-test (for the mean) and Wilcoxon test (for the median).

Table 2: Descriptive statistics of the characteristics of independent directors from the divergence and peaceful subsamples

Variables	$Mean_{peace}$	$Mean_{div}$	*p*-values	$Median_{peace}$	$Median_{div}$	*p*-values
MINORITY	0.054	0.425	0.000***	0	0	0.000***
AGE	54.299	55.962	0.365	55	52	0.583
FEMALE	0.164	0.148	0.805	0	0	0.633
REMUNERATION	45433	113269	0.001***	40000	78178	0.000***
BOARD MEMBERS	13.306	13.371	0.941	13.500	13.500	0.682
N_APPOINTMENTS	10.988	8.584	0.114	9	4	0.007***
ALMA MATER	0.904	0.870	0.552	1	1	0.684
POSTGRAD	0.123	0.203	0.221	0	0	0.141
CEO_PRESIDENT	0.287	0.111	0.016**	0	0	0.007***
CLOSE	0.501	0.352	0.000***	0.521	0.341	0.000***

As Table 2 shows, relative to the peaceful subsample, 42.5 percent of independent directors from the divergence subsample are directors appointed by minority shareholders (5.4 percent in the peaceful subsample) and receive a higher income (113,269 Euro vs. 45,433 Euro in the peaceful subsample)[41], and sit on fewer boards (8.5 vs. almost 11). Further, we observe that only 11.1 percent of diverging actions occur in boards where the CEO is also the president of the board of directors (28.7 percent in the peaceful subsample). We also observe that diverging actions mostly occur in companies displaying a relatively low degree of ownership concentration (35.2 percent, relative to the same value that the variable takes on in peaceful subsample, *i.e.*, 50.1 percent).[42] The same relation and statistical inferences apply using medians, except for the variable N_APPOINTMENTS, for which we find that diverging independent directors have a lower number of multiple directorship (4 vs 9.5). In contrast, we do not find significant differences between the independent directors of the two subsamples in terms of age, gender, education (*ALMA MATER* and *POSTGRAD*) and size of the board at the time of the event.

In sum, the evidence presented in Table 2 is consistent with the following conclusions and has important implications. Compared to a random sample of peaceful events, independent directors are more likely to dissent in corporations with a less concentrated ownership structure. In addition, minority-appointed directors are more likely to dissent than directors appointed with a majority of the votes, but directors paid more are more likely to dissent, which can be interpreted as due to the fact that they are more authoritative, have better professional alternatives, are more appreciated by the market and therefore feel freer to express their ideas even when conflicting with the majority. Separation between chairperson and CEO also seems to facilitate an open discussion on the board and more frequent dissent,[43] thus confirming the validity of the practice of not having the same person

41 This amount compares to an average of 52,000 Euro for the entire stock market in Italy.

42 This amount compares to an average of 52.6 percent for the same variable computed for all Italian listed companies in Datastream as per 31 December 2015.

43 Even if a significant amount of scholars discuss the likelihood of separation between the two roles due to agency conflicts between the CEO and shareholders (*ex multis*, John E. Core, Robert W. Holthausen, David F. Larcker,

serve as both chairperson and CEO. The impact of number of appointments on the propensity to dissent is more ambiguous, which makes sense because directors with fewer appointments are likely to dedicate more time to their duties, and therefore have "stronger" views; but might also be more interested in keeping their positions. The size of the board does not seem to have an impact on the likelihood of dissent.

It is also interesting to note that age, gender and education, in our sample, does not seem to influence the propensity to dissent. In this perspective, stereotypes such as that one gender is inherently more "independent" and less influenced by group dynamics, or that either younger or older people, or more or less educated ones, can be more "rebellious," do not seem confirmed. Independence and propensity to voice a different position, in this respect, appears to be a personality trait not related to age, gender or education.

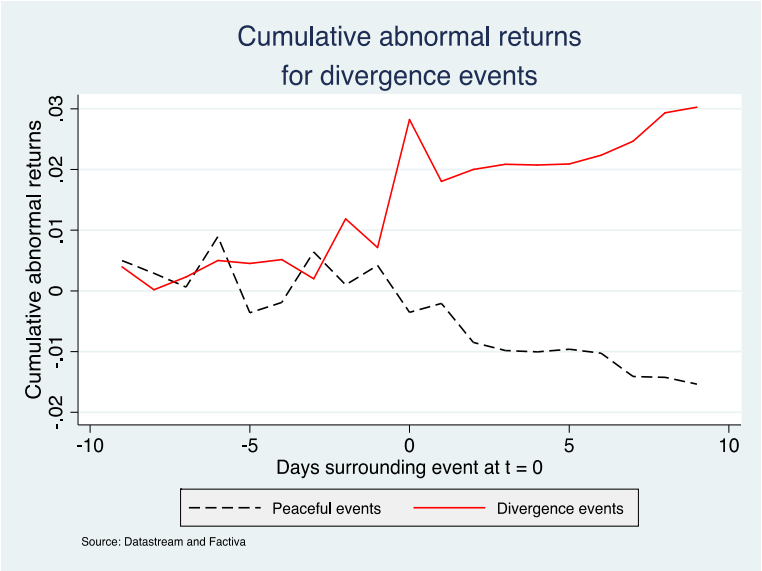
E. *The Market Consequences of Dissent*

Based on the inferences drawn from the analysis in Section IV.D, we now investigate the consequences of independent directors' dissent from the market's standpoint. This analysis is grounded on the premise that independent directors' actions on the board, when publicly known, have an effect on share prices because they convey relevant information to investors, especially if the independence of the board is viewed as an important element in the governance of a corporation[44]. In line with the existing literature, for this analysis we employ abnormal returns ("CAR") as a measure of market reactions. Abnormal returns are computed as actual return minus a market model ("average") return. The market model return is estimated as $E(r_{it}) = \alpha_{it} + ß_{it}(R_{mt})$, where r_{it} is the corporation *i*'s return at time *t* and R_{mt} is the market return at time *t*. The parameters α and ß are computed in the estimating (-120; -11) day window prior to the event at $t = 0$. In Figure 9, we plot CARs for the event (-10; +10) day window around the announcement of independent directors divergence vs. peaceful events.

Corporate Governance, CEO Compensation, and Firm Performance (February 1997), 51 J. FIN. ECONOMICS 371 (1999), also *available at* http://ssrn.com/abstract=10376; Vidhan K. Goyal, Chul W. Park, Board Leadership Structure and CEO Turnover (July 2001), 8 J. CORPORATE FINANCE 49 (2002), *available at* http://ssrn.com/abstract=296703), it worth to be recalled that other scholars argue that a combination of the titles above is efficient from a decision-making perspective (James A. Brickley, Jeffrey L. Coles, Gregg Jarrell, *Leadership Structure - On the Separation of the Positions of CEO and Chairman of the Board*, 3 J. CORPORATE FINANCE 189 (1997)). An attempt to reconcile the two different views on the topic (or, at least, to recognize that "forcing separation by fiat is likely not an ideal policy") tries to exercise caution in the rush to separate the two roles, see Narayanan Jayaraman, Vikram K. Nanda, Harley E. Ryan, *Does Combining the CEO and Chair Roles Cause Poor Firm Performance?* (Georgia Tech Scheller College of Business Research Paper No. 2015-11) (2015), *available at* http://ssrn.com/abstract=2690281.

44 Michael C. Jensen, *The Modern Industrial Revolution, Exit, and the Failure of Internal Control Systems*, 48 J. FINANCE 831 (1993).

Figure 9: CAR around the independent directors' divergence event as compared to the independent directors' peaceful event.



Using both subsamples, we observe, interestingly, that CARs around divergence events date are positive as compared to the CARs around the peaceful event dates. Specifically, on the date of the divergence announcement, CARs increase from 1.2 to about 3 percent (+150 percent), while on the peaceful announcement date, they slightly decrease (from 0 to -0.5 percent). In order to test more formally this result, we compute CARs using the (0; +1) two-day window around the event announcement date and we test whether they are statistically and significantly different from zero. Results are based on 105 events: 39 CAR observations from the divergence subsample and 66 CAR observations from the peaceful subsample. The results are reported in Table 3.

Table 3: Stock price reactions to divergence and peaceful announcements

	N.	**$CAR_{[0;+1]}$**
Peaceful events	66	-0.005
		[0.058]*
Divergence events	39	0.009
		[0.099]* (one-tail)
Diff. in means		0.014**
		[0.027]

Consistent with our graphical evidence, our test in Table 3 confirms that around divergence events CARs increase (by about 1 percent), and this effect is statistically different from zero at 10 percent (one-tail) significance level. Moreover, we observe that the CARs from both subsamples are statistically different from each other. The absolute CAR difference between the two events is 1.4 percent and it is statistically significant at 5 percent level.

In short and somehow simplifying, this might be interpreted in the sense that the market appreciates dissent or, at least, there is more activity on the shares of an issuer in case of dissent. However, since our divergence subsample includes events that reflect different types of reactions of directors, we re-run our tests considering resignations and voting against separately and examining whether the effect is different in case minority directors are involved. The results are reported in Table 4.

Table 4: Stock price reactions to divergence and peaceful announcements

		CAR_{ALL}	CAR_{MIN_DIR}
Resignations	19	0.027	-
		[0.047]**	
Dissents	19	-0.007	-0.010
		[0.052]*	[0.046]**

Table 4 reveals that the market reacts differently depending on the type of conflict arising upon divergence. For example, while the average CAR around the resignation events is positive (+2.7%), we observe, in line with the literature, that the CAR when the board splits on an issue and some directors vote in the minority is negative (-0.7%) and this trend is more pronounced (both statistically and economically) when minority-appointed directors are the ones dissenting (-1%). In short and somehow simplifying, the market seems to appreciate resignations, and react negatively to a divided vote on the board, especially if the dissenting vote comes from directors appointed by minority shareholders (which, as we know, often means by institutional investors).

Our finding of a positive market reaction in the 2-day window surrounding the resignation announcement date, albeit rare, is not unique. Similarly, but in a long-time event window, Dewally and Peck[45] document that resignations for conflict-related reasons are followed with positive market adjusted returns in the three and six months after the resignation event. In explaining this result, the authors suggest that there is a higher frequency of internal management changes, such as changes in the CEO or other top executives for corporations with independent directors that resign in conflict.

To sum up, a possible interpretation of this evidence could be as follows. The market reacts positively to a resignation, because it anticipates more profound changes in the governance. A more cynical interpretation, in some instances, might be that the market is glad that a particular director left. On the other hand, market reacts negatively to a split board because this circumstance casts doubts on the desirability of the decision taken by the board, especially so when a minority-appointed director does not align with the majority of the board.

The results of our market tests, however, are subject to a caveat. Our evidence is based on events that might be contaminated by other firm-specific news at the event date. That is, it is possible that price reactions around the divergence event are also conditional on the type of board proposal and/or other unobserved correlated variables that are not adequately captured by the test, and might thus influence the results. That being said, conclusions should be drawn with caution.

F. *Characteristics of "Diverging" Corporations*

[45] Michael Dewally, Sarah Peck, *Upheaval in the Boardroom: Outside Director Public Resignations, Motivations, and Consequences*, 16 J. CORP. FINANCE 38 (2010), *available at* http://epublications.marquette.edu/fin_fac/16.

In this section, we consider the characteristics of corporations in which dissent occurs and we examine whether these differences, if any, might be predictive of independent directors' diverging events. For each corporation from the divergence and peaceful subsamples, we examine the following economic and market variables over the period 2003-2015:

- LEV: a discrete variable that is equal to the firm's *i* leverage scaled by book value of equity;
- CLOSE: the natural logarithm of the percentage of closely held shares of corporation *i* as reported by WorldScope. This variable is computed as log(Number of Closely Held Shares / Common Shares Outstanding) * 100. Specifically, closely held shares include: shares held by officers, directors and their immediate families, shares held in trust, shares of the company held by any other corporation (besides shares held in a fiduciary capacity by banks or other financial institutions), shares held by pension/benefit plans, shares held by individuals who hold more than 5 percent or more of the outstanding shares.
- EBIT_GROWTH is a discrete variable that is equal to the change in EBIT from year *t-1* to year *t*, scaled by total assets at *t-1*.
- CFO_GROWTH is a discrete variable that is equal to the change in CFO (cash flow from operations) from year *t-1* to year *t* scaled by total assets at *t-1*.
- LOSS is a dummy variable that is equal to 1 if corporation *i*'s reported income for year t is negative.
- SIZE is equal to logarithm of total assets of corporation *i* at year *t*.
- STD_RET is equal to the standard deviation of annual returns for corporation *i* during year *t*.

We start by showing in Table 5 the results of our univariate tests:

Table 5: Descriptive statistics of economic characteristics of the corporations of our diverging and peaceful subsamples

Variables	$Mean_{peace}$	$Mean_{div}$	*p*-values	Med_{peace}	Med_{div}	*p*-values
LEV	1.672	2.386	0.000***	0.959	1.404	0.003***
CLOSE	-0.833	-1.661	0.000***	-0.619	-1.169	0.000***
EBIT_GROWTH	0.008	0.107	0.140	0.004	0.002	0.678
CFO_GROWTH	0.023	0.018	0.807	-0.001	0.003	0.225
LOSS	0.333	0.292	0.215	0	0	0.215
SIZE	13.567	15.747	0.000***	13.614	17	0.000***
STD_RET	0.024	0.026	0.308	0.0219	0.0216	0.41

Table 5 shows that the corporations from the divergence subsample are generally more leveraged (238 percent vs. 167 percent for the corporations in the peaceful subsample), and have a larger size: the logarithm of total assets is 15.747 vs. 13.567 for corporations in the peaceful subsample. Furthermore, and in keeping with the ownership inference discussed in Table 2, we observe that their ownership structure is less concentrated (the natural log of CLOSE is -1.661 as compared to -0.833 for the corporations in the peaceful subsample).

Next, we conduct a firm-year level logit regression to shed light on whether the probability of independent directors' diverging actions is associated to these firm-specific economic characteristics. Our dependent variable is an indicator (*DIVERGE*) that is equal to 1 only if a diverging event (*i.e.*, resignation, abstention or dissent) has occurred during year *t*. In Section IV.C) and IV.D) we have shown that diverging events tend to cluster across industries and time. Therefore, in our specification

we include time and industry fixed effects. Model 1 of Table 6 reports the results of our logit regression without including fixed effects. Model 2 presents the same results after we add time and industry fixed-effects. Further, to provide an economic interpretation of the logit mean coefficient estimates, the last column of Table 6 reports marginal effects. Because divergence events can occur throughout the year, thus making it difficult to establish within that year the causal relation between fiscal year economic performance and independent directors' divergence event, the independent variables are measured with one year lag.

Table 6: Effects of market/economic characteristics on independent directors' divergence event

Logistic regressions, dependent variable is *DIVERGE* for (1) through (3)			
Variables	**(1)**	**(2)**	**(3) Marginal effects**
LEV	-0.156	-0.048	-0.001
	[0.218]	[0.686]	[0.688]
CLOSE	0.064	-0.237	-0.003
	[0.719]	[0.167]	[0.155]
EBIT_GROWTH	-0.695	-0.975*	-0.010*
	[0.114]	[0.056]	[0.099]
CFO_GROWTH	-2.064**	-3.649***	-0.039***
	[0.039]	[0.003]	[0.004]
LOSS	1.008**	0.365	0.004
	[0.014]	[0.388]	[0.388]
SIZE	0.464***	0.394***	0.004***
	[0.000]	[0.000]	[0.000]
STD_RET	6.558**	7.294**	0.079*
	[0.043]	[0.036]	[0.057]
INDUSTRY EFFECTS	NO	YES	YES
YEAR EFFECTS	NO	YES	YES
Constant	-10.547***	-11.101***	
	[0.000]	[0.000]	
Observations	942	942	942

Pseudo R-squared	0.132	0.253

Our results in the last column of Table 6 show that ownership concentration is negatively associated with the probability of observing an independent director's diverging event, albeit it is weakly significant (*p*–value = 0.155). Dissent is also, and not surprisingly, more likely to occur in poorly performing corporations, as indicated by the negative coefficient estimate on EBIT_GROWTH and on CFO_GROWTH. Also, we find that a negative change in EBIT in the year prior to the divergence event increases the probability of dissent by 1 percent (*p*-value = 0.09). Similarly, a negative change in CFO in the year prior to the divergence event increases the probability of divergence event by almost 4 percent (*p*-value = 0.09). Finally, we observe that larger corporations and more risky corporations are more likely to display diverging independent directors.

As in most marriages, it is harder to go along when financially things are not going well and the belt must be tightened!

G. *Additional Analysis: Non-Independent Directors*

In this section, we examine whether, and to what extent, our results differ for diverging events' of non-independent directors. Most academic studies focused on the voting behavior of independent corporate directors who, by definition, differ from non-independent ones in their tasks, responsibilities, reputation concerns, and incentives. Figure 1 above makes clear that non-independent directors represent the majority of Italian listed firms' boards, both in the financial and non-financial industry. Therefore, we believe it is important to shed light also on the features of non-independent directors' voting behavior and its consequences. We do so by conducting an analysis that is similar to the one presented in the previous section.

Using the searching methodology reported in par. IV.A, we start by identifying a set of 267 diverging non-independent directors reflecting 198 events involving 110 firms over 2002-2016: 227 resignations, 15 dissents, and 25 abstentions. About 26% of these observations (*i.e.*, 70) occur in open conflict with the board. Conflicts are more pervasive in the case of dissent (71%, 11 cases out of 15)[46], less pronounced in the case of abstentions (8%, 2 cases out of 25), whereas only one out of four resignations (*i.e.*, 57 out of 227) is attributable to an explicit disagreement between non-independent directors and the board. In order to be fully consistent with our previous analysis, we refer to this group of 70 observations as the non-independent directors' *divergence* subsample. The remaining 197 observations constitute our non-independent directors' *peaceful* subsample. We will use both subsamples to examine whether dissent is associated with some director-based and governance characteristics.

[46] For the remaining 4 cases, public available disclosures do not provide information about the reasons of the dissent.

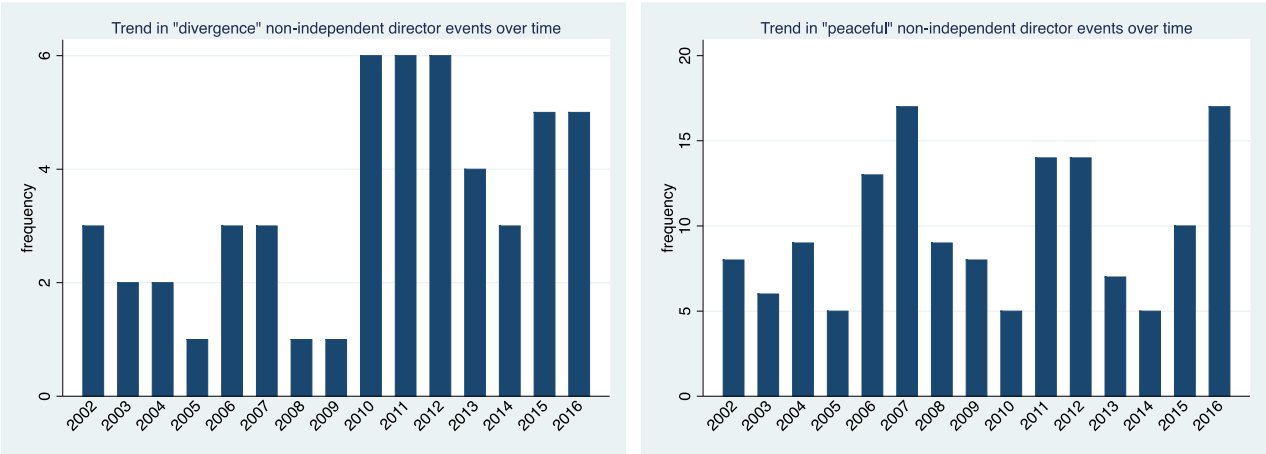
Table 7 Descriptive information about the topics on which non-independent directors diverge

Topics	Events							
	Abstention		Dissent		Resignation		Total	
	Obs	*Perc*	*Obs*	*Perc*	*Obs*	*Perc*	*Obs*	*Perc*
Information disclosure	2	100%	5	45%	1	2%	8	11%
Board or shareholder meeting agenda	0	0%	0	0%	1	2%	1	1%
Director and officer selection	0	0%	0	0%	9	16%	9	13%
Financing and capital structure	0	0%	3	27%	3	5%	6	9%
Internal corporate governance	0	0%	0	0%	35	61%	35	50%
Investment, M&A, and restructuring	0	0%	1	9%	8	14%	9	13%
Payout policies	0	0%	0	0%	0	0%	0	0%
Related-party transactions	0	0%	2	18%	0	0%	2	3%
Total	2		11		57		70	

In line with the results in Table 1, our findings reveal that, overall, most non-independent directors diverging events also occur with reference to internal corporate governance issues (50% of the cases). Considering the three diverging categories, we note that while abstentions and dissents mostly occur in connection with information disclosure issues (100% and 45%, respectively), resignations are more commonly due to internal corporate governance issues (61% of the cases).

Further, we examine the time trend of non-independent directors' diverging events. In Table 8 we report the by-year distribution of our non-independent divergence and peaceful subsamples over the period 2002-2016.

Figure 10: Time trend for the divergence and peaceful subsamples of non-independent directors



Consistent with our independent directors' analysis, we note a remarkable increase in the occurrence of diverging events after year 2010. As shown in the left panel of Figure 10, about 69% of diverging events occur after this date. We do not observe, however, a specific trend for the peaceful cases. The

right panel of Figure 10 shows a more random pattern: for example, about 49% of peaceful events occur after 2010 and about 51% before 2010. We also verify, as we did for the independent director analysis, whether the trend in diverging events is the result of a more pronounced group dynamic effect. To this end, for each year, we compute the number of isolated non-independent director diverging events. The results are illustrated in Figure 11.

Figure 11: Time trend of isolated events for the divergence subsample

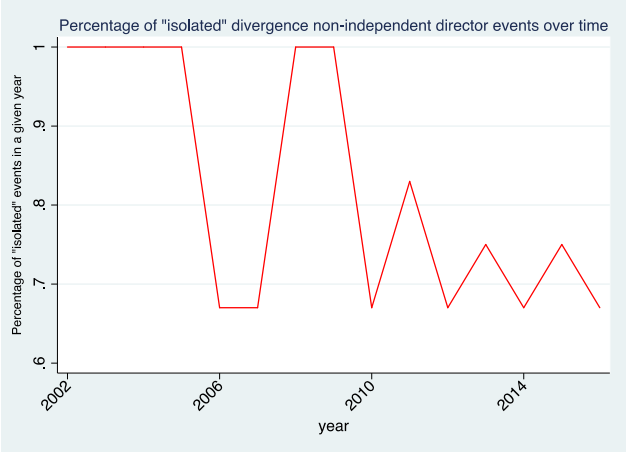


Figure 11 shows a similar pattern to that documented in the independent director analysis. The trend is generally consistent with an overtime decrease in the number of isolated events, especially from year 2010. Specifically, with the exception of 2006 and 2007, in the period 2002 – 2009, all dissenting events are isolated (100%); while, from 2010, the number of isolated cases drops, on average, to 71%. In other words, about 30% of dissenting events during 2010-2016 generally involve more than one non-independent director per event or the same firm during the same fiscal year. Although group dynamic effects appear to be more pronounced for independent directors (please, see Figure 8), overall both Figure 8 and Figure 11 point toward a systemic diminution in the number of isolated dissenting events. This seems to confirm that more recently dissent has become less isolated, and possibly group dynamics have made this event more common.

We conclude this additional analysis by reporting descriptive information on the characteristics of non-independent directors at the time of the event and by briefly examining the market consequences of their dissenting behavior. In Table 8 we report central tendency measures (mean and median) for the same variables examined in the independent director analysis using both the peaceful and divergence subsamples.

Table 8: Descriptive statistics of the characteristics of non-independent directors from the divergence and peaceful subsamples

Variables	$Mean_{peace}$	$Mean_{div}$	*p*-values	$Median_{peace}$	$Median_{div}$	*p*-values
MINORITY	0.025	0.037	0.634	0	0	0.633
AGE	55.391	54.771	0.653	55	52	0.542
FEMALE	0.081	0.014	0.049**	0	0	0.049**
REMUNERATION	569884	770321	0.393	51000	157000	0.011**
BOARD MEMBERS	11.743	13.107	0.027**	11	13	0.041**
N_APPOINTMENTS	9.813	9.191	0.590	8	8	0.388
ALMA MATER	0.822	0.833	0.849	1	1	0.848
POSTGRAD	0.205	0.257	0.388	0	0	0.387
CEO_PRESIDENT	0.178	0.169	0.864	0	0	0.864
CLOSE	0.473	0.429	0.293	0.523	0.349	0.194

Table 8 indicates that, for most non-independent directors' characteristics, there is no statistical difference across the two subsamples. We note, however, that dissenting behavior is less likely to occur among women and more likely to occur in large boards. Also, and consistent with our previous analysis on independent directors, we note that dissenting non-independent directors generally receive a higher income than their "peaceful" counterpart, albeit this inference is statistically significant only for the median (157,000 Euros vs. 51,000 Euros, *p*-value significant at the 5 percent level).

Reading across Table 8 (for non-independent directors) and Table 2 (for independent directors), we observe then that, on average, dissenting non-independent directors appointed by minorities (as mentioned before, it is very rare, but not impossible, to have a minority-appointed director without the requirements to be considered independent) are less likely to dissent (3.7%) than their independent director counterpart (42.5%) (*p*-value less than 0.01 significance level). Also, we find that women directors dissent more if they are independent (14.8%) rather than non-independent (1.4%) (*p*-value less than 0.01 significance level). Finally, considering the median remuneration, we find that dissenting non-independent directors earn higher salaries (157,000 Euros) than dissenting independent directors (78,178 Euros) (*p*-value less than 0.05 significance level). Overall, this descriptive evidence is generally consistent with a greater activism of independent directors relative to non-independent directors in their ability (and willingness) to express dissent.

In the last analysis, we examine market responses to non-independent directors' diverging events. This analysis is based on 166 diverging events (out of 198 of the initial event sample) for which we can obtain useful information on returns in DataStream to compute an event study: 15 abstentions, 6 voting against, and 145 resignations. Please, note that 37 of these 166 events (slightly more than 1 event out five) occur in open conflict with the management. The remaining 129 events refer to peaceful events (mostly, peaceful resignations).

As we did in the independent director analysis, in Figure 12 we plot CARs for the event (-10; +10) day window around the announcement of non-independent directors divergence vs. peaceful events.

Figure 12: CAR around non-independent directors' divergence event as compared to the non-independent directors' peaceful event

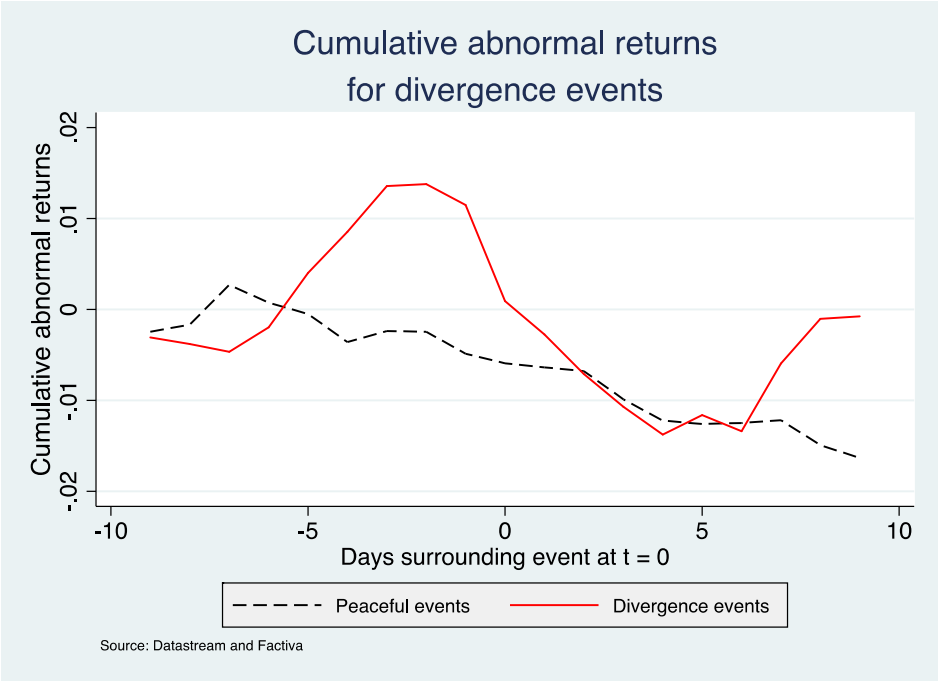


Figure 12 shows a substantial decrease in CARs around the non-independent directors' dissenting event. Specifically, CARs start to decrease at the time of the event and do so up to four days after the event. More formally, CARs decrease by about 1% at the event date and this drop is statistically significant at the 5 percent level (*t*-stat 2.36). The overall stock return decrease amounts, on average, to 2% from day -1 to day +4. We find a similar pattern for peaceful events, albeit we find that this change is not statistically significant (*t*-stat 0.624) at conventional level. A possible explanation for this empirical results is that the sample is likely to include executive directors, and that the market might react negatively to resignation or votes against expressed by an executive director in light of the uncertainty that this event indicates on the future of the corporation.

V. CONCLUSIONS: AN IDENTIKIT OF DISSENT

There is no recipe for the perfect board. Too many heterogeneous and intertwined variables determine how effectively a group of individuals work together and whether they reinforce each other best or worst tendencies. And the link between « *board* performance » in terms of transparent, effective, informed discussion, and « *corporate* performance », however measured, is unclear or, at least, extremely difficult to test empirically.[47]

A diverse board, composed of directors with different backgrounds, meeting different professional and independence requirements, entrusted with different tasks and expressed by different stakeholders might be either a blessing, enriching the discussion with a wealth of points of view, or a curse, lacking a clear and shared vision and cohesion. In the last few years, however, the general trend in many

[47] See April Klein, *Firm Performance and Board Committee Structure*, 41 J.L. & ECON. 275 (1998); Sanjai Bhagat, Bernard Black, *The Uncertain Relationship Between Board Composition and Firm Performance*, 54 BUS. LAW. 921 (1999); Sanjai Bhagat & Bernard Black, *The Non-Correlation Between Board Independence and Long-Term Firm Performance*, 27 J. CORP. L. 231 (2002); Chen Wang, *Does Independent Board of Directors Really Make a Difference? Evaluating the Treatment Effects of Increased Board Independence Requirements on Corporate Performance* (2014), *available at* http://ssrn.com/abstract=2535761; Sebastien Gay, Chris Denning, *Corporate Governance Principal-Agent Problem: The Equity Cost of Independent Directors* (2014), *available at* http://ssrn.com/abstract=2468942 and Harald Baum, *The Rise of the Independent Director: A Historical and Comparative Perspective, in* HARALD BAUM, SOUICHIROU KOZUKA, LUKE R. NOTTAGE, AND DAN W. PUCHNIAK (eds.), *Independent Directors in Asia: A Historical, Contextual and Comparative Approach*, Cambridge University Press (2017) Forthcoming; Max Planck Private Law Research Paper No. 16/20, *available at* t http://ssrn.com/abstract=2814978.

different jurisdictions, and the growing consensus among scholars, policy makers and business people, is that a certain degree of diversity – of course, within limits – is desirable and promotes a more constructive discussion among directors. The circumstance that directors voice their disagreement, either voting against the majority, or resigning due to a difference of opinion on how the corporation should be run, tells us something important about the internal dynamics of the board. Of course, the absence of dissent is not a sign of acquiescence, conformism, and disinterest; and the existence of dissent is not a sign of actual independence and effective discussion. Studying dissent on the board, however, sheds new light on the role of different directors, the composition of the board, and the relevance of board dynamics in the eyes of the market.

In this work we examined empirically, for the first time, dissent on the board in Italy and, differently from other studies focusing on other jurisdictions, we also extended our analysis to non-independent directors.

Let us briefly recap and comment some of the results we have obtained, underlying again, however, that this is an area in which data are scant and need to be handpicked from different sources, and therefore the reader should take the analysis with a grain of salt.

With respect to independent directors, one of the most interesting results concerns the characteristics of dissenting directors. Not surprisingly, directors appointed by minority shareholders (generally meaning institutional investors) are more likely to dissent, confirming that while once appointed directors have fiduciary duties toward the corporation as a whole and all its shareholders, and are not the agents of the particular shareholders who appointed them, substantively directors expressed by different groups can have different priorities. This data might be somehow consistent with the fact that dissent became more frequent after 2011, which might be due to the growing number of directors appointed by minority shareholders; and with less concentrated ownership structures. Dissent is also more frequent in corporations operating in the financial industry, and the explanation might be once again that in these corporations there are often more independent and minority-appointed directors. Also starting roughly in 2010, «isolated dissent», meaning cases in which only one director dissents from the majority, have become rarer, indicating a different group dynamic in which dissent is no longer a taboo.

Dissenting directors generally receive a higher compensation, and sit on fewer boards. This, once again not surprisingly, suggests that when directors are actively engaged in the activities of the board and focused on their job, become more vocal of their opinions.

In terms of corporate governance, our study also seems to confirm that separating the positions of chairperson of the board and CEO is a good idea with respect to the goal of promoting an active and open dialogue among directors:[48] this variable, in fact, is positively associated with divergence events.

On the other hand, dissent does not appear to be influenced by the age, gender, and level of education of the independent director, or by the dimensions of the board. Boards operate less smoothly, however, and dissent emerges more frequently, when the financial situation is not rosy, and in larger and more leveraged corporations.

Market prices of the shares react to divergence events, and in particular react slightly positively when a director resigns, and slightly negatively when a director votes against the majority, especially if he or she has been appointed by the minority. This might suggest a certain degree of « trust » of the market in minority-appointed directors, as confirmed by the fact that shares are sold when the minority-appointed director 'looses' an argument.

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[48] David F. Larcker, Brian Tayan, *Chairman and CEO: The Controversy Over Board Leadership Structure, Rock Center for Corporate Governance at Stanford University Closer Look Series: Topics, Issues and Controversies in Corporate Governance No. CGRP-58*; Stanford University Graduate School of Business Research Paper No. 16-32, *available at* http://ssrn.com/abstract=2800244.

We extended our analysis also to non-independent directors, who are primarily appointed by controlling shareholders and often also have executive powers. One interesting difference with independent directors is that in this case gender seems to have a correlation with the propensity to voice dissent, in the sense that female non-independent directors are significantly less likely to speak against the majority than their male counterparts.

The market tends to react negatively also to dissenting events involving non-independent directors, but more strongly than for independent directors. The explanation might be that dissent of executives determines more profound uncertainty and is potentially more problematic for the managing of the corporation.

Exploring the inner workings of board of directors is complex for the lack of data and information, and of course it is risky to generalize results dealing with such a complex reality and based on limited empirical evidence. This Article attempts to shed some light on dissent within boards of directors in Italian listed corporations. Notwithstanding the inherent challenges and limitations of the work, our results offer some new ideas worth exploring, confirm possible intuitions, but also defy some stereotypes.

Even more importantly, the analysis raises issues that might contribute to better corporate governance. We present them here in terms of open research questions.

The fact that dissent, in the different forms in which it can be expressed, has or can have an impact on the market, brings immediately to our attention a first policy matter. Are more rigorous disclosure rules on the reasons for dissent warranted? Is it acceptable for a director to resign invoking vague «personal reasons»? More generally, the annual corporate governance report that most issuers publish, should be more analytical on the inner workings of the board of directors (i.e., clarifying when resolutions had been approved unanimously or not, and so on)?

As we observed since the introduction, a delicate trade-off between transparency and confidentiality of both the corporation and the individual directors must be considered, but the question deserves to be addressed.

The second issue that needs to be underlined concerns the relationship between dissent and directors' potential civil, but also administrative liabilities. In short: the less courts and regulators apply a business judgment rule in assessing the conduct of directors, the less deferential is the standard of review applied, the more directors might have an incentive to dissent openly as a cautionary measure, in order to avoid liability. Especially in Italy, this is not only true with respect to the risk of private lawsuits, but also with respect to administrative sanctions imposed on the single individual director, with no possibility of being indemnified by the corporation. Does this strong link between the risk of liability and dissent strengthens the incentives to act carefully, and is therefore desirable? Or does it create a suboptimal risk aversion and unnecessary lack of harmony among directors?

A third question is probably even more delicate. Obviously, corporate insiders do not like dissent, and especially public dissent. As a matter of fact, this « fear » of dissent might generate questionable governance practices: for example, meetings one-to-one aimed at reaching compromises that, while inevitable, could hinder the effectiveness of the board as a collective, open forum for discussion. There might be a trade-off, in other words, between concern for dissent and silence.

A final observation is that our discussion reinforces the idea, which we consider a best practice, that the minutes of the meetings of the board must be as analytical and precise as possible, in order to allow a full understanding of the single positions of board members, and of the reasons that lead them to take a specific position.

APPENDIX

Variable definitions and source in parenthesis

MINORITY	= indicator equal to one if the independent director is a minority director (*meeting minutes or financial reports*)
AGE	= age of the independent director at the time of the event
FEMALE	= indicator equal to one if the independent director is a woman
REMUNERATION	= remuneration of independent directors at the time of the event (*corporate governance report and financial reports*)
BOARD MEMBERS	= number of board members (executive and non-executive) at the time of the event (*financial reports*)
N_APPOINTMENTS	= total number of independent director's appointments at other corporations' boards (*Bureau van Dijk*)
ALMA MATER	= indicator equal to one if independent director holds a diploma (*internet, CV attached to the voting list*)
POSTGRAD	= indicator equal to one if independent director has post-graduate degree (*e.g.*, Master, Ph.D.) (*internet*, *CV attached to the voting list*)
CEO_PRESIDENT	= indicator equal to one if the Chief Executive Director is also the president of the board at the time of the event (*financial report*)
CLOSE	= Percentage of shares held by large investors (*Datastream*) measured in the year of the event

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