The Disappearing Taboo of Multiple Voting Shares: Regulatory Responses to the Migration of Chrysler-Fiat.

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Abstract

In 2014, the Italian Government broke an old taboo of Italian corporate law, joining the ranks of many different legal systems that allow the issuance of multiple voting shares (MVSs), including the United States. The importance of the reform is therefore broad, also because it offers the occasion to review, more generally, the state of the debate on MVSs. The new rules are also interesting because they are both a cause and a consequence of regulatory competition in Europe, and can be considered an example of the recent trend toward greater flexibility and contractual freedom in corporate law. This article examines the new rules in a comparative perspcetive, considering similar experiences in Europe and the US, and discussing the empricial evidence on the effects of MVSs, especially in listed corporations. The second part of the paper illustrates some interpretative issues raised by the new Italian rules, and the possible motivations of the Italian legislature in taking this step also vis-a-vis the planned privatization of some large state-owned enterprises.

Keywords: Regulatory competition, one-share, one-vote, controlling shareholders, institutional investors, multiple voting shares, loyalty shares, dual class structures, control enhancing devices

JEL Classifications: K22

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1. *Introduction.* – In August 2015, the Italian government, as part of a package of reforms designed to make listing more attractive for closely-held corporations – but, more generally, also to further enhance contractual freedom in corporate law –, allowed corporations to issue multiple voting shares and loyalty shares that attribute to their long-term holders increased voting rights (hereinafter, collectively, "MVS").[1] In doing so the Italian government has joined the ranks of several other European and American states and abolished an old taboo of Italian corporate law. It has also offered to practitioners, corporate executives, regulators and scholars a great new testing ground for the use of this controversial control enhancing device, a testing ground whose relevance goes beyond the relatively limited dimension of the Italian stock exchange.[2]

The recent introduction of MVS in Italy brings immediately to mind two observations.

The first one can be summarized with a sentence whose attribution is uncertain (some attribute it to René Descartes, others to Marie Antoinette): "There are no new ideas, only ideas that have been forgotten." Or, alternatively, we can use the less cynical and more ironic version of the American poet Ralph Waldo Emerson: "All my best thoughts were stolen by the ancients." In fact, the French *Code de Commerce* of 1807, adopted also in part of Italy, did not include any limitation to the issuance of multiple voting shares, and both the Italian Commercial Codes of 1865 and 1882 granted similar freedom, even if the latter prohibited the issuance of nonvoting shares.[3] At the end of the XIX and beginning of XX century, the issue was intensely debated, and the idea that all shareholders should have had equal rights was gaining traction. However, steep inflation after World War I lead to concerns of possible hostile takeovers of Italian corporations by foreign buyers from countries with a stronger currency, and the use of multiple voting shares was revamped. It is only with the Civil Code of 1942, and again after extensive discussion and conflicting proposals,

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[1] For multiple voting shares *see* Article 2351, paragraph 4, Italian Civil Code and Article 127-*sexies*, Italian Consolidated Law on Finance (hereinafter TUF). On loyalty shares *see* Article 127-*quinquies* TUF.

[2] By leveraging voting powers, multiple voting shares qualify as a control-enhancing device. For a definition of the so-called "control enhancing mechanisms" (CEMs) *see* Shearman & Sterling LLP, Institutional Shareholder Services (ISS), European Corporate Governance Institute (ECGI), *Proportionality Between Ownership and Control in EU Listed Companies. External Study Commissioned by the European Commission. Report on the Proportionality Principle in the European Union*, 2007, at 7, *available at* http://ec.europa.eu/internal_market/company/docs/shareholders/study/final_report_en.pdf (making reference to other CEMs such as non-voting shares, pyramid structures).

[3] *See* A. Padoa Schioppa, *Saggi di storia del diritto commerciale*, Milan, 1992, at 221 f.

that multiple voting shares were prohibited, and remained taboo until its recent overhaul. The pendulum of history, also of this little history, continues to swing and, as it is often the case, the idea of the Italian government is simply a return to the old ways.

The second observation is that we should be careful in calling the introduction of MVS a revolution. MVS are an important development that deserves consideration at a number of levels, but also before August 2015 Italy did not follow a strict "one-share, one-vote" principle. As we will see, in fact, virtually no legislature, either in Europe or in the U.S., adheres to a rigid one-share, one-vote rule mandating its adoption to all listed corporation.[4] Shareholders can obviously opt for a one-share, one-vote rule, but in the overwhelming majority of legal system, departures from this rule are possible and common. Italy was no exception also before the introduction of MVS, because it allowed the issuance of nonvoting shares, shares with voting rights limited to certain decisions, conditional voting rights, and limitations to the maximum number of votes that a single shareholder could cast.[5] The effects of all these devices, clearly enough, are similar to MVS in that they alter the proportionality between voting and cash flow rights, or between power and investment. In addition, other legal instruments that, from an economic standpoint, enhance control without requiring further investment, such as shareholders' agreement or the use of groups of corporations, existed also before the introduction of MVS. We have to keep this panoply of control enhancing devices in mind when discussing the desirability and innovative value of MVS.

This Article will examine MVS from different perspectives. First, it will briefly place the recent Italian reform in the broader context of regulatory competition in Europe. Second, the Article will offer some comparative perspectives on the diffusion of MVS in the U.S. and in other European countries. Third, we will address the key question raised by MVS: whether they are desirable or not from the point of view of investors or with respect to other policy goals, whether the benefits of flexibility and contractual freedom, in this respect, outweigh their costs. In this part we will succinctly recount some of the most interesting and recent empirical studies on the effects of MVS. The two following paragraphs will include an interpretative analysis of the major issues raised by the new Italian rules. Finally, we will conclude by placing this reform on the broader chessboard of European Corporate Law, questioning if it offers us some hints on where EU Corporate Law is going.

2. *European Regulatory Competition?* – It is possible to talk of regulatory competition among European States to attract (and retain) corporations incorporated locally, but of course the features and dynamics of this competition are significantly different from the competition for corporate charters in the U.S., as many scholars have examined.[6] To discuss the many differences explaining this divergence across the Atlantic would be too long and beside the point: a short list of some of the major explanations should suffice. To begin with, notwithstanding the jurisprudence of the European Court of Justice in *Centros* and its progeny, while a certain degree of freedom of incorporation exists in Europe, it is not as complete and frictionless as it is in the U.S. Second, the incentives of E.U. Member States to attract corporations are not comparable with the ones existing in America, especially due to the absence – and, in fact, prohibition – of a franchise tax in the Old

[4] *See* M.S. Spolidoro, *Il voto plurimo: i sistemi europei*, presentation made at the XXVIII Conference on "*Unione europea: concorrenza tra imprese e concorrenza tra stati*", Courmayeur, 19-20 September 2014, at 5 ff., *available at* http://www.cnpds.it/documenti/relazione_prof__spolidoro.pdf .

[5] *See* M. Ventoruzzo, *Experiments in Comparative Corporate Law: The Recent Italian Reform and the Dubious Virtues of a Market for Rules in the Absence of Effective Regulatory Competition*, in *Texas International Law Journal*, 2004, at 118 ff.

[6] In my M. Ventoruzzo, *"Cost-Based" and "Rules-Based" Regulatory Competition: Markets for Corporate Charters in the U.S. and in the E.U.*, in *NYU Journal of Law & Business*, 2006, at 96 ff., 102 ff. you can also find references to other authors; M. Becht et al., *Where Do Firms Incorporate?*, European Corporate Governance Institute, Working Paper No. 70, 2006, at 25.

Continent. Third, regulatory competition can fully develop only with the right balance between harmonization and diversification is achieved: competing jurisdictions must be similar enough to be compared and assessed by shareholders, managers, lawyers and investors, but also have enough wiggle room to differentiate their offering. In Europe, notwithstanding the harmonization effort, significant barriers still exist to competition, including the fact that the meaningful differences among jurisdictions, also in terms of language and legal culture, still make it difficult for the interested parties to fully appreciate the implication of incorporation (or reincorporation) abroad. Consequently, regulatory arbitrage is more complex and costly than in the U.S. This is particularly true with respect to the role of the judiciary, which is one of the most important drivers of charters' competition, probably even more important than statutory rules themselves.[7]

This does not mean that European legislatures and policy makers do not react (also) to market forces, and do not intervene to keep their systems competitive especially vis-à-vis their neighbors. A recent example of this is the progressive liberalization of minimum capital rules in several European countries, from Germany to France, from Spain to Italy, probably prompted by the competition of the more flexible U.K. system.[8] Another example is the way in which Member States have used the optional rules included in the Takeovers Directive in order to protect local corporations from takeovers.[9] More generally, in the last 15 years different European countries enacted reforms designed to broaden the degree of contractual freedom enjoyed by controlling shareholders and corporate managers, freedom only partially balanced by the introduction of additional (mandatory) protections for minority investors, in an effort to prevent corporations from emigrating. Whether these developments constitute a race to the top, or to the bottom, is not the subject of this Article. Our point here is simply to recognize how a flexible financial structure, and the possibility to adopt control enhancing devices, two goals that MVS can achieve, are important levers to make a corporate law system more attractive for corporate decision-makers. Of course, a wise legislature must also take into account the need of protection of minority investors in order to maintain financial markets attractive also for suppliers of capital, but the introduction of MVS is undoubtedly a competitive move of the Italian legislature.

In this perspective, the Italian government introduced MVS a few months after the corporate migration of Chrysler-Fiat, one of the more important Italian multinational corporations, from the warmer shores of Ausonia to the cooler lowlands of Holland. Chrysler-Fiat, in fact, reincorporated in the Netherlands in 2014, also to take advantage of specific governance features of the Dutch system, and specifically MVS. The shock of losing one of its better-known national champions might have contributed to the decision of the Italian government to introduce MVS. Fiat-Chrysler will never come back, but hopefully – the policy makers must have thought – no other large enterprises will follow its example. As we will see, other motivations might have also inspired the decision to introduce MVS, such as the desire to make the stock exchange more attractive, and possibly also more selfish interests connected with the goal of retaining government control over State-owned corporations that could be "privatized."

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[7] *See* Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition For Corporate Charters*, in *University of Cincinnati Law Review*, 2000, 1074. *See* also L. Enriques, *Do Corporate Law Judges Matter? Some Evidence From Milan*, in *European Business Organization Law Review*, 2002, at 765 ff.

[8] M. Ventoruzzo, *The Role of Comparative Law in Shaping Corporate Statutory Reforms*, in *Duquesne Law Review*, 2014, at 165.

[9] M. Ventoruzzo, *Europe's Thirteenth Directive and U.S. Takeover Regulation: Regulatory Means and Political and Economic Ends*, in *Texas International Law Journal*, 2006, at 217 ff.; D. Tuchinsky, *The Takeover Directive and Inspire Art: Reevaluating the European Union's Market for Corporate Control in the New Millennium*, in *New York Law Review*, 2006-2007, at 710. *See* also G. Ferrarini, G. P. Miller, *A Simple Theory of Takeover Regulation in the United States and Europe*, in *Cornell International Law Journal*, 2009, at 317 ff. (discussing the implementation of the Takeovers Directive in some Member States); K.J. Hopt, *Takeover Defenses in Europe: A Comparative, Theoretical and Policy Analysis*, in *Columbia Journal of European Law*, 2014, at 274, 276 ff.

As barriers to freedom of establishment of corporations dwindle, regulatory competition among Member State picks up, and contractual freedom is enhanced opening the door to new instruments such as MVS. In addition, the increasing circulation of legal models and institutes (and of jurists!) that has characterized the last two decades in Europe, has also facilitated the adoption of MVS. This circulation of models and rules determines a sort of bottom-up harmonization, or at least imitation, occurring also in the absence of formal E.U. provisions. MVS are therefore interesting because they are, at the same time, a cause and a consequence of regulatory competition in Europe.

3. *MVS in the U.S.* – MVS are quite widespread in the U.S., even if the majority of listed corporations follow the one share, one vote principle and this is the default applicable rule.[10] State statute and federal law do not provide for significant limitations to the issuance of shares with different voting rights and grant broad flexibility. As we will see, more rigid provisions can be found in listing rules enacted by stock exchanges, and their evolution represents a peculiar example of regulatory competition. To consider the U.S. experience is important not only for the dimensions and relevance of the market, but also because most empirical studies conducted on MVS, and several of the ones that we will discuss in Paragraph 5, refer to the U.S.

At the start of the XX century, MVS in the U.S. were already widely used. Similarly to other countries, however, after the 1920s, probably also due to the depression that drove small investors away from financial markets, this instrument became increasingly under attack, in particular by some well-known economists such as Ripley[11], and its diffusion began to shrink. The debate on the negative effects of shares with disproportionate voting rights for investors was so lively that in 1926 the progressive newspaper *New York World* (made successful by Joseph Pulitzer) published a short and funny poem condemning the use of nonvoting shares, probably the only one dedicated to such a topic in the entire history of English literature.[12]

This battle was at least partially successful. From 1940 on the NYSE no longer listed corporation with nonvoting shares, and in between that year and the end of the 1970s the number of U.S. issuers with dual class structures are fewer than forty. The M&A wave of the Eighties and the fear of hostile takeovers in particular, rekindled the interest in these (and others) control enhancing devices.[13] And this is when competition was triggered. Traditionally, the NYSE and the Amex had quite strict limitations to departures from the one share, one vote principle. Not so the Nasdaq. Several large corporations, apparently including General Motors, started contemplating, and even taking preliminary steps, in order to abandon the NYSE and transfer to the more libertarian Nasdaq. To avoid losing business, the NYSE and the Amex surrendered to this competitive pressure and submitted to the SEC a request to modify their listing requirements allowing dual class structures.[14]

The SEC was not pleased and in fact, at the end of the 1980s, introduced the famous but short-lived *Rule 19c-4*. The Business Roundtable (a powerful lobby of CEOs of large corporations) immediately challenged this rule in court. The resulting 1990 decision, *Business Roundtable v. SEC*, is a leading case on the scope of regulatory powers of federal agencies, in which the court

[10] Model Business Corporation Act, § 7.21(a) (establishing that "[…] unless the articles of incorporation provide otherwise, each outstanding share, regardless of class, is entitled to one vote on each matter voted on at a shareholders' meeting").
[11] *See* W.Z. Ripley, *Main Street and Wall Street*, Boston, 1927, at 77.
[12] The poem, entitled "On Waiting in Vain for the New Masses to Denounce Nonvoting Stocks", is quoted in S.M. Bainbridge, *The Short Life and Resurrection of SEC Rule 19C-4*, in *Washington Law Review*, 1991, at 588.
[13] S.M. Bainbridge, *supra* note 12, at 570 f.
[14] *Id*. at 576 f.

struck down the rule adopting the view that the issue, which concerned the internal affairs of a corporation, was not within the competence of the SEC.[15]

A compromise was however quickly reached. The SEC convinced, through its moral suasion, stock exchanges to reintroduce partial limitations to MVS. Today provisions such as rule 313.00 of the NYSE Listed Company Manual prohibit dual class recapitalizations for listed corporations, but provide several exceptions for the listing of MVS under, quite similar to the ones recently introduced in Italy, as we will see. With some simplifications in the interest of brevity, in fact, MVS can be issued before the IPO and maintained after the corporation has gone public; can be issued respecting the pre-existing composition of the voting capital; and can be issued, under certain conditions, in case of merger.[16]

Let us briefly consider how typical MVS work in the U.S. Of course, while the underlying economic problems related to the use of MVS are similar across the globe, there are relevant regulatory differences with the European approach that are worth mentioning. In the U.S., generally two classes of shares are issued: A shares, with one vote per share similar to "ordinary" or "common" shares in Europe; and B shares, which grant more votes per share (often 10). B shares are issued to all shareholders as a dividend; however if a shareholder transfers them to a third party, the voting privileges are lost (often transfers to heirs of the original holders – founders of the corporation – allow to maintain the special voting privileges). The consequence is that in a few weeks B shares and their multiple votes concentrate in the hands of shareholders interested in control and with a long-term perspective, while institutional and retail investors, who obviously trade the shares, lose almost immediately the super-voting rights.

The possibility of issuing MVS, although not entirely free, still represents a competitive advantage of American exchanges. The rumor has spread, for example, that when in 2012 the soccer team Manchester United decided to go public, it preferred New York over Singapore also because only the former allowed the use of MVS that the company wanted to issue; and commentators have suggested that Singapore rule-makers are reconsidering their rules in this area.[17]

4. *MVS in Europe* – Obviously an analytical description of the regulation of classes of shares with disproportionate voting rights in different European countries would not be possible here, and also only partially useful as other studies, still largely valid today, have already tackled this question.[18] I will therefore only point out some general trends in Europe in this respect.

To begin with, as observed by many scholars and among them, in particular, by Marco Spolidoro,[19] virtually no country follows an inflexible mandatory one share, one vote rule. A one share, one vote structure can always be adopted by a corporation, and it is generally the default

[15] *Bus. Roundtable v. SEC*, 905 F.2d 406 (D.C. Cir. 1990). *See* S.M. Bainbridge, *supra* note 12, at 567 ff.; G.M. Hayden, M.T. Bodie, *One Share, One Vote and the False Promise of Shareholder Homogeneity*, in *Cardozo Law Review*, 2008, at 471 ff.

[16] Consider, for instance, the IPO made by Google in 2004. *See* Form S-1 Registration Statement filed with the SEC on August 18 2004, *available at* http://www.sec.gov/Archives/edgar/data/1288776/000119312504142742/ds1a.htm.
Also consider Google's recent issue of the so-called "class C" shares. *See* SEC, Release No. 34-72103, 6 May 2014, *available at* http://www.sec.gov/rules/sro/phlx/2014/34-72103.pdf.

[17] S. Davidoff Solomon, *In Manchester United's I.P.O., a Preference for American Rules*, in *DealBook New York Times*, 10 July 2012, *available at* http://dealbook.nytimes.com/2012/07/10/in-manchester-uniteds-i-p-o-a-preference-for-u-s-rules/?_r=0; A. Smith, P. J. Davies, S. Foley, *Exchanges divided by dual-class shares*, in *Financial Times*, 2014, *available at* http://www.ft.com/cms/s/0/e18a6138-2b49-11e3-a1b7-00144feab7de.html#axzz3NKMuP18x; N. Tan, *Dual-class shares – a welcome change?*, in *Channel NewsAsia*, 2014, *available at* http://www.channelnewsasia.com/news/business/singapore/dual-class-shares-a/1406402.html.

[18] *See e.g.* Shearman & Sterling LLP, Institutional Shareholder Services (ISS), European Corporate Governance Institute (ECGI), *supra* note 2, at 14 ff.

[19] M.S. Spolidoro, *supra* note 4, at 5 ff.

option, but departures from this principle and the adoption of control-enhancing devices in the form of disproportionate voting rights are often possible. In fact, the purest version of one share, one vote requires several conditions: each share must attribute one and only one vote in each shareholders' meeting or decision; votes cannot be subject to conditions or suspensions; and each shareholder has only but all the votes attributed by the shares that she owns (there are no special voting rights granted to one specific shareholder rather than attached to some shares). Additional requirements concern participation in the shareholders' meeting of beneficial holders.[20]

Guido Ferrarini, in a contribution published a few years ago, has effectively summarized the theoretical reasons that advise against adherence to a pure and rigid version of one share, one vote.[21] Although some of these rationales are questionable, coherently with this theoretical framework, most Member States allow either multiple voting shares or non-voting or limited voting shares, and several allow both. In addition, the European Union has adopted no general rules on voting rights, possibly crediting the argument of authors stigmatizing European Company Law as trivial.[22] More specifically, for our purposes, the European Union regulates MVS in two areas. In the context of a takeover, disproportionate voting rights are (can be) neutralized by the breakthrough rules of the Thirteenth Directive.[23] In addition, the European Court of Justice has often discussed "golden shares" attributing augmented voting rights to the State in privatized corporations. This is clearly a peculiar application of shares with different voting rights. In these areas, the European legislature and judges show a concern for the effects of MVS on the market for corporate control and on freedom of movement, but the actual impact of these rules on the use of MVS, for several reasons that we cannot elaborate on here and already been examined by others, is limited.[24]

The following graphs, elaborated based on the previously cited Sherman&Sterling ISS-ECGI- report, offer an overview of the situation in some European and non-European countries (the information refers to 2007, with a minor updates by the author on Italy).

[20] *Id*. *supra* note 4, at 21.

[21] G. Ferrarini, *One Share – One Vote: A European Rule?*, in *European Company & Financial Law Review*, 2006, 153 ff.

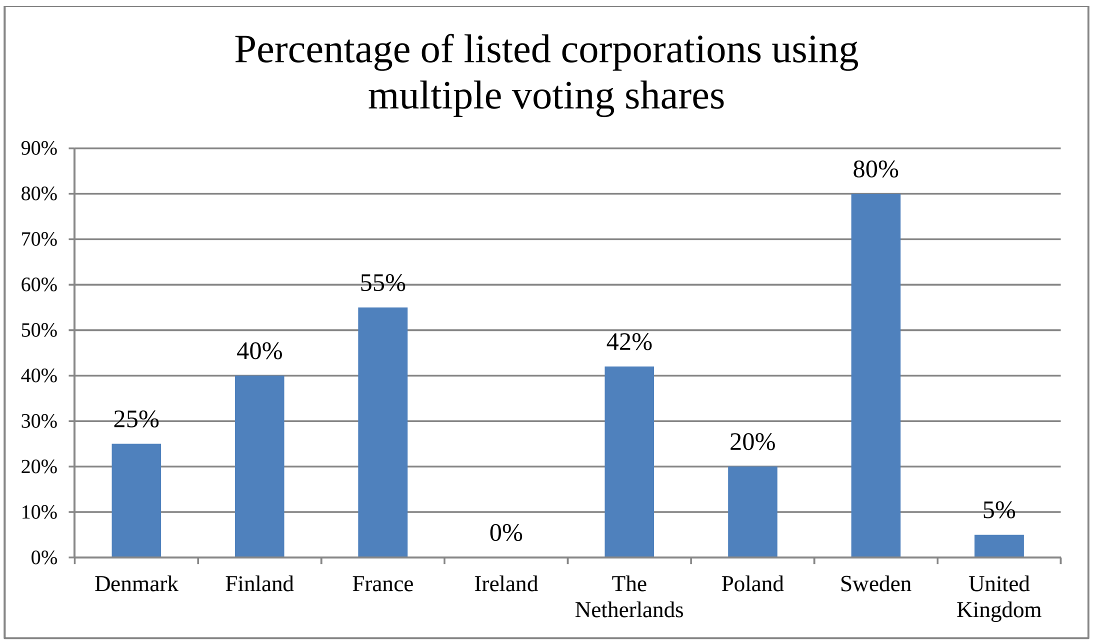
[22] L. Enriques, *EC Company Law Directives and Regulations: How Trivial Are They?*, in *University of Pennsylvania Journal of International Economic Law*, 2006, at 3 ff.

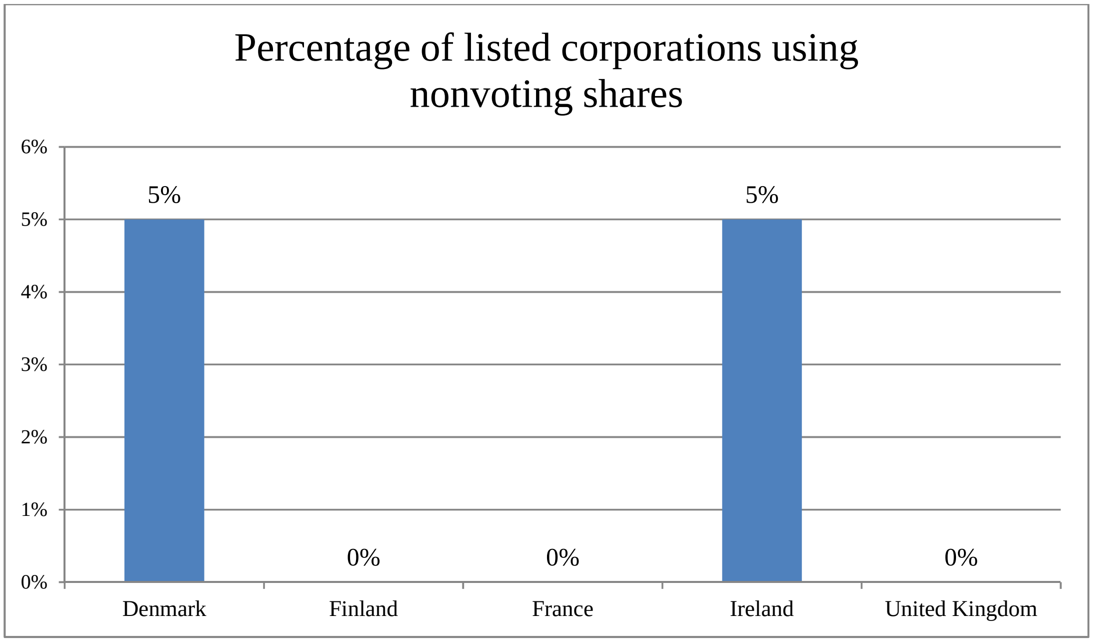
[23] M. Ventoruzzo, *supra* note 9, at 209 f.; K.J. Hopt, *supra* note 9, at 273; L. Enriques, R.J. Gilson, A.M. Pacces, *The Case for an Unbiased Takeover Law (With an Application to the European Union)*, in *Harvard Business Law Review*, 2014, at 118 f.

[24] G. Ferrarini, *supra* note 21, at 168; K.J. Hopt, *supra* note 9, at 273 f.; L. Enriques, R.J. Gilson, A.M. Pacces, *supra* note 23, at 119.

Availability of different classes of shares

country	multiple-voting shares	nonvoting shares
Belgium	NO	NO
Germany	NO	NO
Denmark	YES	NO
Finland	YES	YES
France	YES	YES
Greece	NO	NO
Ireland	YES	YES
Italy	YES	YES
Luxembourg	NO	NO
The Netherlands	YES	NO
Poland	NO	NO
Sweden	YES	NO
Spain	NO	NO
United Kingdom	YES	YES
Australia	NO	YES
Japan	YES	YES
USA	YES	YES





MVS are far from being uncommon in continental Europe. In fact, when available, they are more widespread than in the United States, both a cause and a consequence of the more concentrated ownership structures prevailing in this part of the world. One particularly interesting case, especially for the new Italian regulation that we will consider below, is the French one. In this country, until the 1920s, multiple-voting shares were allowed in all public limited companies, listed or non-listed, without limitation on the number of votes per share. In 1930 a new statute, also in response to possible abuses, prohibited the issuance of new MVS, without however affecting outstanding ones, in order not to jeopardize existing rights. A few years later another statute allowed only double-voting shares and all previously issued multiple-voting shares were cancelled. This regime was slightly modified in the following years.

French MVS are actually "loyalty shares:" Double-voting rights are entrusted only to a shareholder of record who holds the shares for a minimum of two years (and, for listed corporations, generally not longer than four years).[25] Double voting rights are not attached to the shares themselves but rather to the shareholder, and do not circulate with the shares. Any share that is sold, transferred, or converted into a bearer share loses its double voting rights. However, there are exceptions. Inherited shares, shares previously jointly owned by spouses and attributed to one of them in case of divorce, or shares gifted *inter vivos* to a spouse or a relative entitled to inherit the donor's estate maintain enhanced voting rights, and the transfer does not interrupt the holding period. If the shareholder is a corporation and merges or splits and the MVS are transferred to another entity, double votes survive in the absence of a different provision in the governing documents of the corporation involved in the transaction. Double voting rights are also preserved if the corporation that has issued them merges or splits, unless the charter provides otherwise.

Interestingly enough, in 2014 the French legislature has made "loyalty shares" the default rule in listed corporations (issuers can opt-out). In reality, however, most listed French companies already provided for loyalty shares in their bylaws and therefore the 2014 amendment was mostly symbolic. The goal of the reform, clearly enough, is to incentivize and reward long-term shareholders and to foster a long-term perspective and reduce short-termism. In non-listed corporations, double-voting shares can be established by the bylaws with a supermajority vote of

[25] *See* Article L225-123, *Code Commerce*.

2/3. Double-voting shares are less common in non-listed corporations because in these corporations there is generally one shareholder or a family with majority control, and other instruments not very compatible with loyalty shares, such as shareholders' agreements, are often used.

The case of the Netherlands is also worth mentioning, especially considering that, as said before, Dutch rules on multiple voting shares are one of the reasons for the recent cross-border reverse merger by Chrysler-Fiat with and into Fiat Investments N.V., a wholly owned subsidiary organized under the laws of the Netherlands.[26] In particular, according to Dutch law, the surviving corporation governed by Dutch law issued "special voting shares" to the former shareholders of the Italian entity.[27] Relevant shareholders received one special voting share per any common share held. Moreover, shareholders may qualify for special voting shares registering all or some of their common shares in a "loyalty register". After three years of uninterrupted beneficial ownership, shareholders receive a special voting share for each common share.[28] In this way long-term the involvement in the corporation is promoted.[29]

This bird's eye view of the European situation confirms that the Italian legislature is in good company in allowing MVS. More importantly, it reinforces the hypothesis that the forces of regulatory competition are shaping European corporate law. Whether this is a race to the top or to the bottom is a different and more complex question that we will discuss in the next paragraph.

5. *Empirical Evidence on MVS.* – Are MVS desirable for investors? Harry Truman, the U.S. President, famously complained about the fact that his economic advisers would never give him a straight answer. "All my economists say – the President quipped – 'On the one hand this…, but on the other hand this…'. Give me a one-handed economist!" My task here is simply to report on empirical evidence, but I do not want to be liable to the same criticism. Therefore, I will boldly anticipate my somehow simplistic, but I think fair, conclusion: in some specific situations, depending on the industry, business model, and personal characteristics of shareholders, MVS can benefit investors, but overall they are more often a disadvantage than an advantage for minority shareholders, and institutional investors generally oppose their use. MVS can however contribute to pursue other goals, such as attracting more corporations to stock exchanges. In short, MVS are neither an anathema nor a blessing, and probably the best regulatory strategy is to allow them with certain precautions and protections for investors, among which full disclosure concerning the voting structure and the possibility to disinvest at fair conditions if MVS are introduced. As I write these words, however, I realize that they are dangerously close to the 'one hand, other hand' approach that Truman stigmatized. I can partially deflect the accusation to my sources, however, because the truth is that economic studies on this issue are not conclusive.

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[26] *See supra* paragraph 2. *See also* Sergio Carbonara, *The multiple voting structure of the new Fiat-Chrysler is a clear breach of the basic principle of equal treatment of shareholders*, *available at* http://ecgs.org/node/146 (stating that the Dutch more favourable corporate governance requirements, including the possibility to grant multiple voting shares to certain categories of shareholders, roused the Fiat Group's interest in the Netherlands). The merger became effective on October 12. 2014: Fiat Chrysler Automobiles (FCA), *Merger to Form Fiat Chrysler Automobiles N.V. Completed – FCA Debuts on the NYSE*, *available at* http://www.fcagroup.com/en-US/media_center/fca_press_release/FiatDocuments/2014/october/Merger_to_Form_Fiat_Chrysler_Automobiles_NV_Completed_FCA_Debuts_on_the_NYSE.pdf.
[27] On the regulation of multiple voting shares in the Netherlands, *see* generally Sherman & Sterling and others, *supra* note 2. *See* also L. van Vliet, *The Netherlands – New Developments in Dutch Company Law: The "Flexible" Close Corporation*, in *Journal of Civil Law Studies*, 2014, 271 ff. (focusing on close corporations).
[28] FCA Information Document relating to the Cross-Border Merger of Fiat S.p.A. with and into FIAT Investments N.V., October 11, 2014, at 93 ff., *available at* http://www.fcagroup.com/en-US/investor_relations/merger_of_fiat_spa_with_and_into_FCA_NV/Documents/Equivalent_Document_with_Annexes.pdf (hereinafter FCA Information Document).
[29] *See* FCA Information Document, *supra* note 27, at 93.

Theoretical reasons advanced in favor and against MVS, to begin with, are almost too well-known to be recounted here and, in fact, fairly obvious, at least when considering the problem in general ignoring legal technicalities. Detractors underline how MVS exacerbate agency problems creating or reinforcing conflicts of interest inherent in the separation between ownership and control. In addition, again according to their critics, MVS determine inefficient financial structures and impair the market for corporate control and the policing function of takeovers. Admirers of MVS, on the other hand, observe that these risks can be curtailed or eliminated with a few specific protections for minorities, and underline how a more stable control might enhance successful long-term strategies. MVS are also credited, as mentioned before, as a way to make listing and going public more attractive for entrepreneurs, exactly because they allow combining the advantages of raising capital on equity markets with maintenance of control. Independently from these positions, in any case, we must acknowledge that theoretically it is difficult to justify prohibiting MVS when other instruments, such as nonvoting and limited voting shares that simply represent the other side of the coin of MVS, are allowed.

Empirical studies are a better litmus test for the desirability of MVS (or their sisters non- or limited voting shares) than theoretical ones. A couple of caveats. First, most of these studies refer to the financial markets of the United States; therefore, not all the conclusions can be extended to other jurisdictions. Second, all the usual disclaimers concerning statistics are necessary here, like, for example, the fact that correlations does not necessarily implies causation. Different studies are also difficult to compare and contrast because they measure the effects of MVS with different variables, from the value of the corporation based on the Tobin q to market prices of the shares, from the level of risk and return of the equity investment to the cost of capital. Let us, however, take a look.

To begin with, as for diffusion of MVS, in the United States, in the three years between 2010 and 2013, MVS were used in approximately 20 IPOs over 1780 MVS, a number substantially in line with previous years.[30] The instrument is not as common as in some of the European countries that we have mentioned above, but it is far from irrelevant. Interestingly enough MVS are primarily used in publishing and media corporations, such as The New York Times and News Corp., in the high-tech industry, and in fashion.[31] Possible explanations for this are the greater private benefits of control that controlling shareholders can enjoy in media corporations, and the relevance of the technical or artistic skills and of the charisma of the founders – often appreciated by the investors – in the above-mentioned industries.

The ambiguity of the consequences of going public for corporations with MVS emerges, first, from an anecdotal evidence. For example, considering four IPOs of high-tech corporations with MVS occurred after 2011, in a period of similar length after the start of the negotiations, Linkdin registered a price increase of 138%, while the prices of Zynga, Groupon and Facebook declined, respectively, by 72, 80 and 53 per cent.[32]

Looking at more systematic studies, Dimitrov and Jain offer an interesting "defense" of MVS in a 2006 paper.[33] Based on data from almost 200 issuances of MVS occurred between 1979

[30] IRRC Institute, ISS, *Controlled Companies in the Standard & Poor's 1500: A Ten Year Performance and Risk Review*, 2012, at 15, *available at* http://irrcinstitute.org/pdf/FINAL-Controlled-Company-ISS-Report.pdf; P.A. Gompers, J. Ishii, A. Metrick, *Extreme Governance: An Analysis of Dual-Class Firms in the United States*, in *Review of Financial Studies*, 2010, at 1056 ff.
[31] IRRC Institute, ISS, *supra* note 30, at 19 ff; T.J. Chemmanur, Y. Jiao, *Dual class IPOs: A theoretical analysis*, in *Journal of Banking & Finance*, 2012, at 307.
[32] IRRC Institute, ISS, *supra* note 30, at 15.
[33] V. Dimitrov, P.C. Jain, *Recapitalization of one class of common stock into dual-class: Growth and long-run stock returns*, in *Journal of Corporate Finance*, 2006, at 343 f. *See also* M. Lamandini, *Voto plurimo, tutela delle minoranze e offerte pubbliche di acquisto*, presentation made at the XXVIII Conference on "*Unione europea: concorrenza tra imprese e concorrenza tra stati*", Courmayeur, 19-20 September 2014, at 3 ff.; S. Alvaro, A. Ciavarella, D. D'Eramo,

and 1998 in the United States, the authors conclude that the use of MVS determines positive abnormal returns. The stability of corporate control favored by these instruments, according to this research, has a virtuous effect on the profitability of the equity investment.[34]

Several other studies, however, reach opposite conclusions. Villalonga and Amit, in an article of 2006, demonstrate that corporations that do not depart from the one share, one vote rule have a higher market value, as measured with the Tobin q. Their analysis suggests that investors and markets prize corporations with a simpler capital structure[35]. Pajuste (2005) is another study criticizing MVS or limited voting shares, this time with respect to European corporations. Based on a sample of almost 500 cases of European issuers that have abolished dual class structures in favor of one single class of common stock, the author concludes that adopting one share, one vote has a positive effect on the cost of capital.[36]

Going back to the U.S., a recent and convincing research on dual class structures has been published in 2012 by IRRC and ISS, two investors' associations.[37] This work divides Standard & Poor's corporations in three groups: public companies with no controlling shareholder; companies controlled by one shareholder but with only common stock (investment and voting rights are proportional); and companies with a controlling shareholder, but that use classes of shares with different voting rights, and in particular MVS. The study considers, for these three groups, two variables among others: return on investment for shareholders, and level of risk (measured through price volatility) on different time horizons, from one to ten years.

The results are somehow surprising and counterintuitive vis-à-vis the assumption that control stability (in particular, through MVS) guarantees better economic results in the long term.[38] To the contrary, this study indicates that corporations with a strong controlling shareholder using MVS have better results in the short term, and worse ones in the long term, in comparison to public companies. The following Table illustrates the total shareholders returns:

Ownership structure	Shareholders remuneration 1 year	Shareholders remuneration 10 years
Public company	14.81%	9.76%
Controlled corporations with only common stock	13.78%	14.26%
Controlled corporations with shares with different voting rights	17.48%	7.52%

It is interesting to observe that corporations with a "strong" controlling shareholder, not using classes of shares, have the best results in the long term. It is also interesting to consider the

N. Linciano, *La deviazione dal principio "un'azione – un voto" e le azioni a voto multiplo*, *Quaderno giuridico Consob* n.5/2014, in *Riv. soc.*, 2014, at 482 ff. *See also* S.M. Bainbridge, *Corporation Law and Economics*, New York, 2002, at 456 f.

[34] S.M. Bainbridge, *supra* note 12, at 570 f.

[35] B. Villalonga, R. Amit, *Benefits and Costs of Control-Enhancing Mechanisms in U.S. Family Firms*, in *ECGI Finance Working Paper*, 2006, at 27 ff.

[36] A. Pajuste, *Determinants and Consequences of the Unification of Dual-Class Shares*, in *European Central Bank Working Paper Series*, No. 465, 2005, at 10 ff.

[37] IRRC Institute, ISS, *supra* note 30, at 1 ff.

[38] IRRC Institute, ISS, *supra* note 30, at 8.

data measuring investment risk, based on price volatility (the higher the volatility, the higher the risk).

Ownership structure	Price volatility 1 year	Price volatility 10 years
Public company	4.17	11.34
Controlled corporations with only common stock	3.39	10.10
Controlled corporations with shares with different voting rights	4.52	13.53

Public corporations are, in this perspective, less risky than corporations with a dual class structure both in the short and in the long term but, once again, controlled corporations without MVS register better results.[39] Naturally, we must observe that low price volatility is not necessarily desirable for all investors: price movements present a risk, but also an opportunity for capital gains.

There is also another piece of information worth mentioning. In the last proxy season in the United States, which represent a sort of thermometer of the most relevant governance issues for investors, proposals to eliminate MVS have not gained broad consensus and, at best, have received a lukewarm reaction from shareholders. Two examples are the attempt to abandon MVS in 2012 in Google and News Group. This evidence requires a pinch of salt because different factors can determine the success or failure of a proxy campaign. However, the anecdotal evidence is consistent with the idea that investors are not particularly sensitive to the abolition of MVS, or at least not in all types of corporations.

It is not easy to pinpoint one univocal inference from the data and information considered, also because available studies follow different and not comparable methodologies, measuring the effects of dual class capitalizations with heterogeneous variables. Overall, empirical research suggests caution on the desirability of MVS for investors. Some scholars have however reached an opposite conclusion, and the ability to issue MVS can have a positive effect on the competitiveness of stock markets in attracting and retaining issuers, therefore favoring the development of a financial source particularly important in a period of credit crunch.[40]

With respect to this last possible motivation for MVS, however, it is questionable whether MVS will sparkle a rush to listing in Italy. The Italian legal system, in fact, notoriously offers a rich panoply of control enhancing devices, from shareholders' agreements to limited voting shares, from pyramids to a certain latitude in adopting defensive measures in case of hostile takeovers.[41] Also MVS can facilitate minority control, but also in the light of the experience made with non-voting shares ("*azioni di risparmio*") a few decades ago, it would be surprising to conclude that, vis-à-vis other and more important economic variable, MVS could have a meaningful role in the development of the Italian Stock Exchange.

[39] IRRC Institute, ISS, *supra* note 30, at 9.

[40] *See* N. Abriani, *Azioni a voto plurimo e maggiorazione del diritto di voto degli azionisti fedeli: nuovi scenari e inediti problemi interpretativi*, in *Giustizia civile.com*, 2014, at 18; F. Annunziata, *La disciplina del voto plurimo introdotta dal Decreto Competitività. Pegno, usufrutto e sequestro di azioni (a voto plurimo)*, in *Diritto bancario.it*, 2014, at 1 f. (highlighting that, by introducing the new provisions on multiple voting shares, the Italian legislator aimed at fostering companies' listing).

[41] M.S. Spolidoro, *supra* note 4, at 6 ff.

In any case, the introduction of MVS in Italy is a new and interesting experiment on freedom of contract and jurisdictional competition in corporate law in Europe.[42] Jurists and economists will be able to verify, in a few years, the effects of MVS, and provide a better-learned evaluation and more final answers than the ones possible now. Legend goes that in the 1960s Zhou Enlai, the savvy and sophisticated Chinese diplomat, was asked an opinion on the French Revolution of 1789. After almost two hundred years, Zhou Enlai cooled down the enthusiasm of his interlocutor. His answer was: “It is too early to tell.” In the light of the inconclusive empirical evidence, and of the peculiarity of the Italian experiment, we probably can also suspend the judgment, at least for some time.

The lingering question, however, concerns the real motives of the Italian Government in adopting, somehow hurriedly, these new rules (and the new rules on takeovers raise a similar question).[43] The desire to create incentives to go public has certainly influenced policy makers, as well as the honest belief that MVS could be, in some circumstances, a more transparent and investor-friendly control enhancing device as opposed, for example, to shareholders’ agreements. And a healthy competitive pressure might have had a role. The reference is to the already mentioned decision of Chrysler-Fiat to reincorporate in the Netherlands, driven also by the availability, in that system, of MVS (and let’s not forget that Italian newspapers report rumors that also Ferrari, the ultimate symbol of Italian style and technology, controlled by Chrysler-Fiat, might share the same fate).[44] We should hover also mention the possibility that the Government introduced a new tool allowing minority control having in mind the privatizations of state-owned enterprises that are in the pipeline. This might allow the Italian Treasury to sell large amount of shares, cashing in the value of these corporations, without losing control.

6. *Loyalty Shares in Italy.* – Within the framework discussed, let us put on the glasses of the interpreter in order to consider more closely how the Italian legislature has regulated MVS. The innovations introduced by Decree No. 91/2014, converted with the Law No. 116/2014, raise many questions. Without the ambition to cover them all, we will mention some of the most important ones.

To begin with, new Article 2351, paragraph 4, of the Italian Civil Code (ICC), allows non-listed corporations to issue MVS with a maximum of three votes per share. The new rule dilutes the pre-existing – and still mandatory – prohibition to issue limited voting shares in excess of 50% of the outstanding capital (Article 2351, paragraph 2, ICC).[45] This provision was designed to curb the separation between ownership and control. Clearly enough, in the absence of MVS, the implication was that to enjoy absolute control over a corporation with limited voting shares it was necessary to acquire at least 25% of the full voting shares plus one share.[46] Today, with treble voting shares, it is

[42] *See* M.S. Spolidoro, *supra* note 4, at 5.

[43] *See* the amendments to Articles 104-*bis*, 105, 106 and 109 TUF made by Article 20, paragraph 1, law decree 24 June 2014, n. 91, converted with changes by Law 11 August 2014, n. 116. *See generally* P. Marchetti, *Commento all’art. 20 del d.l. Competitività (azioni a voto maggiorato, a voto plurimo ed altro)*, presentation made at the Conference organized by the Consiglio Notarile of Milan, 22 September 2014, at 11, *available at* http://media.wix.com/ugd/e6b941_d6da3f031bfa4dcea5c360e2cb6f9cf2.pdf.

[44] *See* P. Montalenti, *Il diritto societario europeo tra armonizzazione e concorrenza regolatoria*, presentation made at the XXVIII Conference on “*Unione europea: concorrenza tra imprese e concorrenza tra stati*”, Courmayeur, 19-20 September 2014, at, 9, *available at* http://www.cnpds.it/documenti/relazione_prof__montalenti.pdf ; B. Bertoldi, *Come si può (e perché) pesare le azioni oltre a contarle*, in *Il Sole 24 Ore*, 13 February 2014, 16.

[45] *See also* N. Abriani, *supra* note 40, at 10 ff.

[46] P. Marchetti, *supra* note 43, at 5. *See also* M. Notari, *Le società azionarie*, in A. Abriani et al., *Diritto delle società. Manuale breve*, Milan, 2012, at 147; N. Abriani, Sub *art. 2351*, in G. Cottino, G. Bonfante, O. Cagnasso, P. Montalenti (edited by), *Il nuovo diritto societario*, Bologna, 2004, at 322; V. Santoro, Sub *art. 2351*, in M. Sandulli, V. Santoro (edited by), *La riforma delle società*, Torino, 2003, I, at 148; A. Angelillis, M.L. Vitali, Sub *art. 2351*, in M. Notari (edited by), *Azioni*, in P. Marchetti, L.A. Bianchi, F. Ghezzi, M. Notari (edited by), *Commentario alla riforma delle*

possible to have absolute control over a corporation investing in less than 17% of its equity; and if limited voting shares are also used in combination with MVS, the minimum percentage drops to 12.5%.[47]

For listed corporations the possibility to use MVS is not as broad, but still quite significant. Pursuant to the new Article 127-*quinquies* (non-Italian reader, please be patient with this use of Latin extensions to designate additional rules added after the statute had been enacted and squeezed in between existing provisions!) of the Consolidated Law on Finance, the bylaws can adopt loyalty shares fairly similar to the ones developed and widespread in France. These shares grant double voting rights to beneficial owners who hold the shares for a minimum of two years, a privilege lost when the shares are transferred.[48]

The provision creates several technical uncertainties, for example with respect to the notion of beneficial ownership relevant in this context; but in the light of the aims of this article, let us focus on some broader substantive issue. The first one, not difficult to solve, is how this provision should be applied to limited voting shares (for example, shares voting only on certain matters, such as amendments to the governing documents of the corporation), and to non-voting shares, in the absence of specific provisions in the bylaws. The former will enjoy two voting rights for each share on the matters on which they are entitled to vote; while the latter will remain without voting rights, since two times zero – if third-grade math is to be trusted – is zero.

A second and more subtle question is whether loyalty shares are a class of shares. This would be important because, for example, under Italian law, as well as in many other systems, classes of shares are entitled to vote as a class on decisions that might adversely affect their rights (Article 2376 ICC). The law clarifies that shares with multiple voting rights depending on the holding period are *not* a class of shares.[49] This means that, when double voting attaches because "loyalty" has been established, the shares temporarily "empowered" are not a class. For example, a decision potentially adverse to the interest of these long-term shareholders will not require class voting.

In my opinion, however, this does not mean that the bylaws cannot limit the benefit of the double vote (linked to the holding period) *only* to a class of shares characterized by *other* different rights, for example only to shares without a privilege in the payment of dividends. In other words, the law does not mandate that *all* outstanding shares become loyalty shares, and nothing seems to prohibit attributing this feature only to a specific (and already identifiable based on other rights) class of shares. This solution, in addition, is coherent with the foreign experiences that have inspired the Italian legislature, and think about class A and B shares in the United States.[50]

Another interesting issue is that the double vote, which is generally lost if the shares are alienated, survives when loyalty shares are transferred through a merger or spin-off, if the bylaws do not provide differently (*see* Article 127-*quinquies*, paragraph 3, TUF). This means that if a corporation owning double voting loyalty shares merges with and into another one, and therefore the ownership of the shares changes, the new entity retains the enhanced voting rights. This rule, without further qualifications, is fertile ground for elusions. Consider the following hypothetical: a corporation X has owned loyalty shares of Y for three years, and the shares currently enjoy double voting rights. If X wants to transfer the shares to a third party, for example corporation K, without

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società, Milan, 2008 at 410 ff.; A. Busani, M. 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", in *Società*, 2014, at 1050; M.S. Spolidoro, *supra* note 4, at 5; G.M. Hayden, M.T. Bodie, *supra* note 15, at 445 ff.

[47] *See* P. Marchetti, *supra* note 43, at 5; N. Abriani, *supra* note 40, at 12; A. Busani, M. Sagliocca, *supra* note 46, at 1051.

[48] *See* M.S. Spolidoro, *supra* note 4, at 17; M. Lamandini, *supra* note 33, at 6 (noting that similar rules apply in France).

[49] Article 127-*quinquies*, co. 5, TUF.

[50] *See supra* paragraph 3.

renouncing double voting rights, it is sufficient to spin-off Y shares to K and to transfer to K's other shareholders the new shares issued by K to X. In this way, X and K have achieved the goal of not losing extra voting rights notwithstanding the transfer, something hardly in line with the gist of the provision. In effect, in other systems, including in the U.S. for multiple voting shares, the exemption is only available for "bona fide mergers," meaning mergers that have an independent economic significance, and that are not designed for the mere purpose of circumventing the provision. It is true that Italian law, as most legal systems, provides a general anti-fraud rule aimed at preventing contracts that elude the application of mandatory provisions (Article 1344 ICC), and that if the transaction results in a damage for shareholders or other third parties there might be additional sanctions. The application of these provisions is however difficult, also because the burden of the proof is hard to satisfy.

On the other hand, from an opposite perspective, it is questionable the rationale of the rule pursuant to which double voting rights are abolished when there is a mere formal modification of the owner of the shares, with no substantive change. For example, if A, an individual, owned loyalty shares with double votes, the text of the statute suggests that if she contributes the shares to X, a wholly-owned corporation, the benefit will be lost. If a more liberal interpretation is not possible, this option is not entirely comprehensible, even if it might contribute to limit other types of elusions.

Another problem is the fact that Article 127-*quinquies*, paragraph 3, unequivocally provides that the introduction of a bylaws clause providing for loyalty shares does not grant to dissenting shareholders an appraisal (or withdrawal) right pursuant to Article 2437, paragraph 1, letter *g)*, ICC, the rule according to which, generally, a modification of voting and participating rights triggers appraisal rights. Some Authors have argued that the "indirect" weakening of voting rights of shareholders not holding the shares in the long term is irrelevant, also because, at least in theory, all shareholders have the possibility to enjoy double voting rights as long as they keep the shares for the required period.[51] While technically correct, it is questionable that this explanation entirely justifies the lack of protection for existing minority shareholders who, because of the adoption of loyalty shares, could find themselves members of a corporation with a much more dominating controlling shareholder, and in a situation in which shares are more difficult to sell. Appraisal rights, in our opinion, giving a fair exit to minority dissenting shareholders, is like divorce in a no-longer satisfactory marriage: better favoring it rather than forcing disgruntled spouses to stick together.

In any case, if textually we can conclude that the introduction of loyalty shares does not seem to trigger appraisal rights, what about when loyalty shares – and double votes, or the possibility of double votes – are abolished? Do shareholders have an appraisal right in this case? My opinion is that appraisal rights should be granted because the decision clearly causes a prejudice to the voting rights of long-term investors. The fact that, as mentioned before, holders of loyalty shares do not have the right to vote on as a class on issues that adversely affect their position, reinforced the idea that appraisal rights are necessary to protect them.

In order to partially counterbalance the chilling effect of loyalty shares on the market for corporate control, Article 107 TUF, also modified in 2014, provides that when prolonged ownership triggers enhanced voting rights, if the owner of the shares obtains votes in excess of 30 per cent (one of the triggering threshold of mandatory tender offers under Italian law), a mandatory bid on all the outstanding shares must be launched. This provision might raise delicate interpretative and technical problems in the future, especially vis-à-vis the issue of the minimum price of the mandatory bid.

[51] P. Marchetti, *supra* note 43, at 10.

And, speaking of prices, one side note intended as a suggestion for future research concerns the evaluation of loyalty shares: shares that clearly have a higher value for their holder, but whose value is destined to drop – together with their super-voting rights – when sold to a third party. How should they be evaluated in case of appraisal? In case of merger? How should they be evaluated in the financial statements of the holder? Can an offeror pay a higher price for these shares in a tender offer? All these fascinating questions, which we must leave open for future research, would lead us in the perilous waters running among the rocks of corporate law, accounting, and finance.

Loyalty shares have received some attention by listed corporations. In the few months since their introduction, they have been adopted in the bylaws of Campari, the producer of the world-famous drink, and of Amplifon and Astaldi.

7. *MVS in Italy.* – As previously mentioned, in addition to French-style loyalty shares, the Italian legislature has also adopted – with the new text of Article 2351, paragraph 4, ICC – plain MVS, *i.e.* shares that enjoy enhanced voting rights independently from any holding period. Differently from loyalty shares, in the case of MVS, the votes attach to the shares and are transferable to other investors. The law limits the number of extra votes to three per share. It seems possible to attribute also “fractions” of votes, for example 1.5 for each share, if necessary to achieve certain ownership structures. It should be noted, and this is another difference from loyalty shares, that MVS are a class of shares, subject to all the rules applicable to classes of shares, including class voting. Consequently, a corporation can issue different classes of MVS with different voting rights (e.g., one with two votes per share, and one with three votes per share). The augmented voting rights cannot be multiplied through the mechanism of loyalty shares, in order to avoid an excessive concentration of power with a limited investment (combining treble-voting shares, loyalty shares, and limited voting shares, in theory, a shareholder could have absolute control with an investment equal to 6.25% of the capital).

Only non-listed corporations can issue this category of shares, not listed ones (Article 127-*sexies*, paragraph 2, TUF). As in the United States, however, these shares can be issued by a corporation before the IPO and kept after the listing, the idea being that if investors are properly informed about the capital structure through the registration statement and prospectus, they can adequately price the instruments. MVS, therefore, can be interesting for corporations planning to go public.

After having gone public, listed corporations can issue additional MVS with characteristics similar to the ones already outstanding in order to maintain the ratio between different classes of shares unaltered. This is however only possible when the new shares are issued gratuitously (using reserves turned into capital), when they are issued for a consideration but all shareholders can exercise their pre-emptive rights, and when the issuance is the consequence of a merger or spin-off (Article 127-*sexies*, paragraph 2, TUF). What these different cases have in common is that all shareholders are at least theoretically entitled to receive new shares in proportion to their stake in the corporation and with voting rights equal to the ones of the shares they own, and therefore no further disproportion between voting power and investment will occur.

It is however not entirely clear what should happen in case of issuance of new shares of only one class for a consideration. Imagine a corporation with 60 single-voting shares and 40 treble-voting shares outstanding. If 10 new shares are issued, 6 with one vote per share and 4 with three, shareholders' pre-emptive rights should grant to each class of shareholders a right of first refusal on the shares having the same characteristics as the ones they own. This is a broader corporate law question and, although not entirely settled, the prevailing view is that whenever possible shareholders should be protected against dilutions of their rights. If, however, the corporation would issue only one class of shares – and there seems to be no prohibition to do that –, for example, treble-voting shares, this choice might significantly dilute the position of old shareholders holding MVS.[52]

Based on the provisions of Article 2351, paragraphs 2 and 4, ICC, and the Article 127-*sexies*, TUF, the law allows the creation of shares with enhanced voting rights only on some matters, for example the appointment and revocation of directors; or of shares whose super-voting rights are conditioned to certain events, such as for example a deterioration of the economic performance or of the financial stability of the issuer. These instruments can be interesting for important creditors who might get to the driver's seat (meaning, appoint directors) only if the corporation is becoming a more risky debtor.

8. *Conclusions.* – The brief study of the new instruments introduced in Italian corporate law, MVS and loyalty shares, allows a final reflection on the interaction between corporate law regimes in Europe and the role of European corporate law. Regulatory competition and harmonization are not mutually exclusive, and actually can stimulate each other. On the one hand, when legal systems are too profoundly different and distant, regulatory competition might be more difficult, if not impossible. The difficulty to reconcile different rules, the uncertainties in assessing the complex effects of alien rules, the very absence of a shared legal culture among practitioners, business people and scholars can limit the circulation of ideas and cause more caution in jurisdictional shopping. Excluding very extreme circumstances in which a system is blatantly less advantageous than others, regulatory competition thrives only if the presence of a certain degree of harmonization. Legal systems must be sufficiently similar to make comparisons possible and meaningful and changes of corporate regimes not too traumatic, but must also be sufficiently different to have distinct competitive advantages. With a simple metaphor, it is not too different from supermarkets: the products on the shelves must be similar enough to allow a comparison of the different quality/price ratios, and transaction costs must not be an insurmountable barrier. An exotic (for European shoppers) supermarket in Canton, China, might offer wonderful and cheap vegetables that however non-locals do not know how to cook, and a Luxembourger will not go to Canton during the weekend to shop. However, a Luxembourger might be attracted by a good supermarket in Trier, Germany to purchase a cut of meat similar to the one his parents prepared on Sundays, but slightly more tender and cheaper.

The introduction of MVS and loyalty shares in Italy is also an excellent example to demonstrate another feature of the evolution of European corporate law systems. Two forces can drive harmonization: E.U. legislation, in a top-down approach that some authors consider too timid to lead to a true common market; but also bottom-up regulatory competition, in which legislatures imitate each other, and legal institutes and models circulate. This phenomenon, increased in the last decade also due to the jurisprudence of the European Court of Justice, has affected the regulation of legal capital, corporate governance systems, takeover laws, and now also shareholders' rights. What will be next on the list? Directors' liability? Groups of corporations? The next ten years, in this perspective, are likely to be at least as exciting as the last decade.

We can conclude by observing that, from the perspective of Italy but also of other Member States, E.U. law and the law of neighboring countries are no longer seen simply as an interesting ground for scholarly comparisons, but (also) as a very concrete threat and opportunity for economic development.

[52] On preemptive right *see* M. Ventoruzzo, *Issuing New Shares and Preemptive Rights: A Comparative Analysis*, in *Richmond Journal of Global Law and Business*, 2013, 517 ff.

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