SECOND PART:

AN ANALYSIS OF SLATE VOTING IN ITALY

4. Slate voting in Italy: the legal and institutional framework

This year's analysis includes an investigation on the functioning of slate voting in Italy. Slate voting is a technical mechanism, which aims at guaranteeing that minority shareholders may appoint one or more representatives to the corporate bodies of listed firms. This voting method has received particular attention in Italy, and has been the object of repeated statutory (and also regulatory) interventions over time, which produced a regulatory regime which appears unique in the international arena[104].

The election of corporate bodies in Italian firms admitted to trading on a regulated market in the EU must comply with a number of standards set out in the CLF (and further detailed in regulations issued by Consob, the market watchdog). In particular, listed firms are required to write in their by-laws a set of rules governing the election process, which must be based on the submission of lists of candidates (slates) to the AGM; this set of rules must allow for minority representation in the corporate bodies; companies may (and, indeed, they always do) determine a minimum participation requirement to present a list, within an upper limit determined by Consob. Slate voting has been mandated for the election of statutory auditors since 1998, and it was extended to the elections of directors in 2005 (by the "Protection of Savings" Law, which was conceived as a response to the bankruptcy of Parmalat and a number of other major corporate scandals); the provisions of this piece of legislation did not, however, become effective until June 2007.

[104] Slate voting was first introduced in Italy by Law 474/1994 on privatization of publicly-owned enterprises: art. 4 disposed the introduction of slate voting in the by-laws of some companies controlled by the State or other public entities, in order to increase the marketability of their shares in the privatization process. Slate voting was explicitly linked to particular conditions (firms belonging to "strategic" industries and the introduction of a cap to shareholding or voting rights held by private investors). Within this framework, slate voting was a piece of a more complex privatization project, whereby the Italian state aimed either at creating – out of the blue – a dispersed ownership structure or at effectively keeping control in public hands, albeit with a minority shareholding (cfr. Belcredi: *Amministratori indipendenti, amministratori di minoranza, e dintorni*, in Rivista delle Società n.4, 2005, pp.853-878). After some years, in 1998, art.148, para. 2, CLF makes slate voting, enabling minority representation, mandatory for BoSA elections. Finally, the "Protection of Savings" Law extended slate voting to BoD elections (the minimum holding required to submit a list, originally 2.5% of the share capital, has been subsequently modified by art. 3, para.13, leg. decree 303/2006, which makes reference to the "different extent established by Consob " taking into account capitalization, floating funds and ownership structures of listed companies). This same decree delegated Consob to establish rules guaranteeing minority shareholders the possibility to elect at least one statutory auditor.

The election of corporate bodies usually takes place according to a single-winner voting method, with only a quota reserved for minorities: according to this system, the slate which received the highest number of votes takes all but a pre-determined number of seats (set out in the by-laws[105]), which are left for candidates taken from minority slates. Some (mostly financial) companies adopt, however, a "proportional" multi-winner voting method, with no majority premium assigned to the slate which received the highest number of votes[106]. Consequently, a slate receiving only a "relative majority" vote may well elect less than 50% of board members: this happens, rather frequently, in widely held firms and also in companies where multiple blockholders exist, but none of them is strong enough to dominate the AGM[107].

The appointment of directors and statutory auditors usually takes place according to the so-called "quotient" method, whereby the votes received by each slate are divided by a sequence of whole numbers, from one up to the number of directors/statutory auditors to be elected. The quotients thus obtained are assigned progressively to the candidates of each slate, in the order in which they are listed. The quotients attributed to the candidates of the various slates are then arranged in a single list, in decreasing order, and the people with the highest quotients are elected. A number of mechanisms are in place in order to guarantee that other legal or regulatory conditions are met (e.g. the presence of a sufficient number of "independent" directors in the board).

Our analysis of slate voting provides evidence about the implementation by Italian listed firms (in 2008-2010) of the new legal and regulatory provisions adopted in 2005, and in particular about:

a) The companies where lists of candidates have been submitted by minority shareholders for the election to corporate bodies[108]; to this end we analyzed the

[105] Art.147-*ter*, para.3, CLF provides a minimum quota of one seat for candidates taken from minority slates which "have been neither presented nor voted" by shareholders "linked in any way, even indirectly" with those who have presented or voted the majority slate. However, a number of companies have introduced higher quotas (either voluntarily, or to comply with other pieces of legislation): for instance, Law 474/1994 disposed that "privatized" firms which had introduced a share holding or voting cap, a minimum quota of 20% of the seats in the BoD. Furthermore, if the company adopted a "proportional" voting method, the number of candidates taken from minority slates may exceed the quota set out in the by-laws.

[106] A minority quota for minorities is, however, mandated, even in this case, by art.147-*ter*, para.3 CLF).

[107] A different, albeit exceptional, case was found in one company, where the majority blockholder (a private equity fund) voluntarily presented a list of candidates insufficient to get the majority of seats, thus allowing a relevant second-largest shareholder (the founder of the firm) to appoint a majority of directors (it is also worthwhile to underline that Chairman and CEO were subsequently taken from this "minority" slate).

[108] In some companies, the presentation of candidates by minority (and/or majority) shareholders did not follow the system envisaged in the law (i.e. the filing of the list with the company, within a time limit set out in the by-laws, and the subsequent publication of the list on the company website), but took place directly at the AGM. This happened in 8 (5) companies as far as the appointment to the BoD (BoSA) is concerned.

information in *AGM Minutes*. In particular, we analyzed: i) the characteristics of the companies where multiple slates were actually submitted, ii) the structure of the slates, iii) the identity of the shareholders submitting such slates, and iv) the outcome of the shareholders' vote (i.e. the ability to have at least one candidate appointed and the number of candidates actually appointed to corporate bodies).

b) relevant personal characteristics of minority directors and statutory auditors, as well as their role in corporate bodies; to this end we analyzed the information in *Corporate Governance Reports*. We analyzed, in particular, the relation between such characteristics and role, on one hand, and the variables previously analyzed (characteristics of the company and of the shareholders who presented the slate where they were nominated), on the other.

These two sources yield complementary pieces of information; however, they may not be compared systematically, for two basic reasons.

First, AGM Minutes and CG Reports refer to different points in time: CG Reports describe the corporate bodies in charge during the last financial year (typically from 1/1 to 12/31/2009), while the AGM Minutes may alternatively produce either an older or a newer picture. On one hand, one or more directors/statutory auditors might be no more in charge at the date of the CG Report (e.g. they might have resigned); on the other hand, they might have been appointed at the 2010 AGM, i.e. after the reference date of the CG Report.

Second, it is not always possible to derive the name of the minority shareholders who nominated each director/statutory auditor from the AGM Minutes[109]: such Minutes are not always publicly available; furthermore, CG Reports do not always disclose the

In two cases the control blockholder had voluntarily filed a slate with a number of candidates lower than the number of seats; consequently (and, curiously, only) one "minority" shareholder presented his own candidate(s) to fill in the gap directly at the AGM. In the remaining cases, no slate had been filed and the name of (both majority and minority) candidates was presented directly at the AGM; such candidates were sometimes submitted by investors holding a negligible share of equity capital (in one case, all candidates to the board of directors were nominated by a private shareholder holding a 0,000% of equity capital). In all cases but one (where a notorious "greenmail artist" posed some technical questions on the procedure to submit a slate), no debate takes place. In one case, both the majority and the (only) minority slate are voted jointly (and this procedure takes place both for the BoD and the BoSA election). Last, but no least, in two cases a list was withdrawn by minority shareholders before they were actually voted.

[109] Actually, the same person was sometimes presented (and voted) by different shareholders in different meetings. This holds true for both majority and minority representatives; it may even happen that a directors formerly appointed by minority shareholders is then presented (and elected) in the majority slate (and vice versa).

identity of the nominating shareholders[110]. Data drawn from the AGM Minutes and from the CG Reports had, consequently, to be analyzed separately.

4.1. An analysis of AGM Minutes

We analyzed the Minutes of the (2008-2009-2010) shareholders' meetings[111] in which one or more corporate bodies were elected (i.e. Board of Directors – for the companies adopting either the "traditional" or the one-tier management and control system – Board of Statutory Auditors – only for "traditional" firms – or Supervisory Board – for two-tier companies). We considered only the companies which were listed on the Italian Stock Exchange at the end of March 2009 (i.e. the same firms analyzed in the first part).

AGM Minutes (or at least an abstract of such Minutes, referred to the election of corporate bodies) are available almost always (see Tab.36), i.e. in 247 cases (out of 262: 94% of the total) for BoD elections in "traditional" companies and always (3 cases out of 3) in one-tier companies. Data are available less frequently for two-tier companies (we were able to collect 4 Minutes out of 7, i.e. 57% of the total). The results are quite similar for BoSA elections (we found the relevant Minutes for 246 companies). In a great majority of cases (229 BoD and Supervisory Board elections; 226 BoSA elections) the Minutes were downloaded from the Network Information System of Borsa Italiana; a small number of additional Minutes were downloaded from the website of Borsa Italiana (17 BoD or SB elections; 14 BoSA elections) or of the listed company (3 BoD or SB elections; 1 BoSA election).

a) Submission of multiple lists of candidates

[110] Art.123-*bis,* CLF requires CG Reports to indicate: a) the rules applying to the appointment and replacement of directors and statutory auditors; b)"the composition and duties of the administrative and control bodies and their committees; companies are required to disclose neither the identity of the shareholders presenting the slates, nor the outcome of the vote. Art.144-*novies* and *decies* of the Consob Regulation concerning Issuers require the disclosure (in the CG Report) of the list from which each director/statutory audit has been elected specifying whether this list was the list submitted and voted by the majority or the minority; however, such rules do not specifically require disclosure of the identity of the shareholders who presented the list.

[111] On-line availability of AGM in less recent years is quite limited; therefore we concentrated our analysis on the years 2008-2009-2010, i.e. on the years following the entry into force of the "Protection of Savings" Law. We chose a three-years sample period in order to cover the elections in all listed firms (directors are typically appointed for a three-year period in Italy; a three-year office term is mandatory for the BoSA). In companies where multiple elections of a single corporate body took place during the sample period (this might be associated with a one-year term of office, or with a staggered board, or with extraordinary events – such as a change of control – imposing a board change) we considered only the most recent election. Thus, we have one election per corporate body per listed company. We ignored appointments of single directors, which did not make use of the slate voting mechanism (which is mandated only for the appointment of a whole board).

The submission of minority slates is signalled by the existence of multiple lists of candidates (i.e. No. lists ≥ 2).

The option to present a slate has been exploited by minority shareholders in about one hundred Italian listed firms (i.e. 40% of the total): minority slates were presented in 102 BoD and 101 BoSA elections (see Tab. 36).

Slate voting has not been confined in "privatized" companies, but has been used in a number of other firms; however, only one list was still presented in the majority of AGMs, although the capital threshold required to present a list was usually very low. Companies where no second-largest shareholder exists holding – at the election date – a sufficient share of capital are indeed quite rare: we counted only 27 companies (i.e. 11% of the total) for BoD elections and 18 cases (7% of the total) for BoSA elections. Furthermore, even where no single shareholder holds a sufficient share of capital, reaching the necessary *quorum* is usually neither difficult nor particularly costly. The relative "failure" of slate voting seems to be connected less to *quorums* being "too high", and more to a limited interest of minority shareholders for this mechanism. This, in turn, might be connected either to well-known "rational apathy" phenomenon or to the fact that minority shareholders prefer to coordinate with control blockholders or even not to be represented at all in corporate bodies (e.g. to avoid responsibility for corporate actions).

Minority shareholders holding a sufficient share were often present in firms where no minority slates were submitted: this happens (see Tab. 37 and 38) in 126 companies (out of the 152 where only one list was presented). Data are quite similar for BoSA elections: sufficiently strong, but apparently apathetic minority shareholders were present in 128 companies.

Our data may even underestimate investors' lack of interest for the slate voting mechanism. Even where no single shareholder holds the necessary *quorum*, investors might still: a) form a coalition with other investors in order to reach the *quorum* and present an alternative slate[112]; b) exploit – at least for BoSA elections – the opportunity offered by art. 144-sexies, para. 5 of the Consob Regulation concerning issuers, providing that, if only one list has been submitted, further lists may be submitted up to

[112] This is not a mere textbook case. Single Italian mutual funds rarely possess a sufficient number of shares; however, they have been able to form a coalition in a number of cases in order to reach the necessary quorum. We found one case (see Tab. 38) where, although no single investor held the necessary (2.5%) stake, a number of shareholders formed a coalition and were able to file a list of candidates to the BoD supported by a 7% equity stake.

the fifth working day after the original expiry date, and the thresholds established in the articles of association shall be halved[113].

Thresholds required to submit a list written in the by-laws may not exceed the limit established by Consob taking into account capitalization, floating funds and ownership structures of listed companies. Floating funds seem, however, to have little influence, if any, on the shareholders' decisions: minority slates were submitted in 102 BoD (101 BoSA) elections; floating funds, in such cases, were on average 37.9% (36.7%), i.e. totally comparable with those in companies where no minority slates were presented (36.2% for BoD, 35.8% for BoSA elections).

Minority slates, where they are presented, are almost automatically successful: the number of companies where minority shareholders have been able to appoint their own representatives is identical (101 for statutory auditors) to, or just slightly lower (98 for directors) than the number of firms where minority slates have been presented: the small difference (for directors) is explained by a handful of particular cases[114].

Minority shareholders presented their own slates for the election of directors (statutory auditors) in 97 (101) companies adopting the "traditional" board model (out of 247 (246) for which the AGM Minutes were available); there was no minority slate in any of the three one-tier firms, while multiple lists were submitted for the election of the Supervisory Board in all the four two-tier companies for which the AGM Minutes were available. In companies adopting the "traditional" management and control system, slate voting usually took place in the election of both corporate bodies (BoD and BoSA), even when the elections took place in different years: lists of candidates for

[113] This is not a textbook case, either. We found one company (see Tab. 38) where, although no minority shareholder held the (2%) required stake, a slate for the BoSA election was presented by an investor holding a 1,72**%** stake, who took the opportunity offered by the "quorum halving" rule.

[114] In three cases, a minority list did not appoint a single candidate because the staggered board model guarantees such appointment only in one election out of three. In one of these cases, however, the slate was rejected by the Chairman (before the AGM took place) for breach of rules and, in particular, "*(i) since it presents an insufficient number of candidates; (ii) since one candidate lacked the requisite of being a registered shareholder; (iii) since the slate was affected by other formal flaws and imperfections)*". Other cases (where, however, more than one slate "survives") show a number of different problems, e.g.: a) one slate may be withdrawn or the candidates may state that they are no more ready to accept the nomination (this happened in some cases where Consob imposed the disclosure of further information about possible links between the shareholders presenting the minority and majority slates); b) the slate was not actually admitted to voting, due to possible technical flaws (e.g. the number of candidates was too high, or too low, shareholders presenting the slate lacked the quality of "registered" shareholder – a typical requirement in cooperatives – or did not hold a sufficient number of shares, or the list was file with the company after the term set out in the by-laws, etc.); c) the slate did not receive even a single vote at the AGM (apparently another textbook example; however, it actually took place in one BoD election).

both elections were presented in 83 companies, i.e. 34% of the total (see Tab. 37 and 38)[115].

Minority slates are more frequent (see Tab.39) in large firms: they are present in 60% of the FTSE Mib companies, i.e. they are almost twice as frequent as minority slates in Mid cap and Small cap firms (35%). Minority slates are submitted more frequently also in financial firms (52%, versus 39% in non-financial ones).

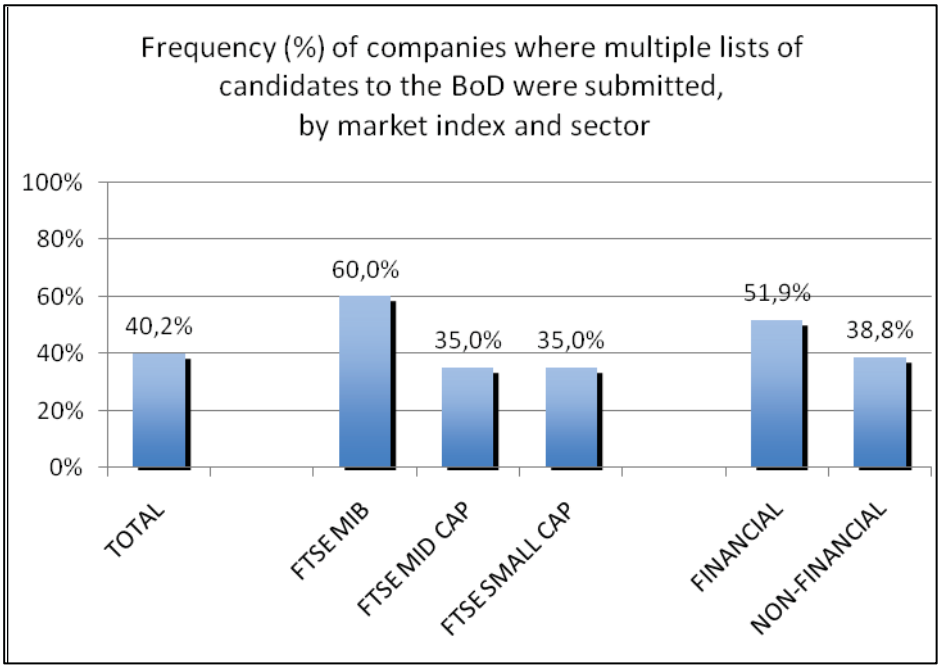

Figure 38

The submission of alternative lists of candidates by minority shareholders seems also to be connected to the ownership structure and, in particular, to the existence of investors holding "relevant" shares of equity capital[116], which may decide to become "active" and to submit their own slate of candidates, apparently without a previous coordination with majority blockholders. Such a decision is far from obvious and depends on the costs and benefits associated with activism.

A primary role was played, in this regard, by regulation (in particular, by art.144-*quater*, Consob Regulation concerning issuers, setting out a system of upper limits to *quorums* defined by companies, on the basis of their market capitalization, floating funds and

[115] Consequently, multiple lists were presented only for the BoD elections in 98 – 82 = 16 cases and only for the BoSA elections in the 101 – 83 = 18 firms.

[116] All Italian listed companies took the opportunity, offered by art. 147-*ter,* para.1, CLF, to define a minimum shareholding required to present a minority list.

ownership structures); however, a number of companies chose to indicate a *quorum* lower than the limit set out by Consob[117].

At the end of 2009, the average *quorum* (for BoD elections) amongst the sample firms was 2.29%, and was influenced by firm size (1.33% in FTSE Mib, 2.11% in Mid Cap, 2,59% in Small Cap firms) and industry (1.36% in financial, 2.40% in non-financial firms: this is likely connected to financial companies being comparatively larger). The companies where shareholders actually submitted multiple lists had, however, a slightly lower average *quorum* (2.1%); even in this smaller sample, *quorums* varied according to firm size and industry[118].

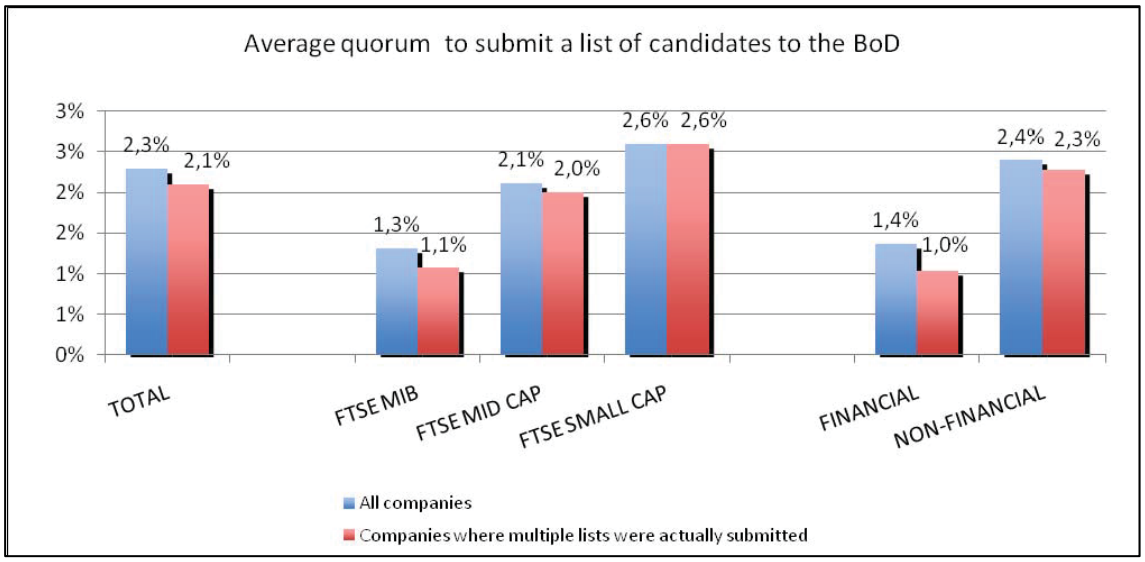

Figure 39

[117] A number of firms (62) made this choice: 4 companies did so through a fixed threshold lower than the Consob cap; 25 through a pre-defined threshold, to be applied unless Consob set a lower cap; 33 through a pre-defined threshold, to be applied unless Consob set a different threshold. Some numbers are slightly different from those commented upon in the previous paragraphs; this is due to small differences in sample composition (data in Tab. 39 refer to companies for which the AGM Minutes were available, those in Tab. 17 to all listed firms).

[118] In one company, candidates were nominated directly at the AGM by the proxy-holder of a group of investors (actually, a group of Italian mutual funds) who did not have a sufficient stake to submit a list. In this case only one slate had been filed by the control blockholder (a state-owned company): this slate comprised a number of candidates (6) which was lower than the number of directors previously in charge. At the shareholders' meeting the proxy-holder of Italian funds (representing a 0.6% stake) puts forward: a) a proposal "to appoint three more directors" and b) the nomination of three further candidates. Upon a specific proposal of the control blockholder, the shareholders approve the appointment of a 9-member Board and subsequently – through two separate votes – the appointment of the candidates of the majority slate and of the other three candidates. The proxy-holder of the control blockholder leaves the room before the second vote takes place, and these three candidates obtain votes "in favour" accounting for 9.3% of the capital (with abstentions accounting for 6,3% of the capital and a further 1.1% voting "against" the proposal).

The submission of multiple slates is particularly frequent (86% of the cases) in "privatized"[119] and in State-owned[120] companies. This result is driven by law 474/1994, which imposed slate voting in a number of companies undergoing the privatization process; however, a number of "privatized" companies voluntarily kept the slate voting system, even after the conditions making this system mandatory had disappeared. However, multiple lists of candidates were presented also in many companies which do not belong to these groups: e.g. 36% of the other (i.e. "not privatized") companies, 30% of family firms, 50% of both widely held companies and companies controlled by private equity funds.

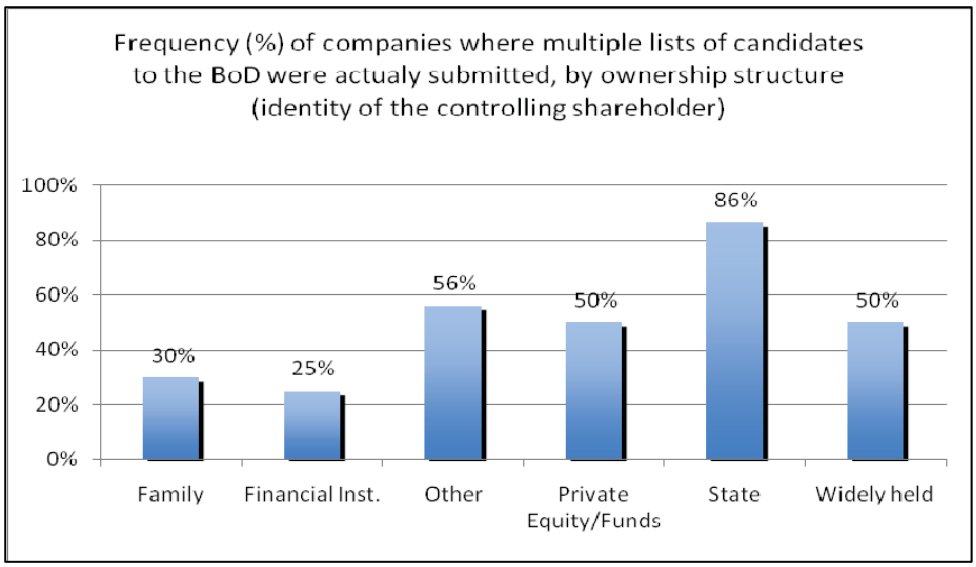

Figure 40

[119] We define "privatized" firms as companies formerly owned – directly or indirectly – either by the State or by other public entities (see the following footnote) whose share capital was (totally or partially) sold to private investors in the last 15 years. This category includes 10 companies recognized as such by Consob (in order to benefit of a special exemption provided by art.144-*undecies* Consob Regulation concerning issuers) and 14 more firms, which: a) operate in the industries specifically enumerated in Law 474/1994 (defence, transportation, telecommunications, energy, public utilities, bank and insurance), and b) have introduced or maintained in their by-laws a voting system which allows minority shareholders to appoint a number of directors higher than the legal minimum provided by the CLF. The total number of "privatized" firms is 10+14=24 (the AGM Minutes were available for 21 of them). This definition does not encompass a small number of: a) "privatized" companies operating in other industries; b) publicly-owned enterprises which have been listed for decades and did not undergo any privatization programme; c) in general, "privatized" companies which did not adopt any particularly "investor-friendly" voting system.

[120] We classify ownership structure according to the identity of the ultimate shareholder, assuming a 30% threshold (which is coherent with existing takeover legislation). The ultimate shareholder may alternatively be: a) a family; b) a financial institution (bank or insurance company); c) a private equity fund (or a similar institution) acting without apparent coordination with other similar institutions; d) the State or another public entity; e) Other (21 firms where one or more shareholders hold a relevant stake, but insufficient to exert control (10%<X<30%) + 13 subsidiaries of such companies). If no ultimate shareholder is present, the company is considered to be widely held.

The percentage of companies where minority slates were actually presented remains stable (around 40%) over the sample period.

The results for BoSA and BoD elections are quite similar (see Tab. 40). The average *quorum* to present a slate are very close (2.29% for the BoD, 2.27% for the BoSA)[121]. The companies where shareholders actually submitted multiple lists for the BoSA elections had, however, a slightly lower average *quorum* (2.04%); *quorums* vary according to firm size and industry.

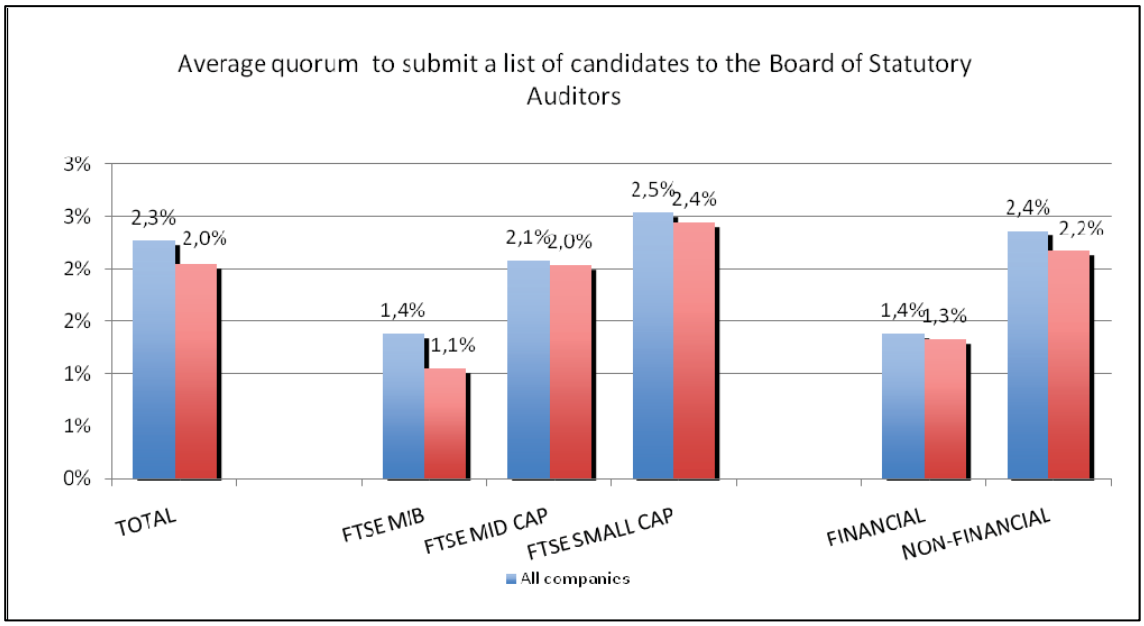

Figure 41

However, the *quorum* required to present a slate may, actually, be lower than the threshold set out in the by-laws, since art.144-*sexies,* para.5 of the Consob Regulation concerning Issuers provides that, if only one list has been submitted, further lists may be submitted up to the fifth working day after the original expiry date, and the thresholds established in the articles of association shall be halved. This regulatory difference notwithstanding, the frequency with which minority slates have been presented is quite similar for BoD (40%) and BoSA elections. The AGM Minutes show that the opportunity offered by the "*quorum* halving" rule was taken in 9 companies[122].

[121] Here, again, some numbers are slightly different from those commented upon in the previous paragraphs; this is due to small differences in sample composition (data in Tab. 40 refer to companies for which the AGM Minutes were available, those in Tab. 18 to all listed firms).

[122] The minority lists were filed (see *infra*, for the precise definitions) in 3 cases by many Italian mutual funds coordinated by Assogestioni, in 3 more firms by private equity funds, in 2 cases by private

Multiple lists of candidates to the BoSA were presented more frequently in large firms (in 56% of the FTSE Mib, 43% of the Mid Cap, 36% of the Small Cap firms) and in the financial sector (63% of the cases, versus 39% in non-financial firms). Minority slates are almost always present in “privatized” (90% of the cases) and state-owned companies (91%); the frequency (33%) is lower than average in family firms.

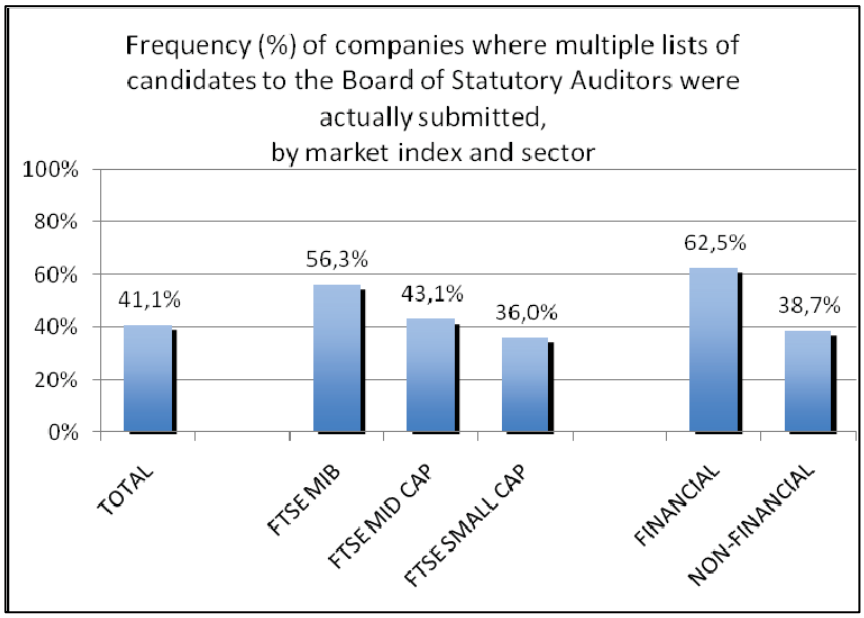

Figure 42

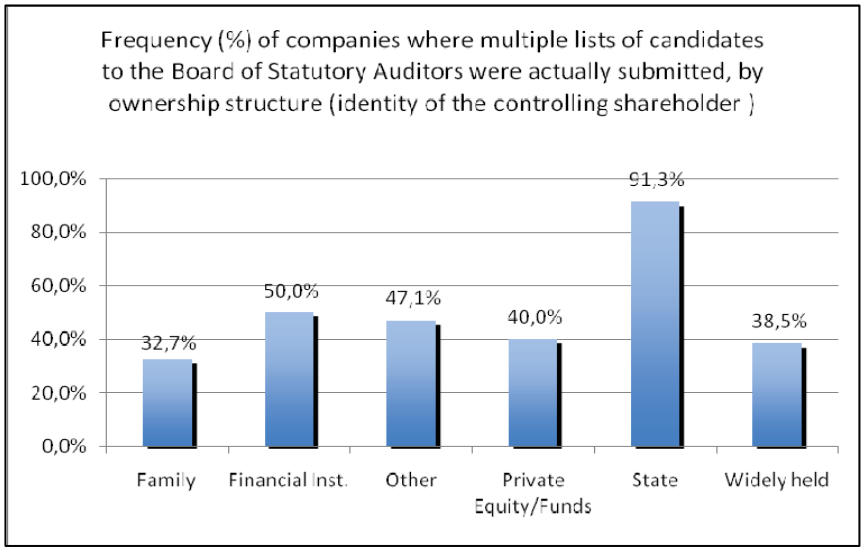

Figure 43

shareholders, in one company by an industrial (*bankassurance*) partner, and – finally – by a group of shareholders, including a family member of the control blockholder.

Where multiple slates have been submitted, their total number is usually 2 (this happens in 82 cases out of 102, for BoD[123], and in 91 firms out of 101, for BoSA elections[124]). Since detailed information about the ownership structure of listed firms is publicly available, shareholders rationally try to avoid transactions costs where an alternative list would have a low probability of success. The submission of three or more slates (implying a higher risk that some of them will not appoint a single candidate) is more frequent in companies where the by-laws adopt a "proportional" voting method and/or where the number of board seats "reserved" for minorities is larger than one. Unsurprisingly, this event is less likely for elections of the BoSA, which is typically composed of three members (and only one seat is "reserved" for minority candidates[125]).

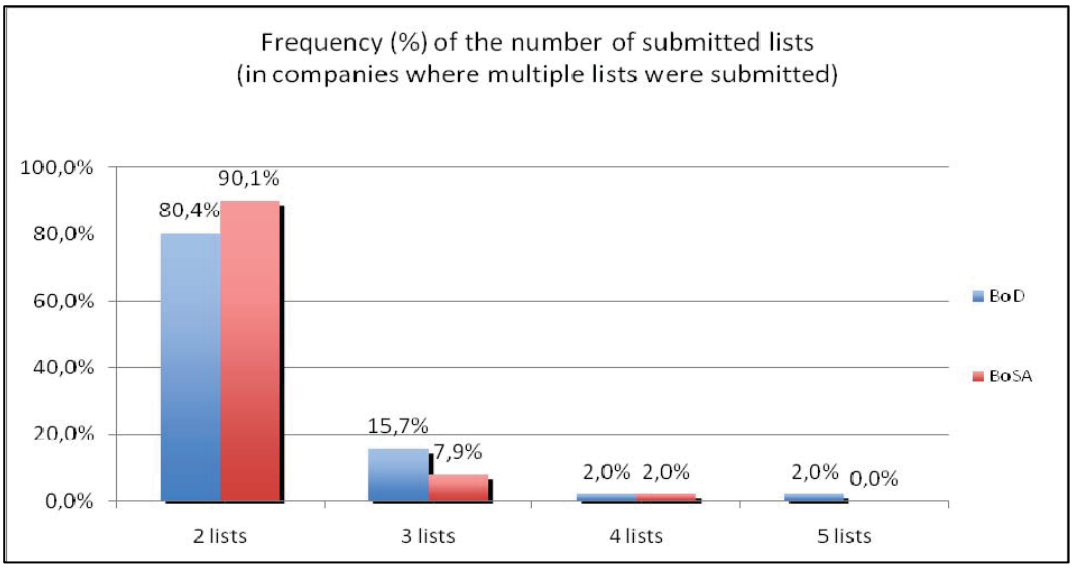

Figure 44

b) "Majority" and "minority" slates

Slates may be qualified alternatively as "majority" or "minority", according to the number of votes they received at the AGM. We counted a total of 382 slates (in 254 companies) for the elections of directors and 359 (in 246 firms) for the election of statutory auditors.

[123] Three slates were presented in 16 firms; four lists in 2 cases, five and six slates were presented in one case each.

[124] Three slates were presented in 8 firms; in the remaining two firms four lists were presented.

[125] Art.148, para. 2, CLF provides for the appointment, through slate voting, of one BoSA member by minority shareholders. 3 or more lists of candidates to the BoSA were presented in 10 companies: two of them had a 5-member BoSA (and 2 seats were "reserved" to minorities); in one case the third list was not admitted to voting on the basis of technical flaws (in particular, no candidate to the role of alternate auditor was nominated).

128 lists of candidates to the BoD and 113 lists of candidates to the BoSA (see Tab. 41 e 42) could be qualified as minority slates.

The ranking of the slates according to the capital held by the shareholders who submitted the list, and to the number of votes received, do usually coincide. In a small number of cases, however, the ranking may change. This may happen for two basic reasons: a) the shareholders submitting a list deposited a certification accounting only for a fraction of the capital they actually held; b) the list was voted also by other shareholders (i.e. by shareholders who did not participate to the presentation of the slate).

Both majority and minority slates did actually often receive more votes in the AGM than those apparently held by shareholders presenting them. This is particularly evident for majority lists of candidates: in the case of BoD elections, they had been presented by shareholders holding (at the filing date) on average 47.9% of equity capital; however, they were voted by 58.6% of the capital (+10,8%). A similar phenomenon takes place also for minority slates: in the case of BoD (BoSA) elections, they had been presented by shareholders holding (at the filing date) on average 7.9% (6.3%) of equity capital; however, they were voted by 10.1% (9.1%) of the capital (+2.3% and 2.8%, respectively).

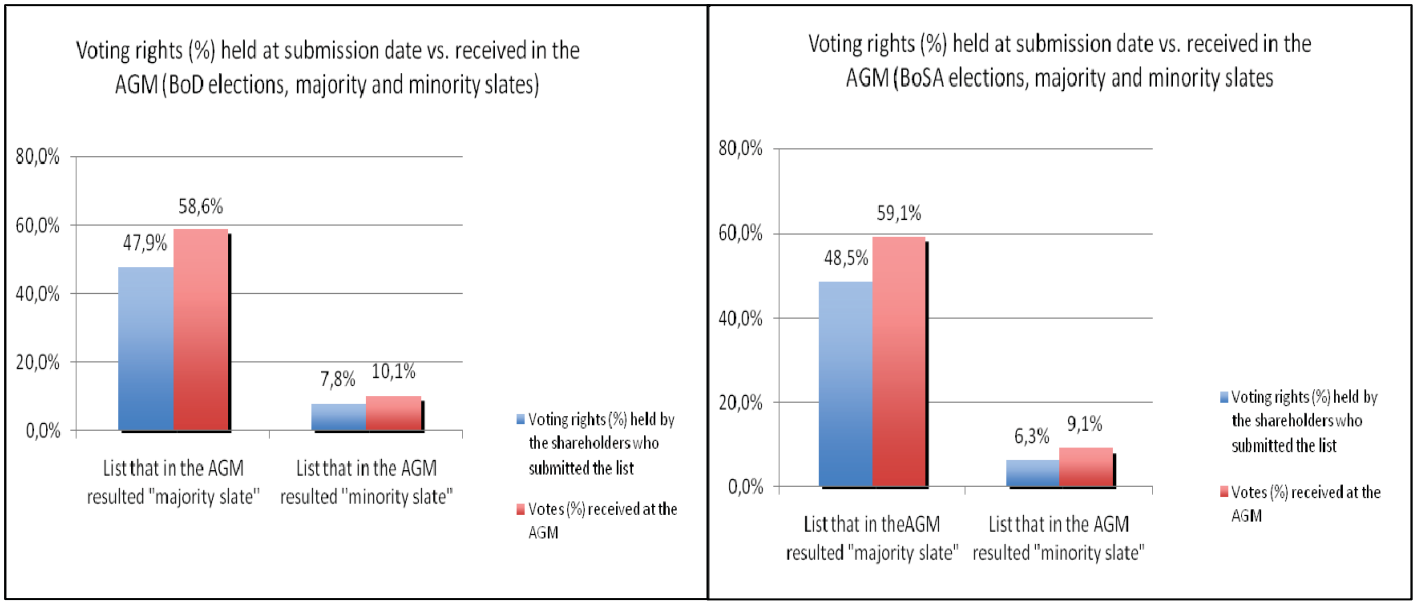

Figure 45

In large firms (see Tab. 43 and 44), minority slates are filed by shareholders holding a much lower stake (3.5% of equity capital, in FTSE Mib BoD elections, versus a higher 7.1% in Mid Cap, and 8.9% in Small Cap firms); however, they get the votes of a

substantially higher stake of capital (+ 4.3%, reaching a 7,8% of equity, in FTSE Mib firms; this compares with a + 2.9%, reaching a 10%, in Mid Cap companies, and with a +0.8%, reaching a 9.7% equity stake in Small Cap firms). A similar phenomenon takes place in the financial sector: minority slates are filed by shareholders holding, on average, a 4.2% equity stake (versus a 8.3% stake in non-financial companies); however, they get almost twice as many votes at the AGM (i.e. + 4,1%, reaching a total 8.3% stake; versus a +2,0%, reaching a 10,4% stake, in non-financial firms). The results for BoSA elections are quite similar.

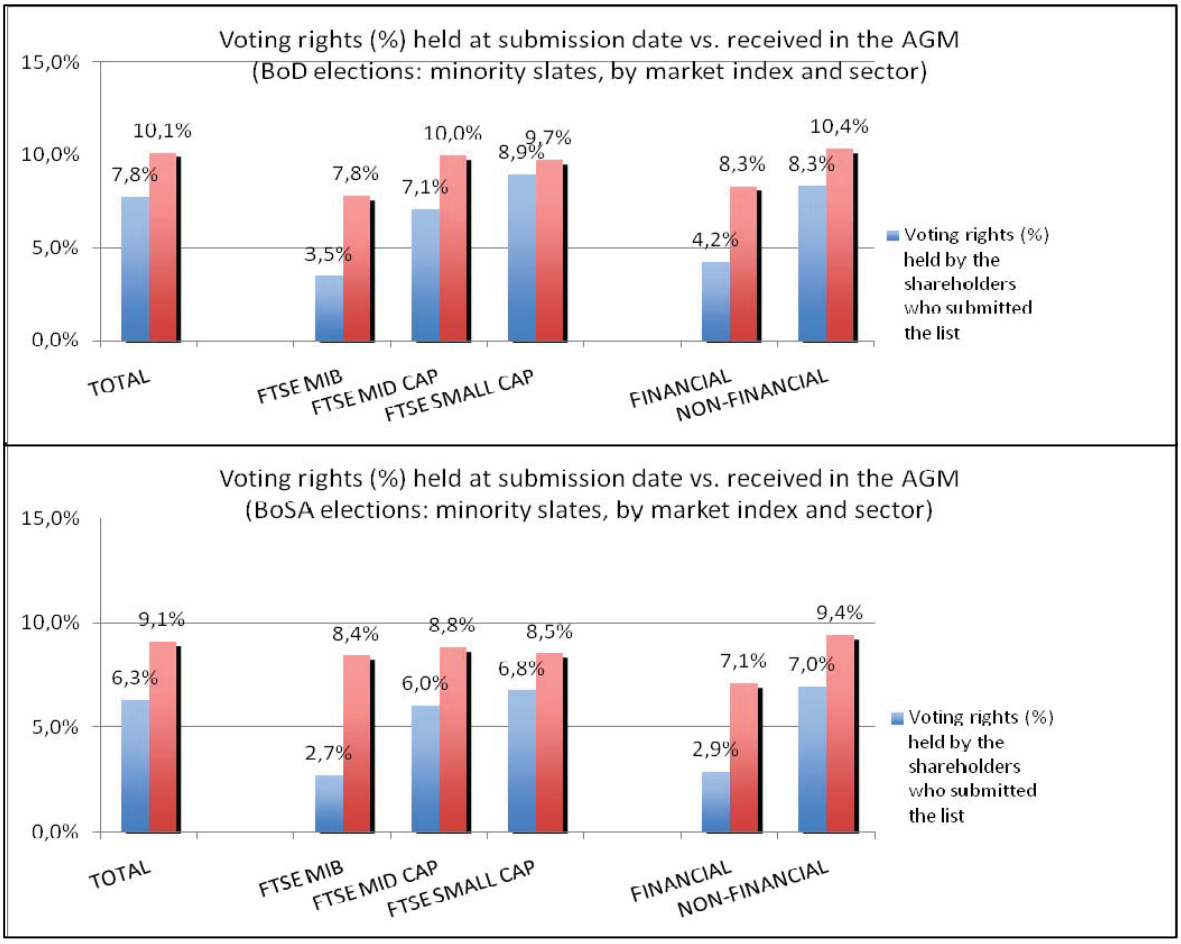

Figure 46

Shareholders filing minority slates held, on average, a stake much higher than the *quorum* set out in the by-laws. The average (median) difference[126] is 5.8% (3.6%) of equity capital for BoD and 4.4% (2.1%) for BoSA elections.

[126] Such difference is lower than 0.5% for 22 lists of candidates to the BoD and for 21 lists (plus the 10 slates – previously commented upon – where the difference is negative, and shareholders took advantage

In 4 (or, respectively, 3) small firms the slate of candidates to the BoD (BoSA) which ranked first in terms of votes (the majority slate) had actually been presented by shareholders which did not rank first in terms of shareholding (therefore, they were apparently minority slates at the filing date).

In a handful of cases the relative ranking of minority slates at the AGM date was different from that apparent at the filing date. This happens in 6 companies (some of them were large firms) for BoD and in 2 firms for BoSA elections. The outcome of the vote (in terms of the number of candidates effectively drawn from each slate) was influenced by the ranking change in 3 BoD and in 1 BoSA elections.

The number of candidates in each slate seems to be defined strategically, on the basis of: a) the voting method (single-winner with quotas for minorities *vs.* multi-winner proportional system); b) the size of the minority quota, i.e. the number of board seats "reserved" in the by-laws to minority candidates; c) other provisions possibly set out in the by-laws (e.g. the by-laws may require active shareholders to propose a number of candidates higher than the number of "reserved" seats).

Slates which will subsequently turn out as minority include a lower number of candidates than majority ones (on average, 3.6 versus 9.7 candidates to the BoD and 1.7 versus 2.9 candidates to the BoSA). On average, 40% of the candidates included in a minority slate are actually elected (vs. a 95% for majority slates). Since voting usually makes use of the so-called "quotient" system[127], the success probability for a specific candidate depends not only on the votes received by the slate but also on his/her position in the list.

c) The outcome of the shareholders' vote

Minority slates are often successful: they elected at least one candidate in 91% of the cases (this is true for both for BoD and BoSA elections). The probability of success is higher in non-financial companies (93% for BoD elections, versus 81% for financial firms; the results for BoSA elections are quite similar), and is lower amongst widely

of the "quorum halving" provision) of candidates to the BoSA. These data are, however, merely approximate, since our information about the *quorum* refers to a specific date (the end of 2009) and may differ from that in force at the single election dates.

[127] According to this system, the votes received by each slate are divided by a sequence of whole numbers, from one up to the number of directors/statutory auditors to be elected. The quotients thus obtained are assigned progressively to the candidates of each slate, in the order in which they are listed. The quotients attributed to the candidates of the various slates are then arranged in a single list, in decreasing order, and the persons with the highest quotients are elected.

held companies (69% for BoD, 75% for BoSA elections), since the outcome of voting strategies is less predictable where the ownership structure is dispersed.

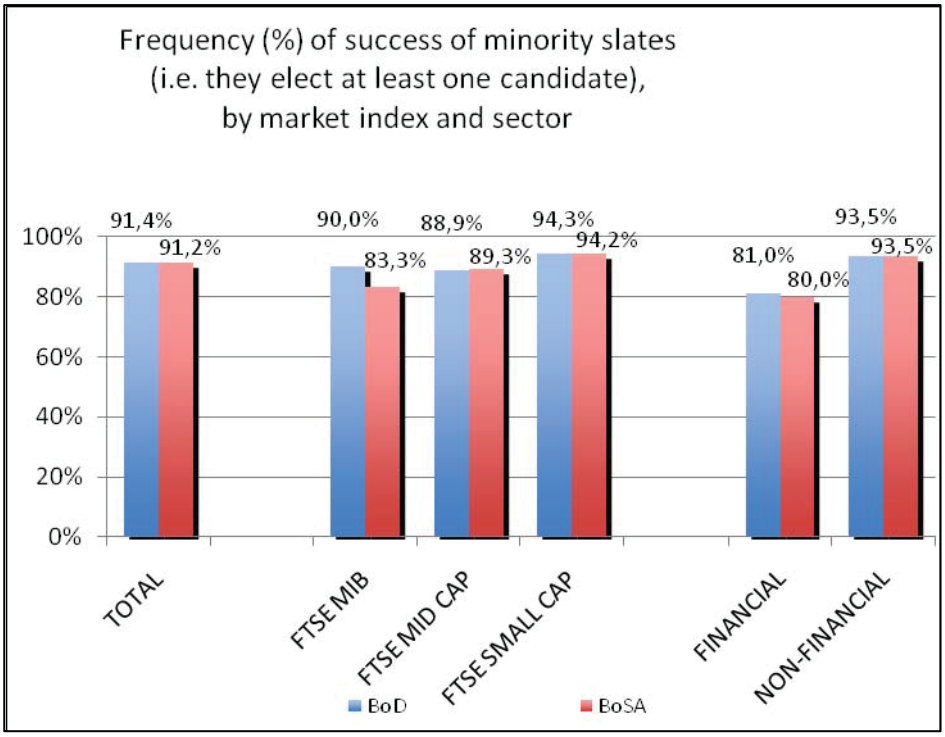

Figure 47

The average number of minority directors (statutory auditors) elected per company (in the firms where they were actually appointed) is 1.5 (0.9).

This number depends, quite obviously, on the voting mechanism adopted by the single firm (multi-winner proportional system *vs.* single-winner with quotas + size of the minority quota). Consequently, the number of directors actually appointed from minority shareholders is substantially higher in "privatized" (2.3, vs. 1.2 in other firms) and publicly-owned companies (2.1, i.e. almost twice as many as those found in family firms). Unsurprisingly, the Board of Statutory Auditors follows a different pattern, driven by its substantially uniform structure (the BoSA is almost always composed of three members, one of which may be appointed by minority shareholders).

We were able to collect 254 (246) AGM Minutes reporting information on the appointment of the BoD (BoSA). Multiple lists were presented in 102 (101) cases (i.e. around 40% of the total). The total number of directors (statutory auditors) actually elected by minority shareholders in the sample period is 186 (107), i.e. 18% (34%) of

the total number of seats. The average number of minority directors (statutory auditors) elected per successful slate is 1,9 (1,1)[128] (see Tab. 45 and 46)[129].

The number (and the relative weight) of minority directors vary with firm size and industry. It is higher in large firms (3.0 directors, on average, i.e. 20% of the Board in FTSE Mib firms; 2,4 directors, i.e. 20% of the Board in Mid Cap and 1.3, i.e. 16% of the Board in Small Cap companies), in the financial sector (where there are, on average, 3.7 minority directors, accounting for 21% of the Board, versus 1.7 directors - 18% of the total – in non-financial firms) and, above all, in "privatized" companies, where minority shareholders were able to appoint, on average, 4.2 directors, i.e. 34% of the Board (versus 1.4 directors, i.e. 14% of the total in other companies). This result is, of course, driven by the influence of Law 474/1994, which granted a floor (20% of the seats) to minority Board representation in the privatized companies operating in some "strategic" industries which had introduced a shareholding or a voting cap.

Ownership structure seems also to play a role: the relative weight of minority directors in state-owned companies (33%) is approximately twice as large as that observable in other firms (where it ranges from 13 to 18%).

[128] The average number of minority directors per successful slate (1.5) is actually lower than the number per company (1.9) because some companies counted more than one successful slate.

[129] Gender diversity amongst minority directors is substantially in line with the average trend: we counted 161 male and 8 female directors (5 women were drawn from slates presented by Italian mutual funds) as well as 105 male and 2 female statutory auditors (both nominated by "private" shareholders: see *infra* for the precise definition). CG Reports show that there are at least 2 (1) more female directors (statutory auditors) in companies where the AGM Minutes were not publicly available.

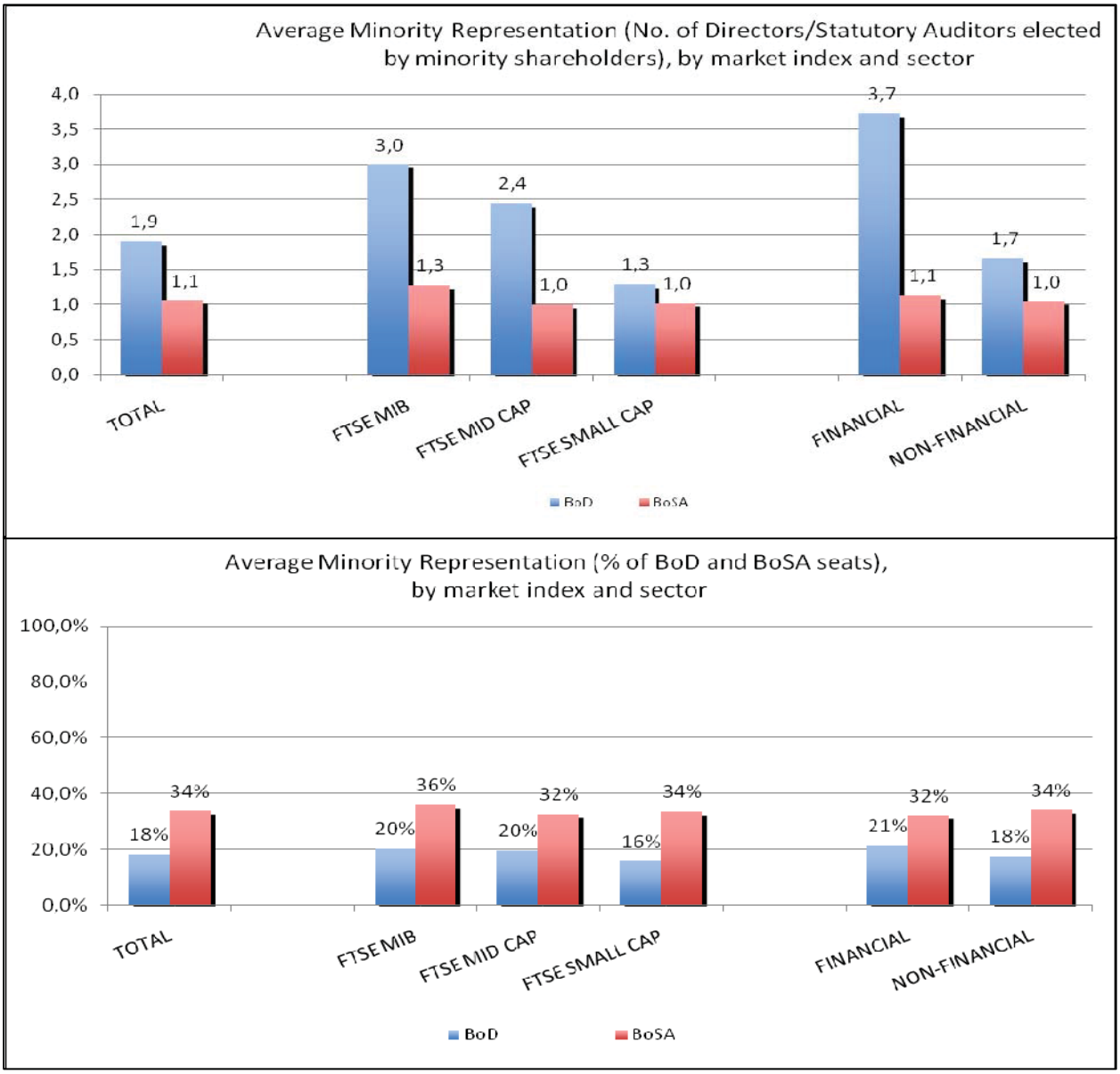

Figure 48

The Board of Statutory Auditors follows a different pattern (see Ta.46), driven by its substantially uniform structure (the BoSA is almost always composed of three members, one of which may be appointed by minority shareholders). Here, the residual, little differences across subsamples are due to a small number of companies having a 5-member BoSA (which may alternatively leave one or two seats to the representatives of minority shareholders).

Additional insights may derive by comparing the number of directors (statutory auditors) actually appointed by minority shareholders with the number of seats "reserved" to them in the by-laws. This ratio yields a measure (in terms of number of persons actually

appointed) of the “interest” of minority shareholders for slate voting, which is alternative and complementary to the sheer number of slates per company[130].

The number of seats “reserved to minority directors (statutory auditors) was 335 (243), i.e. 1.32 (0.99) per company, on average. The number of directors (statutory auditors) actually elected was 186 (107); consequently, they do cover 56% (44%) of the seats “reserved” to them in the by-laws: the opportunity to take the rest of the seats was apparently missed, either because minority shareholders chose not to become active or because no investor held a sufficient number of shares. This “coverage” ratio is much higher in large (82%, for BoDs in FTSE Mib) and in financial firms (89%, for BoD elections)[131].

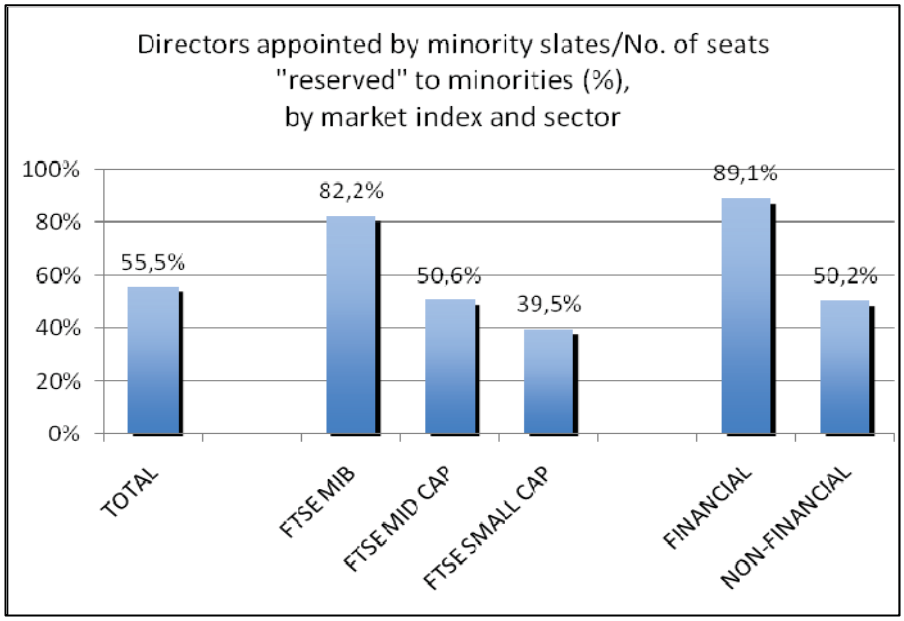

Figure 49

[130] Here, a caveat is in order: the number of candidates actually appointed by minority shareholders may exceptionally exceed the number of seats “reserved” to them (in particular, where the company adopted a “proportional” multi-winner voting system). On the other hand, the true maximum number of seats available for minorities cannot be always estimated a priori, since its value does not depend only on the voting method, but also: on: a) the ownership structure at the AGM date; b) on the number of slates presented, and finally c) on the actual behavior of shareholders at the AGM (attendance to the meeting and distribution of the votes for each slate).

[131] This ratio is particularly high in “privatized” companies (122%, i.e. around three times the average value among other firms); this happens because some of these firms adopted a “proportional” multi-winner voting system, which leads to the election of a number of minority directors larger than the quota reserved in the by-laws. In the case of BoSA elections, the ratio is very high (96%), but always smaller than 100%; this is, obviously, due to the small number of BoSA members (three or – rarely – five), which makes the appointment of a number of statutory auditors higher than the statutory floor (typically 1; in 6 cases the statutory floor is 2) extremely unlikely.

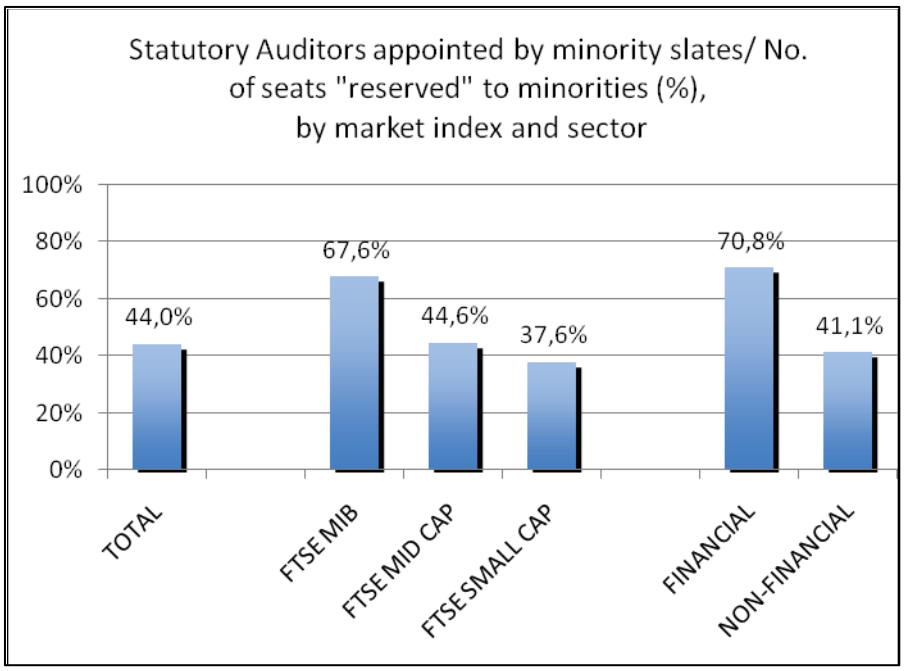

Figure 50

d) Who presented the lists

The slates are submitted almost always by shareholders. In three companies (cooperatives ruled by a one-head-one-vote system) one slate of candidates to the BoD (Supervisory Board, where the company had adopted a two-tier board system) was presented by the outgoing Board. The picture is quite similar for BoSA elections: only in two companies (one was a cooperative), one slate was presented by the Board of Directors in charge (in one of these cases, the BoD stood for re-election in the same AGM). In all these cases, the slate submitted by the BoD always resulted first in terms of votes received[132].

Minority shareholders who submitted a list may be classified as follows: a) Many individual shareholders; b) State and other publicly-owned entities; c) Foundation (they are almost always "bank holding" foundations, established on the basis of Law

[132] In all these BoD elections a second slate had been filed. The results, were, however, very different: in the first case, it succeeded in appointing one "minority" director; in the second case, no minority candidate was appointed, since the company had adopted a *staggered board* system, which allows a minority director to be appointed once every three years; in the third case, the alternative list was not even admitted to voting since the Chairman considered it technically flawed and not in line with the requirements set out in the by-laws. A second slate had been filed also in the two BoSA elections: in one company (the same where this happened for the BoD election) the slate was considered techinically flave an was not admitted to voting; the second case is more complex (three minority slates are presented, two of which are admitted to voting; one of them appoints one director).

218/1990); d) Private equity and other funds acting independently (i.e. not in concert with other similar funds); e) Italian mutual funds, acting under the coordination of Assogestioni, the association of investment companies[133]; f) Financial institutions (bank or insurance company); g) Industrial partners (primary firms, Italian or foreign, operating in the same industry as the listed company)[134]; h) Family members of the control blockholder, possibly acting in concert with other shareholders[135]; i) Private shareholders (all the remaining cases).

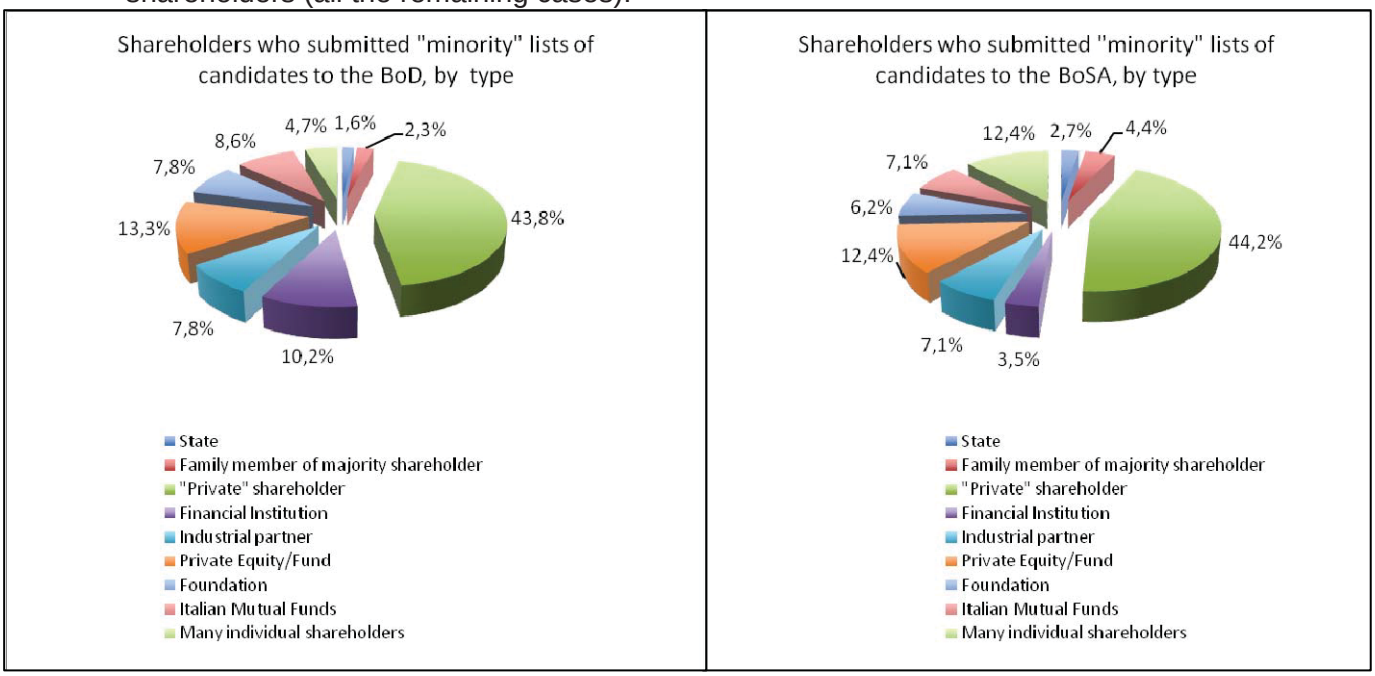

Figure 51

Almost one-half of the minority slates for the election of directors (56 lists, i.e. 43.8% of the total) were presented by “private” shareholders (see Tab. 43). Private equity funds and financial institutions presented 17 and 13 slates (i.e. 13.3% and 10.2% of the total), respectively. The picture for BoSA elections is quite similar (see Tab. 44).

We counted only 11 slates presented by Italian mutual funds coordinated by Assogestioni (i.e. 8,6% of the total); they are concentrated exclusively in companies belonging to the FTSE Mib blue-chip index. Italian mutual funds presented slates for

[133] These cases are explicitly identified as such also on the Assogestioni website, in the “Rules and *governance*” section.

[134] We included in this category also the cases connected to *bankassurance* agreements.

[135] We counted 8 such cases (3 slates of candidates to the BoD, 5 slates for the BoSA). The list presented by family members (alone or together with other shareholders) is always the only minority slate. Consequently, any possible “link” (see art. 147-*ter*, para. 3 and art.148, para. 2 CLF) with shareholders who presented or voted the majority slate would not affect the outcome of the vote.

BoSA elections in 14 companies (i.e. 12.4% of the total)[136]; 12 of them are firms included in the FTSE Mib index. These results are probably driven by the typical composition of mutual (and pension) funds' portfolios, where investment in blue chips takes the lion's share for a number of reasons (higher liquidity, compliance with regulatory benchmarks, availability of derivatives for hedging purposes, etc.).

The companies where Italian mutual funds presented a slate are usually "privatized" firms (this is true for 8 lists of candidates to the BoD out of 11, and 8 lists of candidates to the BoSA out of 14), which are characterized by a regulatory regime particularly favorable to minority board representation. Consequently, mutual funds have been able to appoint a disproportionately high number of directors: even though slates presented by Italian mutual funds account for a mere 8.6% of the total, they actually appoint a much higher 13.4% of the total number of minority directors. The 25 directors appointed by mutual funds in the FTSE Mib index, account for 42% of the total number of minority directors and for 35% of the board seats "reserved" to minority representatives. Slates presented by mutual funds were actually able to elect the highest number of directors per minority list (2.3, i.e. 81% of the candidates included in the list).

The same holds true for BoSA elections: Italian mutual funds elected 15 statutory auditors, 13 of whom were appointed in FTSE Mib firms (this means a sky-high 57% of the total number of minority statutory auditors in large firms).

Industrial partners and (mostly bank holding) foundations filed lists of candidates in 10 BoD elections each (7.8% of the total). Slates are rarely presented by many individual investors (this happens only in 6 companies: almost all of them are cooperatives operating a one-head-one-vote system) or by other categories of shareholders.

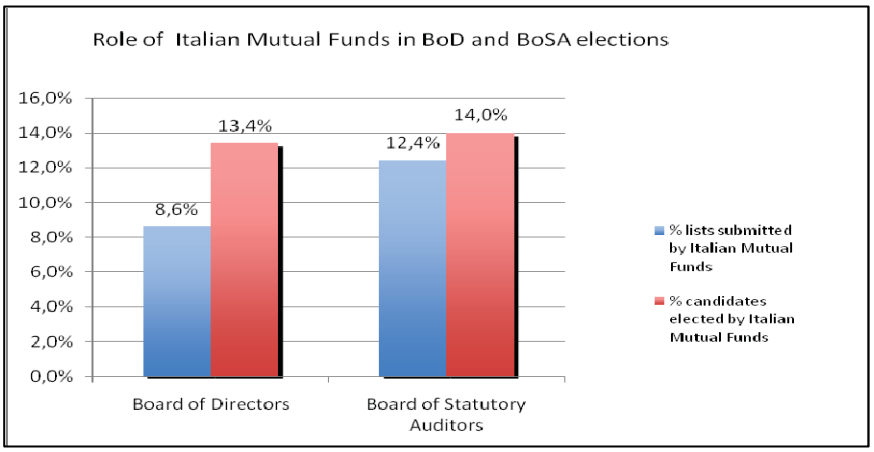

Figure 52

[136] Actually, a fifteenth case is mentioned on the Assogestioni website; however, the AGM Minutes of this company were not available.

4.2. An analysis of CG Reports

Additional information about the number and personal characteristics of minority representatives in corporate bodies may be found in Corporate Governance Reports. As mentioned before, data drawn from CG Reports (cfr. Tab. 47) may be useful, although they cannot be compared systematically with those drawn from the AGM Minutes: we found information on directors (statutory auditors) appointed by minority shareholders in 88 (90) companies[137]. The total number of directors appointed by minorities has grown remarkably over time (from 90 in 2006 up to 169 at the end of 2009).

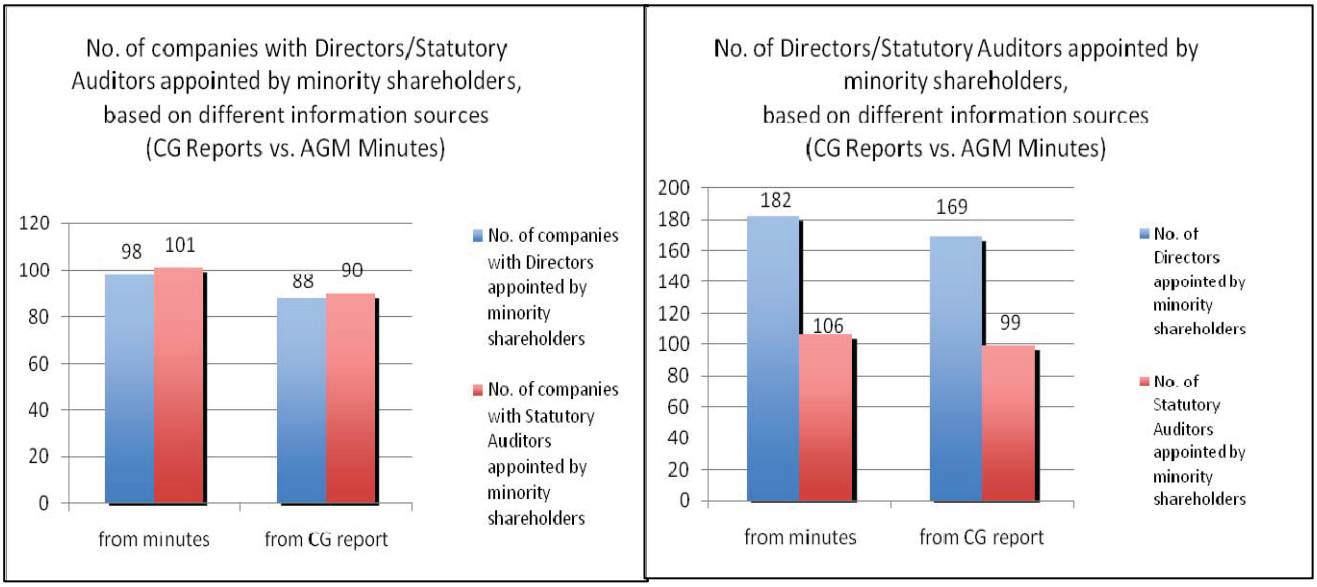

Figure 53

At the same time, their average number (and weight, in terms of % of total board seats) has fallen from 3,9 in 2006 (31% of the board) to 1,9 (17% of the board) at the end of 2009. When slate voting was mandated, many (mostly small) companies which previously did not make recourse to this system were forced to comply with the new regulation; they usually reserved only one seat to minority directors, i.e. the legal minimum set out in the CLF.

The picture for the BoSA is quite similar (see Tab. 48). The total number of statutory auditors appointed by minorities has grown over time (from 64 in 2006 up to 99 at the

[137] The total number of minority directors (statutory auditors) resulting from the AGM Minutes was slightly higher, i.e. 98 (or 101, respectively).

end of 2009); at the same time, their average number (and weight), remained stable (1 out of 3 BoSA members).

CG Reports do not necessarily disclose information concerning the shareholders who submitted each slate: consequently, the number of directors and statutory auditors explicitly qualified as minority representatives is slightly smaller than the number which can be derived from AGM Minutes. Furthermore, around 20% of the companies where such representatives are present did not disclose the identity of the minority shareholders who nominated them (see Tab. 47 and 48). A cross-check with AGM Minutes shows that the missing data often refer to directors (statutory auditors) nominated by "private" shareholders.

a) Personal characteristics of "minority" directors and statutory auditors

We analyzed the following aspects:

i. Number of other positions held

The number of other positions held by directors is often used – in financial literature – either as a measure of their centrality in a network of interlocking directorates (a proxy for possible conflicts of interest) or as a proxy of the directors' "*busyness"*, potentially affecting their effectiveness in monitoring executives. On the other hand, the number of positions held may also have potentially positive implications, since it may depend on the director's reputation.

The number of other positions held by minority directors is 3.17, slightly lower than the average for the whole sample (3.36) (see Tab. 8 and 47). Active minority shareholders do not seem to attach particular importance to this number, i.e. they are not apparently interested in appointing persons holding a number of positions which is substantially lower (or higher) than average. This is not particularly surprising, since the same person may be alternatively a majority or a minority director in different companies. The same result holds for statutory auditors (which, however, do usually hold a higher number of positions: minority statutory auditors hold 9.31 altri other positions, just below the average value of 9.78) (see Tab. 8 and 48).

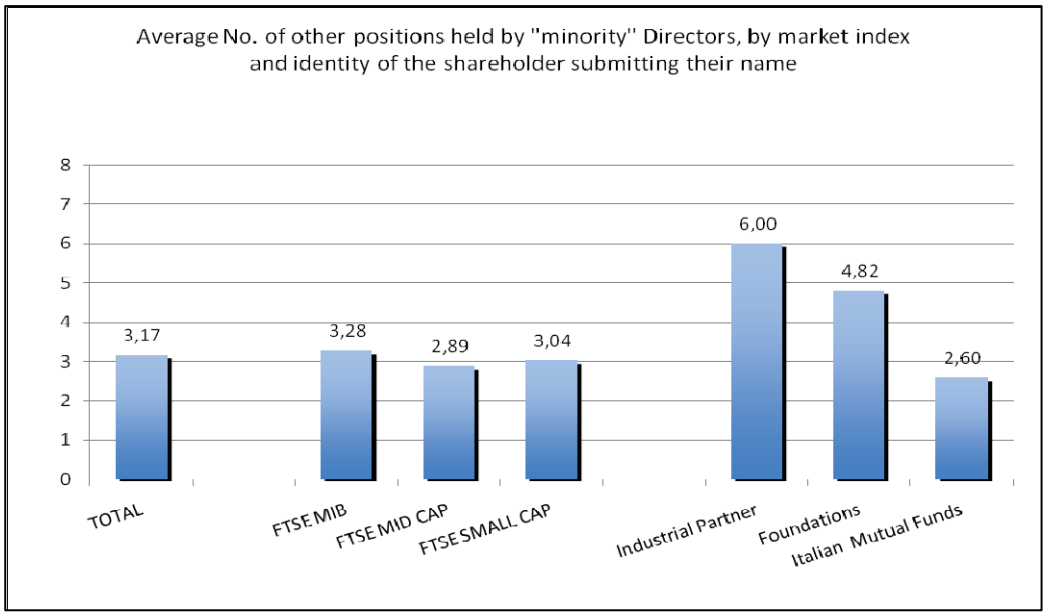

Figure 54

Remarkable differences in "busyness" emerge across industries. Minority directors in financial firms hold a much higher number of other positions (4.29, versus 2.91 in non-financial firms); the opposite is true for minority statutory auditors in financial firms (they hold 6.86 other positions, versus 9.76 in non-financial companies).

The number of positions held is apparently related to the identity of the nominating shareholder: industrial partners, foundations and small shareholders appointed minority directors holding a higher than average number of other positions (6, 4.82 and 4.88, respectively). Directors appointed by Italian mutual funds hold a slightly lower than average number (2.6) of other positions.

ii. Minority directors/statutory auditors with a long tenure (> 9 years)

A long tenure is a factor which Boards should consider in their assessment of the independence of single directors. It is also a controversial one, since on one hand, it is not a binding requirement while, on the other hand, they might be criticized by outside investors and the press, since a director's' tenure is easily observable. Furthermore, a number of listed companies (around 10% of the total: see Tab. 11) stated explicitly that they did not adopt tenure as a relevant criterion when assessing independence. Consequently, we decided to check how frequently do minority shareholders appoint directors/statutory auditors who have been in charge for over 9 years.

Minority directors who have been in charge for over 9 years account for 9.5% of the total (see Tab. 47). This is approximately in line with the percentage of independent directors who – apparently – do not comply with the tenure criterion (10.9%: see Tab.

15). Directors with a long tenure are appointed more frequently (15,1%) by "private" shareholders[138].

Minority statutory auditors with a long tenure are more frequent (17,2%) than directors; minority shareholders tend to appoint such subjects with a frequency higher than average (statutory auditors in charge for over 9 years are 15.8% of the total: see Tab. 16 and 48). In general, minority shareholders do not seem to show a greater propensity than majority ones to appoint persons with a shorter tenure.

iii. Attendance to meetings

Minority directors attended to 87% of BoD meetings (a percentage slightly lower than average – 89%: see Tab. 5 and 47).

Board attendance of minority directors is slightly higher in large firms (91% in FTSE Mib, 86% in Mid Cap, 82% in Small Cap companies), although the number of meetings is much higher in such firms (i.e. 12.8 in FTSE Mib, versus 9.3 in both Mid and Small cap where minority directors have been appointed).

Board attendance is highest for directors appointed by many small investors (95%); it is lower than average for directors appointed by foundations (73%) or by industrial partners (74%). Directors appointed by Italian mutual funds attended to 91% of the BoD meetings (in line with the general average: 91%; they have all been appointed in FTSE Mib companies).

[138] Data for subsamples are not particularly interesting, due to the small number of observations (in some categories, there may be only 1 director with a long tenure); even Italian mutual funds have appointed at least one director and one statutory auditor who had been in charge for over 9 years.

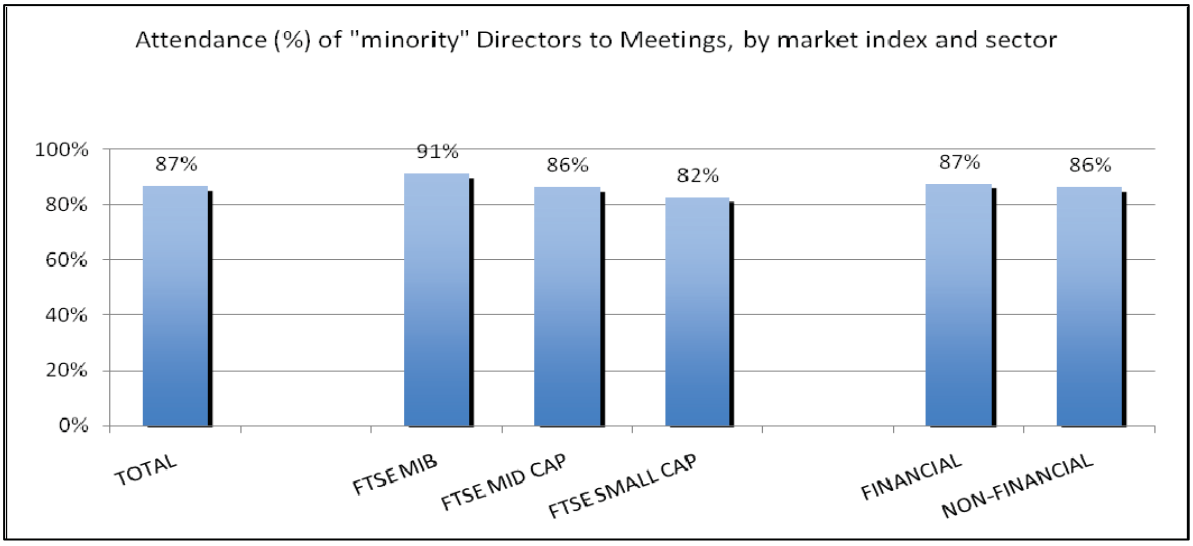

Figure 55

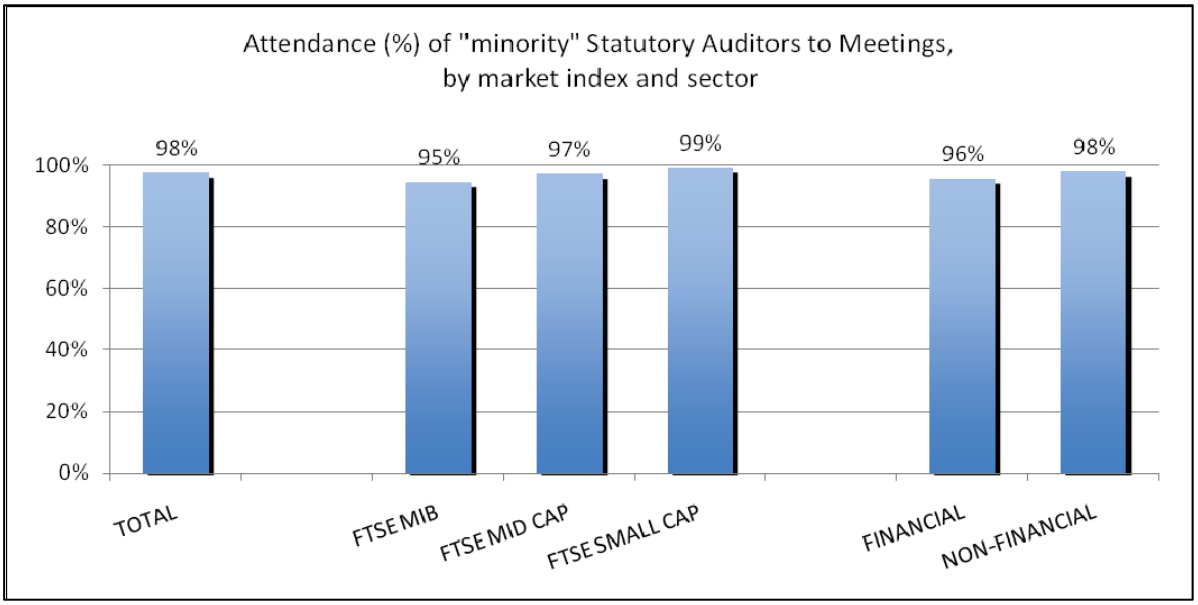

Figure 56

Attendance to BoSA meetings by statutory auditors appointed by minority shareholders is slightly higher (98%) than average (95%: see Tab. 5 and 48). It is slightly lower in large companies (95% in FTSE Mib, 97% in Mid Cap, 99% Small Cap firms); this apparently strange result is driven by a parallel, strong difference in the average number of meetings (20.6 in FTSE Mib, 14 in Mid Cap, 7 in Small Cap companies).

Attendance to BoSA meetings is similar for statutory auditors appointed by different categories of shareholders: it is slightly lower (89%) only for people nominated by foundations.

b) The role of "minority" directors and statutory auditors

Minority directors have been sometimes advocated as being the only directors "truly" independent; however, our data do not confirm this hypothesis. On the opposite, they are not even always qualified as independent by the very companies where they serve on the board.

In CG Reports 169 directors are explicitly qualified as "drawn from a minority slate" (see Tab.49): 157 of them (93% of the total) have been qualified as non-executive, and 12 (serving in 6 different firms[139]) as executive. Two of them have taken the role of Chairman of the Board, one of Vice-Chairman, two of General Manager. Independent minority directors (according to the CG Code (or, respectively, the CLF) definition) are 115 (119), i.e 68% (70%) of the total.

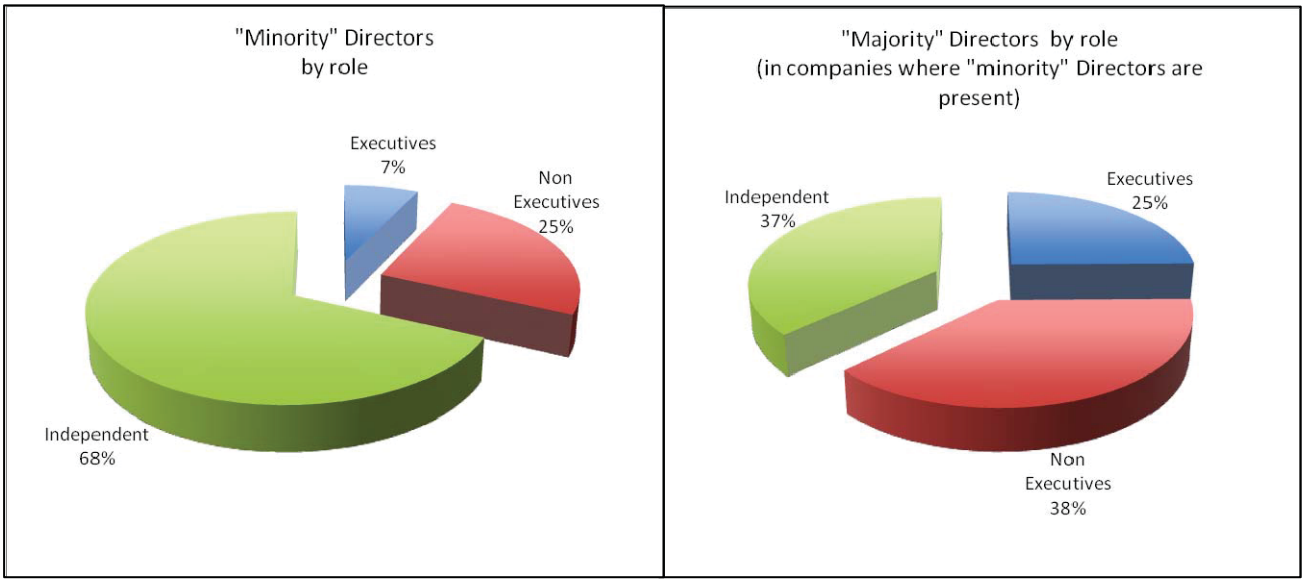

Figure 57

The Chairman of the BoSA is almost always "drawn from a minority slate", as now mandated by art.148, para.2-*bis* CLF, wherever minority representatives have been appointed. This happens in 85 cases (accounting for 86% of the 99 statutory auditors qualified as such in CG Reports: see Tab. 50). The remaining 14 statutory auditors serve in 12 companies. They are either components of 5-member BoSA's (11 cases)

[139] As already shown, in one of these firms the control blockholder voluntarily presented a slate with a number of candidates much lower than the number of board seats; consequently the majority of board members (including the Chairman and the CEO) were actually drawn from the "minority" list.

and/or statutory auditors appointed before the rule mandating a minority chairman entered into force (6 cases)[140].

c) Committee membership of "minority" directors

The presence of minority directors is associated almost always with the establishment of board committees. The Internal Control Committee (ICC) and the Remuneration Committee (RC) have been established by 84 and 86 companies out of the 88 where minority shareholders appointed directors (95% and 98% of the total, respectively). These percentage values are remarkably higher than average (an ICC (RC) has been established by 88% (84%) of listed firms: see Tab. 21, 32 and 51).

At least one minority director has been appointed to the ICC in 56% of the cases (see Tab.51; of course, the percentage is referred to the total number of companies: a) having minority directors on the board; b) which have established the ICC). This happens more frequently in large firms (79% of the cases, in FTSE Mib, 52% in Mid Cap, 47% in Small Cap companies), in "privatized" companies (82% of the cases: this is not surprising, since they have a much larger pool of minority directors) and in State-owned firms (74% of the cases). No particular difference does emerge across sectors.

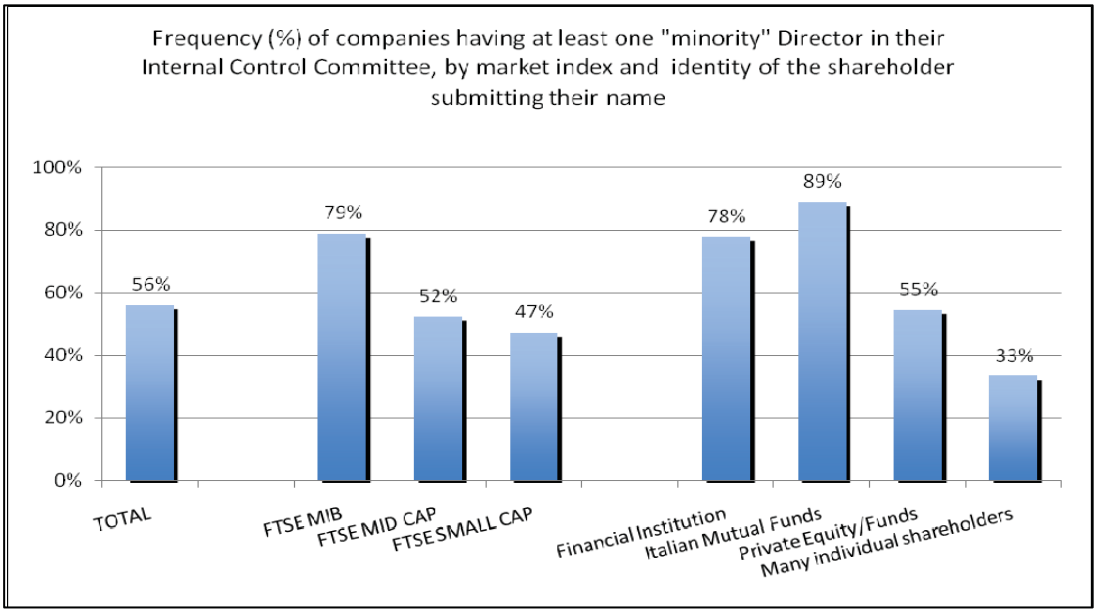

Figure 58

[140] A handful of companies still have a BoSA which is not chaired by one of the statutory auditors appointed by minority shareholders: three of these companies have one minority representative (one in a 3- and two in a 5-member BoSA); two companies have two minority representative in a 5-member BoSA. 7 more companies have a minority chairman + one minority representative in a 5-member BoSA.

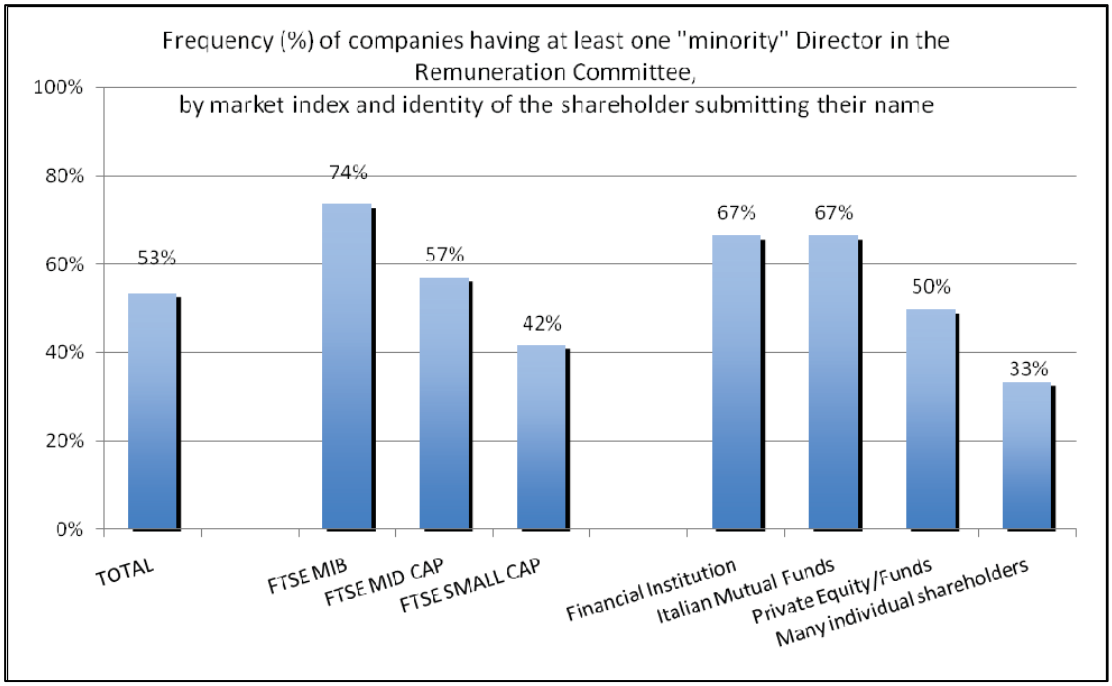

Figure 59

The picture is quite similar for the Remuneration Committee. At least one minority director has been appointed to the RC in 53% of the cases (see Tab.53; of course, the percentage is referred to the total number of companies: a) having minority directors on the board; b) which have established the RC). This happens more frequently in large firms (74% of the cases, in FTSE Mib, 57% in Mid Cap, 42% in Small Cap companies), in "privatized" and in State-owned firms (86%, in both cases). Minority directors are less often members of the RC in financial companies.

Committee membership of minority directors is apparently related to the identity of the shareholders who become active: minority directors are appointed more frequently to board committees in companies with directors nominated by Italian mutual funds[141] (in 89% of the ICCs and 67% of the RCs) or by financial institutions (in 78% of the ICCs and 67% of the RCs). On the opposite, they are appointed less often in companies with directors nominated by many individual investors (in 33%, for both committees) or by shareholders whose identity is not disclosed in CG Reports (in 44% of the ICCs, 39% of the RCs).

The minority directors disclosed in CG Reports (169) are appointed to board committees more frequently than the 855 directors drawn from majority slates. Even

[141] They may, however, have been appointed by other classes of minority shareholders (i.e. they are not necessarily those elected by the mutual funds themselves). The number reported in the text should be interpreted as follows: 8 companies out of the 9 (89% of the total) which: a) have on the board minority directors appointed by Italian mutual funds; b) have established the ICC, have at least one ICC member which has been appointed to the board by minority shareholders (of any category).

though minority representatives are 17% of the total number of directors, they acount for 23% of the ICC and 22% of the RC seats (see Tab. 52).

More than one-third of minority directors (38%) are members of the Internal Control Committee (see Tab. 53). This happens more frequently in large firms (46% of minority directors are members of the ICC in FTSE Mib companies; this compares with a 35% in Mid Cap and 32% in Small Cap companies) and in non-financial companies (where 43% of minority directors are ICC members, versus a 19% in financial firms). Directors appointed by Italian mutual funds are those appointed most frequently (67%), followed by directors elected by financial institutions (63%) and by private equity funds (55%).

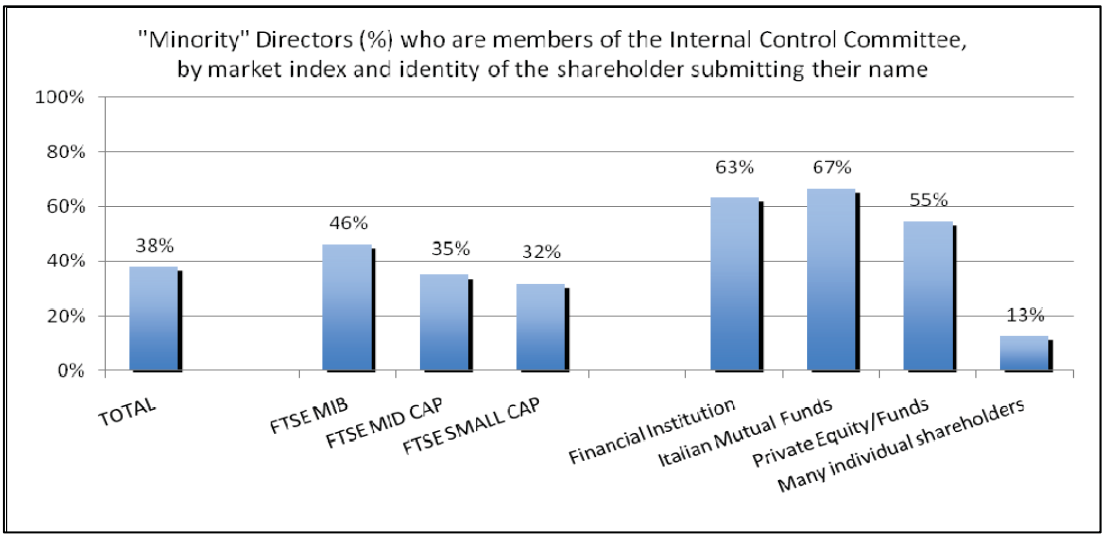

Figure 60

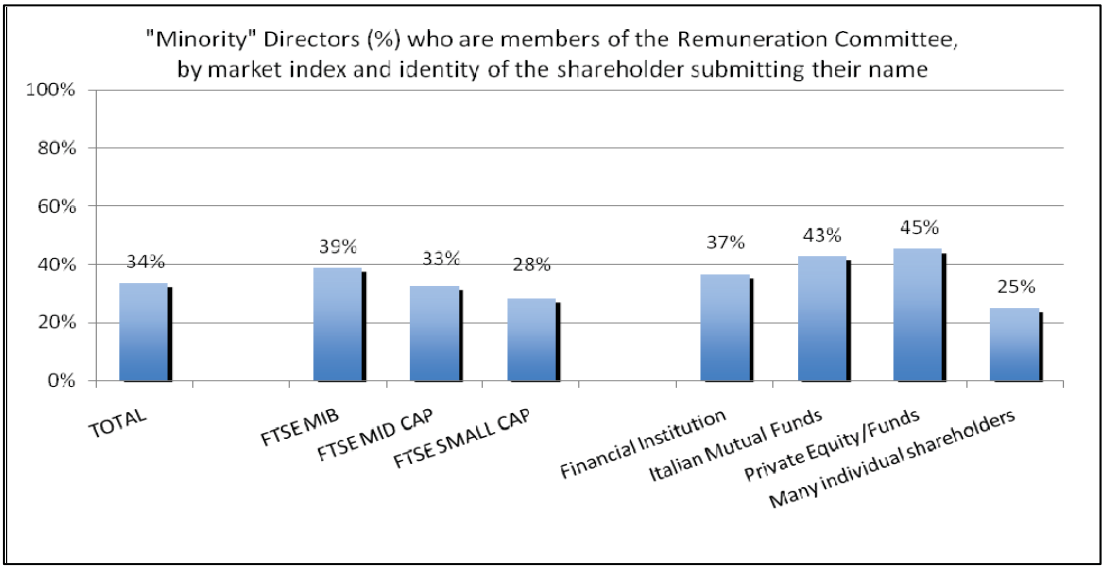

Figure 61

The picture for the RC is quite similar. More than one-third of minority directors (34%) are members of the Remuneration Committee (see Tab. 53). This happens more frequently in large firms (39% of minority directors are members of the RC in FTSE Mib companies; this compares with a 33% in Mid Cap and 28% in Small Cap companies) and in non-financial companies (where 37% of minority directors are RC members, versus a 22% in financial firms). Directors appointed by private equity funds are those appointed most frequently (45%), followed by directors elected by Italian mutual funds (43%) and by financial institutions (37%).