The Minority Directors in the Corporate Governance of EU Listed Institutions: a Chimera or a Possibility?

Abstract

The analysis of the category of minority directors is discussed in this paper in an ambitious undertaking which hopefully is not overly so. This niche body of directors, a classification present in very few jurisdictions across the world, is discussed against the backdrop of a legal framework, Italy, where it has been codified for quite some time. Italy then, will be the starting point of a legislative expedition which will firstly encounter the shores of a comparator, Britain, and its local system of corporate governance, before ultimately reaching its journey's end in Brussels, and its legal framework of corporate governance addressed to listed companies. Based on the findings of this doctrinal analysis, it is suggested that the notion of minority directors as public safe-keepers, albeit exclusively confined to listed companies, could spearhead the agenda of the EU legislature and is a device fit for transplantation across the different corporate law frameworks, first and foremost the British one. Ultimately, through a speculative reference to the notion of 'board diversity' and the literature sprouted on this concept, the Italian voting list model is discussed as a means of adding both value to listed entities and efficiency to the relevant boards.

Contents

1. Introduction

Epistemologically, minority directors are members of the governing body of a company, having been directly appointed to this position by the minority shareholders, i.e. by the shareholders who did not succeed in achieving either the absolute majority, or the relative one, of the votes. As the minority director does not 'represent' the majority but strictly speaking the minority, as elucidated further in this paper, its role should theoretically ensure that the resolutions of the company are adopted with the involvement of a plurality of voices, including those somehow connected with the minority, or one - the largest, amongst the minority groups. As highlighted by the principal literature, [1] the purpose of this *genus* of director allows an organised minority that selects only a fraction of the board to 'still benefit from access to information and in some cases, the opportunity to form coalitions with independent directors.'

Empirically, there is a European jurisdiction, Italy, where this category has been formally adopted within its domestic legislative framework.[2] As clarified in this paper, the legal concept under discussion was introduced, in 2005, by virtue of an *ad hoc* piece of legislation addressed exclusively to listed companies. Essentially, the legal provisions substantiate in an obligation levied on these entities to ensure that at least one director shall be appointed by the minority shareholders of the legal entity.

Interestingly, in the jurisdiction under consideration, the innovative category of the minority director does not engender, nor is regarded as inconsistent with, the independent director. The latter remains a resolute feature in the architecture of the corporate governance of listed companies, as professionals who, albeit appointed by the majority, do not hold personal or professional connections with the dominant members.[3]

The rules governing the notion of the minority directors are discussed and analysed in this paper from a comparative and cross-border perspective. In this respect, the contribution seeks to discuss and analyse the main features of this category of minority directors in a jurisdiction (the Italian) where legal provisions have been shaped for a while. In doing so, an attempt is made to compare these legal provisions with the correspondent legal body existing in other jurisdictions where this category

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[1] L Enriques, H Hansmann and R Kraakman, 'The Basic Governance Structure: Minority Shareholders and Non-Shareholder Constituency' in R Kraakman, J Armour, P Davis, L Enriques, HB Hansmann, G Hertig, KJ Hopt, H Kanda, EB Rock, *The Anatomy of Corporate Law. A Comparative and Functional Approach* (2nd edn Oxford University Press, Oxford 2009) 90.

[2] From a study published by the OECD (OECD – Directorate for Financial and Enterprise Affairs – Corporate Governance Committee, Peer Review 4: Board Nomination and Election (April 2012) http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/CA/CG(2012)1/FINAL&docLanguage=En accessed 13 October 2015) it can be inferred that, in addition to Italy, the comparator in this paper, only Israel adopts a category of directors appointed according to lists, thus constituting minority directors. However, in the Italian literature (S Alvaro, G Mollo and G Siciliano, *Il Voto di Lista per la Rappresentanza di Azionisti di Minoranza nell'Organo di Amministrazione delle Societa'*, Consob, Quaderni Giuridici, November 2012, 24) it is suggested that Spain too, which is not part of the OECD survey, is a further jurisdiction where the minority directors have been recognised in statute as an autonomous category since as early as 1951, to be later amalgamated in the law of corporate entities of 1989.

[3] For a recent doctrinal discussion about independent directors, see M Gutiérrez and M Sáez, 'Deconstructing Independent Directors' (2013)13 Journal of Corporate Law Studies 63-94.

is missing. In this respect, emphasis will be placed on the codes of corporate governance existing in this country, both the *Codice di Autodisciplina* applicable to the Italian listed companies,[4] and its counterpart across the Channel, the British Corporate Governance Code.[5] The British and, to a lesser extent, the US system of corporate governance shall be adopted as comparators whereas the EU legal framework will be the ultimate landscape of discussion.

Within the broader discussion about the notion of corporate governance,[6] the ultimate purpose of the analysis is to ascertain whether, first and foremost, the category of minority director may have a future in the corporate governance across different countries, and more generally, in Europe. Secondly, the paper tries to assess, in a more speculative way, whether this category may replace, or – more likely - amalgamate with further and better known categories of directors, namely the non-executive and the independent ones. The latter, universally adopted in listed companies in major jurisdictions, have proved controversial in the last decade, particularly because of their ineffectiveness during the latest financial crises. The introduction of minority directors, alongside the 'modernisation' of the controversial independent directors,[7] could provide a legal scenario on which to lay down the foundations of a new and more mature system of corporate governance.

2. Minority Directors in a Nutshell

It may appear a paradox to initiate a contribution on the minority directors by affirming that there is no such thing as a minority director! In fact, in one of the very few jurisdictions - the Italian one - where this category can be somehow identified, no express definition is provided. In detail, in some specific corporations of that jurisdiction, namely companies listed on a stock market, minority shareholders are entitled to take part in the management of the company. 'Minority director' is not an official nomenclature, simply because it is not articulated in the legislation. Rather, it is a term coined in the literature,[8] in order to express a category that, indirectly, is

[4] Comitato per la Corporate Governance, 'Codice di Autodisciplina', July 2015 <http://www.borsaitaliana.it/borsaitaliana/regolamenti/corporategovernance/codice2015.pdf> accessed 13 October 2015.

[5] Financial Reporting Council, 'The UK Corporate Governance Code', September 2014 <https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/UK-Corporate-Governance-Code-2014.pdf> accessed 13 October 2015.

[6] In the vast literature about corporate governance, see B Tricker, *Corporate Governance. Principles, Policies, and Practices* (2nd edn Oxford University Press, Oxford 2012); R Kraakman, J Armour, P Davies, L Enriques, H Hansmann, G Hertig, K Hopt, H Kanda, E Rock, *The Anatomy of Corporate Law. A Comparative and Functional Approach* (2nd edn Oxford University Press, Oxford 2009).

[7] A recent suggestion among scholars is that independent directors should be converted from private gatekeepers to 'public third-party enforcers'. See M Gutiérrez & M Sáez, 'Deconstructing Independent Directors (2013)13 Journal of Corporate Law Studies 92. In a brief formula, they should be 'agents of the regulator rather than agents of the shareholders.' (ibid)

[8] See, for instance, F Denozza, 'L' "Amministratore di Minoranza" e i suoi Critici' in Assogestioni, *La Corporate Governance e il Risparmio Gestito*, 2006, 21-25. However, in the same Italian literature (M Cera, 'Il Buon Governo delle Banche tra Autonomia Privata e Vigilanze Pubbliche' [2015] Rivista delle Società 947), an explicit concern about the rationale behind the 'minority directors' is expressed. It is opined that minority directors would affect the sacrosanct principle which permeates a company: the management of an entity requires the existence of a 'cohesive body, flanked by its massive tools of internal auditing (...).' (ibid) The

inferable from that fact that in listed companies, the election of candidates occurs through lists of contenders. The way to achieve this is to make compulsory in the bylaws[9] of the listed legal entity that grouped minority shareholders may appoint at least one director. More practically, before the shareholders' meeting of each company where the appointment is expected to be made, a qualified percentage of shareholders are entitled to submit a list of prospective directors. The percentage shall be qualified in its upper threshold, either by law and/or by the market authority, to ensure that the minority shareholder is really a minority one, rather than a disguised majority shareholder.

Company law's 'general majority principle' has it that the majority shareholders appoint, through their vote, all the directors of the company, including the independent ones; the minority is a mere spectator, who shall passively accept the decisions of the majority[10] , unless they opted for voluntarily exiting the company, where listed. Nevertheless, the consequences of this axiom can be partly reversed through the legal device under discussion: a quota of directors, expressed either in terms of percentage or in terms of numbers, shall be reserved to the minority list. The latter is the list of shareholders which, without having any connection with the majority ones, have managed to achieve the highest consensus in the Assembly General Meeting (AGM). The first candidate of the most successful minority list will be appointed director, as will the second candidate of the same list, if the quota of Board of Directors allows the appointment of an additional director.

Technically speaking, the director appointed as such is not explicitly regarded and defined as minority director, although it is quite obvious that, because chosen from the list of the successful minority directors, he will certainly represent (also) the 'soundings' and 'voices' of the minorities. The rationale behind this category is to ensure that minorities are practically involved in the management of the companies, particularly the listed companies, where the investors and their protection represent paramount interests.

3. The Legislative Rules of Appointment of the Board of directors: UK, Italy and the silence of the European Union

In Italy, art. 2383(1) of the Italian Civil Code (ICC) confers on the shareholders' meeting the power to appoint directors[11] according to an absolute majority principle.[12] This principle is not mandatory, for the reason that 'for purposes of appointment of the representatives, the bylaws [may] fix specific rules' (art. 2368(1),

internal auditing system, ultimately, would not make sense if 'the audit, the guardianship, was conferred on minority directors' (ibid)

[9] In this paper, the term 'bylaws' shall be used as synonym of 'articles of association'.

[10] This notion of dominance of the majority and the binding nature of these decisions on the minority has been an entrenched concept in the Italian legal system. See, among the others, F Ferrara Jr and F Corsi, *Gli Imprenditori e le Società* (13th edn Giuffre' Editore, Milan 2006) 573-622.

[11] 'Directors are appointed by the shareholders' meeting, except for the first directors, who are appointed in the memorandum of association (…) .' (our translation).

[12] Art 2368(1), ICC: *'L'assemblea ordinaria è regolarmente costituita quando è rappresentata almeno la metà del capitale sociale, escluse dal computo le azioni prive del diritto di voto nell'assemblea medesima.'*

last part).[13] The entrenched interpretation of the rules under discussion is that specific clauses in the bylaws in force, of which in the AGM the vote shall be cast according to lists of directors submitted in advance, are permissible.

With regards to Britain, it is surprising how relatively simple and laconic the rules concerning the appointment of directors are. The approach to the way directors are appointed is comparatively loose. The company's articles arrange the relevant rules, given the fact that, as pointed out by scholars,[14] the main concern of the Companies Act 2006 (CA 2006) is 'to give publicity to those who are appointed rather than to regulate the appointment process'.[15]

In more detail, in the UK as well as in Italy, apart from the first directors (usually appointed by the subscribers of the memorandum), the appointment of the subsequent directors is bestowed on the shareholders,[16] through an ordinary resolution.[17] It is worth pointing out that this is what usually happens in corporations; nevertheless, there is no such thing as a requirement by the CA 2006 that the directors are elected 'by the shareholders in a general meeting'.[18] Although the observation of the practice suggests that this is usually the case, this is 'the consequence of the provisions of the company's articles, not of the Act's requirements'.[19] The provisions in the articles of association could be very eclectic and disparate; the appointment of the company directors, including potentially the minority directors, could be bestowed upon debenture holders and even third parties.[20] As far as the supranational and, more specifically, the European Union layer are concerned, it is known that no European Union directive has provided and regulated so far the matter of the listing vote in the election of the members of the board of directors, nor any rule has been set forth in the area of the minority directors. Therefore, it is possible to suggest that there is a lack of interest in this micro-area of corporate governance or, in cases where commentaries were avialable, a certain degree of scepticism seems to transpire.
The above referred lack of interest to the matter seems to be inferable from the Action Plan of the European Commission[21] which does not refer at all to the 'voting list'.

[13] 'The by-laws may establish specific rules for the appointment of officers of the company.' (our translation)
[14] PL Davies & S Worthington, *Gower & Davies. Principles of Modern Company Law* (9th edn Sweet & Maxwell, London 2012) 398.
[15] See Companies Act 2006, Draft Model Articles for Public Companies, ss 33-41.
[16] *Worcester Corsetry Ltd v Witting* [1936] Ch 640 (CoA). See D French, S Mayson & C Ryan, *Mayson, French & Ryan on Company Law* (32th edn Oxford University Press, Oxford 2015) 439.
[17] *Link Agricultural Pty Ltd v Shanahan* (1998) 28 ACSR 498.
[18] PL Davies & S Worthington, *Gower & Davies. Principles of Modern Company Law* (9th edn Sweet & Maxwell, London 2012) 398.
[19] Ibid.
[20] Ibid.
[21] Comunication from the Commission to the European Parliament, the Council, The European economic and social committee and the Committee of the Regions. Action Plan: European company law and corporate governance – a modern legal framework for more engaged shareholders and sustainable companies, http//www.eu-lex.europa.eu/legal-content. Moreover, the subject matter of minority directors has not been taken into account neither by "The new European Model Company Act" (that is a model statute regulating coroporations: see the EMCA – Draft 2015, www.commerciallaw.com.ua), nor by the Reflection Group on the Future of EU Company Law (see the Report of the Reflection Group on the Future of EU Company Law published on the 5th of April 2011).

Furthermore, it is worth noting that European Commission's Green Paper on corporate governance[22] too is silent about the ‘viting list’ mechanism. More in detail, this document, in a large part devoted to the administrative body, sheds a light on both board composition and possible forms of diversity, viz. international and/or gender diversity; nevertheless, nothing is said as to the possibility to confer on to the minority a representation in the board of directors.
As far as a sceptical approach is concerned, in a recent analysis of ECGS,[23], three cases of Italian listed companies whose by-laws contemplate the “voting list” mechanism have been analysed. That investigation – which may be partial, given the narrowness of the selected sample - ends with the statement that the voting mechanism would need to be changed: <<A regulatory amendment, forcing to apply the real ‘voting list’, would allow for greater proportionality: the votes obtained by each slate shall be divided by the integers from one to the numbers of directors to be elected; resulting the quotients are then allocated, one each, to the nominees on that list, in accordance with the order in which their names appear there; all the nominees on all the lists (including the majority one) are then arranged in descending order of their individual quotients>>. Properly understood, this conclusion would highlight - not without reasonable grounds - possible fallacies of the corporate provisions of the voting list mechanism, not the same principle.

4. The Genesis of Minority Directors in the Italian Corporate Governance

As already mentioned, a jurisdiction where a form of minority directors is *de facto* recognised, is the Italian one. The way this has been achieved is by the legislation and, more specifically, a derogation from the way directors are usually appointed (fundamentally, the majority ‘strikes the pot’ and gets 100 per cent of the board). In this respect, the Italian corporate legislation has been characterised in the last two decades by two main developments: the Privatisation Act (1994);[24] and the Savings Act (2005).[25]

As to the former, law 30 July 1994, no 474 has made it mandatory for companies previously owed by the Government, to introduce in their bylaws a clause on the election of directors according to lists submitted by diverse groups of shareholders. This clause was – and is still – unmodifiable, so long as the bylaws are fitted with a threashold to the holding in its share-capital.

[22] European Commission, Green Paper. The EU corporate governance framework, http/ec.europe.eu/internal_market/company/modern/com.

[23] ECGS European Corporate Governance Service, ‘*Election of the Board: Is the Italian "voting lists", as Defined by the By-laws, still Valid? The Cases of Fiat, Unicredit and Prysmian*’<<http://www.ecgs.org/node/62>.

[24] Law no 474 of 31 May 1994, converting, with amendments, law decree 31 May 1994, no 332, containing norms aimed to accelerate the procedures of divestment of holdings by both the Government and Public Authorities in joint stock companies.
[25] Law no 262 of 28 December 2005 (‘Legal provisions for the protection of the savings and the governance of the financial markets’).

In more detail, according to these *ad hoc* legal provisions, the AGM shall be convened by a notice to be published at least 30 days before the meeting. The agenda shall contain the items of business. In view of the AGM, those entitled to submit a list of candidates are the departing directors or the shareholders that represent at least one per cent of the share with voting rights in the ordinary shareholders' meeting. Such lists shall be made public at the company office (at least 20 days before the AGM) and with dissemination in at least three national newspapers at least ten days before the planned shareholders' meeting. Corollary of this microcosm of rules is the legal provision (art. 2(1)(let d)) which stipulates that the successful minority list shall be given 'as a whole at least one fifth of the directors ...'.

As far as the second piece of legislation is concerned (Law 28 December 2005, no 262), a specific legal provision (art. 1) has made mandatory, for purposes of the appointment of directors, a bylaws' provision requiring grouped shareholders to submit a list of candidates. This norm applies to all listed companies.[26] The legislative technique whereby this has occurred, is the amendment to the Italian Consolidated Finance Act, particularly the introduction of a new art. 147-ter. The Consolidated Finance Act (the TUF) refers to Legislative Decree 24 February 1998, no 58, amended by Law Decree 24 January 2015 no 3, converted with amendments by Law 24 March 2015, no 33.

So long as the bylaws of a listed company stipulates as such, the Board of Directors shall be 'elected on the basis of lists of candidates'.[27] The details of these provisions can be summarised, also in relation to the rules contained in the Privatisation Act, already examined in this Section 4. In greater detail, the lists shall be lodged with the company office at least 25 days before the date of the shareholders' meeting in charge of appointing the directors. Similarly, at least 25 days before the meeting, they shall be publicised, through the internet and the other forms fixed by the Market Authority, in its delegated legislation. The dissemination to the public shall occur at least 21 days before the date that has been fixed for the shareholders' meeting.

Beyond the black-letter of the legislation, it is possible to summarise that, in Italy, the minority director is a concept indirectly inferable from the 'list of candidates'. The list of candidates, originally introduced for a niche category of legal entities (privatised companies previously owned by the Italian Government or public authorities), has been extended more recently (courtesy of the Savings Act 2005) to all listed companies, and ultimately the relevant legal provision is codified within art. 147-ter of the TUF. According to this norm, the most voted list of candidates, which

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[27] G Presti and M Rescigno, *Corso di Diritto Commerciale, Volume II* (7th edn Zanichelli Editore, Bologna 2015) 144-145.

is by definition the majority one[28], will not get the entirety of the board, as it would happen in other jurisdictions. Conversely, the second voted list[29] will be entitled to receive a quota of directors, no less than one[30]. More specifically, the number of minority directors shall be at least one or, if the board of directors is made up of no fewer than seven people, no fewer than two.[31]

5. Minority Directors: the Details of the Italian Legislation

As made explicit in Section 1 above, one of the purposes of this contribution is to assess whether minority directors can be a new, efficient tool to solve the intrinsic problems of corporate governance (eg lack of participation of the minorities in the decision making process) or, to be less pessimistic, a way to improve the corporate governance in listed companies.

In this respect, it is necessary to clarify that the minority directors are not subject to the conditions of independence which are otherwise applicable to independent directors [32] . Minority directors may hold specific interests of the minority shareholder and these interests may be inconsistent with those of the company or of the shareholders in general. As far as 'independent directors' are concerned, they are supposed to be independent from connections with the majority shareholder, not from the minority shareholders which indicated him.

To clarify the 'serpentine' development of the Italian legislation, the following principles should be highlighted. The appointment of minority directors was

[28] It can however happen that the most voted list submitted a number of candidates inferior to seats available in the board of directors. This can lead to the bizarre situation of a minority list that has a majority of directors on the board.

[29] The straightforward definition of 'minority list' is the list that has not achieved the majority of votes in the AGM. However, the concept of minority list warrants a more in-depth discussion. In actual terms, there are two potential circumstances which reflect possible attitudes of the investor towards the governance of the listed company.

On the one hand, the shareholder, whether the majority or the minority one, might be inclined to indicate in its list fewer candidates than available seats in the BoD. If this does happen, then that list, albeit with the highest percentage of votes, does not get the majority of directors. On the other hand, the shareholder, including the minority one, may aim at snatching the majority of the seats in the BoD. In this case, it will indicate in the voting list as many candidates as the number of available seats to be filled in within the BoD. In the latter scenario, the expectation of this shareholder will be met so long as this list resulted in getting the majority of votes in the AGM. As a consequence, the notion of 'protection of minorities' in companies adopting a voting list, where minority directors can be appointed, is broader and more articulated than the one existing in other entities.

[30] Italian listed companies adopt, primarily, a majority system, which provides for the attribution of the majority of seats to the list with the highest number of votes. A number of seats, specified in the bylaws, is given to candidates taken from at least one or, depending on the actual provisions of the bylaws, more minority lists.

Sometimes, mainly in the financial sector, companies have adopted a 'proportional' voting mechanism. In this case, there is no attribution of a majority bonus. The seats are usually distributed through the 'quotient' method, which involves the allocation of votes to the candidates by dividing the number of votes obtained by each list for the sequence number of the individual candidate on the list. Once this count is complete, it could be necessary to carry out some adjustments in order to ensure that the final count is consistent with any legal requirement (eg the gender representation and quota) and pertinent bylaws.

[31] Art 147-ter of the TUF. Among scholars, see G Presti and M Rescigno, *Corso di Diritto Commerciale, Volume II* (7th edn Zanichelli Editore, Bologna 2015) 145.

[32] In companies that have adopted the one-tier system however, the minority director must possess the same requirements of independence as those in place for the members of the statutory board of auditors (art 147-ter, paragraph 3, TUF).

originally required merely by soft law [33] for listed companies. However, in the further legislative developments, the category resulted in being odified and encompassed within the statute. [34] Furthermore, the appointment of minority directors was originally grounded on the bylaws of the company, based on the ICC. However, in the latest version of the TUF, particularly article. 147-ter, it is obvious that the bylaws of every listed company shall be required, on a mandatory basis, to stipulate that the appointment of directors is organised through lists, to make sure that the winning minority list is given no less than a seat in the board[35].

More specifically, the piece of legislation to refer is the TUF, already introduced under the previous Section 4. Article 147-ter stipulates: 'The Statute provides for members of the Board of Directors to be elected on the basis of the lists of candidates and defines the minimum participation share required for their presentation, at an extent not above a fortieth of the share capital or at a different extent established by CONSOB [36] , with the regulation taking into account capitalization, floating funds and ownership structures of listed companies.'[37]

At this point, some clarifications are necessary. First and foremost, the legal provision at stake does not give a mere option to the listed company to use lists of candidates; as said, its use is mandatory.[38] Furthermore, because such a norm is addressed only to public companies, the lists of candidates are mandatory for these companies, although they are optional for legal entities outside this 'perimeter'. Given the flexibility provided by the ICC (see the analysis of the relevant legal provisions contained in the previous Section 4), a mere alteration of the bylaws of any Italian joint stock company would allow it to adopt the list of candidates system. As a result, institutions carrying out a reserved activity such as credit institutions and management funds, if not listed, are not subject to the legislation at stake, although the appointment according to lists may be an option that the bylaws may well contemplate.

[33] More specifically, Borsa Italian, Codice di Autodisciplina, 1999, also referred to as Codice Preda or Preda Code.

[34] Also in this case, the TUF, at art 147-ter(4). '… at least one of the members of the board of directors, or at least two if the board of directors is made up of more than seven members, shall possess the requisites of independence established [for the members of the board of auditors] …'. Further, if this is required by the bylaws, the directors shall possess the further requisites of independence established by the Codes that either the company in charge of the securities market or the business associations (eg the Banking Association) had to establish from time to time.

[35] Nothing prevents the statute of a company providing for the assignment to more than one list for a place in the Board of Directors.

[36] The Italian Market Authority. CONSOB is acronym of *Commissione Nazionale per le Società e la Borsa*.

[37] The aforementioned provision is applicable to companies that have opted for the one-tier system or what is defined in Italy as the 'traditional' one. Conversely, in those entities that have adopted the two-tier one, the election of the supervisory board is governed by the provisions for the election of the board of auditors.

[38] Nevertheless, the language used within the TUF could have been more explicit. It is affirmed '*prevede*' - therefore 'it envisages' -, whereas the auxiliary '*deve*' - therefore, 'it shall envisage' or 'it must envisage' - would have made the provision more clearly mandatory. It is worth highlighting that this statutory provision requires the members of the board to be elected on the basis of lists of candidates, not the presentation of lists itself.

From a different perspective, an explanation has been provided from the outset about the fact that there is no such thing as a definition of minority directors.

In the AGM of Italian listed companies, the election of directors will be based on the principle that lists may be submitted. The list that receives the majority of the votes, appoints the directors. However, at least one member shall be granted to the 'second-best' list[39]. More precisely, as stipulated under the art 147-ter(3) of the TUF:

'…at least one member shall be elected from the minority list that obtained the largest number of votes …'.[40]

To elaborate, the expression 'at least one member' means that the bylaws of the listed company may also increase the quota reserved to minority shareholders, in so far as to allow them to have two or even more directors originating from the winning minority list or from more than one minority list. In this case, the post shall be given to the first two (or more) candidates appearing in the list. Similarly, according to the same line of reasoning, it would be consistent with these legal provisions a rule in the bylaws whereby at least one director is reserved to the most voted minority list and a further director is reserved to the second minority list. Also in this case, the candidate to whom the post as director is assigned, shall be the first one indicated in the minority list of candidates that was the second most voted[41].

Furthermore, to make sure that the minority list is not a sham and it legitimately represents the interests of a minority rather than indirectly those of the minority, it is added in the same article 147-ter(3) of the TUF that such a list shall not be 'linked in any way, even indirectly, with the shareholders who presented or voted the list which was declared first by the number of votes.'

More importantly, the minority list is not competing with the majority one: this list, in order to be qualified as 'minority list', needs to be presented by shareholders representing no more than a fortieth of the share-capital of the listed company.[42] This norm is justified by the circumstance that a higher percentage would contradict the same ontology and essence of the minority shareholder and, therefore, the

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[39] As the number of minority directors is limited, the potential conflict within the board should not hinder any board's activity.

[40] In other words, the largest minority will have one, or more than one director, irrespective of the proportion of their shareholding in the share-capital of the listed company concerned. This circumstance has been harshly criticised by some of Italian scholars: see F Bonelli, 'Ecco Perché non può Funzionare l'Amministratore di Minoranza' Milano Finanza, 13 April 2005, 13. The means of appointment of the minority director makes it clear that only 'one', amongst possibly more, minority shareholders, will have the right to elect its candidate. It is argued that this circumstance infringes the principle of equal treatment between shareholders, and it is used by some scholars to deny the utility of enhancing the protection of minorities through the introduction of a voting list: see https://circabc.europa.eu/faces/extension/wai/navigation/container.jsp. See also European Company Law Experts Paul Davies, Guido Ferrarini, Klaus Hopt, Alain Pietrancosta, Rolf Skog, Stanislaw Soltysinski, Jaap Winter, Eddy Wymeersch, 'Making Corporate Governance Codes More Effective A Response to the European Commission's Action Pans of December 2012' December 2013 <22 July 2011, in https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1912548> accessed 1st October 2015.

[41] As far as the removal of the minority director is concerned, there is a dearth of specific legal provisions. Nevertheless, a minority director shall be potentially removed in accordance with general rules therefore, even without a 'just cause'. Bearing this in mind, in listed companies, a resolution of this kind would be a risky move as it would seriously affect the company's reputation.

[42] Art. 147-ter(1), first paragraph, first part, of the TUF.

minority director. It is worth noting that the threshold of the fortieth of the capital, required by the Italian legislation for purposes of definition of a minority list, can be increased or decreased by the market authority (the CONSOB) of that country (Italy), in force of its own regulation, 'taking into account capitalization, floating funds and ownership structures of listed companies'.[43]

Additionally, the legislation delegated to the CONSOB 'takes pain' to define the concept of connection, upon the occurrence of which the minority list shall not be eligible for purposes of appointment of its representative in the Board of Directors. In this respect, a parameter to ascertain such connection shall be, by way of rebuttable presumption, the list of connection contemplated in the current CONSOB Issuers' Regulation, art. 101-bis.[44]

Furthermore, a list presented by a minority which in reality is connected with the majority, would potentially give rise to a legal claim, for instance by other minority shareholders having presented the losing list. These may provide evidence of the fact that the asserted 'lack of links' was not genuine. This would lead to an invalidation of the resolution of appointment of the minority director(s) and, additionally, damages awarded to the minority shareholders divested of their right to appoint their representatives, according to mandatory rules. This possible scenario further highlights the responsibilities of the BoD chairman in connection with the procedures aimed to appoint the board, including the victorious minority list.

As regards these numerous norms and legal provisions, it is correctly emphasised, doctrinally,[45] that this micro-system of rules confers on the Chairman of the Board of Directors an important and significant role: the identification of what can be regarded, from a legal point of view, as the minority list of candidates, through the assessment of the requisite of independence that each elected candidate, including the minority candidate, must possess.

Finally, the bylaws of the Italian listed companies may limit the right of minority lists to appoint their own representative. More specifically, according to the second part of article 147-ter(1), TUF.

> '… The Statute may also provide that, with regard to the apportion of the directors to be elected, what is not to be taken into account <u>are the lists which have not reached a percentage of votes at least</u> equal to half of the one required by the Statute for the presentation of same.'[46]

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[43] Art. 147-ter(1) of the TUF.

[44] This view is confirmed doctrinally too. See G Presti and M Rescigno, *Corso di Diritto Commerciale. Volume II* (7th edn Zanichelli Editore, Bologna 2015) 144-145.

On the risk that the minority list be linked, not explicitly, with the majority list, see CONSOB Communication n. DEM/9017893 of 26 February 2009. The latter recommends that shareholders submitting a "minority list" make a declaration stating the non-existence of links, even indirect, with shareholders holding, either individually or jointly, a controlling or majority stake in the company concerned.

[45] See F Benedetto, 'Commentary on Articles 147-ter-, 147-quarter, 147-quinquies', in F Vella (ed), *Commentario T.U.F. Vol II* (Giappichelli Editore, Bologna 2012) 1577.

[46] Emphasis added.

6. Minority Directors and Independent Directors in Italy: a difficult cohabitation? A comparison with UK

As said before, minority directors represent a peculiarity of the Italian system of corporate governance, [47] whereas independent directors are a cross-border, transnational category, consolidated in different jurisdictions, including the Italian one.[48] In the two jurisdictions under scrutiny, the UK and Italy, the source of this category (the independent directors) is different: in Italy, it is partly legislative and partly soft law whilst in the UK, it is exclusively soft law. The way independent directors are shaped are briefly described in this section, without any pretence of completeness of analysis, and exclusively for purposes of better addressing the main research question: if and how the Italian minority director is a legal concept that can be adapted in other jurisdictions, particularly the British one, and more importantly in a prospective supranational layer, the EU one.

First and foremost, in both countries the independent director is, ontologically, a subcategory of the non-executive director[49]. The latter one, in Italy, is a director whom, without management powers, is expected to 'bring their specific expertise to Board discussions and contribute to the adoption of fully informed decisions …'.[50] In Britain, in a similar but not totally identical way, the non-executive director is the member of the BoD in charge of constructively challenging and helping develop proposals on strategy.[51] As a corollary of this, the non-executive director should scrutinise 'the performance of management in meeting agreed goals and objectives and monitor the reporting of performance.[52]

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[47] According to Assonime (Assonime, La *Corporate Governance* in Italia: Autodisciplina, Remunerazioni e *Comply-or-Explain*, 2015, 58 <http://www.assonime.it/AssonimeWeb2\>), in 2015, listed companies with at least one minority director were 90, including three companies, adopting the two-tier system. The total number (90) is slightly down from the previous year, 2014, when they were 93, and also from the previous 2013, when the number was 97, although this decrease may be the outcome of the corresponding reduction of the number of listed issuers. As a whole, minority directors in 2015 were 172, with the number significantly verying depending on the company size (2.3 directors in FTSE Mib, 1.9 in the Mid cap and 1.3 among Small cap) and the sector (2.6 in banks). The differences are even more obvious in supervisory boards. For instance, banks holding the 'two-tier' system of governance have on average six minority directors, equal to 30% of the total of the supervisory board. In 2014, among the 170 minority directors surveyed by Assonime, 159 (representing 94% of the total) have been classified as 'non-executive'; 11, in seven companies (9, albeit in five companies in the previous year, 2013) have been qualified as executive. Three of them have performed the role of Chairman, one of vice-chairman, four of CEO, the last three were executives without managerial powers.

[48] Remarkably, neither the Italian civil code nor the Italian Code of Conduct for listed companies give minority directors any roles within board committees. According to Assonime survey as referred to above, among the 93 companies fitted with minority directors, 90 (ie 93% of the total) have set up the committee for controls and risks, and 87 (90% of the total) the compensation committee. Among those companies with minority directors, 56% placed at least one minority director on at least one of the committees. The presence of at least one director of minority in JRC is more frequent in larger companies (70% in FTSE Mib, it was the 58% in 2013) and less common (45%) in the financial sector. Among the companies with minority directors which set up CR, 50% placed at least one of them on the committee. The inclusion of at least one of the minority in the CR is more frequent in major companies (65% in FTSE Mib).

[49] See P de Gioia-Carabellese, Non-executive Directors and Auditors in the context of the UK Corporate Governance: two (or too many) "Characters" still in the Search of an Author? [2011] European Business Law Review 759-789.

[50] Art. 2 of the Italian Code of Corporate Governance.

[51] Section A (Leadership), A 4 (Non-Executive Directors), Main Principle, of the UK Corporate Governance Code, September 2014.

[52] *Ibid*.

As far as the executive director is concerned, the British 'Code' does not get into an explanation of the role, given the absence of a proper definition of this category. Indeed, it is hinted at the fact that every company 'should be headed by an effective board which is collectively responsible for the long-term success of the company'[53]. Accordingly, one can assume by exclusion and in a way that is not totally obvious that, by setting aside the directors (non-executive directors) who are not given any management role,[54] the executive directors are those in charge of management powers.

With regards to the independent directors, the two countries may have more similarities in the way this category is defined. They are basically directors who, albeit voted by the majority, do not have professional links or other conflicts of interest with the majority, although it is the same majority that have appointed them. Nevertheless, the British Code somehow clarifies, albeit indirectly, the minimum number of independent directors. Except for smaller companies,[55] at least half the board, excluding the chairman, should comprise non-executive directors determined by the board to be independent.[56] A smaller company should have at least two independent non-executive directors. Furthermore, it is stipulated that the board should appoint 'one of the independent non-executive directors to be the senior independent director …'[57], which ultimately means, tautologically at least one 'independent director' shall be appointed, as one independent director must be, explicitly, the 'senior independent director'. Furthermore, for non-small listed companies, half the board should be made up of directors who are at the same time non-executive and independent.

Conversely, according to the *Codice di Autodisciplina* (the Italian Corporate Governance Code),[58] the piece of soft law[59] that, in Italy, sets forth some guidelines in the way the 'issuer' is governed and organised,[60] the BoD of a company shall be made up of both executive and non-executive directors.[61] Unlike the British counterpart, it is recommended that an adequate number of the non-executive directors will be independent too. More specifically, according to article 3 of the Italian Corporate Governance Code:

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[53] Section A (Leadership), A1 (Non-Executive Directors) of the UK Corporate Governance Code, Sep 2014.
[54] According to the same Corporate Governance Code (A.4: Non-Executive Directors, Supporting Principle), the non-executive directors 'should scrutinise the performance of management in meeting agreed goals and objectives and monitor the reporting of performance.'
[55] A smaller company is defined 'one that is below the FTSE 350 throughout the year immediately prior to the reporting year' (Section B.1.2., footnote 6, of the UK Corporate Governance Code).
[56] Section B.1.2 (Composition of the Board) of the UK Corporate Governance Code.
[57] Section A (Leadership), A 4 (Non-Executive Directors), Code Provisions, A.4.1.
[58] Comitato per la Corporate Governance, Codice di Autodisciplina (July 2015) <http://www.borsaitaliana.it/borsaitaliana/regolamenti/corporategovernance/codice2015.pdf> accessed 13 October 2015.
[59] It will be mentioned later that in Italy the Corporate Governance Code is becoming more a kind of delegated legislation.
[60] As already clarified above, this Code is now expressly recalled by the legislation, particularly by article 147-ter(4) of the TUF.
[61] A recent analysis in English concerned with independent directors can be read in D Siclari (ed), *Italian Banking and Financial Law* (Palgrave MacMillan, London 2016).

> 'An adequate number of non-executive directors shall be independent, in the sense that they do not maintain, directly or indirectly or on behalf of third parties, nor have recently maintained any business relationships with the issuer or persons linked to the issuer, of such a significance as to influence their autonomous judgement.'

The adjective 'adequate' is not associated with a number, which means that in Italy there is more flexibility in the number of independent directors to appoint.

Nevertheless, in both jurisdictions the independent directors represent *de facto* a collegiate micro-body within the Board of Directors, *ergo* no fewer than two independent directors which shall be necessarily non–executive directors,[62] whereas the opposite shall not be necessarily true as a non-executive director can be also non-independent.[63]

Finally, and interestingly, although in Britain no minority director is codified, either at legislative level or within the soft law, nevertheless independent directors are required to carry out a specific activity that may be vaguely reminiscent of that of the minority directors in Italy. Particularly, the senior independent director should be available to shareholders 'if they have concerns contact through the normal channels of chairman, chief executive or other executive directors has failed to resolve or for which such contact is inappropriate.'[64] Nevertheless, it is our understanding that, upon closer scrutiny, this function bestowed by the British Code upon independent directors, does not equate the independent director to the minority director, as they are fundamentally two different categories with two different tasks[65].

7. The Underpinning Philosophy of Minority Directors in the Italian Experience

To be a minority director does not necessarily imply a special impartiality, other than that it must be possessed by each director called to contribute to pursue the interest of the company.[66] It is well known that, within the system of the corporate

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[62] The Italian Code of Corporate Governance demands that an 'appropriate' number of independent directors is appointed. Companies listed in the FTSE Mib are recommended to have a Board of Directors formed by at least one third of independent directors. At the end of 2014, 33 companies in the FTSE Mib38 (representing 94% of the total) had a Board of Directors, or a Supervisory Board, in line with this recommendation. The Code also recommends that the number of independent is, in any case, not less than two. At the end of 2014, 209 companies (92% of the total) were already in line with this recommendation.

[63] The lack of a normative category, at least in analysing Britain and Italy, of an executive director who is also 'independent' is probably a flaw existing in both soft law and in the same literature.

[64] Section A (Leadership), A 4 (Non-executive Directors), Code Provisions, A.4.1.

[65] In any case, the minority director will not likely become an executive director, although Italian experience evidences a few cases of executive minority directors (see above, note no. 41). Nonetheless, since the minority director does not generally perform executive functions, he may be considered, albeit only *de facto*, as a member of the internal control system. This control on the activities carried out by those directors who have been appointed by the majority shall be more effective as it is performed by someone chosen by stakeholders (the minority) who are likely to be affected by the activity subject to control.

[66] This argument has been highlighted by those (S MICOSSI, 'Il Punto sugli Amministratori Indipendenti', Annual Meeting Nedcommunity, Milan, 21st April 2011, 8 <http://www.assonime.it/AssonimeWeb2/servletAllegati?numero=3508> accessed 1st March 2016) who maintain that, as a default rule, minority directors should really be independent from the controlling shareholders,

governance, the impartiality of the directors has been associated for a long time with the adjective 'independent'. In a nutshell, this would be a director still appointed by the majority shareholders, however not having any ties and/or connections with the majority appointing the board.[67]

The requirement of independence of directors, for so many years the flagship of the stock markets, has been given a serious blow during the financial crises of 2008/2009. Although corporations listed in capital markets, including banks, were 'full to the brim' with independent directors in strict compliance with the relevant national code of corporate governance, these companies turned out to be affected by huge losses as a result of poor management. The presence of several independent directors in the board of listed companies should have, theoretically, preserved the collegiality of the decision process; in reality, as testified by the minutes of the boards, independent directors were merely figureheads incapable of liaising with the 'proper' directors and challenging their decisions.[68]

Also in the jurisdiction where the minority of directors have been a notion of the corporate system for a while, the *ratio essendi* of this legal concept is not totally accepted by scholars. Although there is a general understanding that minority directors represent a feature that may eventually improve the way listed corporations are managed,[69] a certain degree of scepticism still persists regarding the same ontological feasibility of this concept.[70]

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although nothing prevents the minority directors from engaging in opportunistic behaviour for personal purposes. According to this school of thought (ibid), this risk is more severe whenever the investment requested for the presentation of the list is modest.

[67] According to scholars (P Loose, M Griffiths and D Impey, *The Company Director. Powers, Duties and Liabilities* (Jordans, Bristol 2011), independent non-executive directors 'should bring a completely independent view to the deliberations of the board.'

[68] See P de Gioia-Carabellese, 'Corporate Governance of British Banks and Duties of Directors: Practical Implications of the Royal Bank of Scotland's Demise' (2014)3 Law and Economics Yearly Review 134-156.

[69] See, among others, F Denozza, 'L'"Amministratore di Minoranza" e i suoi Critici' [2005] Giurisprudenza Commerciale 1; GF Campobasso, 'Voto di Lista e Patti Parasociali nelle Società Quotate' [2003] Banca, Borsa e Titoli di Credito (I) 128; F Carbonetti, 'Amministratori e Sindaci di Minoranza e "Rapporti di Collegamento"' [2007] Società 1186-1190.

[70] F Bonelli, 'Ecco Perché' non può Funzionare l'Amministratore di Minoranza' Milano Finanza, 13 April 2005, 13. With even more criticism, see M Cera, 'Il Buon Governo delle Banche tra Autonomia Privata e Vigilanze Pubbliche' [2015] Rivista delle Società 947. In this respect it is contended that the minority director may be linked to either competing companies or investors interested in short-term strategies. The two objections are very different from each other and, upon better scrutiny, they may not completely confute the theory, which this papers attempts to demonstrate; that a representative of minorities in the board is more an opportunity than a threat. It is worth recalling that the minority director may influence the company's decision-making process only if his or her viewpoints and his or her opinions are perceived by the other members of the board as provided in the interests of the company. Needless to say, if the minority director used his say in the board for unnecessary or, even, harmful purposes, the reasonable consequence will be the marginalization. In this regard, see F Denozza, 'L'Amministratore di Minoranza' [2005] Giurisprudenza Commerciale 767. A further sceptical view is maintained by those who argue that the presence of a minority director in the board might result in a fragmentation of the 'corporate interest'. See P Montalenti, Amministrazione, Controllo, Minoranze nella Legge sul Risparmio [2006] Rivista delle Società 990.; G Strampelli, *Sistemi di Controllo e Indipendenza nelle Società per Azioni* (Milan 2013) 102. This opinion is challenged by other legal scholars (M Ventoruzzo, 'La Composizione del Consiglio di Amministrazione delle Società Quotate dopo il D.Lgs. n. 303 del 2006: Prime Osservazioni' [2007] Rivista delle Societa 210) who conversely claim that the minority director does not act as a fiduciary of the shareholders who have appointed him. *Contra*: G Strampelli, *Sistemi di Controllo e Indipendenza nelle Società per Azioni* (Egea, Milan 2013) 102.

From other quarters, emphasis is placed on the fact that the mechanism of the separate lists may lend itself for circumventions,[71] despite the fact that the minority directors may be conducive in sorting out some inefficiencies – minorities not having a proper say - and imbalances currently existing in the listed companies.[72]

The real conundrum that may somehow question the way the minority director works in the Board of Directors of companies is the role as insider he or she is going to play. This may eventually favour the interests of a specific minority rather than the general minority[73]. However, also from this perspective, it can be counterclaimed that this director, albeit appointed by a minority, is subject - and would be subject, if introduced in other jurisdictions - to the same duties of the other directors. Among these duties, the most remarkable one is the one that, albeit codified with different formulas in different jurisdictions, can be synthesised as the duty to promote the success of the company.[74] Further, in using the same reasoning, it can be argued that the majority directors can encounter the same problems as, similarly, these are appointed by the majority and their interests could be in contrast with the general one of the company. Again, these issues are usually addressed because a demarcation line is usually drawn between shareholders – either majority or minority – appointing the directors and directors themselves. The directors, either majority or minority, represent an autonomous genus, subject to an autonomous regime, including their responsibilities. This prevents them from being identified and mingled with those - either majority or minority - who appointed them. Finally, more recent evidence suggests that minority directors have been so far a quite positive experiment of the Italian corporate governance regime.[75]

According to the same line of reasoning, some legal scholars[76] have argued that minority directors can better operate in larger companies, where institutional investors are in a position to indicate and appoint experienced competent people. On the contrary, in smaller companies minority directors may end up holding individual interests. This assertion - not empirically demonstrated - links the success of independent directors, including minority directors, to the dimensions of the company and, consequently, also to the amount of the provided directors' compensation.

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[71] G Guizzi, 'Il Voto di Lista per la Nomina degli Amministratori di Minoranza nelle Società Quotate: Spunti per una Riflessione' [2007] Corriere Giuridico 301-304, particularly 302.
[72] Ibid 201.
[73] From a different point of view, the success of the figure could be compromised by a passive attitude of the minority director towards the majority directors. The latter ones will eventually 'catch' the former. Nonetheless, should this occur, it is unlikely that in the future the minority director would have a seat. Ultimately, this would be the most persuasive disincentive against this kind of conduct.
[74] D French, S Mayson & C Ryan, *Mayson, French & Ryan on Company Law* (32th edn Oxford University Press, Oxford 2015) 486-496.
[75] G Vega, 'Intervento del Presidente della CONSOB' (2015) Italy Corporate Governance Conference, Milan, 4th December 2015.
[76] S MICOSSI, Il Punto sugli Amministratori Indipendenti, Annual Meeting Nedcommunity, Milan, 21st April 2011, 8 <http://www.assonime.it/AssonimeWeb2/servletAllegati?numero=3508> accessed 1st March 2016.

8. The cumulative voting right: an American counterpart?

It is well known that in the US there is a possible counterpart of the minority director and this is the cumulative voting right. However, the latter does not necessarily have the same normative strength. Upon closer consideration, both 'cumulative voting right' and 'voting list' can be considered as an expression of the 'corporate control theory'. This construct, put forward for the first time in the US around the 1940s, maintains that the minority has the right to be represented in the board of directors.[77] It is worth recalling that the 'corporate control theory' was born and developed in response to financial scandals.[78] Cumulative voting rights first emerged in the Illinois Constitution, art. XI, §. 3. The tenor of the relevant provision is worthy of recollection:

> 'The General Assembly shall provide, that in all elections for directors or managers of incorporated companies, every stockholder shall have the right to vote, in person or by proxy, for the number of shares of stock owned by him, for as many persons as there are directors or managers to be elected, or combined to said shares, and give one candidate as many votes as the number of directors multiplied by the number of shares of stock shall equal, or to distribute them on the same principle among as many candidates as he shall think fit; and such directors or managers shall not be elected in any other manner'.

This model soon became successful in other US States, although not all of them made it mandatory. The SEC itself propped up cumulative voting right in the 1930s. Where cumulative voting right was made optional, the majority shareholders were able to replace the voting system with straight voting by amending the relevant bylaws and Courts stated the validity of those amendments.[79] In other cases, the system was made ineffective by the removal of minority-elected directors without cause.[80]

From the 1950s until today the interest towards this voting model is greatly diminished. According to some scholars,[81] this shift is due to the opposition of the incumbent managers in public companies, fearful that the lowering of the voting threshold to get a seat on the board of directors makes it easier, in insurgent shareholders, to launch a proxy fight. In 1980, the cumulative voting right was mandatory in 19 states, whereas now it is six, including California.

A similar result can be achieved via a legislative route and through a different device: 'cumulative or proportional voting rights, which allow relatively large blocks of

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[77] See The University of Chicago Law School. Comments, 'Cumulative Voting: Removal, Reduction and Classification of Corporate Boards' (1955)22 University of Chicago Law Review 751-759; LR Mills, 'The Mathematics of Cumulative Voting' [1968] Duke Law Journal 28-43.

[78] CM William, *Cumulative Voting for Directors* (Bailey & Swinfen 1951) 20-22.

[79] See for instance *Maddock v Vorclone Corp.*, 17 Del. Ch. 39, 147 Atl. 255 (Ch. 1929).

[80] See HE Bowes and LA De Bow, *Cumulative Voting at Elections of Directors of Corporations* (1037)21 Minnesota Law Review 366-67.

[81] J N Gordon, *Institutions as Relational Investors: A New Look at Cumulative Voting* (1994)94 Columbia Law Review 124-145.

minority shares to elect one or more directors, depending on the number of seats on the board.'[82] It is reminded that cumulative voting right is the default rule in Japan, whereas it is merely permissible in France, the U.K. and the U.S.[83]

9. The Possible 'Legal Transplant'

In light of the Italian legislative scenario described above under Section 5 and taking into account the consideration contained in the preceding Section 8, it is possible to put forward some observations of a comparative law nature.

First, the minority director, as the administrator who is *de facto* appointed as a result of a list of minority shareholders, can be, from a theoretical point of view and save for a further scrutiny of an empirical nature, an effective legal device aimed at improving the corporate governance of listed companies. Its possible categorisation in Britain, a country where this category does not exist, would entail a rewording of the rules governing the shareholders' meeting as well as a re-assessment of the way entities are governed.[84]

Second, as mentioned under Section 3 above, the British legislation is not particularly interested in the way directors are appointed, *a fortiori* it is possible to affirm that a vote according to lists of candidates, as required in Italian listed companies, would not be inconsistent with the corporate rules existing in Britain. Prospectively, once the vote according to lists of candidates would be regarded mandatory in British listed companies, then the only legal provision to be engineered would be, within the CA 2006, the requirement that the articles of association of listed companies are amended so that minority shareholders shall be allowed to appoint a member of the BoD, according to competing lists of candidates. In other words, such a provision would not drive a coach and horses through the laissez-faire principles adopted by the CA 2006. Nor would it destabilise the corporate governance of British companies; it would apply to listed companies, rather than the variety of non-listed companies.[85]

Furthermore, as things are, the transplant of the minority directors into UK law would be an opportunity, rather than a mere legal elaboration. In the current British system of corporate governance, as highlighted in the literature,[86] the conduct of the directors is barely scrutinised, despite the assurances of both the codes and reports.

[82] Ibid.
[83] Ibid 91.

[84] For a practical analysis of the debate on the corporate governance in Britain, see V Jones and C Pierce, *Corporate Governance in the United Kingdom* (Global Governance Services Ltd , Orpington 2013).
[85] If transplanted to the UK, it is worth noting that s 160 of the CA 2006 prohibits block voting for a slate of 2 or more directors of public companies in one resolution. Nevertheless, this specific legal provision would not prevent the implementation.
[86] A Keay, *Directors Duties* (2nd edn Jordan Publishing, Bristol 2014) *passim*.
As far as the US is concerned, this lack of accountability has been highlighted for a while too. See M Ventoruzzo, 'Empowering Shareholders in Directors' Elections: a Revolution in the Making' March 2010 – Law Working Paper no 147/2010 European Corporate Governance Institute 1-39

Additionally, as demonstrated in this research paper, through an analysis of both a doctrinal and comparative nature, the current British rules of soft law and those existing in the Italian counterpart show discrepancies in the way independent directors and non-executive directors are weighed within the BoD of listed companies . Beyond these differences, admittedly the same concept of the independent director, currently ‘pegged’ and ‘shackled’ on the category of the non-executive, has never proved to be particularly effective in the last two decades and would certainly require more attention among scholars.

Moreover, the minority director in the British system would not be inconsistent with the non-executive directors and the independent directors. It would be a further *genus,* or a *sub-genus* of the former, rather than the latter. Its insertions would be a useful opportunity to better clarify some current obscurities surrounding the definition of non-executive directors and independent directors, in the UK Code.[87] Ultimately, to put it in the words of the prevailing view, independent directors will continue being the ‘principal trusteeship strategy […] for protecting the interests of disaggregated shareholders – as well as minority shareholders and non-shareholder corporate constituencies’.[88]

From a more practical perspective, an opportune question is whether the insertion into Britain of this concept may spark off any rejection.[89] More generally, the question is whether a certain power conferred on a minority may increase the level of litigation and, therefore, the same effectiveness of the decision making process of the corporation. In this respect, the answer seems to be negative. More specifically, some tentative answers could be the following ones.

(a) The minority shareholder, actually the main minority shareholder to be more precise, would be given a real opportunity to understand the way the company is managed. This point involves, fundamentally, the way information flows from the top management to the board of directors or, depending on the jurisdictions, to the supervisory board.

(b) The directors would be under a more challenging scrutiny. The ‘absolute tyranny’ of the majority shareholder, which currently characterises the British system of listed companies,[90] might become an ‘enlightened management’.

<https://www.researchgate.net/publication/228223354_Empowering_Shareholders_in_Directors%27_Elections_A_Revolution_in_the_Making> accessed 1 October 2015.

[87] See above Section 3.

[88] L Enriques, H Hansman and R Fraakman, *The Anatomy of Corporate Law. A Comparative and Functional Approach* (Oxford University Press, Oxford 2009) 64.

[89] Legal transplants are far from being unproblematic. For the necessary *caveats* relating to these processes and the literature sprouted around it, see Mathias Siems, *Comparative Law* (Cambridge University Press, Cambridge 2014) 191-221.

[90] Doctrinally, in the past this ‘directors’ dictatorship’ has already been highlighted in the literature, albeit as regards Italian companies. See M Ventoruzzo, ‘Empowering Shareholders in Directors’ Elections: a Revolution in the Making’ (2010) European Corporate Governance Institute. Law Working Paper no 147/2010 (March 2010) 38
<https://www.researchgate.net/publication/228223354_Empowering_Shareholders_in_Directors%27_Elections_A_Revolution_in_the_Making> accessed 1 October 2015.

(c) The litigation originating from the decisions of the BoD, which is nowadays potentially copious, would turn out to be seemingly decreased. Particularly, derivative proceedings which currently are potentially in the hands of the minority shareholder, would be *de facto* prevented, or reduced, as the representative of that minority shareholder was already involved in that resolution and could have taken part in it.

(d) The minority directors, in listed companies, would be, in contrast to independent directors, appointed by the minority, who are in charge of epitomising the public role as 'public gatekeepers for the regulator'. In this respect, the authoritative view advocated by scholars [91] that independent directors should turn into public gatekeepers is further elaborated and made more radical in this paper. Because independent directors are appointed by the majority shareholder, its possible role of reporting to public authorities seems to be less credible. Thus a system where independent directors continue playing their - unfortunately - blurred role of moral suasion of the management body may persist, with all its historical deficiencies. Conversely, the minority directors, a legislative body not created by the soft law, will be empowered to challenge in exceptional circumstances the possible abuse of power perpetrated by the BoD.

Needless to say, if this was the additional task given to the minority shareholders, a further, natural step would be to put in place a reform of the legal framework, where specific powers of the minority directors vis-a'-vis the market authority, are moulded and shaped.

(e) The evocative reasoning reverberating from the previous letter (d) may suggest that this new category is to be introduced in a prospective European Union framework, concerned with quoted companies.[92] The ultimate purpose of this would be a more persuasive system of corporate governance.

(f) Ultimately, not only would minority directors express the minority voice, but they would also add value to the company as a further step towards 'board diversity'[93]. In this respect, it is a trite view that board diversity positively impacts

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In Britain, scholars (see A Keay, *Board Accountability in Corporate Governance* (Routledge, London 2015) point out the issue of the accountability of the BoD and the way it is assessed as regards fairness, transparency, practicality, effectiveness and efficiency. See also K Keasey, H Short & M Wright, 'The Development of Corporate Governance Codes in the UK' in K Keasey, S Thompson & M Wright (eds), *Corporate Governance: Accountability, Enterprise and International Comparisons* (John Wiley and Sons, West Sussex 2005) 21-44.

[91] M Gutiérrez and M Sáez, 'Deconstructing Independent Directors' (2013)13 Journal of Corporate Law Studies 86-87.

[92] In a more conservative way, the category could be introduced within the EU framework exclusively within the legislation addressed to banks and financial institutions. For a general overview of the corporate governance of banks, see Iris H-I Chiu (ed), *The Law on Corporate Governance in Banks* (Edwar Elgar Publishing, Cheltenham 2015).

[93] We are aware that the concept of board diversity is commonly used in a different meaning (see D Carter, BJ Simkins, WG Simpson, 'Corporate Governance, Board Diversity, and Firm Value' (2003)38 Financial Review 33-53) to include within the 'minority category' women, and ethnic minorities. Nevertheless, the issue of board diversity - and, in particular, of gender diversity - is just one of the multifarious viewpoints from which to observe and look at what the optimal board composition is. The literature, in fact, has analysed the impact on the company's profitability of either the insider orientation of board members and their close ties with management (PL Cochran, RA Wood and TB Jones, 'The Composition of Boards of Directors and Incidence of Golden Parachutes (1985)28 Academy of Management Journal 664-671) or occupational characteristics of board

on organizational performance and gives value to the firm[94]. On the one hand, the right to appoint a candidate of the minority in the board of directors would not fetter the majority's ability to make resolutions; on the other hand, the minority voice would allow the majority to pre-emptively and even tactically take in to due account the voice of a potential, future disapproval.

In conclusion, it is believed and corroborated in this paper, albeit from a mere legal point of view,[95] that the presence in the board of a director chosen by the minority could positively contribute to the communication and interaction within the board. This would ultimately make better, rather than worse, the board's action and, in particular, the analysis of matters submitted to it for its resolutions. This point should be particularly strategic for banks, where the variety of voices is particularly needed[96], and more in general for listed companies. Admittedly, the voting list that allows minority shareholders, in Italian listed companies, to elect at least one representative is nothing more than an alternative system to 'cumulative voting right'. Both systems share the purpose of ensuring that minority shareholders sit on the board, albeit through different routes or legal mechanisms. Both minority directors and cumulative voting rights are seemingly disliked by managers in public companies with a dispersed ownership structure as well as by majority groups in systems with a concentred ownership.[97] Nevertheless, the strength of the minority director system currently in place in Italy lies on its cogency, as it does not leave room for circumventions nor derogations.

members (MN Zald, 'Urban Differentiation, Characteristics of Boards of Directors, and Organization Effectiveness' (1967)73 American Journal of Sociology 261-272), primarily in the 'environment' of financial institutions.
The basic idea inspired by the 'resource dependence theory' (see HE Aldrich, *Organizations and Environments* (Prentice-Hall, Inc. Englewood Cliffs NJ 1979); J Pfeffer and GR Salancik, *The External Control of Organizations: A Resource Dependence Perspective* (Harper & Row, New York 1978) is that boards of directors are part of the organization and its environment, and that board members bring resources to the organization as a consequence of their backgrounds (MN Zald, 'The Power and Function of Boards of Directors. A Theoretical Synthesis' (1969)75 American Journal of Sociology 97-111). In general, with the exception of gender, age and ethnic minorities representation, the 'diversity' to which is attributed greater value is that concerning people with business background and experience, even if it increases the consideration towards people that can bring to the board 'new insights and perspectives'.

[94] According to the economic literature there is also empirical evidence of a correlation between minority stake in the board of directors, and an improvement in the financial value of the company: D Carter, BJ Simkins, WG Simpson, 'Corporate Governance, Board Diversity, and Firm Value' (2003)38 Financial Review' 33-53.

[95] An empirical analysis focused on the usefulness and benefits of the notion of minority directors as the natural companion of this theoretical discussion is desirable. Although there is not a total dearth of a quantitative discourse on this point (C Malberti and E Sironi, The Mandatory Representation of Minority Shareholders on the Board of Directors of Italian Listed Corporations: an Empirical Analysis' (2007) Universita' Commerciale Luigi Bocconi, Research Paper No 18, 27 February 2007, 1-39), a possible discussion could be the observation of management behaviours in companies with or without minority directors, therefore listed companies existing in a jurisdiction like the Italian one, where the notion is mandatory, and those operating in a market where the minority director is not required. The observation could relate to specific behaviours and/or conducts ascribable to the board, such as dividend pay, top manager pay and more generally pay performance sensitivity.

[96] This is the view maintained by G Ferrarini and P Giudici, 'La Legge sul Risparmio' [2006] Rivista delle Società 586.

[97] This is the case of Italy.

10. Conclusion

Amidst the vast and ever evocative confines of corporate governance, the minority director, a classification hitherto encapsulated in very few jurisdictions, may constitute a new frontier of contention and a fertile terrain of debate and legislative engineering. Although leading academics in the field have not refrained from analytically broaching the subject, this paper has sought to build on the latest stances of legal scholars and makes an express demand that a more incisive use of this category is promoted in a broader legal framework, the European Union one.

The ultimate purpose of the creation of this new category, exclusively for listed companies, would be to better preserve the credibility of the market through a more incisive protection of the investors. Notwithstanding the genesis of a new 'organ' within the management body, this paper has succeeded in demonstrating that there would not necessarily be an infringement of the golden rule to which the corporate governance is informed, *ergo* the management of the company as the outcome of the unitary interests of the majority shareholders. Given the obligations of confidentiality to which the minority directors would be bound, the decision-making processes at a managerial level would be preserved.

The beneficial outcome of an examination undertaken in this paper of the Italian jurisdiction, where this category is codified, may be twofold: a paradigm establishing a positive precedent and the scene of an encouraging test. Likewise, the parameter discussed, Britain and its system of corporate governance, with the categories 'pencilled' by the 'soft law' rather than rubber stamped by legislation, has been used as a hypothetical litmus test. In the latter case (Britain), the category of the minority directors would not be inconsistent with the domestic corporate law rules, nor would it conflict with the multifarious categories of executive and non-executive directors, which prevail in the UK corporate codes. Actually, the minority directors would be equipped with the tools to attain, through a catharsis of the UK corporate governance, a better efficiency of the management body. There is no doubt that the effectiveness of minority directors is higher in economic environments, such as the Italian one, where the presence of block holders is more obvious. Nevertheless, this circumstance does not rule out that, albeit with the appropriate corrections, the presence of minority directors in the board may improve the decision-making process of companies in dispersed ownership systems too. This is the case in Italy, so shall it potentially be in other jurisdictions.