Penn State Law eLibrary

Journal Articles

Faculty Works

2004

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

Marco Ventoruzzo
Penn State Law

Follow this and additional works at: http://elibrary.law.psu.edu/fac_works

Part of the Business Organizations Law Commons, Comparative and Foreign Law Commons, and the Securities Law Commons

Recommended Citation

Marco 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*, 40 *Tex. Int'l L.J.* 113 (2004).

This Article is brought to you for free and open access by the Faculty Works at Penn State Law eLibrary. It has been accepted for inclusion in Journal Articles by an authorized administrator of Penn State Law eLibrary. For more information, please contact ram6023@psu.edu.

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

MARCO VENTORUZZO†

SUMMARY

I. INTRODUCTION 114

II. FINANCING THE CORPORATION 118
- A. *New Categories of Shares and Freedom of Contract* 118
- B. *Tracking Stocks* 122
- C. *The Issuing of Shares: Preemptive Rights and the Broadening of Directors' Powers* 125
- D. *Liberalization of Corporate Bonds* 131
- E. *Separated Pools of Assets* 133
- F. *Questions About the Role of the Stock Exchange Regarding New Financial Instruments* 135

III. PROTECTION OF MINORITIES 137
- A. *Exit Strategies: The Right of Withdrawal* 137
- B. *Directors' Liability Toward the Corporation and Minority Derivative Suits* 140
- C. *Groups of Corporations and Liability of the Controlling Shareholder* 143

† LL.M., Yale Law School; Ph.D. in Corporate Law, Università degli Studi of Brescia, Italy; J.D., Università degli Studi of Milan, Italy; B.A. in Economics and Business Administration, Bocconi University, Milan, Italy. Assistant Professor of Corporate Law, Bocconi University, Milan, Italy; International Visiting Professor of Comparative Corporate Law, Louisiana State University Law Center, Baton Rouge, Louisiana. For their ideas, discussion, and comments, I would like to thank José Antunes, Luigi A. Bianchi, John Birds, James W. Bowers, Paul Davies, Ignacio Farrando, Federico Ghezzi, Ronald Gilson, Heribert Hirte, Jonathan Rickford, Guido Rossi, and Joëlle Simon. I am particularly grateful to Piergaetano Marchetti, director of the law department of Bocconi University, who inspired, advised, and supported this project. Precious comments and suggestions on an earlier draft of this paper came from Catherine A. Rogers, while Francesco De Lorenzi and Giulio Sandrelli provided valuable research assistance.

A preliminary version of this article was the basis for discussion at a conference organized at Bocconi University (June 11, 2004), on "Corporate Law Reforms in Europe and Law & Economics Methodology" sponsored by Bocconi University and by the Italian Ministry of University and Scientific Research. The conference brought together scholars and experts from different European countries (France, Germany, Italy, Portugal, Spain, and the United Kingdom) to discuss, in light of the recent Italian Reform, corporate reforms in their respective countries. The article, or parts of it, has been presented at the conference "Corporate Governance: The UK and the EU Agenda" organized by the British Institute of International and Comparative Law (London, November 19, 2004) and on various occasions (seminars, classes) at the Louisiana State University Law Center, Baton Rouge, Louisiana, in the Fall terms of 2003 and 2004. This article builds on my earlier analysis of the Reform, which focused on its effect on listed corporations, published in Italian as a chapter of a national yearly report on economic and legal developments of the Italian equity markets. BORSA 2004: RAPPORTO REF SUL MERCATO AZIONARIO 81 (2004).

IV. CORPORATE GOVERNANCE 145
A. *Shareholders' Agreements and Shareholders' Meetings* 145
B. *The Board of Directors: The Three Options Menu* 146

V. EVALUATING THE REFORM 149
A. *A Market for Rules Without Regulatory Competition?* 149
B. *Increasing or Decreasing Protection for Minorities?* 152
C. *Entrenching Corporate Control* 154

VI. CONCLUSION 154

VII. APPENDIX A 156

I. INTRODUCTION

Some comparative corporate law scholars have recently argued that a meaningful measure of the quality of a system's corporate law is its ability to innovate.[1] "The more innovative and adaptable a legal system is," they argue, "the more likely it is able to respond to a changing environment and thereby give firms the possibility to explore new opportunities while ensuring a minimum level of investor protection."[2] To demonstrate their thesis, these authors undertook a relatively comprehensive evaluation of ten different legal systems. While they addressed a range of common law and civil law systems, conspicuously absent from their analysis was the Italian system.[3] This article fills this gap by analyzing a recent reform that profoundly overhauls Italian corporate law (hereinafter, the Reform) and thus undoubtedly represents both a dramatic innovation and movement toward flexibility, all of which are very much inspired by foreign experiences. Throughout the analysis and in my conclusions I will question, at a substantive level, whether this

1. Katharina Pistor et al., *Innovation in Corporate Law*, 31 J. COMP. ECON. 676, 677 (2003) [hereinafter Pistor et al., *Innovation*]. These scholars are challenging the conventional wisdom that looked to substantive indicators (such as mechanisms for protecting minorities) as an indicator of the quality of corporate law. *Id.* This counterthesis is part of a larger scholarly response to empirical research that demonstrates that several financially successful systems (in particular German and certain Scandinavian systems) lack the indicators previously thought to be a necessary predicate to such success.

2. *Id.* The authors evaluate a system's ability to innovate along three axes: rate of statutory legal change, the flexibility of corporate law (measured as the ratio of enabling to mandatory rules), and the development of new enforcement mechanisms. *Id.* at 678. This work focuses on the first two elements, which were innovated by the Legislative Decree No. 6 of January 17, 2003. Decreto Legislativo 17 Gennaio 2003, n.6, Gazz. Uff. n.17 (Jan. 22, 2003) [hereinafter Legislative Decree No. 6], *available at* http://gazzette.comune.jesi.an.it/2003/17/17.htm (last visited Nov. 3, 2004), *corrected by* Errata-Corrige, Gazz. Uff. n.153 (July 4, 2003), *available at* http://gazzette.comune.jesi.an.it/2003/153/gazzetta153.htm (last visited Nov. 3, 2004), *modified by* Decreto Legislativo 6 Febbraio 2004, n.37, Gazz. Uff. n.37 (Feb. 14, 2004), *available at* http://gazzette.comune.jesi.an.it/2004/37/4.htm (last visited Nov. 3, 2004). It is necessary to also mention that a distinct but connected piece of legislation, Legislative Decree No. 5 of January 17, 2003 also reformed civil procedure rules and arbitration affecting corporate litigation. Decreto Legislativo 17 Gennaio 2003, n.5, Gazz. Uff. n.17 (Jan. 22, 2003), *available at* http://gazzette.comune.jesi.an.it/2003/17/16.htm (last visited Nov. 3, 2004).

3. *See* Pistor et al., *Innovation*, *supra* note 1, at 678. Italy is an interesting and important subject for comparative study because it is a successful European economy with sizeable output growth and a gross domestic product (GDP) per capita that has been, until recently, above the European Union (EU) average and higher than that of the United Kingdom. Jonathan R. Macey, *Italian Corporate Governance: One American's Perspective*, 1998 COLUM. BUS. L. REV. 121, 140 (1997); *see also* CIA, WORLD FACTBOOK 274 (2004) (stating that "Italy has a diversified industrial economy with roughly the same total and per capita output as France and the UK"); Nation Master, *Italy: Economy* (stating that Italy has the 8th highest GDP worldwide), *at* http://www.nationmaster.com/country/it/Economy (last visited Nov. 2, 2004). This economic success has struck some comparative corporate law scholars as counterintuitive since, in their estimation, Italian corporate governance is poorly developed. *See* Macey, *supra*, at 140–43.

legislative innovation can be viewed on balance as an overall improvement, particularly in light of some of the new risks it creates for minority shareholders. These critiques also raise questions more generally about whether a high rate of innovation and flexibility in statutory corporate law can be considered a proxy for the quality and efficiency of its provisions.

The Reform came into effect on January 1, 2004. It is expressly inspired by comparative analysis in that a number of new governance and financing options for Italian companies were borrowed or "transplanted" from other systems.[4] In addition, the Reform is premised on deliberate adoption of law and economics theories, both in its overall approach and in many of its individual provisions.

The Reform introduced profound changes to the rules contained in the Italian Civil Code, changes that dwarf the extent of all other corporate law reforms since the Code's enactment in 1942.[5] Even more significant than its introduction of new instruments and rules, the Reform really revolutionizes some of the underlying principles of Italian corporate law.[6] Prior to the Reform, Italian corporate law contrasted dramatically with the United States and other common law systems (but was consistent with its civil law cousins) by its systematic preference—in relative terms—for mandatory rules over enabling rules.[7] In post-Reform Italy, by contrast, Italian corporate law is less rigid and the degree of contractual freedom allowed in drafting (or amending) corporate bylaws has increased

4. Legislative Decree No. 6, *supra* note 2. For an overview of the Reform, see IL NUOVO DIRITTO SOCIETARIO FRA SOCIETÀ APERTE E SOCIETÀ PRIVATE (Paolo Benazzo et al. eds., 2003); IL NUOVO ORDINAMENTO DELLE SOCIETÀ: LEZIONI SULLA RIFORMA E MODELLI STATUTARI (Serenella Rossi ed., 2003) [hereinafter IL NUOVO ORDINAMENTO DELLE SOCIETÀ]; LA RIFORMA DEL DIRITTO SOCIETARIO ATTI DEL CONVEGNO DI COURMAYEUR, 27–29 SETTEMBRE 2002 (2003); LA RIFORMA DELLE SOCIETÀ, COMMENTARIO DEL D.LGS. 17 GENNAIO 2003, N. 6 (Michele Sandulli & Vittorio Santoro eds., 2003); Floriano D'Alessandro, *"La Provincia del Diritto Societario Inderogabile (Ri)Determinata". Ovvero: Esiste Ancora il Diritto Societario?*, 48 RIVISTA DELLE SOCIETÀ 36 (2003); Giorgio Oppo, *Le Grandi Opzioni della Riforma e la Società per Azioni*, 49 RIVISTA DI DIRITTO CIVILE 471 (2003); Guido Rossi & Alessandra Stabilini, *Virtù del Mercato e Scetticismo delle Regole: Appunti a Margine della Riforma del Diritto Societario*, 48 RIVISTA DELLE SOCIETÀ 1 (2003).

5. Among the recent reforms, Legislative Decree No. 58 of February 24, 1998 had introduced new and innovative rules concerning listed corporations. Decreto Legislativo 24 Febbraio 1998, n.58, Gazz. Uff. n.71 (Mar. 26, 1998) [hereinafter Legislative Decree No. 58], *available at* http://gazzette.comune.jesi.an.it/71/9.htm (last visited Nov. 3, 2004). Many of these reforms have now been extended—even if with some adjustment—also to nonlisted corporations by the Reform, such as the introduction of a sort of derivative suit for directors' liability or the prevision of an external auditor.

6. The new rules affect not only *società per azioni* (joint stock corporations, both listed and nonlisted), but also *società a responsibilità limitata* (limited liability corporations) and *società cooperative* (cooperative corporations). Partnership law has not been directly reformed, although some aspects of the life of a partnership have indirectly been affected by the Reform. For example, contrary to a well-established case law principle, the new rules provide that a joint stock corporation can be an unlimited partner in a partnership. CODICE CIVILE [C.C.] art. 2362 (It.). In addition, revised Article 2500 *et seq.* of the Civil Code provides that the decision to transform a partnership into a limited liability corporation can be decided by the majority of the partners, thereby modifying the previous rule that required unanimous consent. *Id.* art. 2500 *et seq.*

7. A significant example of this difference is found in Section 23(5) of the Aktiengesetz, the German corporate law statute, which establishes as a general principle the mandatory nature of corporate law rules. Aktiengesetz, § 23(5), v. 6.9.1965 (BGB1. I S.1089). Specifically, it provides: "The bylaws may make different provisions of this Act only if this Act explicitly so permits. The articles may contain additional provisions, except as to matters that are conclusively dealt with in this Act." *Id.* It should be noted, however, that a trend toward greater contractual freedom in corporate law is now common to almost all of the European continental systems: for an overview of the most recent statutory innovations introduced or discussed in France in order to simplify and render more flexible corporate law, see Joëlle Simon, The New French Company Law: Between Freedom of Contract and Mistrust (unpublished manuscript), http://www.uni-bocconi.it/index.php?proc_id=11&nav_level1=3&nav_level2=17&nav_level3=5439&documento=0&procedura=0&sub_action=0&sub_param=&sub_function_title= (last visited Oct. 28, 2004).

significantly.[8] In this way, the Reform represents a fundamental break from the past and is thus a truly unique attempt (by both European and Italian standards) to render corporate law more flexible.

This increased contractual freedom affects various areas of corporate law. With regard to financing the corporation, it creates opportunities for issuing new types of shares and financial instruments prohibited thus far, reduces or eliminates limitations on the issuing of bonds, and establishes the possibility for creating separate pools of assets.[9] It profoundly reorients traditional Italian corporate governance by opening up the possibility to choose from among several possible corporate governance structures in addition to the traditional Italian model.[10] The express purpose of the legislature in enacting these changes is to enable different stakeholders (controlling and minority shareholders, investors, creditors, managers, employees, and other constituencies), both in closely and in publicly held corporations, to select the most efficient rules within the broader "menu" offered by the Civil Code.

It is questionable whether greater Europe will provide such an opportunity since European corporate law is currently hovering between a limited harmonization[11] and an

---

8. The assumption underlying the Italian legislature's project is that in Italy (and Europe generally) there exist the preconditions for developing a market for rules. The causes and consequences of regulatory competition in the United States have been extensively debated. *See, e.g.*, William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663 (1974) (arguing for an increased role for federal regulation of corporations); Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251 (1977) (arguing against federal regulation of corporations); Roberta Romano, *The State Competition Debate in Corporate Law*, 8 CARDOZO L. REV. 709, 710–13, 752–53 (1987) (criticizing Professors Cary and Winter and concluding that a middle ground between them is the correct position); John C. Coffee, Jr., *The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role*, 89 COLUM. L. REV. 1618 (1989) (discussing the effects of mandatory legislation and specifying standards courts should use in determining whether to accept deviations from traditional rules of corporate governance); Lucian A. Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435, 1437 (1992) (arguing for a "substantial expansion of the role of federal law in shaping corporate law rules"). It remains unclear, if not doubtful, how many of the assumptions and conclusions applicable about the U.S. system can be readily applied to the European context: this question will be discussed in Part V.A.

9. *See infra* Part II.E.

10. *See infra* Part IV.B.

11. For an overview of the most recent reforms and developments of corporate law in some European countries, also in light of regulatory competition issues, see the papers presented at the conference "Corporate Law Reforms in Europe and Law and Economics Methodology", *at* http://www.uni-bocconi.it/index.php?proc_id=11&nav_level1=3&nav_level2=17&nav_level3=5439&documento=0&procedura=0&sub_action=0&sub_param=&sub_function_title= (last visited Oct. 28, 2004): José Engrácia Antunes, An Economic Analysis of Portuguese Corporation Law: System and Current Developments (unpublished manuscript); John Birds, Corporate Law Reform in the UK (unpublished manuscript); Ignacio Farrando, Evolution and Deregulation in the Spanish Corporate Law (June 25, 2004) (unpublished manuscript); Heribert Hirte, Die "Limited" mit Sitz in Deutschland—Abkehr von der Sitztheorie nach Centros, Überseering und Inspire Art (unpublished manuscript) [hereinafter Hirte, Die "Limited" mit Sitz in Deutschland]; Simon, *supra* note 7. The process of harmonizing corporate law in Europe has its milestones in the following directives: Council Directive 68/151, 1968 J.O. (L 65) 8 (EEC) (regarding nullity of the companies and their disclosure); Council Directive 77/91, 1977 O.J. (L 26) 1 (EEC) (regarding public limited liability company formation and the maintenance and alteration of capital); Council Directive 78/855, 1978 O.J. (L 295) 36 (EEC) (regarding mergers of public limited liability companies); Council Directive 78/660, 1978 O.J. (L 295) 11 (EEC) (regarding the annual accounts); Council Directive 82/891, 1982 O.J. (L 378) 47 (EEC) (regarding the division of public limited liability companies); Council Directive 83/349, 1983 O.J. (L 193) 1 (EEC) (regarding consolidated accounts); Council Directive 84/253, 1984 O.J. (L 126) 20 (EEC) (regarding the approval of statutory auditors of accounting documents); Council Directive 89/666, 1989 O.J. (L 395) 36 (EEC) (regarding certain disclosure requirements); Council Directive 89/667, 1989 O.J. (L 395) 40 (EEC) (regarding single-member private limited liability companies); Council Directive 2003/58, 2003 O.J. (L 221) 13 (regarding certain disclosure requirements); Proposal for a Tenth Directive of the Council Based on Article 54(3)(g) of the Treaty Concerning Cross-Border Mergers of Public Limited Companies, 1985 O.J. (C 23) 11; Council Directive 2004/25, 2004 O.J. (L 142) 12. Extensive literature exists on the harmonization of European corporate law and on convergence or divergence of the different

apparently developing market for rules. A series of recent cases decided by the European Court of Justice appear to open opportunities for corporations to choose which national corporate regime will govern their internal affairs,[12] but many scholars argue that freedom to choose the place of incorporation—a necessary predicate for competition among nationally determined corporate governance structures—is still far off.[13] While there remain ambiguities at the European Union (EU) level, the Italian legislature's entry into this foray may not be entirely well advised or well conceived.

In this article, I provide a critical and analytic overview of the major innovations of the Reform, concentrating on those aspects that deal with joint stock corporations as well as the possible effects on listed corporations. The Reform's principle innovations can be divided into three major categories, with a part of this article dedicated to each. Part I will focus on financing the corporation, Part II on protection of minorities, and Part III on corporate governance. While it is not possible in the space of this article to examine all the nuances and possible effects of the Reform, within each of these three parts, I will describe some of the newly introduced institutions and lay the groundwork for exploring, later in Part IV, the extent to which the Reform may undermine investor choice, lower the level of protection of minorities, and create obstacles to the mobility of control.[14]

---

systems. With specific reference to one of the core problems on the subject, governance structures, see John C. Coffee, Jr., *The Future as History: The Prospects for Global Convergence in Corporate Governance and Its Implications*, 93 NW. U. L. REV. 641 (1999).

In addition to the above-mentioned directives, it should be recalled that the Council Regulation 2157/2001 is a statute that creates the possibility of the "European Company," a company that will be governed in part directly by community rules and in part by rules of the state where the company itself has been incorporated. Council Regulation 2157/2001, 2001 O.J. (L 294) 1. In drafting the Regulation, the purpose of the European legislature was to create an internal market by providing companies with the ability and means to plan and carry out the reorganization of their business on a community-wide scale. For an overview of the issues regarding the incorporation of a European Company in Italy, see Giuseppe Alberto Rescio, *La Società Europea Tra Diritto Comunitario e Diritto Nazionale*, 48 RIVISTA DELLE SOCIETÀ 31 (2003).

12. This series of cases has challenged the continued viability of the "real seat" approach, followed by many continental jurisdictions, which limits companies' ability to choose where they will incorporate. While some ambiguities remain regarding the extent to which the "real seat" approach has been rejected, an insightful analysis of the possible effects of the leading case, Case 212/97, Centros Ltd. v. Erhvervs-og Selskabsstyrelsen, 1999 E.C.R. I-1459 (1999), on the convergence of European corporate governance can be found in Ronald J. Gilson, *Globalizing Corporate Governance: Convergence of Form or Function*, 49 AM. J. COMP. L. 329 (2001). For a discussion of the evolution of the principles affirmed in *Centros*, see Tito Ballarino, *From Centros to Überseering: EC Right of Establishment and the Conflict of Laws*, 4 Y.B. OF PRIVATE INT'L L. 203 (2002); Tito Ballarino, *Les Règles de Conflit sur les Sociétés Commerciales à L'Épreuve du Droit Communautaire D'Établissement: Remarques sur Deux Arrêts Récents de la Cour de Justice des Communautés Européennes*, 92 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 373 (2003); Wulf-Henning Roth, *From Centros to Ueberseering: Free Movement of Companies, Private International Law, and Community Law*, 52 INT'L & COMP. L.Q. 177 (2003); Eddy Wymeersch, *The Transfer of the Company's Seat in European Company Law*, 40 COMMON MKT. L. REV. 661 (2003). For a more recent discussion of the issue with specific reference to the German situation, where a form of regulatory competition with the United Kingdom is present because of the different minimum capital requirements, see Hirte, Die "Limited" mit Sitz in Deutschland, *supra* note 11.

13. In an important forthcoming article—a draft version of which the author kindly showed to me—it has been effectively argued that the many existing differences make the development of an effective market for corporate charters in Europe doubtful. Luca Enriques, *EC Company Law and the Fear of a European Delaware*, EUR. BUS. L. REV. (forthcoming), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=553885 (last visited Nov. 4, 2004).

14. For an institutional analysis of the causes and consequences of the relatively high level of stability of corporate control in Italy, see Richard Deeg, Corporate Governance Italian Style: Is the Northern Galaxy Realigning or Going Supernova? (2004) (unpublished manuscript), *available at* http://www.europanet.org/conference2004/papers/G2_Deeg.pdf (last visited Nov. 2, 2004).

II. FINANCING THE CORPORATION

The first category of new rules, which will significantly affect both listed and unlisted corporations, is the liberalization of rules concerning the types of equity and debt financial instruments that can be issued. The Reform has done away with some of the old taboos, such as those that restricted what rights could be attached to shares and bonds and those that fixed the financial equilibrium of the corporation.

A. New Categories of Shares and Freedom of Contract

To appreciate the level of innovation brought by the Reform, it is necessary to understand pre-Reform restrictions. Prior to the Reform, the "genetic make-up" of various categories of shares had significant limitations.[15] First, there were ordinary shares, which were shares that enjoyed full voting rights in both the ordinary and extraordinary shareholders' meetings and whose economic rights were linked to the financial success of the corporation.[16] By contrast, another type of shares, called limited voting shares, could vote only in the extraordinary shareholders' meeting, which meant voting on amendments to the articles of incorporation or bylaws, including such matters as the issuing of new shares, mergers, spin-offs, and the issuing of bonds.[17] In other words, with limited voting shares, voting rights could be limited to exclude all matters within the competence of the ordinary shareholders' meeting, such as appointing and removing the directors, suing the directors for liability toward the corporation, approving the annual financial statements and the dividend policy, and nominating the auditors.[18] This was, however, the only way in which voting rights could be limited.

Another important limitation was that whenever limited voting shares were issued, the bylaws were required to provide for some economic advantage over ordinary shares to "compensate" for the limitation on voting rights.[19] The law did not quantify the measure of this economic privilege. It could, for example, be a premium over the dividends distributed to ordinary shareholders, a fixed dividend (distributed in case there were distributable profits), or a preference (in case of the liquidation of the corporation). Most scholars who considered this requirement concluded that the privilege had to be "effective," meaning that utterly trivial privileges would not suffice. For example, a 0.5% increase over the

---

15. For an overview of the issues regarding categories of shares prior to the Reform, see Massimo Bione, *Le Azioni*, *in* TRATTATO DELLE SOCIETÀ PER AZIONI 44 (G.E. Colombo & G.B. Portale eds., 1999); GIAN FRANCO CAMPOBASSO, MANUALE DI DIRITTO COMMERCIALE 192 (2d ed. 2003) [hereinafter CAMPOBASSO, MANUALE].

16. Under Italian law (and similarly in several civil law countries based on the French tradition, such as Spain and some South American systems), enjoying voting rights in the ordinary and the extraordinary shareholders' meetings has a particular meaning. The table in Appendix A synthesizes the relative competences and their required quorums and majorities according to the new Articles 2368 and 2369 of the Civil Code. *See* App. A; C.C. arts. 2368–2369. It should be noted that in a system in which it is possible to issue shares with voting rights limited to the extraordinary shareholders' meeting, the shareholders controlling the ordinary and the extraordinary meeting may have different interests. Needless to say, it is the majority of the votes in the ordinary meeting that determines who "controls" the corporation, since this is the meeting in which directors are appointed, financial statements are approved or rejected, and so on. For an overview of the various competences and powers of entities in the Italian system, see Appendix A.

17. Bione, *supra* note 15, at 57 n.38.

18. See, prior to the Reform, Pietro Abbadessa, *L'Assemblea: Competenza*, *in* TRATTATO DELLE SOCIETÀ PER AZIONI 3 (G.E. Colombo & G.B. Portale eds., 2000).

19. Bione, *supra* note 15, at 49.

amount of dividends distributed to holders of ordinary shares would probably have been deemed insufficient to satisfy this requirement, even if a precise line had not been drawn.[20]

In addition to these general parameters, only corporations that had issued shares listed on a regulated market could issue nonvoting shares, meaning shares with no voting rights attached.[21] The underlying assumption for this exception was that this type of securities could attract "passive" investors, who are interested in holding equity financial instruments but not in actively partaking in the life of the corporation.

Introduced into the Italian corporate law system by a 1974 statute, nonvoting shares (*azioni di risparmio*) were originally required to pay their holders a minimum dividend whose measure was rigidly defined by the statute.[22] By the end of the 1990s, however, it had become clear that a predefined economic privilege was an ineffective way to "compensate" for the lack of voting rights because statutorily defined benefits could easily become meaningless if there were significant changes in either the corporation's economic profile or the market.[23] As a consequence, Legislative Decree No. 58 of 1998 changed the regulation of nonvoting shares, establishing a rule similar to the one applicable to limited voting shares. The Decree required only that the issuance of nonvoting shares by listed corporations be accompanied by a privilege that was "effective," but it left the measure of this privilege to market forces.[24]

With the Reform, most of the above-described limitations disappeared.[25] First, pursuant to the new version of Article 2351 of the Civil Code, it is now also possible for nonlisted corporations to issue nonvoting shares. Moreover, there is now much greater flexibility regarding how voting rights can be limited. Whereas prior to the Reform, the only option available to a nonlisted corporation was to issue shares that could vote exclusively in the extraordinary meeting, under the new rules, it is now possible to issue

---

20. *See* Bione, *supra* note 15, at 55 n.34. It is worth pointing out that before the Reform, while it was always necessary to provide for an economic privilege when limited voting shares were issued, it was nevertheless possible to issue shares that enjoyed certain economic privileges without imposing limitations on their administrative rights.

21. For an analysis of the underlying theoretical arguments of the regulation of nonvoting shares, see Mario Notari, *Comment to Art. 145*, *in* LA DISCIPLINA DELLE SOCIETÀ QUOTATE NEL TESTO UNICO DELLA FINANZA 1531 (Piergaetano Marchetti & Luigi Arturo Bianchi eds., 1999).

22. Pursuant to Law No. 216 of June 7, 1974, the company had to pay to the holders of nonvoting shares a portion of the net profit equal to 5% of the nominal value of the nonvoting shares. Legge 7 Giugno 1974, n.216, Gazz. Uff. n.149 (June 8, 1974). Moreover, the residual net profit, if allotted, had to be distributed between all the shareholders such that holders of nonvoting shares received a global dividend whose measure was equal to 2% of the nominal value of the nonvoting shares in comparison with the measure of the ordinary shares dividend. *Id.* A similar approach has been followed—as will be discussed in the text—in many European countries over the last few decades: in Spain, for instance, the 1989 Ley de Sociedades Anónimas introduced nonvoting shares, providing that they must pay a minimum dividend of 5% over their par value. Arts. 91–92 of the Ley de Sociedades Anónimas (R.C.L. 1989, 2737). The very limited fortune of this financial instrument led the legislature, in 2003, to liberalize the measure of the economic privileges eliminating the fixed dividend and leaving the determination of an adequate privilege to the bylaws. The evolution of the Spanish regulation on nonvoting shares recalls the Italian one—as well as the limited success among investors of this kind of shares—seem to suggest that "one-share, one-vote" is what financial markets prefer. On the Spanish experience, see Ignacio Farrando Miguel, *Las Acciones sin Voto y el Valor del Derecho de Voto*, 206 REVISTA DE DERECHO MERCANTIL 767 (1993).

23. For example, a minimum dividend of 2% of par value could be virtually worthless if the market price per share was four times the par value. In that case, the real return on investment, considering the price paid to buy the share on the market, would be 0.5%. Unsophisticated investors might not perceive this distinction and would therefore expect a minimum dividend much higher, in real terms, than what they would actually receive.

24. *See* Notari, *supra* note 21, at 1531.

25. Francesco Dimundo, *Comment to Art. 2351*, *in* SOCIETÀ PER AZIONI, AZIONI, SOCIETÀ CONTROLLATE E COLLEGATE 83 (Giovanni Lo Cascio ed., 2003); Mario Notari, *Disposizioni Generali. Conferimenti. Azioni*, *in* DIRITTO DELLE SOCIETÀ: MANUALE BREVE 131 (2004).

shares that vote only on "specific topics," independent of whether those topics fall within the competence of the ordinary or the extraordinary shareholders' meeting.[26] For example, corporations can issue shares that vote only on the appointment of new directors, or only to approve the balance sheet, or only to determine the dividend policy—all matters that fall within the competence of the ordinary shareholders' meeting.[27] Alternatively, a corporation can now issue shares that vote only regarding whether the corporation will issue new shares or to approve a merger, both of which are matters traditionally reserved to the extraordinary meeting.[28] In addition, various topics that had been traditionally bifurcated between the ordinary and extraordinary meeting can also be combined, meaning that after the Reform it is possible to issue a category of shares that vote, for example, on the election of directors (in the ordinary shareholders' meeting) and on the issuing of new shares (in the extraordinary shareholders' meeting).

Again with respect to categories of shares, it is also now possible to issue shares whose voting rights are conditioned upon the occurrence or nonoccurrence of future events. For example, shares can be issued that do not generally carry any voting rights or that have voting rights limited to specific topics but that "recover" full voting rights if, according to specified indicators, the economic situation of the corporation is deteriorating.[29] Such an instrument might be appealing to a creditor, such as a bank, which would not generally be interested in participating in the life of a corporation that is financially sound and regularly paying its debts, but which might want to "raise its voice" if the possibility of default were to become real. Alternatively, shares with voting rights that are limited to the occurrence of certain events can also be used as a defensive measure in the event of a hostile takeover attempt. For example, it is possible to issue shares to the controlling shareholder for which the voting right is triggered by the launching of a hostile takeover, thereby making it easier to resist the attack by approving appropriate defensive measures.[30]

Another important innovation of the Reform is that when limited voting shares are issued, it is no longer necessary to compensate their owners with an economic privilege.[31] The underlying assumption is that if an economic privilege is necessary to sell the shares, market forces will determine its existence and measure and there is no need for the law to impose it. This approach represents further progress on a scale that started with statutorily mandated percentages and then shifted to the requirement that compensation be simply economically "effective."[32] These changes also demonstrate a shift from mandatory—and, someone might say, paternalistic—rules designed to protect investors toward a system in

26. *See supra* note 16.

27. *See* C.C. art. 2351.

28. *Id.*

29. By way of example, a category of shares can be imagined, subscribed to (at a lower issuing price than the one applied to full-voting shares) by creditor banks, that gives voting rights when the debtor corporation does not repay, within a certain deadline, one installment of a loan, or when some financial ratios indicate the likelihood of a situation of crisis, or of a partial or total default (for instance, cash flow over sales or other similar measures, even combined).

30. While this example is possible under the terms of the Reform, Legislative Decree No. 37 of February 6, 2004 (a recent statute that coordinates the Reform with other statutes, such as the Legislative Decree No. 58, *supra* note 5), provides that a hostile takeover itself is not sufficient to trigger such "dormant" voting rights, but instead that their exercise must be approved by the shareholders' meeting with at least 30% of the votes. Decreto Legislativo 6 Febbraio 2004, n.37, art. 9.64, Gazz. Uff. n.37 (Feb. 14, 2004) [hereinafter Legislative Decree No. 37], *available at* http://gazzette.comune.jesi.an.it/2004/37/4.htm (last visited Nov. 3, 2004). Notwithstanding this rule, it might still be advantageous to issue these kinds of shares, for example, if the controlling shareholder holds more than 30% of the outstanding shares. In that situation, she might be able to subscribe these shares and, once a hostile takeover is launched, approve the "resurrection" of the voting rights, thereby raising the threshold that the bidder must reach (and increasing the cost of the takeover) to obtain control of the corporation.

31. The new versions of Articles 2348 and 2351 have abolished this rule. C.C. arts. 2348, 2351.

32. Notari, *supra* note 21, at 1563.

which the forces of the market are expected to determine the optimal measure of privileges in general and the desirable mix of administrative and economic rights attached to equity financial instruments in particular.[33]

In addition to this liberalization, it is now possible in closely held corporations to limit a single shareholder to a maximum number of votes independent of the number of shares she holds.[34] For example, now one shareholder, no matter her threshold of participation in the corporation, can be limited to exercising no more than 10% of the voting rights. It is also possible to stagger voting rights, for example, to provide that one shareholder is entitled to one vote per share if she owns up to 20% of the outstanding shares, one vote for every two shares if she owns between 20% to 40% of the outstanding shares, and one vote for every four shares for any participation above those levels. These provisions, available only for nonlisted corporations, could be used to create a more "democratic" power structure within the corporation and to limit the power of holders of a significant percentage of shares. On the other hand, these provisions might interfere with the market of corporate control, and for this reason they are forbidden in listed public corporations.

Given the extent of the innovations introduced by the Reform, it seems worth asking what remains applicable of the previous regulations regarding voting rights. The answer is, not much. Probably the most important rule that remains in place is the provision that limited voting shares cannot exceed one-half of the legal capital.[35] The purpose of this rule, which remains valid even in light of the perceived need to increase contractual freedom, is to avoid an excessive separation between ownership and control through indiscriminate issuing of limited or nonvoting shares. The other significant rule that remains is the

33. Not all continental European countries provide for such a degree of flexibility. Portuguese corporate law, for instance, has quite rigid standards in the issuing of different categories of shares. According to Professor Antunes:

> The freedom of creation of classes of shares is, however, not as large as the legal formula may appear—the opposite actually holds true. The most prominent example of this contractual freedom are *nonvoting preference shares* ("acções preferenciais sem voto"), which entitle holders with a priority and cumulative dividend of at least 5% of their nominal value while depriving them of their voting rights: contrary to what one could expect, such hybrid class [h]as [sic] almost no practical significance concerning private as well as public corporations, probably for tax reasons (the remunerations paid to shareholders are not considered as a fiscal cost, being therefore not deductible) and also for the hidden risk of "recovery" of the attached voting rights (which is a mandatory consequence of the unpayment to holders of the preferential dividend for two consecutive years: cf. art. 342°, n 3 CSC). Other types of shares categories, also expressly admitted by statutory law, are the so-called *redeemable shares* ("acções preferenciais remíveis")—a sort of preference shares which are to be redeemed or are liable to be redeemed at the option of the corporation or of the shareholder according to the terms of issuing (art. 345° CSC)—, and the *reimbursed shares* ("acções de fruição")—a class of shares that follows the amortization of a part of the share capital and its repayment to shareholders (art. 346° and 347° CSC). On the opposite, a significant set of classes of shares, namely those concerning the voting rights, it is not foreseen by statutory law, if not even expressly prohibited. Thus, similarly to many European legal orders, Portuguese law forbids the issue of shares *with plural, cumulative or double voting* (art. 384°, n° 5 CSC); likewise, shares *carrying limited voting* (such as the Italian "azioni a voto limitato") are not permitted.

Antunes, *supra* note 11, at 25–26 (footnotes omitted).

34. The possibility to limit, through a bylaws provision, the maximum number of votes that can be exercised by one single shareholder, independently from her participation, is common to many European countries, such as Portugal, Germany (*Höchststimmrecht*), and France (*clauses de plafonnement*). *See* Theodor Baums, *Höchststimmrecht*, 35 DIE AKTIENGESELLSHAFT 221, 225 (1990); Antunes, *supra* note 11, at 32. In Spain, Article 105.2 of the Ley de Sociedades Anónimas regulates the issuance of limited voting shares. *See* ANDRÉS RECALDE CASTELLES, LIMITACIÓN ESTATUTARIA DEL DERECHO DE VOTO EN LAS SOCIEDADES DE CAPITAL (1996).

35. C.C. art. 2351, para. 2.

prohibition against the issuance of multiple voting shares, which are used in some North European legal systems as an antitakeover device, as noted in the recent EU debate on the Thirteenth Directive.[36]

This discussion illustrates vividly how the Reform has significantly increased the freedom of contract enjoyed by controlling shareholders and, indirectly, directors, in designing the rights attached to different categories of shares. It is not possible, in the space of this paper, to detail the different possible effects of these various sources of increased flexibility, although it is intuitively obvious that it will be now easier to "custom-tailor" shareholders' rights to the specific needs and preferences of a particular corporation and investor. The question remains, however, whether and to what extent the benefits of the reduction of standardization exceed its potential costs. I will take up this question in my conclusions once we have a broader picture of the entire Reform.

B. *Tracking Stocks*

Another major innovation of the Reform is the introduction of tracking stocks. Derived from the U.S. experience, tracking stocks are designed to unlock the hidden value of a corporation.[37] The purpose of this new instrument is to allow corporations to issue equity instruments that trace the performance of a specific division or business of the corporation, instead of the entire corporation, and pay dividends (assuming sufficient funds are available at the corporate level) tied to the results of the specified division or business. Through this new instrument, a corporation that manages different businesses, which are characterized by different combinations of risk and expected return on investment, will be able to attract investors who are interested in only one or some of these businesses without having to go through a spin-off of the business.[38]

An example will help illustrate. Assume A is a corporation with two aspects to its business, B and C. Further suppose that B is a traditional business in a mature industry with a low level of risk, a relatively stable flow of earnings (let's say €10 per year with a 95% likelihood of return), while C is a very innovative new business with significant growth potential but also significant risks associated with it (say a 50% chance that it will obtain €100 in profits and a 50% chance that will sustain €100 in losses). Before the Reform, unless the corporation separated the two businesses (for instance by creating a separate legal entity through a spin-off), the shares issued and offered to investors would have presented a level of risk and return that was a combination of the two activities. Under certain conditions, it might have been possible that very risk-adverse investors were willing to pay a higher price for shares that track only the traditional business B, and investors with a higher propensity to risk were willing to pay a higher price to participate

---

36. Council Directive 2004/25, 2004 O.J. (L 142) 12. The issue of proportionality between investment and voting powers in the takeover context is discussed in the Report of the High Level Group of Company Law Experts on Issues Related to Takeover Bids, at 21–23 (Jan. 10, 2002), http://www.europa.eu.int/comm/internal_market/en/company/company/official/index.htm (last visited Nov. 2, 2004). For a discussion of vote differentiation in Europe and its relationship to concentrated ownership structures, see Jesper Lau Hansen, *When Less Would be More: The EU Takeover Directive in Its Latest Apparition*, 9 COLUM. J. EUR. L. 275, 286–89 (2003); *see also* JOSEPH A. MCCAHERY ET AL., CTR. FOR EUR. POLICY STUDIES, THE ECONOMICS OF THE PROPOSED EUROPEAN DIRECTIVE 49–51 (2003) (describing the opposition of Nordic European Union Member States to harmonized takeover rules designed to undermine multiple voting shares as a defensive mechanism for a target corporation).

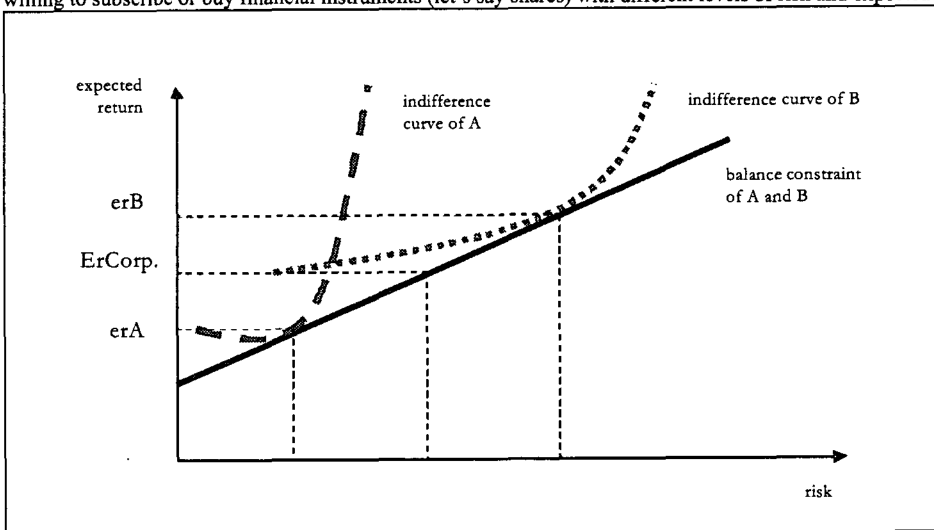
37. For a discussion of tracking stocks in the U.S. system and their possible transplantation to other legal systems, such as Germany, see generally York Schnorbus, *Tracking Stock in Germany: Is German Corporate Law Flexible Enough to Adopt American Financial Innovations?*, 22 U. PA. J. INT'L ECON. L. 541 (2001).

38. *See* Dimundo, *supra* note 25, at 73; G. Mignone, *"Tracking Shares" e "Actions Reflet" come Modelli per le Nostre "Azioni Correlate"*, 56 BANCA BORSA TITOLI DI CREDITO 610, 610–19 (2003).

only in the business of C. Such investors, however, could only evaluate and invest in company A as a whole. With tracking stocks, it becomes possible to meet the preferences of these different categories of investors without any corporate reorganization by issuing different categories of shares that track the different business units.[39]

One important limitation on the remuneration of tracking stocks is that no dividends can be distributed unless there are sufficient legally available funds in the corporation. Therefore, the remuneration of the different tracking shares will still be linked to the results of the corporation as a whole, in the sense that losses in one business unit could erode profits in others, and therefore affect the measure of distributable dividends. Figure 1 illustrates this consequence using four hypothetical situations.

39. Assume A and B are two investors, the former more risk adverse than the latter. Their balance constraint is the same. If we draw their indifference curves and their balance constraints on a graph, we see that they will be willing to subscribe or buy financial instruments (let's say shares) with different levels of risk and expected return:



As the graph shows, investors A and B, according to their preference structure, would be willing to buy shares that present different combinations of risk and expected return. A is more risk adverse and therefore would be better off with a lower expected return and a lower risk. For B, the reverse is true. Imagine that Corporation X can only offer shares with the indicated level of expected return and corresponding risk, representing an average between A and B's favorite combinations. It is clear that, in the situation described, X will not be able to maximize its flow of capital, and at least one of the two investors represented in this microeconomic system will not maximize her utility. In this situation, the separation of X's business into A and B and the issuing of stocks that track A and B separately (therefore offering two different risk/earning profiles) might represent a Pareto-optimal solution, allowing different investors to obtain exactly the risk/earning combination that they desire.

	Business Unit Of A	Profit/Loss of the Business Unit	Profit/Loss of Corporation A as a Whole	Maximum Dividend Distributable to Each Business Unit (all other variables being equal)
Situation 1	B	10	110	10
	C	100		100
Situation 2	B	10	- 90	0
	C	- 100		0
Situation 3	B	- 5	95	0
	C	100		95
Situation 4	B	20	5	5
	C	- 15		0

Figure 1—Tracking stocks and distributable dividends

In situation 2, for example, the losses arising from business C erode the profits derived from business B, with the consequence that no dividends can be distributed to any stockholder. On the other hand, in situation 4, the losses of C do not completely erode B's profits, with the consequence that the (lower) profits of B are entirely distributed to holders of stocks tracking the business unit B.

If the possible advantages of this instrument are clear, so are its potential risks.[40] The issuing of tracking stocks can create (or exacerbate) internal conflicts of interest each time that assets and resources are allocated to one of the business units. As commentators have pointed out for tracking stocks issued in the United States, when the interests of tracking stockholders come into conflict with other shareholders, there is one board of directors that must resolve the problem for both groups.[41] In addition, accounting rules for determining profits and losses of each business unit are extremely delicate, particularly considering that there

40. As one scholar explains, "[t]he prevailing financial press and academics are pessimistic regarding the issuance of tracking stock." Schnorbus, *supra* note 37, at 554. Some experts estimate that tracking stocks trade at a discount of up to five to ten percent. *Id.* at 555. On the other hand, some experts argue that tracking stocks have the potential to create value by reducing agency costs. *See* Peter H. Huang & Michael S. Knoll, *Corporate Finance, Corporate Law and Finance Theory*, 74 S. CAL. L. REV. 175, 187–88 (2000).

41. Bruce N. Hawthorne & Andrew M. Tebbe, *Tracking Stock: Terms, Methods of Issuance, Advantages and Disadvantages*, 1279 PLI/CORP 254 (2001). To alleviate this problem, some companies implement policies setting forth procedures that the board of directors will follow in resolving conflicts between business units when they issue tracking stocks. *See id.* The Reform does not impose any such obligations on corporations issuing tracking stocks.

are fixed and general costs that must be allocated to the different business units. While accountants have developed rather sophisticated and rational techniques to divide and allocate such costs, it is certain that the very choice of accounting techniques, as well as their day-to-day application, will carry a lot of discretionary power.[42]

One of the potential problems with the new regulation of tracking stocks in Italy is that it leaves accounting criteria and reporting duties entirely to the bylaws (Article 2350 of the Civil Code).[43] The underlying premise is, once again, that market forces will evaluate whether the accounting and reporting rules provided for in a corporation's bylaws are investment worthy (or, more precisely, are sufficient to determine the reserve price for this particular investment). This premise, however, relies on the assumption that there exists an efficient market of information on which investors can rely in making their decisions. Looking to the foreign experiences that inspired this instrument, and in particular to tracking stocks issued by U.S. and French corporations,[44] the absence of uniform, straightforward, and reliable accounting rules on which investors could rely limited the use of the instrument.[45] In the Italian context, more specific rules from the legislature could reduce the degree of uncertainty about how the performance of the different units is compounded. While such rules would reduce bargaining costs and information asymmetries, the Italian legislature did not see fit to issue them.[46]

C. The Issuing of Shares: Preemptive Rights and the Broadening of Directors' Powers

In addition to new rules on the rights of shareholders, the Reform also includes many important innovations regarding issuing procedures. There are two aspects in particular that are worth our consideration: the new possibility to limit or exclude shareholders' statutory preemptive rights when new shares are issued and the expansion of the powers that the shareholders' meeting can entrust to directors in the issuing of new shares.

Before discussing the specific changes, it is once again helpful to understand the existing regulatory framework against which the Reform was enacted and which continues to operate in many contexts.[47] Under Italian law, as in many legal systems, existing shareholders enjoy a statutorily mandated preemptive right to subscribe whenever new

42. For a thorough discussion of the "unique and formidable challenges" presented to directors by the use of tracking stocks and a related call for imposition of a duty of fairness, see Jeffrey J. Hass, *Directorial Fiduciary Duties in a Tracking Stock Equity Structure: The Need for a Duty of Fairness*, 94 MICH. L. REV. 2089, 2091 (1996).

43. C.C. art. 2350.

44. *See* Schnorbus, *supra* note 37, at 546–52. In Spain, on the contrary, this type of shares has not attracted—at least not so far—the attention of policy makers. *See* Farrando, *supra* note 11, at 7.

45. *See supra* notes 40–41.

46. Another issue left opened by the Reform with respect to tracking stocks is the lack of clarity about whether the business unit to be tracked could be, instead of an internal unit of the corporation, also a controlled corporation. Particularly for listed corporations with nonlisted subsidiaries, this might be an attractive way to unlock hidden value in their controlled corporations. In this respect, if shares tracking the results of a controlled corporation are designed as preferred shares with a variable privilege linked to the profits of a subsidiary and if the dividends are—as they must be—paid only out of the legally available funds of the holding corporation (therefore, the results of the subsidiary simply represent a variable to which the measure of the privilege is linked), it would appear possible to issue this kind of instrument. Since the subsidiary is required by law to publish a yearly financial statement, the accounting problems described above are even less severe.

47. For a discussion of preemptive rights before the Reform, see generally GIAN FRANCO CAMPOBASSO, DIRITTO COMMERCIALE, 2. DIRITTO DELLE SOCIETÀ 460 (4th ed. 1999) [hereinafter CAMPOBASSO, DIRITTO COMMERCIALE]; FRANCO DI SABATO, MANUALE DELLE SOCIETÀ 368 (1999); GIANVITO GIANNELLI, L'OPZIONE INDIRETTA (1993); RAFFAELE NOBILI, CONTRIBUTO ALLO STUDIO DEL DIRITTO D'OPZIONE NELLE SOCIETÀ PER AZIONI (1958).

shares were issued (the so-called *diritto di opzione*). Article 2441 of the Civil Code provides that every shareholder has the right to subscribe to newly issued shares in proportion to her participation for a consideration in cash.[48] If shareholders reserve at the time they subscribe to the new shares, shareholders who exercise this right also have the right of first refusal with regard to shares that were not subscribed to by other shareholders under their preemptive rights.[49] As a consequence, directors are not generally free to allocate shares as they see fit, but instead are required to first offer them to existing shareholders. Only those shares that are not opted for could be offered to third parties, and different rules govern the manner in which those shares could be offered depending on whether the shares are listed or not.[50]

There are situations in which shareholders' preemptive rights might adversely affect the corporation, such as when there is a conflict of interest between shareholders, who are interested in maintaining or increasing their participation in the corporation, and the corporation itself. As we will see later, for various reasons, the corporation might be better off allowing subscription by a third party or, in any case, not in exact proportion to existing shareholders' ownership. Article 2441 of the Civil Code recognized this potential problem by providing specifically enumerated situations in which the shareholders' preemptive right can be limited or excluded.

Until the Reform, there were only three such situations. First, the corporation could (and still can after the Reform) interfere with preemptive rights "whenever the interest of the corporation" requires the exclusion or limitation of the preemptive right.[51] This exception can be successfully invoked only in a limited number of circumstances, such as if it were necessary to increase the number of shareholders in order to develop a number of outstanding floating shares sufficient to obtain (or maintain) listing on a stock exchange. A second exception, which might be considered a particular application of the first exception, was (and still is) when newly issued shares have to be paid for with a contribution in kind. In this situation, the interest of the corporation in obtaining a particular contribution in kind (such as a building, patent, or trademark) owned by a third party would be deemed superior to the interest of the existing shareholder in maintaining their proportional participation. The third and last situation in which preemptive rights were limited prior to the Reform was when new shares were issued to employees in order to facilitate employees' ownership of the corporation.

The provision of preemptive rights is designed to avoid having new share issuances impose a double prejudice on existing shareholders. On the one hand, when new shares are issued, shareholders end up with less power within the corporation because their proportion of participation has been reduced.[52] If shares were offered at a price that is lower than their

48. C.C. art. 2441. If different categories of shares exist and new shares are issued in proportion to every category, the preemptive right attached to shares of a specific category is exercised firstly on newly issued shares of that category. By contrast, if shares are issued not in proportion with the existing categories (for instance, in a corporation with full and limited voting shares outstanding, if only full voting shares are issued), the preemptive right can also be exercised with regard to shares belonging to a different category.

49. *Id.*

50. In case of nonlisted shares, the existing shareholders who reserve at the time they subscribe the shares also have the right of first refusal with regard to nonopted shares. In case of listed shares, the directors must offer in a regulated market, for at least five market days, the preemptive rights regarding shares that have not been exercised. Only if the right of first refusal (for nonlisted shares) is not exercised, or in the event of an inability to sell the preemptive rights on a regulated market (for listed shares), the directors are free to allocate shares that have not been exercised as they see fit. *Id.*

51. *See* C.C. art. 2441, para. 5. For an examination of the rule before the Reform, see CAMPOBASSO, DIRITTO COMMERCIALE, *supra* note 47, at 460.

52. It is perfectly understandable, therefore, why systems characterized by "strong" controlling shareholders usually grant equity holders a preemptive right and restrict the number of cases in which the right can be limited.

fair market value, shareholders might also suffer a loss in the existing goodwill of the corporation. For example, the subscription price for shares may be set at €1 to reflect the accounting value based on the corporation's financial statement, but the corporation may own a patent whose real value exceeds 100% of its book value, with the consequence that the actual value of the shares is €1.3.[53] In this case, the new shareholders would (as noted above) obtain a level of participation that infringes on existing holders' proportion, and they would obtain that participation at a cut rate, leaving existing shareholders worse off in real economic terms.

To reduce the possibility of this type of prejudice, in particular to minority shareholders, the Civil Code provides certain protections. When preemptive rights are limited or excluded, the new shares must be issued at a price higher than their par value.[54] The extent to which the issuing price exceeds the par value (in Italian, *sovrapprezzo*) is not set by the law, but the law provides some guidance for its determination depending on whether or not the shares are listed. If the shares are listed, the issuing price must be determined by taking into account the market price in the last six months.[55] If the shares are not listed, the Civil Code simply provides that the price must be determined by taking into account the net value of the corporation (assets minus liabilities).[56] In both cases, a formal proposal to issue new shares must be prepared by the directors, which explains the reasons why the preemptive right has been excluded and sets forth the criteria used to determine the issuing price. Moreover, the board of auditors must issue an opinion verifying the fairness of the issuing price.

Adding to this existing framework, the Reform introduced a new basis for excluding or limiting preemptive rights, which applies only to corporations issuing shares listed on a regulated market. New paragraph 4 of Article 2441 of the Civil Code provides that the bylaws of a corporation with shares listed on a regulated market can exclude the shareholders' preemptive rights for up to 10% of the existing legal capital, provided that the issuing price equals the "market value" of the shares and that this prerequisite is verified by an ad hoc report issued by the external auditing firm in charge of the certification of the corporation's financial statements.[57]

For listed corporations, the new rule operates as a general liberalization—up to 10% of the existing capital—of restrictions on issuing shares without preemptive rights but protects existing shareholders by regulating the issuing price. While in theory this approach appears sound, the Reform leaves a significant ambiguity that may need to be redressed by courts and scholars. The Civil Code simply states that the price must be equal

---

On the other hand, in systems characterized by widespread ownership structures and a majority of public listed corporations, the preemptive right is usually not a major policy issue in corporate law.

53. This scenario is not merely hypothetical in systems, such as the Italian one, where accounting principles are based on historic cost for conservative reasons, rather than on fair value. In fact, notwithstanding the fact that shareholders control the issuing procedure by voting on it, in case the majority decides to exclude the preemptive right, for instance in order to favor a bank interested in becoming a shareholder of the corporation, minority shareholders would suffer the double prejudice described above.

54. For a discussion of par value, see BAYLESS MANNING & JAMES J. HANKS, LEGAL CAPITAL 22–29, 40–41 (3d ed. 1990).

55. C.C. art. 2441, para. 5.

56. *Id.*

57. For a discussion of the new rule, see Piergaetano Marchetti, *Gli Aumenti di Capitale*, *in* IL NUOVO ORDINAMENTO DELLE SOCIETÀ, *supra* note 4, at 267, 271; Gian Luca Greco, *Commento*, *in* LA RIFORMA DELLE SOCIETÀ: COMMENTARIO DEL D.LGS. 17 GENNAIO 2003, N. 6, 915 (Michele Sandulli & Vittorio Santoro eds., 2003); Mario Notari, *Appunti sul Diritto di Opzione Nella Riforma delle Società*, 56 RIVISTA DEL NOTARIO 841 (2002); Fernando Platania, *Comment to Art. 2441*, *in* SOCIETÀ PER AZIONI, OBBLIGAZIONI, BILANCIO, RECESSO, OPERAZIONI SUL CAPITALE 475 (Giovanni Lo Cascio ed., 2003).

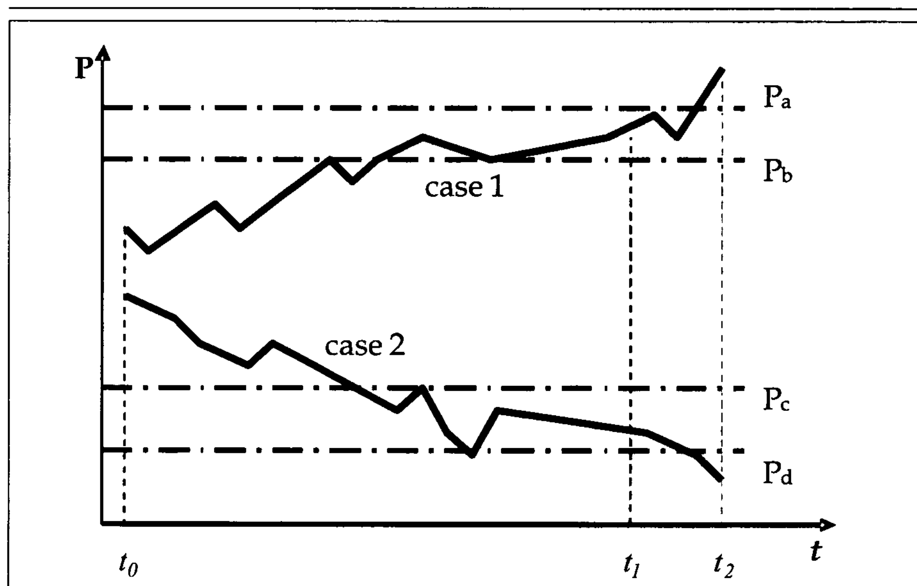
to the "market value" of the shares, as certified by an auditing firm, but it does not provide any meaningful guidance for how to determine that value.[58] It might be argued, in fact, that the expression "market value" is imprecise, if not utterly confused. The "market," particularly a regulated financial market, expresses a "price" and not a "value." As the theory of evaluation explains, there are "market prices" and "values derived from market prices."[59] The terminology of the Reform, however, seems to conflate these two, eliding distinctions that in some instances can mean dramatic differences in value. In addition to this definitional problem, and perhaps relatedly, the Reform also fails to answer numerous questions about how this "market value" should be determined. Should the "market value" be determined by a mean of market prices (as seems intuitive)? In that case, what time frame should be used to calculate the mean? Two or three days? One week? Fifteen days? From what point should this time period be measured—from before the shareholders' (or board) meeting approving the issuing of new shares? What about the period subsequent to the resolution but precedent to the public offer? Apart from the question of time, should the mean be a weighted average, taking into account, for example, variables such as the volume of exchanges?[60]

58. Gaia Balp & Marco Ventoruzzo, *Esclusione del Diritto d'Opzione nelle Società con Azioni Quotate nei Limiti del Dieci per Cento del Capitale e Determinazione del Prezzo di Emissione*, 49 RIVISTA DELLE SOCIETÀ 795 (2004); Stefano Cerrato, *Comment to Art. 2441*, *in* IL NUOVO DIRITTO SOCIETARIO 1502, 1530 (Gastone Cottino et al. eds., 2004).

59. It is almost intuitive that, no matter how reliable market prices can be considered in determining the value of the firm, it is always necessary to make a choice concerning how the market prices should be used to determine the value of the shares. For instance, it can be decided to simply take the average market price of one particular trading day, but even this apparently simple solution implies several options: which day, whether to use a compounded average price or not, and, if so compounded, with what weights, and so on. The issue is even more complex when the "market value" is calculated—as it probably should not be—by taking into account only one day of trading rather than a more or less extensive period of time. In addition, the delicate issue of minority and majority discounts could further complicate the scenario. Extensive literature exists on the problem of how a "market value" should be derived from "market prices": see, e.g., Richard M. Morton & John D. Neill, *The Relation Between Market Prices and Fundamental Value Surrounding a Corporate Restructuring* (Sept. 1997) (unpublished manuscript), *at* http://ssrn.com/abstract=39966 (last visited Nov. 4, 2004); Richard A. Booth, *Minority Discounts and Control Premiums in Appraisal Proceedings*, 57 BUS. LAW. 127 (2001); LUIGI GUATRI, TRATTATO SULLA VALUTAZIONE DELLE AZIENDE (Egea 1998), in particular paragraph 1.3 for a discussion of the different definitions of "price" and "value" and paragraphs 11.82 *et seq.* for an analysis on how to derive the "value" of a participation from the value of the firm, taking into account also possible control premiums and minority discounts.

60. To illustrate the potential impact of various answers to these questions, consider the following Figure:

Obviously, some flexibility in setting the issuing price is necessary because the corporation needs to be able to adjust it to accommodate market conditions and apply a "discount" on the actual market price.[61] Otherwise, investors would not subscribe to the new shares because they could find shares at the same price on the market. The benefits of flexibility can be undercut, however, by the costs of unpredictability. Without either guidance from the legislature about how the "market value" should be determined or, at a minimum, mandated requirements that corporations pre-publish the standards they will use, the flexibility allowed can easily result in disputes over the issuing price.[62] Alternatively, this problem could be ameliorated by entrusting the authorities that regulate listed corporations (such as the Stock Exchange Commission or the Italian Stock Exchange) with the power to determine what elements should be taken into account in determining the issuing price. This assignment of regulatory competence, already adopted in the field of compulsory takeovers,[63] could reduce the potential uncertainties without precluding flexibility.



In case 1, where prices are rising, calculating the average price—and therefore the "value" of the shares to be issued—on the time horizon t_0-t_2 (for instance, three weeks) will lead to the average price P_b; on the other hand, assuming as a basis for the calculation the shorter time interval t_1-t_2, this should determine a higher issuing price (P_a). The opposite is true in the bearish market illustrated in Case 2. The consequence of this reasoning is that when prices are rising, a shorter time horizon might lead to the determination of an issuing price that might affect the convenience of the transaction for the subscribing investor, but be more fair from the point of view of old shareholders whose option rights are limited, and vice versa in cases of descending prices.

61. For a detailed analysis of valuation issues under U.S. law in analogous contexts, see John C. Coates IV, *"Fair Value" as an Avoidable Rule of Corporate Law: Minority Discounts in Conflict Transactions*, 147 U. PA. L. REV. 1251 (1999).

62. For an overview of value disputes in the United States and judicial techniques for resolving them, see *id.* at 1280–87.

63. *See* Legislative Decree No. 58, *supra* note 5, art. 10; *see also* Consob Regulation No. 11971/1999, art. 50, *available at* http://www.consob.it/produzione/english/Regulations/reg11971e.htm (last visited Nov. 4, 2004). With regard to listed corporations (and residual-acquisition public offers), the Consob Regulation states that "[i]n determining the offer price, the Consob shall also take into account . . . any preceding public offer; the average weighted market price of the last six months; the issuer's shareholders' equity adjusted to current value; [and] the issuer's earning results and prospects." Consob Regulation No. 11971/1999, art. 50(3). Moreover, "where the residual-acquisition tender offer obligation arises following an earlier complete-acquisition tender offer in which the acceptances were at least 70% of the shares that were the subject of the offer, Consob shall set the price equal

In addition to creating more opportunities for listed corporations to avoid preemptive rights, the Reform also makes it possible for shareholders to entrust directors with broader powers in issuing new shares. Under Italian law, the issuance of new shares increases the legal capital set by the articles of incorporation and is therefore considered an amendment to the corporate contract, meaning the issuance must be decided by the extraordinary shareholders' meeting.[64] The Civil Code allows the shareholders' meeting to delegate to the board of directors the power to issue the shares, but only within the framework designed by the shareholders' meeting resolution. Under Article 2443 of the Civil Code, the bylaws can entrust the directors with the power to raise capital by issuing new shares.[65] Prior to the Reform, it was generally believed that the shareholders' meeting could not also delegate to the directors the power to limit the statutory preemptive rights enjoyed by every shareholder. Instead, the shareholders' meeting had to affirmatively decide to limit the preemptive rights (in one of the cases in which this was allowed), at which point it could delegate the issuing of the shares to the directors.[66]

The Reform now expressly permits delegation of the decision to limit or exclude the preemptive rights to directors, together with the decision to issue new shares.[67] In light of this new rule, as well as in light of other rules that will be discussed below, the Reform represents a significant shift in power from the shareholders' meeting to directors, particularly with regard to decisions concerning the financial structure of the corporation. The broader power conferred on directors is even more striking if this innovation is considered in conjunction with the new opportunity to exclude preemptive rights for up to 10% of the capital in listed corporations. In combination, these changes mean that not only is it possible to delegate to directors the power to issue new shares that exclude the preemptive right altogether, but that it is also possible to exclude the preemptive right of up to 10% of the outstanding capital without any need for special justification or authorization, provided that the issuing price equals the "market value" of the shares. As a consequence, after the Reform, directors can be entrusted by the shareholders' meeting with extensive new powers concerning the financial and ownership structure of the corporation.

This increase in directors' powers vis-à-vis the shareholders' meeting might be regarded as a move toward a more modern system of governance in which controlling shareholders step back and allow directors to take full control and responsibility of the life of the corporation. As I will argue below, however, in an economic scenario dominated by

---

to the price of that offer, unless reasons can be adduced why recourse should be made [to the previously described elements]." *Id.* art. 50(4).

64. C.C. art. 2365.

65. *Id.* art. 2443.

66. In Italy—as well as in other continental European legal systems—in which the power to issue shares and decide on the forfeiture of the statutory preemptive rights has traditionally been entrusted to shareholders, it was discussed whether the shareholders' meeting could delegate to the directors not only the decision to issue new shares, but also to limit or exclude the preemptive rights of existing shareholders. For references to the Portuguese debate see Antunes, *supra* note 11, at 19-21; CARLOS OSÓRIO DE CASTRO, VALORES MOBILIÁRIOS: CONCEITO E ESPÉCIES 226 (2d ed. 1998); PEDRO DE ALBUQUERQUE, DIREITO DE PREFERÊNCIA DOS SÓCIOS EM AUMENTOS DE CAPITAL NAS SOCIEDADES ANÓNIMAS E POR QUOTAS 300 (1993). Under Spanish law, pursuant to Article 159.2 of the 1989 Ley de Sociedades Anónimas, the shareholders' meeting can delegate to the board of directors not only the decision to issue new shares, but also to limit shareholders' preemptive rights. Art. 159.2 of the Ley de Sociedades Anónimas (R.C.L. 1989, 2737).

67. It must be noted that although the Reform allows the shareholders' meeting to attribute this power to the directors, it is possible that it retains such a decision. In this respect, it is interesting to point out that in France it was because of the pressure of associations of minority shareholders that it was maintained that the shareholders' meeting had the possibility of retaining the power to limit or exclude preemptive rights. *See* Simon, *supra* note 7, at 10. This "behind the scenes" of the French legislative process suggests that, in a system characterized by relatively strong controlling shareholders (as France—and even more so, Italy—might be considered), greater power entrusted to the board of directors might result, as a matter of fact, in greater power to the controlling shareholders to the prejudice of minorities.

strong controlling shareholders often entrenched in their position through shareholders' agreements, pyramidal structures, and other legal devices,[68] directors are often the expression of controlling shareholders, when not controlling shareholders themselves. As a consequence, in such a system greater powers to the directors might result in greater powers to the majority that backs them.

D. *Liberalization of Corporate Bonds*

The Reform also overhauled the regulation of corporate bonds. In particular, issuers now enjoy greater flexibility concerning the financial structure of the corporation, and directors have been entrusted with the power to issue and control corporate bonds. Again, some background is helpful for understanding how significant the changes brought by the Reform are.

Prior to the Reform, Italian corporate law limited the amount of bonds that could be issued to prevent the corporation from adopting an unbalanced financial structure.[69] To that end, the nominal value of the bonds issued could not exceed the paid-in capital net of losses, which meant that the financial ratio of bonds-to-equity could not exceed one.[70] When this limitation proved to be too narrow for some corporations, they would incorporate wholly owned subsidiaries with very little capital in states that did not prescribe strict minimum capital requirements or significantly limited the issuing of bonds.[71] The new subsidiary would then issue bonds to finance the needs of the controlling corporation, which sometimes would guarantee the repayment of the bonds, at least to the banks that subscribed them on the primary market. As highlighted in some of the recent financial scandals,[72] the pressures created by this approach are highly unsatisfactory, and methods for circumventing it are ripe for potential abuse.

---

68. See MCCAHERY ET AL., *supra* note 36, 4–19 for an updated and comprehensive discussion of ownership concentration in Europe and the effects of the resulting separation between ownership and control.

69. On the regulation of bond issuing prior to the Reform, see Gian Franco Campobasso, *Le Obbligazioni, in* 5 TRATTATO DELLE SOCIETÀ PER AZIONI 379, 394 (G.E. Colombo & G.B. Portale eds., 1998).

70. Only banks and listed corporations could exceed this general limitation and were permitted to issue bonds up to the amount of capital, undistributed profits, and reserves in the balance sheet. Limitations similar to the one formerly provided by the Italian Civil Code are still present in several European countries, such as Portugal and Spain. *See* Antunes, *supra* note 11, at 22–23 (discussing the limitations of Portuguese companies issuing bonds as regulated by Article 348, notes 2–3 of the Código das Sociedades Comerciais); Farrando, *supra* note 11, at 16 (stating how in Spain, Article 282.1 of the Ley de Sociedades Anónimas of 1989 dictates that the limit is substantially represented by the paid-in legal capital plus reserves). It must be pointed out, however, that this limitation has several exceptions: for instance, Article 111 *bis* of the Ley del Mercado de Valores provides that the limitation is not applicable to listed corporations. Article 111 *bis* of the Ley del Mercado de Valores (R.C.L. 1988, 1644). Other continental European countries, on the contrary, do not provide for such limitations: this is, for example, the case of Germany.

71. Minimum legal capital requirements are common in many civil law countries, but some commentators have questioned the efficacy of legal capital requirements as a means of protecting creditors. *See* Luca Enriques & Jonathan R. Macey, *Creditors Versus Capital Formation: The Case Against the European Legal Capital Rules*, 86 CORNELL L. REV. 1165, 1184–89 (2001).

72. To date there is no extensive legal analysis of the Parmalat case, but such "creative" financing schemes as described above are clearly part of the story. For a brief but thoughtful comparison between Parmalat and Enron in a socioeconomic context, see GIULIO SAPELLI, GIOCHI PROIBITI: ENRON E PARMALAT CAPITALISMI A CONFRONTO (2004). A more analytical discussion of the Parmalat and Cirio cases and their effects on financial markets can be found in *Cirio, Parmalat e Dintorni: Finanza, Industria, Regole*, BORSA 2004: RAPPORTO REF SUL MERCATO AZIONARIO 105 (2004). Media coverage on the Parmalat case, by contrast, has been extensive. *See, e.g.*, Gail Edmonson & Laura Cohn, *How Parmalat Went Sour*, Business Week Online (Jan. 12, 2004), *at* http://www.businessweek.com/magazine/content/04_02/b3865053_mz054.htm (last visited Nov. 1, 2004).

Consistent with the general approach of the Reform, the legislature decided to liberalize the conditions for issuing bonds under the assumption that the market should determine whether particular corporate financial structures are balanced. The general quantitative cap has been raised for all the corporations to twice the amount of capital and reserves (representing a doubling of the previous limit).[73] Figures 2-a and 2-b illustrate how the Reform affects the amount of bonds that can be issued.

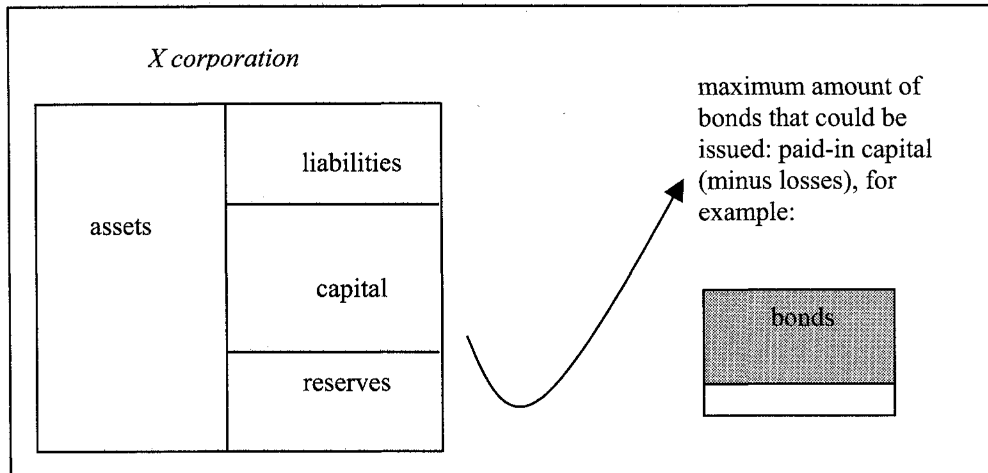


Figure 2-a—General limit on the issuing of bonds prior to the Reform

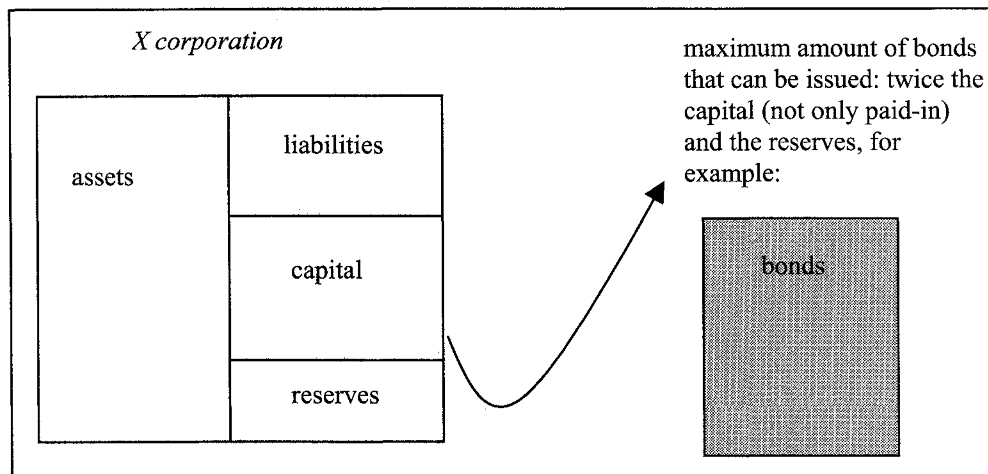


Figure 2-b—General limit on the issuing of bonds after the Reform

In addition to raising the general cap, the Reform also introduced new exceptions in which the prescribed limits can be exceeded. The first exception is when the bonds are subscribed to by professional investors subject to control by credit authorities, such as

73. Piergaetano Marchetti, *Le Obbligazioni*, *in* IL NUOVO ORDINAMENTO DELLE SOCIETÀ, *supra* note 4, at 213; Luigi Arturo Bianchi & Andrea Giannelli, *Riforma del Diritto Societario e* Corporate Bond, *in* IL MERCATO DEI CORPORATE BOND IN ITALIA 55 (Carlo Maria Pinardi ed., 2003); G. Giannelli, *Obbligazioni. Strumenti Finanziari Partecipativi. Patrimoni Destinati*, *in* DIRITTO DELLE SOCIETÀ: MANUALE BREVE 157 (2004); Carlo Saggio, *Comment to Art. 2410 and 2412*, *in* LA RIFORMA DEL DIRITTO SOCIETARIO: SOCIETÀ PER ANZIONI 1 (Giovanni Lo Cascio ed., 2003).

banks.[74] In this context, it is possible to issue bonds without any limitation whatsoever. However, if the subscribing banks decide to sell the bonds to nonprofessional investors, they become jointly and severally liable with the corporation for the repayment of the bonds to the investors.[75]

The second new situation in which bonds can be issued in excess of the general limitation is with regard to listed corporations. Under the new Article 2412 of the Civil Code, corporations whose shares are listed on a regulated market are free to issue bonds (destined to be listed) with no limitation.[76] Once again, the underlying assumption is that with listed corporations, a market for the shares and for the bonds exists, which facilitates investors' ability to evaluate the financial structure of the corporation. Recent financial scandals raise doubts about whether, in light of information inefficiencies, this confidence in the abilities of the market have been overstated,[77] as will be discussed later in Part IV.

In addition to liberalizing the amount of bonds that can legally be issued, the Reform also significantly simplified the procedure for the issuing of bonds. Prior to the Reform, as noted above, the power to issue bonds was—as a default rule—within the competence of the extraordinary shareholders' meeting. The bylaws could, however, delegate it to the board of directors according to Article 2420-*ter* of the Civil Code, introduced in 1986 as a consequence of the implementation of the Second European Directive on Corporations.[78] The new Civil Code Article 2410, by contrast, assigns this power to the board of directors, as is the case in several corporate law statutes in the United States.[79] In addition, this power can be delegated to one member of the board, which stands in contrast to other subject matters, such as drafting the yearly financial statements, which cannot be delegated and must be approved by the entire board. As a consequence, one single director, perhaps the chief financial officer, could be entrusted with the power to issue bonds within the outer limits provided for by the Reform, which again are nonexistent for listed corporations. This aspect of the Reform also then represents a transfer of powers from the shareholders' meeting to the directors, this time with regard to defining the optimal financial structure of the corporation.

E. *Separated Pools of Assets*

The Reform creates a new possibility to separate a pool of assets that, under certain conditions, can be isolated by the directors from the general creditors of the corporation. Article 2447-*bis* of the Civil Code provides that a pool of assets, not to exceed 10% of the net worth of the corporation, can be dedicated to the accomplishment of one specific transaction.[80] To do this, a resolution of the board of directors must specify the transaction

---

74. C.C. art. 2412, para. 2.

75. This situation might affect the independence of the banks with regard to the financed corporation. The resulting conflict of interest might provide an incentive for a bank to extend additional credit to a corporation that is not deserving of additional credit in order to avoid the default of the issuer and the potential liabilities toward unsophisticated bond holders. As a consequence, it could be argued that the concurrent liability of the bank toward bond holders, in the situation described in the text, might interfere with the bank's willingness to police the credit market ex post.

76. C.C. art. 2412, para. 4.

77. Again, recent financial scandals, such as Parmalat or Cirio, suggest that this is the case. *See supra* note 72.

78. Campobasso, *supra* note 69, at 409.

79. C.C. art. 2410.

80. *See* ASSOCIAZIONE DISIANO PREITE, IL NUOVO DIRITTO DELLE SOCIETÀ 56 (Gustavo Olivieri et al. eds., 2003); Giuseppe Bozza, *Comment to Art. 2447-*bis *c.c.*, *in* PATRIMONI DESTINATI, PARTECIPAZIONI STATALI, S.A.A. (Giovanni Lo Cascio ed., 2003); CAMPOBASSO, MANUALE, *supra* note 15; C. Comporti, *Comment on Art.*

to which the pool is dedicated, the economic and financial plan for its realization, and the accounting rules applicable to the separate pool of assets.[81] The board must also appoint an auditing firm to monitor the deal and, in particular, its accounting and reporting.[82] In addition, the decision to constitute a separate pool of assets must be publicized in the Public Register of the Enterprises and the creditors of the corporation must be given two months in which to oppose the establishment of the separate pool of assets. If two months elapse with no opposition from the creditors of the corporation, creditors will be precluded from executing against the assets in the separate pool.[83]

When these procedures have been followed, creditors are generally limited to assets included in the pool to satisfy obligations arising out of the specific transaction to which the pool of assets is designated.[84] In any case, the Reform provides that, for obligations arising out of a tort caused through the activity carried on with the separate pool of assets, in order to protect noncontractual creditors who did not decide to become creditors of the separate pool of assets alone, the corporation will be liable to the extent of all its assets.[85]

The separate pool of assets creates the possibility for a sort of "corporation within the corporation," meaning an entity that enjoys—within certain boundaries—limited liability for obligations arising from a specific transaction and thus avoids the need to incorporate a separate entity or undergo a spin-off. In this way, the separate pool of assets can be an efficient mechanism for reducing the risks related to a specific business.

Notwithstanding the potential benefits, there remain some profound interpretation issues that must be clarified and that might affect both the appeal and operation of this instrument. First, the new rules do not specify what happens if the business managed with the separate pool of assets becomes insolvent and, particularly, whether it can declare bankruptcy. Relatedly, it is not completely clear what would happen to the separate pool of assets and its creditors in case of insolvency (and therefore bankruptcy) of the corporation as a whole. The uncertainties of these rules might be more detrimental than a more rigid but straightforward rule.[86]

Secondly, while the Reform permits the issuance of financial instruments that allow investors to participate in the separate deal and provides for certain rights attached to these instruments, it remains ambiguous whether and to what extent general voting rights could be granted to holders of these instruments. Once again, the Reform provides for an innovative financial instrument but leaves its regulation almost entirely, not to the corporate bylaws, but to the directors who decide to create the separate pool of assets.[87] In keeping

---

2447 bis ff., *in* LA RIFORMA DELLE SOCIETÀ, COMMENTARIO DEL D.LGS. 17 GENNAIO 2003, N. 6, at 950 (Michele Sandulli & Vittorio Santoro eds., 2003); G.E. Colombo, *La Disciplina Contabile dei Patrimoni Destinati: Prime Considerazioni*, 57 BANCA BORSA TITOLI DI CREDITO 30 (2004); N. Rocco di Torrepadula, *Patrimoni Destinati e Insolvenza*, 31 GIURISPRUDENZA COMMERCIALE 40 (2004).

81. C.C. art. 2447-*ter*.

82. *Id.*

83. *Id.* arts. 2447-*quater*, 2447-*quinquies*.

84. It must be mentioned, however, that it is also possible for the directors' resolution establishing the separate pool of assets to provide that, for those obligations, the corporation will remain liable with regard to general corporate assets beyond the designated pool.

85. *Id.* art. 2447-*quinquies*, para. 3.

86. Some scholars have argued that while legal indeterminacy is ordinarily considered a negative attribute, it may have contributed to giving Delaware a competitive advantage that cannot be replicated by other states because indeterminate standards must be interpreted by Delaware courts, which have unique competences with corporate law. *See* Ehud Kamar, *A Regulatory Competition Theory of Indeterminacy in Corporate Law*, 98 COLUM. L. REV. 1908 (1998). This reasoning, however, holds true only in a legal system characterized by binding precedents, highly sophisticated judiciary, effective (and rapid) adjudication, enforcement mechanisms, and a vast number of cases.

87. C.C. art. 2447-*ter*, para. 2.

with other aspects of the Reform, freedom of contract with respect to the corporation's financial structure is again broadened, and directors are entrusted with new and extensive powers concerning it.

F. Questions About the Role of the Stock Exchange Regarding New Financial Instruments

I have described how the Reform introduces a wide variety of different possible categories of shares that are characterized by different administrative and economic rights, reduces (some might even say eliminates) limitations on the issuance of bonds, and introduces new, more liberal procedural rules concerning the issuing of these instruments. The cumulative result of all of these changes is a significant broadening of options concerning the financial structure of the corporation. In this respect, the Reform does not preclude the listing of these new instruments, meaning that, in the absence of any restrictive secondary regulation, they could be issued by either listed or nonlisted corporations and either be listed or not. The Consob (the Italian equivalent of the Securities and Exchange Commission) might limit through secondary regulation, at least to some extent, the issuing or listing of innovative instruments. In addition, an important role in policing the market from the proliferation of atypical and risky instruments might be played by stock exchanges.

This greater freedom therefore raises significant issues for the Italian Stock Exchange, which must decide whether these instruments can be negotiated on regulated markets and, if so, what the conditions for their listing will be. This allocation of regulatory competence is consistent with certain foreign examples that inspired the Reform. For example, in the United States the debate over the so-called "one-share, one-vote" rule was essentially resolved when stock exchanges (re-)established limitations on the listing of multiple-voting shares or other shares that did not comply with the "one-share, one-vote" rule, of which the purpose was to increase the standardization of the market and foster a market for corporate control.[88] Similarly in Italy, the Stock Exchange might be the appropriate institution to curtail the flexibility introduced by the Reform if it would be considered excessive for listed corporations and not suited for the needs of financial markets. Before the Italian Stock Exchange could exercise such a role, however, there are several issues that must be addressed.

One important premise for considering attribution of this role is that, notwithstanding the recent establishment of a regulated market organized by a bank (TLX) for the trading of bonds, securities issued by the government, and specific warrants and certificates of mutual funds,[89] there is only one national stock exchange in Italy. Unlike the United States, therefore, there is no real competition among stock exchanges for listing. To the extent that some form of competition exists with foreign exchanges—both in Europe and in the United

88. *See* Joel Seligman, *Equal Protection in Shareholder Voting Rights: The One Common Share, One Vote Controversy*, 54 GEO. WASH. L. REV. 687, 693 (1986); Daniel R. Fischel, *Organized Exchanges and the Regulation of Dual Class Common Stock*, 54 U. CHI. L. REV. 119, 135 (1987); Stephen M. Bainbridge, *The Short Life and Resurrection of SEC Rule 19C-4*, 69 WASH. U. L.Q. 565, 576–77 (1991).

89. TLX is a regulated market, organized by a leading Italian bank (Unicredito), which trades Italian and European government bonds, corporate bonds, mutual fund certificates, covered warrants, and shares. For every security listed on TLX, a market maker ensures the liquidity of the instrument. Additional information on the structure and the functions of this market can be retrieved at http://www.eurotlx.com (last visited Nov. 2, 2004).

States—it is significantly less intense[90] and therefore not comparable with the competition existing, for instance, between the New York Stock Exchange (NYSE) and the National Association of Securities Dealers Automated Quotation System (Nasdaq).[91] As a consequence, it is doubtful that a regulatory competition would develop on the issue of listing these new financial instruments, leading to the selection of the most efficient rules.[92] Therefore, if the stock exchange will play a significant and efficient role in regulating these new financial instruments, it will not be due to competition forces but to the "preference function" of the stock exchange. The set of variables influencing this development cannot be spelled out in a detailed way in this article, but intuitively includes ownership structure of the corporation managing the market (both in terms of concentration and identity of the major shareholders), statutorily assigned goals, political and lobbying pressure, and the like.[93]

In this respect, consistent with markets dominated by a single exchange, one of the most important functions of the Italian Stock Exchange is to promote a "thickening" of the market by increasing the number of listed corporations and financial instruments (assuming that they have the necessary economic attributes required to go public). This function suggests an inherent tension in having the Italian Stock Exchange perform the dual functions of providing incentives for listing and restraining financial innovations that limit the flexibility of listed corporations with respect to their nonlisted competitors.[94] In other words, even if a rule like the "one-share, one-vote" rule would appear by objective criteria to be the most suitable to achieve a given goal of efficiency or protection of minorities, it can be questioned whether the Italian Stock Exchange would endorse it. More generally, while the Exchange might be the only institution able to effectively curtail the lack of standardization and the overly permissive aspects of the Reform, it is a position that, due to both the absence of real competition among exchanges and the pressure to enlarge the market, might be difficult for the Exchange to assume.

---

90. The reason being, in short, that Italian corporations do incur higher transaction costs in the case of cross-listing or double-listing on a foreign exchange, in comparison to their U.S. counterparts that might decide on which national (U.S.) stock exchange to be listed among the different existing ones.

91. Paul G. Mahoney, *The Exchange as Regulator*, 83 VA. L. REV. 1435 (1997).

92. *See id.*

93. On the structure and functions of stock exchanges in Europe and in the United States, see Norman S. Poser, *The Stock Exchanges of the United States and Europe: Automation, Globalization, and Consolidation*, 22 U. PA. J. INT'L ECON. L. 497 (2001). For a very clear article, although in Italian, on the functions performed by a stock exchange seen as an enterprise, see Alberto Cybo Ottone, *Strategia e Struttura dei Mercati Organizzati di Valori Mobiliari*, *in* LA RIFORMA DEI MERCATI FINANZIARI, DAL DECRETO EUROSIM AL TESTO UNICO DELLA FINANZA 505 (G. Ferrarini & P. Marchetti eds., 1998).

94. Due to another innovation of the Reform (Legislative Decree No. 37), necessitated by the possibility of issuing new categories of shares that enjoy voting rights only on specific subject matters or only upon certain conditions, it became necessary to also amend the regulation of compulsory takeovers. Legislative Decree No. 37, *supra* note 30. Under Italian law, pursuant to Article 106 of Legislative Decree No. 58 of 1998, anyone who acquires ordinary shares in excess of 30% of the outstanding ordinary shares is required to launch a compulsory takeover on all the outstanding ordinary shares at a set price that takes into account the market price. Legislative Decree No. 58, *supra* note 5, art. 106. It is not possible, in this article, to explore all the nuances of this rule, but it is interesting to note that a similar rule exists in several other European legal systems and has been followed also in the formulation of the Thirteenth Directive on Public Offers. What is distinct on the Italian front, however, is that until the Reform, it was sufficient to apply the rule to ordinary shares, the only category of shares that, by voting in the ordinary shareholders' meeting, could influence the appointment of the corporations' directors. With the Reform, since it is now possible to issue a category of shares that vote *only* on the appointment of directors (but not on all the other subject matters within the competence of the ordinary shareholders' meeting), it became necessary to amend this rule. The Reform, which coordinates the new rules with the regulation of banks, intermediaries, and listed corporations, provides that the compulsory takeover regulation is applicable also in case of acquisition of shares that grant voting rights on the appointment, revocation, or promotion of a liability lawsuit against directors.

III. PROTECTION OF MINORITIES

The Reform introduces certain new instruments to protect minorities, which are designed to offset the broader contractual freedom offered to shareholders. The premise for these new protections is that increased contractual freedom combined with the existence of strong controlling shareholders, as well as the more extensive powers granted to directors appointed by the controlling shareholders, might easily result in oppression and exploitation of minorities unless they are granted effective countermechanisms. While this article cannot discuss all the aspects of the Reform that may fit in this category, it is worth pointing out three of the most important areas affected: withdrawal rights, derivative suits against directors, and the new regulation of groups of corporations.

A. *Exit Strategies: The Right of Withdrawal*

Ease of exit for minorities, meaning the ability to disinvest at a fair price, is one of the most important protections for investors. One legal technique to accomplish this end is to create a right of withdrawal. This right is particularly important when the corporation is not listed or, more generally, when there is not an active and liquid market for its shares. When it is impossible (or, more precisely, impossible at a fair price) to sell shares on the open market, the only realistic way out for a minority shareholder is to rescind the contract with the corporation and have the value of its participation liquidated.

Prior to the Reform, under Article 2437 of the Civil Code there were only three circumstances in which it was possible to withdraw from nonlisted corporations and a fourth one that was available for shareholders of listed corporations.[95] All of these circumstances were tied to amendments to the corporate bylaws that produced significant changes in the corporate structure and shareholders rights. The first situation in which withdrawal was, and still is, permitted is in the case of transformation of the corporation, for instance from a joint stock corporation into a limited liability corporation or into a partnership.[96] These types of changes represent the most significant possible revisions to the articles of incorporation because they alter the very form of the corporation. The second situation justifying a right of withdrawal was (and is) when the seat of the corporation was transferred abroad.[97] In legal systems that follow the real seat approach to determine the applicable corporate rules, transferring the seat of the corporation abroad might imply the application of foreign corporate statutes, resulting in potentially significant changes to the applicable rules.[98]

95. On the right of withdrawal prior to the Reform, see Giovanni Grippo, *Il Recesso del Socio*, *in* TRATTATO DELLE SOCIETÀ PER AZIONI 133 (G.E. Colombo & G.B. Portale eds., 1993); G. Niccolini, *Recesso per Giusta Causa del Socio di Società di Capitali?*, 90 RIVISTA DEL DIRITTO COMMERCIALE 77 (1992).

96. In this respect, the Reform, in its effort to broaden contractual freedom and flexibility of the corporate form, expanded the possibilities for transformations, explicitly allowing transformation of nonbusiness entities (such as associations) into corporations, and vice versa. An analysis of these rules is beyond the scope of this article. For a discussion of these changes, see ASSOCIAZIONE DISIANO PREITE, *supra* note 80, at 341; Giorgio Marasà, *Le Trasformazioni Eterogenee*, 57 RIVISTA DEL NOTARIATO 585 (2003); Luciano Panzani, *Comment to Art. 2498*, *in* GRUPPI, TRASFORMAZIONE, FUSIONE E SCISSIONE, SCIOGLIMENTO E LIQUIDAZIONE, SOCIETÀ ESTERE 291 (Giovanni Lo Cascio ed., 2003).

97. C.C. art. 2437, para. 1(c).

98. For an analysis of how the real seat approach operates, see, in addition to the articles and papers cited *supra* note 12, Jens C. Dammann, The U.S. Concept of Granting Corporations Free Choice among State Corporate Law Regimes as a Model for the European Community (2003) (unpublished manuscript), *at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=418660 (last visited Oct. 28, 2004).

The third case provided for in Article 2437 of the Civil Code was (and is) a change of the corporate purpose.[99] Under Italian law, consistent with other continental European countries and in contrast with U.S. corporate law,[100] a corporation must have a defined purpose. It is unlawful to simply state in the articles of incorporation that the corporation can engage in "any lawful activity," as is permitted and a common practice in the United States.[101] As a consequence, an amendment to the purpose of the corporation that implies a significant change in the conditions of risk and return on shareholders' investment triggers their right of withdrawal.

The last case triggering the right of withdrawal prior to the Reform was provided for in the regulation of listed corporations. Pursuant to Article 131 of Legislative Decree No. 58 of 1998, shareholders can withdraw in case of corporate merger if, as a consequence of the transaction, shareholders holding listed shares would obtain nonlisted shares.[102] Also, this last case still triggers withdrawal rights, but the Reform—as we will discuss—introduced a new hypothesis of withdrawal.

Prior to the Reform, all of these events were necessarily the consequences of an extraordinary shareholders' meeting resolution because they all constituted amendments to the articles of incorporation or to the bylaws. The right of withdrawal, therefore, was granted only to shareholders who were absent from the meeting or dissented from the resolution that had been adopted. No other rights of withdrawal could be provided for in the bylaws. Provisions attempting to provide for additional rights of withdrawal or limiting the right of withdrawal in the above-mentioned cases were considered void.[103]

Another important background consideration in the pre-Reform setting is that the evaluation of the shares of the withdrawing shareholder not only failed to provide an affirmative incentive, but actually caused a serious disincentive to actual withdrawal, especially from nonlisted corporations. In listed corporations, the value of the shares was determined by an average of the market price over the last six months.[104] As a consequence of this requirement, if prices were more or less constantly rising in that period, withdrawal could be a costly alternative to selling the shares and vice-versa in the case of a bearish market. In nonlisted corporations, shares were liquidated at their book value as of the last financial statement approved by the shareholders' meeting.[105] This process often underestimated the fair market value of the participation, since in order to protect legal capital, financial statements in Italy usually follow the historical cost accounting principle.[106]

---

99. C.C. art. 2437.

100. Katharina Pistor et al., *The Evolution of Corporate Law: A Cross-Country Comparison*, 23 U. PA. J. INT'L ECON. L. 791, 818 (2002) (discussing the U.S. acceptance of broad definitions of corporate purpose and the related demise of the importance of the *ultra vires* doctrine, as contrasted with Germany's continued vitality of stated purpose requirements, despite the absence of an *ultra vires* doctrine).

101. 19 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 2.13 (perm. ed., rev. vol. 1999).

102. *See* Mario Notari, *Comment to Article 131*, *in* LA DISCIPLINA DELLE SOCIETÀ QUOTATE NEL TESTO UNICO DELLA FINANZA 1101 (Piergaetano Marchetti & Luigi Arturo Bianchi eds., 1999).

103. Prior to the Reform, see Grippo, *supra* note 95, at 142; CAMPOBASSO, DIRITTO COMMERCIALE, *supra* note 47, at 455–56.

104. CAMPOBASSO, DIRITTO COMMERCIALE, *supra* note 47, at 454.

105. *Id.* at 455.

106. Italian accounting rules concerning yearly financial statements provide, according to the Seventh Directive, that the basic evaluation principle concerned is the historical cost, depreciated according to the residual possible use of the asset. This approach often underestimates the value of the assets, especially when compared with their market value. Since the measure of the capital emerges, from an accounting point of view, from the difference between assets and liabilities toward third parties, the legislature is concerned that an overestimation of the assets might lead to an overestimation of the legal capital. On the contrary, if the assets are slightly underestimated, the capital could be higher, but not lower, than its accounting value. In other words creditors can

The Reform significantly modifies and adds to these rules.[107] On the one hand, several additional bases for withdrawal have been added to the original list of three (or four, if you consider listed companies). First, the Reform clarifies that all shareholders who did not "concur" in a relevant resolution would be eligible, which broadens slightly the previous rule that required either absence or dissent, extending eligibility to shareholders who were present but abstained.[108] More importantly, the list of events legitimizing the right of withdrawal was expanded to include resolutions that modify shareholders' administrative or economic rights, revoke the liquidation of the corporation, and amend the evaluation criteria of the shares applicable in case of withdrawal.[109] In addition, nonlisted corporations now have the option of providing additional bases for withdrawal in the bylaws.

The Reform also introduced new criteria for evaluating a withdrawing shareholder's shares. The new Article 2437-*ter* of the Civil Code did not change the criteria for listed corporations (which, recall, is the average of the market prices of the last six months), but it provided that for nonlisted corporations, the value of shares must take into account the real value of the corporation's assets, its expected yield, and the market price, if any.[110] In this way, the evaluation approach shifts toward fair market value. It must be added, however, that the bylaws can change this criteria. As a consequence, the controlling shareholder can make withdrawal less convenient, although changing the evaluation criteria to make withdrawal less convenient will itself trigger the right of minority shareholders to withdraw.

Although the new rules may appear to significantly broaden the exit possibilities of minority shareholders, thereby "compensating" for the more extensive powers granted to the controlling shareholders, this impression is not entirely accurate. In fact, while the bylaws can introduce additional bases for withdrawal, this power is once again placed in the hands of the controlling shareholder, who might not want to leave this door open for her

---

rely on the expectation that, if necessary, the value of the assets of the corporation, minus all the liabilities toward third parties, will be at least equal to the capital. This explanation, obviously oversimplified, suggests why the historic cost is considered more conservative than the market value. This approach will, at least partially, change due to the adoption of International Accounting Standards and, in particular, of the criterion of "fair value" to evaluate assets. According to EU Regulation 1606/02, in fact, starting in 2005, all EU listed corporations are required to publish their consolidated financial statements adopting these principles; Member States can also allow or impose the adoption of these accounting principles to other types of corporations and financial documents. Council Regulation 1606/2002, 2002 O.J. (L 243) 1. The Italian legislature, with the so-called *legge comunitaria* for 2003 (a statute enacted every year to implement within national boundaries the EU's legislation), provided that listed corporations must adopt the International Accounting Standards and fair value also in their yearly (nonconsolidated) financial statements, and stated that banks and insurance companies must also comply with the new rules. Other types of corporations might adopt them, but only on a voluntary basis. *See* FRANCO ROSCINI VITALI & MARIO ANTONIO VINZIA, FAIR VALUE: RAPPRESENTAZIONE CONTABILE E VALUTAZIONI FINANZIARIE SECONDO GLI IAS 6 (2003).

107. *See* Sonia Carmignani, *Comment to Art. 2437*-ter, *in* LA RIFORMA DELLE SOCIETÀ, COMMENTARIO DEL D.LGS. 17 GENNAIO 2003, N. 6, at 877 (Michele Sandulli & Vittorio Santoro eds., 2003); Michele Vietti, *Comment to Art. 2437*-ter, *in* SOCIETÀ PER AZIONI: OBBLIGAZIONI, BILANCIO, RECESSO, OPERAZIONI SUL CAPITALE 420 (Giovanni Lo Cascio ed., 2003).

108. *See* Grippo, *supra* note 95, at 173.

109. The first hypothesis, in particular, raises interpretation problems since it is not clear if the rule applies only in cases of amendment of the rights provided for in the bylaws (for instance, if a privilege in the distribution of dividends equal to 2% over dividends distributed to ordinary shares is lowered to 1%), or also to mere de facto amendments, such as when new shares are issued without a preemptive right. In the latter situation, even though there might also be a change in the position of the existing shareholders (the pie will have to be divided among more investors), because it is a de facto change, it does not trigger the application of the rule.

110. *See* Mia Callegari, *Comment to Art. 2437*-ter, *in* IL NUOVO DIRITTO SOCIETARIO 1420, 1421 (Gastone Cottino et al. eds., 2004).

minority shareholders. In addition, the new criteria for evaluating shares reduce the disadvantages for minority shareholders that existed before the Reform, but they can also be amended by the bylaws. While, as noted above, the change of the evaluation criteria is itself a basis for withdrawal, if this amendment is made at a time when the corporation is doing well and shareholders are bullish about the price of the shares or the expected earnings of the corporation, it may be unlikely that investors will exercise their right of withdrawal. In sum, it cannot be said that the new rules regarding withdrawal rights have significantly extended the ability of shareholders to "vote with their feet."

B. Directors' Liability Toward the Corporation and Minority Derivative Suits

Apart from exit, the other mode for protecting minority shareholders is to facilitate their voices, which includes suits to hold directors liable. The general rule under Italian law is that a lawsuit seeking to hold directors liable must be approved at the ordinary shareholders' meeting, meaning it must be approved by the controlling shareholder or shareholders.[111] The dilemma is that, in most cases, controlling shareholders are the ones who appointed those directors. As a consequence, apart from quite particular and extreme cases, directors are rarely sued unless the corporation goes bankrupt, in which case the trustee in bankruptcy might sue them if she believes that they damaged the corporation or the creditors with their negligence. Obviously, in this situation minority shareholders have little protection or recourse against directors' misconduct.

The problem was partially addressed in 1998, when derivative lawsuits by minority shareholders were introduced as a possibility for listed corporations.[112] Again, with the current Reform, derivative lawsuits were extended and adjusted and now apply also to nonlisted joint stock corporations.[113] More precisely, in 1998, Article 129 of the Legislative Decree No. 58 provided for a derivative action that minority shareholders can bring against directors for liability toward the corporation.[114] Article 129 of that statute provides that minority shareholders representing 5% of the outstanding shares (and who have held that level of participation for the last six months)[115] can sue the directors on behalf of the corporation. In the suit, they can allege that directors breached their duty of care or loyalty and they can seek damages that inure to the benefit of the corporation (although notably the shareholders would have to shoulder the cost of the lawsuit since contingency fees are illegal in Italy). The corporation, for its part, can renounce or settle the case through a shareholders' meeting resolution, provided that 5% of the

111. *See* Macey, *supra* note 3, at 133.

112. See Alberto Picciau, *Comment to Art. 129*, *in* LA DISCIPLINA DELLE SOCIETÀ QUOTATE NEL TESTO UNICO DELLA FINANZA 1531 (Piergaetano Marchetti & Luigi Arturo Bianchi eds., 1999), for a brief discussion of the underlying rationale for the introduction of these types of "derivative" causes of action.

113. A similar derivative action is provided in several European countries. See, for instance, Article 77 of the Portuguese Código das Sociedades Comerciais, which requires that the plaintiff hold 5% of the capital to be able to bring the lawsuit, or Section 147 of the German Aktiengesetz, providing that the necessary threshold can be reached either holding a certain percentage of the capital, or shares that exceed a certain market value. CÓDIGO DAS SOCIEDADES COMERCIAIS art. 77 (Port.); AKTIENGESETZ [AKTG] § 147 (F.R.G.). In the German example, it is interesting to note that once the derivative action is judicially authorized after passing a first scrutiny aimed at rejecting frivolous suits, the plaintiff-shareholders enjoy significant facilitations, especially concerning litigation expenses. *See* AKTG, *supra*, § 147.

114. *See* Picciau, *supra* note 112, at 973; Gaia Balp, *Comment to Art. 129, Profili Comparatistici*, *in* LA DISCIPLINA DELLE SOCIETÀ QUOTATE NEL TESTO UNICO DELLA FINANZA 1048 (Piergaetano Marchetti & Luigi Arturo Bianchi eds., 1999).

115. The rule is designed to prevent speculation on the shares for the purpose of bringing a strike suit against the corporation. The bylaws of listed corporations can lower the threshold of possession required to promote the lawsuit (for instance, by bringing it to 1%), which would allow even smaller minorities to use this instrument of protection, but notably no listed corporation has ever used this option.

shareholders—obviously, the same percentage that might promote the action—do not vote against such a renunciation or settlement.[116] The rationale for these rules is that, in case of victory, the damages recovered by the corporation will increase the value of the participation of the shareholders, and that increase in value might justify the cost of undertaking the litigation.

The Reform has extended this possibility also to minority shareholders of nonlisted corporations, but in this case derivative suits require a different (and higher) percentage of the outstanding capital. New Article 2393-*bis* of the Civil Code requires that a shareholder or shareholders bringing a lawsuit on behalf of the corporation must own 20% of the shares.[117] In contrast to the prior rule concerning listed corporations provided for in Article 129 of the Legislative Decree No. 58 of 1998, however, no minimum holding time is required as a condition to bringing the action.[118]

Looking at the experience of listed corporations after the 1998 Reform, it should be noted that in six years this instrument has never been used. The reasons are relatively straightforward. First and foremost, the economic incentives for minority shareholders to bring a lawsuit are relatively low. To bring a suit, they would have to advance the expenses of the litigation, which could be recovered only in case of victory and, even in this case, not necessarily in their entirety.[119] The minority shareholder, therefore, bears a rather substantial risk of loss. In addition, in the event of victory, only the corporation gets reimbursed. While it is true, as a theoretical matter, that the cash flow obtained by the corporation increases the value of the shareholders' participation, this effect is inevitably diluted, particularly when the shareholder holds a minority interest. Moreover, the very fact that a lawsuit is pending against current or former directors might itself adversely affect the value of the participation. It is not surprising, therefore, that in listed corporations, shareholders prefer simply to exit the corporation and sell their shares on the market rather than to engage the directors in costly, uncertain, and potentially protracted litigation.

In addition, Italian rules of civil procedure and professional regulation of attorneys do not provide for instruments that might encourage the use of such derivative actions. Under Italian law, there are no set rules concerning class actions, although some proposed legislation is currently being discussed by scholars and policy makers.[120] Contingency fees are forbidden, and there is nothing comparable to U.S.-style extensive, party-controlled discovery. As a consequence, in any derivative action, minority shareholders are at a significant disadvantage in terms of information in relation to the director-defendants, who have better access to the relevant information and can therefore more easily defend against allegations of misconduct. Finally, the average length of a civil lawsuit in Italy seriously discourages resort to the courthouse as a means for protecting minorities.[121]

---

116. Legislative Decree No. 58, *supra* note 5, art. 129.

117. C.C. art. 2393-*bis*.

118. *See* CAMPOBASSO, MANUALE, *supra* note 15, at 259; Loredana Nazzicone, *Comment to Art. 2393 bis, in* SOCIETÀ PER AZIONI, AMMINISTRAZIONE E CONTROLLI 203 (Giovanni Lo Cascio ed., 2003).

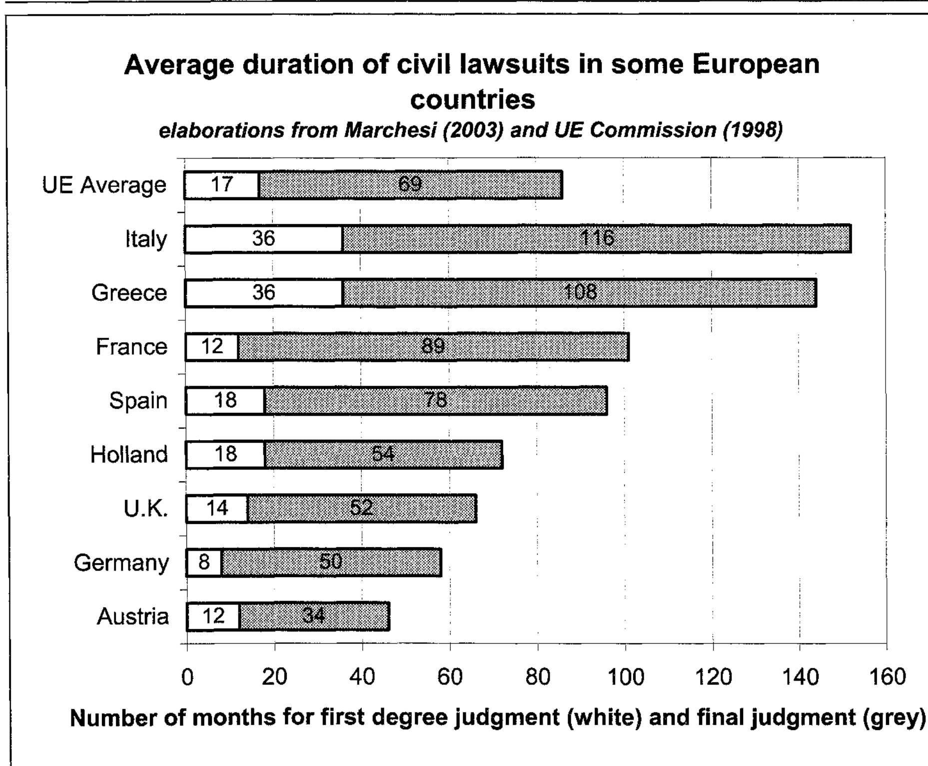
119. The expenses determined by the judge, in fact, might be different (and lower) than the ones actually sustained by the acting party.

120. *See, e.g., Relationships Between Corporations, Financial Markets, and Investors' Protection: Hearing Before the Italian Joint Commission (Commissioni Riunite)*, XIV Legislatura (2004) (statement of Gustavo Visentini, Professor of Law), http://www.astridonline.it/Economia-e/Atti-parla/Indagine-c/Camera-dei/Cam_Sen--Comm-cong-09_02_04.pdf (last visited Nov. 2, 2004).

121. *See* DANIELA MARCHESI, LITIGANTI, AVVOCATI E MAGISTRATI: DIRITTO ED ECONOMIA DEL PROCESSO CIVILE (2003) (reporting data on the average duration of a civil lawsuit that portrays a discouraging scenario, illustrated in the figure below).

In nonlisted, closely held corporations, shareholders might have more incentives to use the lawsuit. First of all, since there is usually not a market for the shares, it might be more difficult for minority shareholders to simply exit the corporation by selling their shares. As a consequence, the opportunity to raise their voices through a lawsuit might be relatively more appealing. In addition, the very essence of a closely held corporation makes it more likely that a shareholder holding a minority but not trivial percentage (such as 25%) has access to more information in comparison to a group of minority shareholders in a listed corporation who, while collectively reaching the 5% threshold, individually hold not more than 1% of the outstanding shares. Finally, in a closely held corporation with a more concentrated ownership structure, there might be fewer collective action problems in coordinating a derivative suit brought by two or three minority shareholders. For these reasons, derivative suits might be more popular in closely held corporations rather than in publicly held ones.

It must be pointed out, however, that even with respect to this instrument for protection of minorities, the Reform grants significant freedom of contract. Specifically, the bylaws can raise the threshold of shares that is necessary to bring a derivative lawsuit up to one-third of the outstanding capital, therefore making it more difficult for minorities to meet the necessary prerequisite. Once again, the level of protection for minorities, in this case the cause of action that might be used to react to breach of fiduciary duties of directors appointed by the majority, is in great part left to the majority itself. As a consequence, while from any perspective this "Italian-style" derivative action seems like a relatively feeble instrument in comparison with its U.S. counterpart, its effectiveness can be further reduced through bylaws.



C. *Groups of Corporations and Liability of the Controlling Shareholder*

Some important new rules have also been developed regarding liabilities within groups of corporations.[122] Under the Reform, there is a new form of liability for holding corporations (or their controlling shareholders) accountable. These entities can now be held liable to minority shareholders or creditors of the controlled corporation if the controlling or holding corporation causes damage through mismanagement of the controlled corporation.[123] This new rule is a significant innovation. Before the Reform, it was theoretically possible, at least according to some scholars, to impose similar liability through application of preexisting general rules and principles of civil law (such as general tort liability).[124] The provision of a specific cause of action with straightforward requirements should make such claims easier to pursue.

The new rule is not a panacea, however, because the conditions that must be met to sue and the burden of proof imposed on the minority shareholder or creditor are significant. First of all, the new rules apply only in case of "direction and coordination" of the corporation by a controlling or holding company.[125] The meaning of this term is rather elusive. While in the case of control through shared ownership (both absolute control, meaning 50% + 1 of the votes in the ordinary shareholders' meeting, or de facto control, meaning a number of votes in the ordinary shareholders' meeting that, in the light of the ownership structure, allow a "dominant influence"), there is a presumption that the controlling corporation exercises "direction and coordination" of the controlled one, this presumption can be overcome by demonstrating that, as a matter of fact, the shareholder had a "passive role" with regard to the group.[126]

---

122. In contrast to the German approach and that of other countries that took inspiration from it, Italy does not have a comprehensive regulation of corporate groups (*Konzernrecht*). There are, however, "pieces" of legislation that, while taking into account the phenomena, do not provide for comprehensive regulation of it. The Reform adds a new and important piece to this puzzle, introducing a specific cause of action, available to either shareholders or creditors, against a controlling corporation that damages one of its subsidiaries. It should be noted, however, that not even after the Reform is there a comprehensive regulation of corporate groups. The Reform, in this respect, never refers to the phenomenon of "groups," but simply regulates—as we will see—situations in which a corporation exercises "direction and coordination" of other corporations. For an extensive discussion of corporate groups before the Reform, also in a comparative perspective, see the three volumes of I GRUPPI DI SOCIETÀ (Paola Balzarini et al. eds., 1996). As Professor Antunes points out, after the German Aktiengesetz of 1965 and the Brazilian Lei das Sociedades Anónimas of 1976, Portugal was the third country to enact a comprehensive regulation of groups of corporations, a regulation that would also provide for specific protections of minority shareholders of subsidiaries versus abuses of the holding corporation. Antunes, *supra* note 11, at 48–50. For further discussion of the Portuguese experience, as well as comparative references, see generally JOSÉ A. ENGRÁCIA ANTUNES, OS GRUPOS DE SOCIEDADES: ESTRUTURA E ORGANIZAÇÃO JURÍDICA DA EMPRESA PLURISSOCIETÁRIA (2d ed. 2002).

123. For an examination of the new rules, see CAMPOBASSO, MANUALE, *supra* note 15, at 222; Vincenzo Cariello, *Direzione e Coordinamento di Società e Responsabilità: Spunti Interpretativi Iniziali per Una Riflessione Generale*, 48 RIVISTA DELLE SOCIETÀ 1227, 1229–67 (2003); Antonio Pavone La Rosa, *Nuovi Profili della Disciplina dei Gruppi Societari*, 48 RIVISTA DELLE SOCIETÀ 763, 765–79 (2003); Roberto Sacchi, *Sulla Responsabilità da Direzione e Coordinamento nella Riforma delle Società di Capitali*, 30 GIURISPRUDENZA COMMERCIALE 661, 661–77 (2003).

124. For an exposition of the so-called theory of *vantaggi compensativi*, see Paolo Montalenti, *Conflitto di Interesse nei Gruppi di Società e Teoria dei Vantaggi Compensativi*, 22 GIURISPRUDENZA COMMERCIALE 710 (1995). For a discussion on the innovations of the Reform at a time when the new roles were being drafted, see Nicolò Abriani, *Gruppi di Società e Criterio dei Vantaggi Compensativi nella Riforma del Diritto Societario*, I GIURISPRUDENZA COMMERCIALE 623 (2002) and Paolo Montalenti, *Gruppi e Conflitto di Interessi nella Riforma del Diritto Societario*, I GIURISPRUDENZA COMMERCIALE 628 (2002) (sources on file with author).

125. *See* Alfonso Badini Confalonieri & Riccardo Ventura, *Comment to Art. 2497*, *in* IL NUOVO DIRITTO SOCIETARIO, 2150 (Gastone Cottino et al. eds., 2004).

126. *See id.* at 2216.

In addition, the rule applies only when the controlling shareholder is itself a corporation or a legal entity, not when it is an individual.[127] As a consequence, many groups in which a large number of corporations are controlled by one single individual, a situation that is often a prelude to misappropriation of assets of controlled corporations,[128] will not be subject to the new regulation.[129]

If we now turn to the burden of proof imposed on minority shareholders or creditors of the controlled corporation, it becomes clear that it will be difficult to succeed with such a claim. The plaintiff would have to demonstrate: (1) that the controlling shareholder was "acting in the entrepreneurial interest of herself or of other subjects," (2) that the "principles of good management" have been violated, and (3) that the action caused a "damage to the profitability or value of the shares" (for cases brought by minority shareholders) or to the "integrity of the corporation's assets" (for the creditors).[130] None of these elements are precisely defined by the new statute. Intuitively, defining what the "principles of good management" are is extremely difficult, and it will be similarly difficult to determine what an "entrepreneurial interest" is and how it is distinguishable from other interests of the corporation. By way of reminder, in a system that does not permit contingency fees and instead has a "loser pays" rule, would-be plaintiffs bear significant risks that discourage lawsuits aimed at developing the law in these areas.

Another obstacle to successful recovery is that the new rule limits potential liability if the damage caused is offset by some advantage in the structure of the group (the so-called "theory of compared benefits").[131] For example, if the holding company requires the controlled corporation to purchase goods at an inflated price but also assists the controlled corporation in selling its own products at a higher price, the damage would be deemed to be offset and no liability would result. While this limitation of liability seems logical in such a simplistic example, it is easy to imagine how any degree of complexity can make the application of the rule uncertain and the burden of proof unbearable for minority investors who, by definition, suffer from an information asymmetry (in particular in a system that does not have procedural discovery mechanisms). These circumstances provide obvious advantages for the controlling shareholder.

From the foregoing analysis, it becomes clear that while the Reform has introduced some new rules concerning protection of minorities, the effectiveness of these rules is subject to serious question. Protection of minority shareholders external to the controlling coalition, which is a critical concern in Italian markets, is presumably addressed by the new regulation concerning groups of corporations. While the introduction of a specific cause of action might provide for a higher level of protection, significant ambiguities remain regarding its interpretation, and it seems to impose a virtually insurmountable burden of proof on minority investors or creditors. Much will depend on how courts interpret the rule, but at least at first blush the changes do not seem as innovative as was originally

127. It must be pointed out, however, that an individual might be held liable under the new rules if he or she "actively participated" in the damaging action or "knowingly obtained a benefit from the unlawful action," but only to the extent of the economic advantage received. *See id.* at 2166.

128. In the so-called *Caltagirone* case, for example, three brothers exercised direction, coordination, and financing of numerous controlled corporations. The Italian Supreme Court held that this activity should be considered an entrepreneurial activity such that the individual conducting that activity might be subject to bankruptcy. *See* Cass., sez. un., 26 feb. 1990, n.1439, Guir. Comm. 1991, II, 366, 367.

129. On the other hand, Article 2497 of the Italian Civil Code provides for joint and several liability against whoever takes part in causing the damage or who knowingly took advantage from it, up to the amount of the benefit received. Through this rule, individuals who intentionally participate in or take advantage from control might be held liable, but the subject who exercises direction and coordination must in any case be a legal entity. C.C. art. 2497.

130. *Id.* art. 2497, para. 1.

131. *See generally* Montalenti, *supra* note 124.

supposed. Moreover, the extension of the derivative action against directors to nonlisted corporations and the broadening of the right of withdrawal, at a practical level, might not be particularly effective in raising the level of minority protection.

IV. CORPORATE GOVERNANCE

Some of the most dramatic changes brought by the Reform are in its amendments regarding corporate governance. In the next few pages, the newly introduced models of corporate governance will be briefly examined.

A. *Shareholders' Agreements and Shareholders' Meetings*

Before analyzing the new rules regarding the composition and roles of the directors and of the auditors, it is useful to point out some innovations concerning the ownership structure of the corporation and the shareholders' meeting. In this respect, the Reform provides specific rules concerning shareholder agreements. Shareholder agreements can either affect the transferability of shares or establish voting trusts that require participating shareholders to decide collectively by majority vote how all shareholders in the trust should vote. Prior to the Reform, these types of agreements were only regulated with regard to listed corporations. Specific rules required the disclosure of any such agreements to the Consob, publication in newspapers, and deposit in a public registry. If these disclosure requirements were not satisfied, the agreements were void, meaning that any shareholder member of the agreement could default without any legal consequences.[132]

The Reform expands regulation of shareholder agreements to nonlisted corporations, but less so than with regard to disclosure (which is more critical in public or listed corporations). Instead of disclosure, the regulation of shareholder agreements in nonlisted corporations focuses on the duration of shareholder agreements. In listed corporations, even before the Reform, the maximum period a shareholder agreement could last was three years.[133] If it included a longer period, such as five years, it was valid only for three years, after which shareholders could withdraw without consequences.[134] This rule has now been extended to nonlisted corporations (the maximum duration of the agreement is longer, five years).[135] As a consequence, with the Reform, all shareholder agreements, whether regarding listed or nonlisted corporations, are limited in their duration, even if they can be renewed after their expiration date.

A second and important area affecting shareholders' meetings concerns the voidability of the resolutions passed by this body. Under prior Italian law, shareholders could challenge the resolutions of a shareholders' meeting relatively easily. While the specific rules cannot be discussed in detail in this article, it is worth noting that, under the Reform, there are some specific limitations on shareholders' ability to challenge the

---

132. *See* Alberto Picciau, *Comment to Art. 122*, *in* LA DISCIPLINA DELLE SOCIETÀ QUOTATE NEL TESTO UNICO DELLA FINANZA 822 (Piergaetano Marchetti & Luigi A. Bianchi eds., 1999).

133. *See* Alberto Picciau, *Comment to Art. 123*, *in* LA DISCIPLINA DELLE SOCIETÀ QUOTATE NEL TESTO UNICO DELLA FINANZA 895 (Piergaetano Marchetti & Luigi A. Bianchi eds., 1999).

134. *Id.* at 896.

135. For an overview of the new rules, see Tommaso Manferoce, *Comment to Art. 2341*-bis & *2341*-ter, *in* 3 SOCIETÀ PER AZIONI: COSTITUZIONE, PATTI PARASOCIALI, CONFERIMENTI 130 (Giovanni Lo Cascio ed., 2003); Giuseppe Alberto Rescio, *Assemblea dei Soci. Patti Parasociali*, *in* DIRITTO DELLE SOCIETÀ: MANUAL BREVE 180, 203 (2004); Giorgio Semino, *I Patti Parasociali nella Riforma delle Società di Capitali: Prime Considerazioni*, SOCIETÀ 345 (2003).

resolutions of the shareholders' meeting. In particular, shareholder-plaintiffs who want to challenge a resolution adopted at the general meeting must hold at least 5% of the outstanding shares in a nonlisted corporation and 1‰ in a listed one.[136] Those shareholders who do not satisfy these minimum requirements but still sue alleging the unlawfulness of the meeting can only obtain damages caused by the adoption of a resolution at a shareholders' meeting that does not comply with the law or with the articles of incorporation.[137]

The purpose of this rule is to prevent minority shareholders from blackmailing the corporation with frivolous suits that block the activity of the corporation by having the shareholders' meeting declared void and requiring reconsideration of all issues voted on. On the other hand, however, in these situations damages are usually very difficult to calculate and might be an ineffective remedy in cases in which a resolution has been passed without, for instance, respecting rules concerning the way in which the meeting must be called.

B. The Board of Directors: The Three Options Menu

Apart from the shareholders' meeting, the most important aspect of the Reform is with respect to the board of directors.[138] Prior to the Reform, the shareholders' meeting appointed the directors, and if there was more than one director, they collectively operated as a board of directors. The shareholders' meeting also separately appointed an internal board of auditors, which was composed of certified accountants, and had different functions depending on whether the corporation was listed. In nonlisted corporations, the board of auditors had the task of monitoring not only directors' respect for the law but also the accounting of the corporation and its balance sheet.[139] In listed corporations, external auditing firms audited the corporation's accounting and its balance sheet, while the internal board of auditors controlled the adequacy of the organizational, information, and accounting systems adopted by the corporation.[140] One additional relevant distinction is that in listed corporations, some of the members of the board of auditors had to be appointed by minority shareholders.

The Reform introduced, in addition to this traditional model of corporate governance, new variations that permit at least three, and potentially four, separate possible models of corporate governance.[141] The first possible model is the classic, traditional model described above, which is similar to the ones adopted in France, Spain, and most South and Central American countries. In addition, it is now also possible (as will be discussed below) to adopt either a "dualistic" model, inspired by the German system of corporate governance, or a "monistic" system, inspired by Anglo-American systems of corporate governance.

Even within the traditional model, there are some revisions. As noted above, prior to the Reform, the board of auditors in nonlisted corporations controlled the corporation's accounting and balance sheet, while in listed corporations, the internal board of auditors

136. C.C. art. 2377.

137. *See* Gabriella Muscolo, *Comment to Art. 2377*, *in* 4 SOCIETÀ PER AZIONI: AZIONI, SOCIETÀ COLLEGATE E CONTROLLATE, ASSEMBLEE 367 (Giovanni Lo Cascio ed., 2003); Gaetano Presti & Matteo Rescigno, *L'invalidità delle Deliberazioni Dassembleari e delle Decisioni dei Soci*, *in* IL NUOVO ORDINAMENTO DELLE SOCIETÀ, *supra* note 4, at 133, 146.

138. For an overview of Italian corporate governance prior to the Reform, see generally Macey, *supra* note 3, at 129–43.

139. For a description of this system, see CAMPOBASSO, DIRITTO COMMERCIALE, *supra* note 47, at 342, 378.

140. *See* Legislative Decree No. 58, *supra* note 5, art. 149.

141. For an overall discussion of the new Italian corporate governance system, see Giovanni E. Colombo, *Amministrazione e Controllo*, *in* IL NUOVO ORDINAMENTO DELLE SOCIETÀ, *supra* note 4, at 175.

controlled only the corporation's system of information, with external auditors controlling the accounting and balance sheet.[142] Under the Reform, it is now possible for both listed and nonlisted corporations to assign to external auditors control over the accounting and balance sheet, leaving to the internal board of auditors the task of controlling the corporation's system of information. [143]

In addition to the traditional model, a corporation can adopt a "dualistic" system, inspired by German corporate law. [144] Under this model, the corporation does not appoint two different bodies, a board of directors and a board of auditors. Instead under this model, the shareholders' meeting appoints only a supervisory board, which under German law is called the *Aufsichtsrat*.[145] This supervisory board is charged with appointing the board of managing directors, which under German law is called the *Vorstand*.[146] In effect, there are two boards of directors, the supervisory board and the board of managing directors. The shareholders' meeting does not directly appoint and cannot remove the board of managing directors, but that power is instead vested in the supervisory board, which is appointed by the shareholders' meeting.

One important feature of this model is that the board of supervisory directors has responsibility for some of the controlling functions that in the traditional model are assigned to the board of auditors and also for some of the functions traditionally reserved to shareholders' meeting in the traditional model. One example is that the balance sheet is approved by the supervisory board. This is a change from the traditional system, in which the balance sheet was generated by the board of directors but approved by the shareholders' meeting. [147]

In the third model, the "monistic" system based on Anglo-American systems, the shareholders' meeting appoints only a board of directors, but one-third of the members of the board must possess independence requirements similar to the ones prescribed for the members of the board of auditors in the traditional model and provided by Article 2399 of the Civil Code.[148] The board of directors then appoints, within the board itself, an audit committee among the directors possessing the independence requirements mentioned above.[149] There is not a separate body that controls the activities of the managing directors, but instead an internal body of independent directors.[150]

---

142. *See* CAMPOBASSO, DIRITTO COMMERCIALE, *supra* note 47.

143. C.C. art. 2409-*bis*, para. 3.

144. *See* David Charny, *The German Corporate Governance System*, 1998 COLUM. BUS. L. REV. 145, 148–51 (1998); Thomas J. André, Jr., *Some Reflections on German Corporate Governance: A Glimpse at German Supervisory Boards*, 70 TUL. L. REV. 1819, 1823–26 (1996). It is important to point out, however, that one of the most striking features of the German system, the presence of directors representative of employees (so-called codetermination or *Mitbestimmung*)—also adopted in some northeastern European countries (such as the Netherlands, Poland, and Finland)—has not been introduced in Italy. The same is true for other European countries that have adopted some version of the German dualistic model, such as France and Portugal. *See* Lauren J. Aste, *Reforming French Corporate Governance: A Return to the Two-Tier Board?*, 32 GEO. WASH. J. INT'L L. & ECON. 1, 18–24 (1999); Antunes, *supra* note 11, at 36 n.140.

145. André, Jr., *supra* note 150, at 1823.

146. *Id.*

147. CAMPOBASSO, DIRITTO COMMERCIALE, *supra* note 47, at 432.

148. C.C. art. 2409-*septiesdecies*.

149. *Id.* art. 2409-*octiesdecies*.

150. V. Calandra Bonaura, *I Modelli di Amministrazione e Controllo nella Riforma del Diritto Societario*, 30 GIURISPRIDENZA COMMERCIALE 535 (2003); Salvatore Providenti, *Comment to Art. 2409* sexiesdecies*—2409* noviesdecies, *in* SOCIETÀ PER AZIONI, AMMINISTRAZIONE E CONTROLLI 389 (Giovanni Lo Cascio ed., 2003). For an in-depth analysis of the new monistic system of governance, see manuscripts by Federico Ghezzi, *at* http://www.unibocconi.it/dirittocommerciale (last visited Nov. 28, 2004), and in A COMMENTARY TO THE REFORM (Piergaetano Marchetti et al. eds.) (forthcoming 2005).

From this brief overview, it is clear that the Reform dramatically expands contractual freedom in structuring corporate governance. Instead of one model, there are now three, four if retention of the original traditional model is considered, and each model has significantly different rules. The new models create the possibility for more precise tailoring of corporate governance structures to the specific needs of particular corporations. For example, the dualistic model, with its supervisory and managing board, can be used by a very large corporation in which it is necessary to have a board that deals only with general issues, as well as a more executive board for day-by-day managing of the corporation. This system might also render a corporation more resistant to hostile takeovers because the incumbent controlling shareholders would have to change not only one board of directors, but two separate boards. It would first be necessary to terminate the members of the supervisory board, and then to have the newly appointed members of the supervisory board appoint new members of the board of managing directors. While this hurdle is probably not technically a defensive measure, it can nevertheless make it more difficult and more expensive to take over a corporation, at least in comparison to the monistic model.[151]

There are also other potential opportunities created by the diversification of models. Again looking at the example of the dualist, German-inspired model, such a system may be useful for intergenerational transfers of small or medium corporations. The heirs of a corporation's founders could be members of the managing board of directors, while the founders can be members of the controlling supervisory board. Because in Italy many of even the largest firms are family owned and operated, this model may be particularly popular.

Meanwhile, the multiplicity of models may also allow Italian subsidiaries of foreign corporations to structure their corporate governance system in a manner similar to that of their parent or holding corporations. In this way, it would be possible to replicate the same corporate structure in all the subsidiaries, therefore reducing the costs related to the existence, within the same multinational group, of many different organizational structures around the world.

Notwithstanding these possible benefits, it remains to be seen whether and to what extent these potentials will be realized. Proposals to make contrasting national financial and governance structures available within one legal system is not novel. Some American scholars, manifesting their dual love affairs with freedom of contract and comparative corporate governance, have already made such a suggestion, proposing that a panoply of choices similar to the one(s) offered within the United States, could be tested also in Europe.[152] The Italian legislation may be unique in the extent of its new menu of available options, but it is not the first time that a system has permitted choice from transplanted foreign corporate governance options. In the 1960s, France introduced an optional dualistic model, inspired by German corporate law, but this option has not been widely used by

151. In fact, if the members of the supervisory board do not resign spontaneously, the shareholders' meeting should remove them and, especially if change of control is not considered a cause for removal, their way out might be quite expensive for the corporation. The new supervisory board, at this point, would have to remove the existing executive board and appoint a new one. These procedures might be time consuming, expensive, and not quite efficient, especially when compared with the monistic model. While these costs and delays should not be overemphasized, it is likely that they might affect—even if at the margin—the overall cost of a hostile takeover.

152. *See* Edward B. Rock, *America's Shifting Fascination with Comparative Corporate Governance*, 74 WASH. U. L.Q. 367, 378–82 (1996) (agreeing with Roe's "important and controversial" suggestion to reform domestic law to enable competition among governance structures within the United States, in Mark J. Roe, *Some Differences in Corporate Structure in Germany, Japan and the United States*, 102 YALE L.J. 1927, 1989–97 (1993)). For a European echoing the same sentiment, see Kai Schadbach, *The Benefits of Comparative Law: A Continental European View*, 16 B.U. INT'L L.J. 331, 413 (1998).

corporations (available data suggests that very few corporations have ever adopted this model);[153] a two-tier system has also been introduced in Portuguese corporate law.[154]

The limited success of transplanted systems of corporate governance may, as some scholars suggest, be explainable under a theory of path dependency.[155] Alternatively, as other scholars argue, they may be a sign that particular governance structures germinated and developed in one social, economic, and political culture are not readily transplantable.[156] Whatever the causes of the limited success of historical precedents, the Italian legislature seems to have expressed a willingness to offer these different national structures well before the EU is able to permit corporations to choose from among national models through freedom of incorporation.

V. EVALUATING THE REFORM

A full evaluation of the Reform will inevitably require the benefit of several years of application of the new rules. There are several observations, however, and some tentative conclusions that can be drawn from the foregoing discussion that cast doubt on some of the premises of, and the solutions adopted by the Reform. In the final pages of this article, I spell out my criticisms of the Reform in three major areas: the implausibility of an effective market for rules in the absence of regulatory competition, the ineffectiveness of the supposed protection of minorities, and the possible effects of the Reform on the development of a market for corporate control.

A. *A Market for Rules Without Regulatory Competition?*

Even in light of recent developments in corporate law at the EU level, in the current situation, the Italian legislature cannot be considered one of several competing regulators as the individual states are in the United States. While EU law—and in particular, at least so far, case law of the European Court of Justice—may be leading to increased mobility for

153. *See* Aste, *supra* note 144, at 21–25. The author points out how a version of the dual model, in France, was originally introduced in the nineteenth century, only to be later abandoned and introduced again in 1966. *Id.* at 18–21. The article points out how from 1967 to 1977 some corporations adopted this model (reaching almost 8% of the shareholder agreements), only to decrease to less than 2% by the end of the 1990s. *Id.* at 24–25.

154. It is interesting to note that several European countries have attempted to offer different systems of governance to their corporations in the hope that the more efficient one will be automatically selected. In addition to the already cited example of France and the Italian Reform, it is at least worth noting the Portuguese example, where a variation of the two-tier, German-inspired system has been introduced. *See* Antunes, *supra* note 11, at 36–37. There are countries, however, that—at least so far—have not ceded to this "fashion." Spain is an interesting example of a continental European system where "only" one system of governance (similar to the traditional Italian one, with a board of directors and a board of auditors both appointed by the ordinary shareholders' meeting) is available. *See* G. Esteban Velasco, *La Renovación de la Estructura de la Administración en el Marco del Debate Sobre el Gobierno Corporativo*, *in* EL GOBIERNO DE LAS SOCIEDADES COTIZADOS 137 (G. Esteban Velasco ed., 1999).

155. *See* Coffee, Jr., *supra* note 11, at 660–61 ("Although a complex concept, the core idea in path dependency is that . . . initial conditions direct an economy down a particular path of development from which there is no easy return."); Gilson, *supra* note 12.

156. *See* Troy A. Paredes, *A Systems Approach To Corporate Governance Reform: Why Importing U.S. Corporate Law Isn't The Answer*, 45 WM. & MARY L. REV. 1055, 1072 (2004); Hideki Kanda & Curtis J. Milhaupt, *Re-Examining Legal Transplants: The Director's Fiduciary Duty in Japanese Corporate Law*, 51 AM. J. COMP. L. 887, 887 (2003) (noting that "transplantation of legal rules from one country to another is commonly observed around the world" and examining the duty of loyalty as transplanted into Japan). Even when Alan Watson noted and named the phenomenon of legal transplants, he cautioned that they can often cause mischief. ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (1974).

corporations, and thus increased competition among national regulators, to date the "real seat" approach remains a hurdle to free mobility.[157] As a consequence, the Reform might foster a market for rules, but mainly internal to Italy. This statement requires some elaboration.

Regulatory competition theories are based on the premise that different regulators (whether states, agencies, stock exchanges, or the like) compete to attract regulated subjects.[158] Several scholars argue, sometimes apodictically, that regulatory competition is either good because it leads to selection of efficient rules more effectively than one single "monopolistic" regulator would do, or bad because it predicates a race to the bottom.[159] Whichever position may have the better side of the debate, and it is not my intention here to weigh in on that debate, any possible development of an efficient market for rules presumes the existence of some preconditions that are at the basis for the development of every market.

According to the theoretical framework developed by the economist Tiebout,[160] you can imagine competitor-regulators as economic agents that offer one particular combination of "goods" and "services:" this includes rules, their interpretation, and their enforcement. These regulators might have incentives to attract regulated subjects, in this instance corporations, and therefore try to develop a coherent set of rules to effectuate this aim.[161] Independently from what our judgment is on this approach and its possible outcomes, even the most convinced supporters of regulatory competition would agree that, in order to develop an efficient market for rules, a few conditions must be met.

---

157. According to Gerard Hertig and Joseph A. McCahery:

> Two central trends are clearly beginning to emerge regarding state competition. First, the evidence suggests that, while regulatory competition remains close to non-existent within the EU, the appearance of new judgments from the ECJ can support the inference that regulatory arbitrage is an imminent possibility. Second, the threat of state competition, which is less attractive to weakly responsive states, such as France and Germany, can provide a new impetus for EU harmonization .... One of the most important debates in European company law is whether a 'market for corporate law' will ultimately emerge within the European Union, and if so, whether it will be based on a Delaware-like model in which companies can freely select their country of incorporation .... The absence in Europe of anything resembling American charter competition must therefore mean that there are substantive regulatory barriers to jurisdictional competition.

Gerard Hertig & Joseph A. McCahery, *Company and Takeover Law Reforms in Europe: Misguided Harmonization Efforts or Regulatory Competition?* 6–7 (Aug. 2003) (Eur. Corp. Governance Inst., Working Paper No. 12/2003), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=438421 (last visited Nov. 3, 2004). On regulatory competition in the EU, see also Stefan Grundmann, *Regulatory Competition in European Company Law—Some Different Genius?*, *in* CAPITAL MARKETS IN THE AGE OF THE EURO (G. Ferrarini et al. eds., 2002); Simon Deakin, *Regulatory Competition Versus Harmonization in European Company Law*, *in* REGULATORY COMPETITION AND ECONOMIC INTEGRATION 190, 205 (Daniel C. Esty & Damien Geradin eds., 2001).

158. There is extensive literature on this issue, in particular in corporate law. *See, e.g.*, sources cited *supra* note 8.

159. In addition to the articles cited *supra* note 8, for a critical discussion of the possible effects of freedom of incorporation, see, e.g., Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679 (2002); Lucian Arye Bebchuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Reconsidering the Competition over Corporate Charters*, 112 YALE L.J. 553 (2002).

160. *See* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956). Although this seminal article deals with the definition of the optimal level of taxation and production of public goods and services, discussing the alternatives of a single central regulator and several regulators in competition to attract resident-voters, as I have argued in my work, provides for one of the most powerful theoretical frameworks for discussing regulatory competition. MARCO VENTORUZZO, LA RESPONSABILITÀ DA PROSPETTO NEGLI STATI UNITI D'AMERICA TRA REGOLE DEL MERCATO E MERCATO DELLE REGOLE 150 (2003); *see also* Henri I.T. Tjiong, *Breaking the Spell of Regulatory Competition: Reframing the Problem of Regulatory Exit* (MPI Collective Goods Preprint No. 2000/13, Aug. 2000), http://ssrn.com/abstract=267744 (last visited Nov. 4, 2004).

161. *See* Tiebout, *supra* note 160, at 416.

One of the most important preconditions is the mobility of regulated subjects. In other words, corporations have to be able to decide freely—and without incurring additional and therefore "distortive" costs—to which set of rules they wish to be subject.[162] A second condition is that corporations, and also stakeholders, should be able to observe the different regulatory options and behave accordingly. For this condition to be met, information symmetry and low information-gathering costs are necessary.

Returning to the Reform and the European situation, it can be observed that the absence of these preconditions in the current Italian context might actually retard the development of rules that benefit minority investors. Notwithstanding the European Court of Justice's apparent move toward freedom of incorporation among the Member States,[163] a real market for rules similar to the one developed in the United States, whether desirable or not, is still far off in Italy's future.[164] As a consequence, the Reform might simply lead to a sort of "internal" market for rules within Italy's national boundaries, in which issuers compete to attract investors through their bylaws. Greater freedom of contract might, in other words, produce a market for rules but without the competition among regulatory authorities that exists among the individual states in the United States' charter competition. Instead of competition among regulators, the corporations themselves would offer different menus through their bylaws, exploiting the broader options left blank by the single, and still monopolist (or at least protected by barriers to mobility), national legislature.

While this lesser form of competition might have some virtues, it will likely require even higher information efficiency than the case of regulatory competition among competing states. Where real regulatory competition exists, for example, it would be relatively easy to know and signal that corporations incorporated in State X have certain features and investors enjoy a certain degree of protection.[165] By contrast, in an "internal" market for rules, in the absence of regulatory competition, the type of information an

162. More precisely, the transactional costs of the choice should not be so high as to interfere with the convenience of the optimal choice.

163. *See supra* note 12.

164. According to a recent analysis:

> Presently, the most substantial obstacles to free choice are those of a legal nature. They include the risk that the Member States will adopt pseudo-foreign corporation statutes, the inability of corporations to reincorporate without having to transfer their assets one by one, the taxation of hidden assets upon reincorporation, and the rules governing adjudicative jurisdiction in the European Community. However, while these obstacles are bound to limit free choice sharply while they exist, the Community legislator can easily remove them. Much harder to eliminate are certain factual barriers to free choice: Frictions between the judicial system of the real seat state and the corporate law of the state of incorporation, a shortage of multilingual lawyers, the cost of changing one's lawyer, and conflicts of interest on the part of lawyers fall into this category. However, these factual obstacles matter most to small and medium-size corporations, that is, businesses which tend to incorporate locally even in the United States. Also, most of the above-described factual barriers to free choice are likely to grow weaker over time, as the corporate law of one or two jurisdictions begins to dominate. In sum, therefore, while the European legislator cannot hope to afford European corporations the degree of free choice enjoyed by U.S. corporations, there is reason to believe that Europe will not lag too far behind the United States.

Dammann, *supra* note 98, at 52 (footnote omitted). Doubts on the development of an effective market for rules and on the risk of a "Delaware effect" are raised also by Enriques. *See supra* note 13.

165. In addition, as discussed regarding listed corporations, we cannot expect that a market for rules will develop among stock exchanges since rarely—for both legal and economic reasons that cannot be analyzed here but that can easily be imagined—an Italian corporation decides to list (only) on a stock exchange of a different European country. In addition, within national boundaries, there are not significant alternatives to being listed on the Italian Stock Exchange, with the consequence that in Italy there are not competition phenomena that can be compared to the ones occurring in the United States between, for instance, the NYSE and the Nasdaq.

investor must gather, and the methods for gathering it, are inherently different. When competition is left only to individual corporate bylaws, investors must understand the specific rules adopted by that particular corporation, and these information-gathering techniques might be even more laborious and detailed than in the context of real regulatory competition.

Moreover, in this context, investors do not have the possibility of opting among different regimes with different balances between mandatory and enabling rules and different levels of compulsory disclosure. There is only "one" balance between mandatory and enabling rules and "one" level of compulsory disclosure, and within that framework every single corporation is free to adopt its preferred rules. The signaling effect of different regulatory regimes decided by independent and competitive regulators is not present, and investors can only choose among the rules chosen by the different corporations.

Supporters of regulatory competition might argue that market prices of shares and other securities issued signal, even to the uninformed investor, the evaluation of the corporation (and its regulatory choices) made by professional, sophisticated investors. Through this mechanism, therefore, all investors should be allowed to appreciate the bylaws choices of the issuer that they are considering. Such a conclusion, however, holds true only assuming (almost) perfect information efficiency on the market, a condition that—as recent scandals such as Parmalat and Cirio have dramatically demonstrated—is far from being proven in the Italian financial market. In addition, even assuming that market prices perfectly reflect costly information concerning the regulatory choices, the reasoning would not apply to closely held corporations, which are also affected by the Reform. In this respect, it should also be considered that listed corporations often participate in the ownership of nonlisted corporations, for whose shares there is not a reliable market price. It is in these corporations that there are often hidden problems, which provides even more reason to doubt—in the current Italian scenario—the reliability of market prices as an accurate signal of the degree of protection of minorities.

B. *Increasing or Decreasing Protection for Minorities?*

Turning attention to the issue of protection of minorities and investors, the effect of the broader freedom of contract and of the proliferation of different and new financial instruments with particular administrative and economic rights may not be entirely good news.[166] The theoretical assumption on which the legislature relied is that the market itself will provide for "natural selection of the fittest" rules, presumably meaning the "fittest" with regard to the needs of all stakeholders involved. This assumption only holds true, however, if the different stakeholders involved do not suffer information asymmetries regarding the alternative forms of investment proposed. In the scenario designed by the Reform, therefore, the issue of information and transparency concerning both the economic and financial conditions of an issuer and the legal rules that govern it are even more crucial.[167]

If it is true that greater freedom of contract requires, to protect investors, stricter rules concerning financial information, the Reform not only missed this point but seems to have turned it on its head. The new rules seem almost reckless in leaving the definition of general accounting principles and specific reporting rules to corporate bylaws (meaning the

---

166. Notably, even when tracking stocks were introduced in the United States, some investment professionals sounded the alarm to "'run for the hills.'" Hass, *supra* note 42, at 2089 (quoting Stephanie Strom, *It's Called Targeted Stock: Shun It, Some Experts Say*, N.Y. TIMES, July 12, 1994, at D1).

167. This observation is particularly relevant with respect to the new possibility of creating a separate pool of assets or dramatically increasing the amount of bonds issued by a corporation.

controlling shareholder or her directors), particularly with respect to new financial instruments (i.e., tracking stocks, separated pool of assets). This approach is particularly problematic in light of contemporaneous reductions in the sanctions for publications of false or misleading information that have been recently enacted by the legislature. In the field of white collar crime in fact, the legislature has, in other legislative enactments, reduced consequences for the crimes of publication of false financial statements and false statements in a prospectus.[168] As a consequence, it seems unlikely that after the Reform any momentum in favor of a higher degree of transparency in financial markets will develop, as would be required to reduce information asymmetries and allow investors to make efficient choices among corporations.

This situation is further aggravated by the fact that in Italy, as well as in many European countries, there is no statutory ad hoc regulation of civil liabilities related to the diffusion of false, incomplete, or misleading prospectuses or other financial publications. This absence of civil liability is compounded by the absence of procedural instruments (such as class actions, contingency fees, or discovery rules), which would be necessary to allow small investors to recover through a lawsuit the damages suffered.[169]

These issues concerning financial information and transparency become even more critical after the Reform because, by increasing the degree of contractual freedom and creating new room for financial innovation, complete and reliable information is all the more important to protect investors. Even the staunchest proponents of freedom of contract in corporate law acknowledge that some mandatory rules concerning information are necessary as a precondition for the development of an efficient market for rules.[170]

Thus, the new instruments introduced by the Reform may be a Pyrrhic victory for champions of minority rights. True, the right of withdrawal has been significantly broadened in order to allow easier and more convenient opportunities for minorities to exit, and a specific cause of action has been introduced for shareholders and creditors of corporate groups damaged by the holding corporation. As discussed above, however, the baroque and ambiguous burden of proof imposed on minorities combined with existing difficulties in Italian corporate litigation (the absence of clear rules on class actions, the unlawfulness of contingency fees, the absence of discovery mechanisms, the "loser pays" rule, and so on) might render these instruments blunt weapons for protecting minorities' interests.

---

168. *See* Luigi Foffani, *L'Infedeltà Patrimoniale*, *in* IL NUOVO DIRITTO PENALE DELLA SOCIETÀ (Alberto Alessandri ed., 2002); Vincenzo Militello, *L'Infedeltà Patrimoniale (Art. 2634)*, *in* IL NUOVO REATI SOCIETARI: DIRITTO E PROCESSO 471 (A. Giarda & S. Seminara eds., 2002).

169. *See* VENTORUZZO, *supra* note 160, at 233 (arguing that in the absence of ad hoc statutory regulation of prospectus liability and the consequent need to apply to cases involving false, misleading, or missing information in registration statements and other documents given to the investors, the basic Civil Code rules on tort and pre-contractual liability results in suboptimal protection of investors).

170. *See* Paul G. Mahoney, *Mandatory Disclosure as a Solution to Agency Problems*, 62 U. CHI. L. REV. 1047 (1995); *see also* Oliver Hart, Recent Developments in Corporate Governance 3 n.1 (Nov. 2003) (unpublished manuscript) ("There are some aspects of the corporate charter that may not be chosen efficiently. For example, the founder may not have the socially correct incentives to disclose information about the company. A mandatory disclosure law may help here.") (on file with author). There are those who nevertheless argue for a shift from mandatory disclosure to an issuer's choice approach. *See* Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 YALE L.J. 2359, 2363–64 (1998); Stephen J. Choi & Andrew T. Guzman, *Portable Reciprocity: Rethinking the International Reach of Securities Regulation*, 71 S. CAL. L. REV. 903 (1998). These arguments have been effectively criticized by Merritt B. Fox, *Retaining Mandatory Securities Disclosure: Why Issuer Choice Is Not Investor Empowerment*, 85 VA. L. REV. 1335 (1999); *see also* Merritt B. Fox, *Securities Disclosure in a Globalizing Market: Who Should Regulate Whom?*, 95 MICH. L. REV. 2498 (1997).

C. *Entrenching Corporate Control*

The final point on which the Reform can be critiqued is its apparent improbability that it will foster competition in the market for corporate control. Several new rules may limit the development of a strong equity market, on the one hand, and create opportunities to use the broader freedom of contract, to entrench control, and to avoid takeovers, on the other.

Removing limitations on the issuing of bonds for listed corporations and creating the possibility of issuing new financial instruments that do not correspond with participation in the capital might lead to even broader recourse to debt instead of equity to finance the corporation. This option might aggravate the "original sin" of undercapitalization of Italian listed corporations, resulting in a weaker and less liquid equity market.[171] Moreover, there is an increased possibility of segmentation of the market because of the numerous different new instruments that can now be issued by the same corporation. In that event, the liquidity of financial markets may be negatively affected.

In addition, exploiting the new margins of freedom concerning financial instruments introduced by the Reform, it is possible to create instruments that might help controlling shareholders entrench their control. For example, as discussed above, it is possible to issue shares whose voting rights are triggered by the launch of a hostile takeover or by the decline of participation of the present controlling shareholder below a certain threshold. The increased freedom afforded by these instruments is placed in the hands of controlling shareholders and can thus be used by them to further leverage and preserve their control. On the other hand, the new rules concerning preemptive rights in the case of issuing of new shares and the more extensive powers granted to directors in the case of a capital increase might facilitate entrenching control through the issuing of shares to provide a white knight in the case of a hostile takeover.

Another aspect of the Reform that could interfere with the market for corporate control is the opportunity to adopt the dualistic model. As noted above, the German experience could raise the cost of launching a hostile takeover since the new controlling shareholder would have to change not only the members of one board but of two.[172] This circumstance might, at least to some extent, create an additional obstacle in the creation of a more active market for corporate control.[173]

VI. CONCLUSION

These foregoing critiques do not necessarily imply that the Reform should be deemed a step backward for Italian corporate law. The Reform has clearly modernized the Italian system of corporate law and introduced institutions that might prove to be very useful to the development of Italian enterprises.

While the Reform has surely taken away some dust from the original corporate law rules, however, it also suffers from several shortcomings that might cause problems in realizing the benefits it was meant to introduce. By "borrowing" what comparative law scholars refer to as "legal transplants," the legislature was able to introduce new institutions and rules from foreign systems that provide innovative options for corporate managers and shareholders. There is a real fear, however, that this extensive borrowing may have been overly exuberant.[174]

---

171. *See* Deeg, *supra* note 14.

172. *See supra* Part IV.B.

173. *See supra* note 144.

174. As one scholar has warned about indiscriminant transplanting of corporate law:

After surveying the list of innovations, the Italian legislature seems to evoke the image of a meandering tourist who, enchanted with the new cultures he encounters, fills up his luggage with exotic collectibles only to discover once back home that the enormous, feathered ritual mask really does not go with his grandmother's antique credenza. This image might come to mind, for instance, when considering the introduction of tracking stocks, the reduction or elimination of limitations to the issuing of bonds, the "dualistic" model of governance inspired by the German system, or the new rules on groups of corporation.

In any case, the Reform represents a unique experiment of comparative corporate law, and for this alone warrants scrutiny and consideration by comparative corporate law scholars. In the next few years, it will be interesting to examine which of the new options offered by the broader freedom of contract will actually be used by corporations and what their effect will be on the market prices of shares, on the efficiency of the Italian corporate law system, and on the position of minority investors within that system.

The Reform undoubtedly qualifies Italy as a necessary topic in any discussion about the role of innovation and freedom of contract in corporate law. It is not certain, however, whether the new rules will prove or disprove those who argue that the innovativeness and flexibility can, in and of themselves, operate as indicators of the quality of a nation's corporate law.[175] The Italian system is now decidedly more open to solutions and rules inspired by a comparative analysis of corporate law, and the experimental transplantations may result in higher efficiency of the Italian economic system in the long run. One must only hope, however, that the guinea pig for the experiment will not be—as too often happened in the past—the investors.

> There are . . . dangers with legal transplants. As a result of any number of differences between the "importing" and "origin" countries, including different economies, political systems, and social structures, as well as unique value systems and priorities, an "importing" country might not be ready to receive the transplant. Further, the "importing" country simply might not understand the law it is importing and how it is supposed to work. As a result, the transplant might not take root or might evolve differently in the "importing" country than in the "origin" country. In any case, the transition to a new regime can be socially disruptive and is likely to be rife with ongoing challenges and unanticipated consequences—for better and for worse.

Paredes, *supra* note 156, at 1072–73 (footnotes omitted).

175. On the role and rate of innovation in corporate law and its possible effects, see generally Pistor et al., *Innovation*, *supra* note 1.

VII. APPENDIX A

		Most Important Competences	**1st Call**		**2nd Call**		**3rd Call**	
			quorum (necessary to hold the meeting)	majority (necessary to pass a resolution)	quorum (necessary to hold the meeting)	majority (necessary to pass a resolution)	quorum (necessary to hold the meeting)	majority (necessary to pass a resolution)
Ordinary Shareholders' Meeting		appointing and removing directors and auditors, approving the financial statements and the dividend policy, making decisions to sue the directors for breach of their duties toward the corporation	1/2 of the outstanding voting shares	1/2 + 1 of the votes attached to the shares represented at the meeting	not provided to avoid deadlocks	1/2 + 1 of the votes attached to the shares represented at the meeting	not provided to avoid deadlocks	1/2 + 1 of the votes attached to the shares represented at the meeting
Extraordinary Shareholders' Meeting	nonlisted corporations	issuing new shares, merging, and, in general, any other amendment to the articles of incorporation or to the bylaws	not provided, but indirectly assured by a majority calculated on the basis of outstanding voting shares	1/2 of the outstanding voting shares	1/3 of the outstanding voting shares	2/3 of the votes attached to the shares represented at the meeting (but for certain resolutions, such as amending the corporate purpose, 1/3 of the outstanding voting shares)	1/3 of the outstanding voting shares	2/3 of the votes attached to the shares represented at the meeting (but for certain resolutions, such as amending the corporate purpose, 1/3 of the outstanding voting shares)
	listed corporations and corporations with widespread ownership structure		1/2 of the outstanding voting shares	2/3 of the votes attached to the shares represented at the meeting	1/3 of the outstanding voting shares	2/3 of the votes attached to the shares represented at the meeting	1/5 of the outstanding voting shares	2/3 of the votes attached to the shares represented at the meeting