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The Curious Case of Italian Interlocking Directorates

Federico Ghezzi and Chiara Picciau

11.1 INTRODUCTION

In this chapter, we provide an overview of the Italian legislation on interlocking directorates and its enforcement in the last decade. Italy has introduced an anti-interlocking provision to promote competition in the banking, insurance, and financial sectors. Even if it is not easy to make comparisons with other EU Member States, many studies claimed that the number and relative dimension of the Italian financial companies linked by interlocking directorates were greater than in other Member States.[1] This is why, in 2011, in the aftermath of a very harsh financial crisis, Italy enacted a statutory provision forbidding the simultaneous appointment of the same person to the board of directors (or to other corporate bodies)[2] of two or more competing financial companies.

Although this chapter is the result of common research and discussion between the authors, Sections 11.3, 11.4, 11.5, and 11.7 shall be attributed to Federico Ghezzi, while Sections 11.1, 11.2, 11.6, 11.8, 11.9, and 11.10 shall be attributed to Chiara Picciau. The analysis in this chapter has been further expanded in two other works, to which the reader may refer: F Ghezzi and C Picciau, 'Il divieto di *interlocking* nel settore finanziario: spunti da un'analisi empirica sui principali 25 gruppi bancari italiani' (2020) 65 Rivista delle società 1659–93; F Ghezzi and C Picciau, 'Evaluating the Effectiveness of the Italian Interlocking Ban: An Empirical Analysis of the Personal Ties among the Largest Banking and Insurance Groups in Italy' (2022) 18 J Compet Law Econ 29–74. The authors finished working on this chapter in August 2021 and very limited amendments could be made after that date.

1 See e.g. the Italian Competition Authority's (AGCM) sector inquiry on the corporate governance of banking and insurance companies: AGCM, *La corporate governance di banche e compagnie di assicurazioni (IC 36)* (2008) 96–97 www.agcm.it/dotcmsCustom/getDominoAttach?urlStr=192.168.14.10:8080/C12564CE0049D161/0/26FE72DE86F8B4D9C1257546004B404D/$File/IC36%20.pdf accessed on 20 August 2021.

2 Italian corporations may adopt one of three different governance models: (1) the traditional model, in which the shareholder meeting appoints a board of directors with management powers and a board of statutory auditors with control duties; (2) the two-tier system, consistent with the German tradition, in which the shareholder meeting appoints a supervisory board that in turn appoints a management board; and (3) the one-tier system, consistent with the Anglo-American experience, in which the shareholder meeting appoints a board of directors, which entrusts some of its members, constituting a management control committee, with monitoring functions. See F Ghezzi and C Malberti, 'The Two-Tier Model and the One-Tier Model of Corporate Governance in the Italian Reform of Corporate Law' (2008) 5 Eur Co Financ Law Rev 1–47.

After explaining why, without regulation, these personal ties may facilitate or reinforce the achievement of a collusive or quiet life equilibrium among competitors, we provide a brief description of the main features and scope of the 2011 Italian interlocking ban. We then attempt to evaluate its effectiveness and limits. Using the banking sector as a case study, we gathered data on the number of interlocking directorates that persisted among the 25 largest banks and banking groups in Italy at the end of 2018. The result of our study is that interlocking directorates among major Italian banks seem to have disappeared. This is at odds with the prevailing empirical literature which has claimed that interlocking directorates are still a widespread reality of Italian capitalism, with possible persisting anticompetitive effects in many markets. To counter this claim, we also considered some empirical studies showing that, in the period following the entry into force of the interlocking ban, bank lending rates fell, which suggests more vigorous competition.

We conclude the chapter by questioning whether the 2011 interlocking ban has had any effect on the ownership structure of the relevant market players – for instance, contributing to the disposal of minority and cross-shareholdings held by companies operating in the sectors concerned – as well as on the composition of their governing bodies.

11.2 INTERLOCKING DIRECTORATES, OWNERSHIP TIES, AND THEIR EFFECT ON COMPETITION

While there are different justifications to establish interlocking directorates,[3] these personal links may produce anticompetitive effects when the linked firms operate on the same markets. The conclusion is straightforward when the personal tie is one of the elements of a wider collusive scheme in which a director sitting on the board of two horizontal competitors helps make sure that each firm sticks to the terms of an agreed-upon behaviour.

However, even when there is no anticompetitive agreement in place, interlocking directorates can still limit competition by facilitating the establishment of a quiet life equilibrium.[4] This often happens when interlocking directorships are coupled with ownership ties. To be sure, not all ownership ties are relevant in an antitrust perspective. For instance, common majority shareholdings are usually not relevant, since companies belonging to the same group generally constitute a single economic entity and

[3] Interlocking directorates may also serve legitimate purposes, including monitoring (for example, in a bank-firm relationship). See e.g. MS Mizruchi, 'What Do Interlocks Do? An Analysis, Critique, and Assessment of Research on Interlocking Directorates' (1996) 22 Annu Rev Sociol 271–98. For an overview of the literature on the positive and negative effects of interlocking directorates, see NH Lamb and P Roundy, 'The "Ties that Bind" Board Interlocks Research: A Systematic Review' (2016) 39 Manag Res Rev 1516–42.

[4] For an overview of the theories of harm see Chapter 10 by F Thépot, 'Interlocking Directorates in Europe: An Enforcement Gap?'.

are thus not considered independent competitors.[5] Other ownership ties may, however, pose antitrust concerns. This is the case for minority shareholdings (e.g., firm A holds a minority stake in competitor firm B),[6] cross-shareholdings (e.g., competitors A and B hold shares in one another), and horizontal shareholdings (e.g., horizontal competitors A and B have, in all or in part, the same minority shareholders).[7] In all these cases, the horizontal competitors might have an incentive to forego or limit competition, as the higher profits that each firm would earn from competition could be, in all or in part, offset or even outweighed by a loss in the value of the stake held in the competitor (directly by the company or by its common minority shareholders).

The incentives are mostly the same when the ownership ties between the competing firms are only indirect and include companies operating in other markets or sectors, as it would happen if the cross-shareholding involved one or more interposed companies. This is probably why, in the Italian experience, interlocking directorates and ownership ties have often gone hand in hand. It is also why, considering that Bank of Italy regulations restrict ownership ties between financial firms,[8] they have typically involved not only these companies but listed companies more generally.[9] Empirical studies based on data collected before the 2011 statutory ban on interlocking directorates showed, for instance, that the ownership patterns of large Italian listed companies, including major financial firms, closely resembled the interlocking directorates among them.[10] At least until 2011, many listed companies that shared one or

[5] In the Italian case law see, for example, TAR Lazio, 14 November 2018, n 11002. In fact, the Italian interlocking ban does not apply to personal ties within the same group of companies. See Section 11.5 of this chapter.

[6] On the anticompetitive effects of minority shareholdings, see OECD, 'Antitrust Issues Involving Minority Shareholding and Interlocking Directorates' (Competition Committee Roundtable DAF/Comp[2008]30 23 June 2009) www.oecd.org/competition/mergers/41774055.pdf accessed on 20 August 2021. See also Chapter 15 by A Tzanaki, 'Common Ownership and Minority Shareholding at the Intersection of Competition and Corporate Law: Looking Through the Past to Return to the Future?'.

[7] A well-known study on the subject, examining the anticompetitive effects of common ownership in the US domestic airline industry, is that of J Azar, MC Schmalz, and I Tecu, 'Anticompetitive Effects of Common Ownership' (2018) 73 J Finance 1513–65. For further discussion, mostly in a US perspective, and references, see Chapter 12 by MC Schmalz, 'Conceptual Breakthroughs on Common Ownership and Competition: A Framework for Evaluating Policy' and Chapter 13 by EB Rock and DL Rubinfeld, 'Does Common Ownership Explain Higher Oligopolistic Profits?'. On the topic, also with respect to the European Union, see Chapter 14 by M Corradi, 'Common Ownership by Investment Management Corporations and EU Policies: Please, Play Puzzles and not Mikado!' and Chapter 15 by A Tzanaki, 'Common Ownership and Minority Shareholding at the Intersection of Competition and Corporate Law: Looking Through the Past to Return to the Future?'.

[8] For instance, the acquisition of relevant shareholdings in other banks or in insurance and financial firms must be authorised by the Bank of Italy when certain conditions are met. See Section V, Chapter 1, Part III of the Bank of Italy's prudential supervisory regulations: Bank of Italy, *Disposizioni di vigilanza per le banche. Circolare n. 285 del 17 dicembre 2013* (17 December 2013), as subsequently amended.

[9] See e.g. F Bertoni and PA Randone, 'The Small-World of Italian Finance: Ownership Interconnections and Board Interlocks amongst Italian Listed Companies' (2006) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=917587 accessed 20 August 2021.

[10] C Drago, S Manestra, and P Santella, 'Interlocking Directorships and Cross-Shareholdings among Italian Blue Chips' (2011) 12 Eur Bus Organ Law Rev 619, 629–36, 638, 641. See also Bertoni and

more directors also directly or indirectly shared some stockholders and/or held shares in one another. Interlocking directorates have hence likely enhanced or strengthened the anticompetitive pressure created by the ownership links of Italian capitalism.

However, interlocking directorates may have anticompetitive effects also in other circumstances[11] and even if the competing firms are not linked by ownership ties. For instance, before and during board meetings, strategic information is shared among the directors and officers of the firm. The interlocked directors receive this information together with the other members of the board and may use it to the benefit of the competing firm in which they also serve.

Even when the interlocked directors do not actively use the information to the advantage of the competitor, the information may influence their opinions and votes at board meetings.[12] This is because a director sitting on the boards of two competing companies owes fiduciary duties to both of them and must try to maximise the profits of both. That may *per se* lead to a quiet life equilibrium, since the director will vote for the solution that maximises the joint profits of the two companies or that increases the profit of one without damaging the other.[13] Indeed, if 'X is a director of both Corporation A and Corporation B', 'X could hardly vote for a policy by A that would injure B without violating his duty of loyalty to B; at the same time he could hardly abstain from voting without depriving A of his best judgment'.[14] If the director is an executive officer in at least one of the interlocked companies, the impact on the company's management and day-to-day decisions is straightforward.[15] In other cases he/she may still signal to both boards the choice that would maximise joint profits.[16]

Randone (n 9) (observing, at 16 and 20, that the ownership and interlocking networks in Italy seemed to be strongly related).

11 In this chapter, we do not consider vertical interlocking directorates, which, under some circumstances, may favour market foreclosure effects. See V Petersen, 'Interlocking Directorates in the European Union: An Argument for Their Restriction' (2016) 27 Eur Bus Law Rev 821, 855–58.

12 GD Pini, 'Passive – Aggressive Investments: Minority Shareholdings and Competition Law' (2012) 23 Eur Bus Law Rev 575, 589–90; Petersen (n 11) 846–48.

13 See e.g. F Ghezzi, 'Legami personali tra intermediari finanziari e diritto della concorrenza. Sull'opportunità di introdurre uno specifico divieto «anti-interlocking» nell'ordinamento italiano' (2010) 55 Rivista delle società 997, 1006–07. See also F Ghezzi, 'La nuova disciplina dei legami personali in Italia' (2012) 14 Mercato Concorrenza Regole 199, 210–11; Petersen (n 11) 846–47. Among the decisions of the Italian Competition Authority, see AGCM, *Banche Popolari Unite/Banca Lombarda e Piemontese*, 12 April 2007, Bollettino 13/2007, §§ 139–40. Some empirical studies have found that interlocking directorates rarely facilitate collusion in practice. See H Buch-Hansen, 'Interlocking Directorates and Collusion: An Empirical Analysis' (2014) 29 Intl Sociol 1–19. However, according to other studies, in the past interlocking directorates had a role in building trust between participants in a collusive scheme. See CR Leslie, 'Trust, Distrust, and Antitrust' (2004) 82 Tex Law Rev 515, 583–84. In any case, we simply suggest that personal ties among competitors may lead to a quiet life equilibrium without that necessarily amounting to collusion.

14 AH Travers Jr, 'Interlocks in Corporate Management and the Antitrust Laws' (1968) 46 Tex Law Rev 819, 840; also cited by Petersen (n 11) 847.

15 cf Ghezzi, 'La nuova disciplina' (n 13) 212.

16 Ghezzi, 'Legami personali' (n 13) 1007. For an example, see Petersen (n 11) 846.

Holding a directorship position in two competing firms should thus be prohibited not only when it helps competitors reach a common understanding about future behaviour or detect each other's deviations from that common understanding[17] but also when it enables them to establish a quiet life equilibrium. The question remains, however, as to what is the best way to address this potential information-sharing mechanism.

Absolute prohibitions may be too strict.[18] Indeed, based on the circumstances of the relevant markets, lawmakers typically choose between *ex-post* antitrust enforcement and *ex-ante* limits or bans. In the first case, personal ties are eradicated if a reduction in competition has been observed, but there is a chance that they escape regulation and enforcement. The pervasiveness of the phenomenon and a history of collusive behaviour in the relevant market might thus suggest the need for an *ex-ante* ban on interlocking directorates, eventually accompanied by exceptions for situations that, due to the size of the firms involved or to other circumstances, do not pose actual dangers to competition.

11.3 THE UNCOMMON SPREAD OF INTERLOCKING DIRECTORATES IN THE ITALIAN BANKING, INSURANCE, AND FINANCIAL SECTORS

Interlocking directorates have always been a common feature of Italian capitalism. In 1928, statistician Luzzatto Fegiz wrote that

> [f]lipping through a yearbook of joint-stock companies one is struck by the frequency with which the same names repeat themselves on the boards of several companies; and indeed a closer look only confirms the first impression, because not only is it that many people take up two or three seats, but it is not rare that one person occupies fifteen, twenty or even more seats.[19]

Interlocking directorates and ownership ties have been used in Italy, typically by families, as a mechanism to secure control of the biggest privately owned corporations across different sectors (conglomerate interlocks), as well as a defensive tool

[17] See JT Halverson, 'Should Interlocking Director Relationships Be Subject to Regulation and, If So, What Kind?' (1976) 45 Antitrust LJ 341, 345–46. See also P Buccirossi and G Spagnolo, 'Corporate Governance and Collusive Behavior', in WD Collins and J Angland (eds), *Issues in Competition Law and Policy* (ABA Section of Antitrust Law 2008) vol 2, 1228; ME Jacobs, 'Combating Anticompetitive Interlocks: Section 8 of the Clayton Act as a Template for Small and Emerging Economies' (2014) 37 Fordham Intl LJ 643, 652–53.

[18] cf V Falce, 'Interlocking Directorates: An Italian Antitrust Dilemma' (2013) 9 J Compet Law Econ 457, 459 (arguing that interlocking directorates should not be prohibited *per se* and underscoring the importance of evaluating the relevant circumstances of the market).

[19] P Luzzatto Fegiz, 'Il consiglio di amministrazione e l'interdipendenza delle imprese' (1928) 68 Giornale degli Economisti e Rivista di Statistica 197, 197 (our translation from Italian).

against hostile takeovers.[20] They reinforced the ability of coalitions and weak owners to maintain control and extract private benefits.[21]

However, interlocking directorates were a common feature even within industrial and financial sectors, thus affecting the relationship between horizontal competitors. Empirical studies suggest that, after World War II, interlocking directorates were a persistent and endemic phenomenon especially within the Italian banking, insurance, and financial sectors.[22] The Mediobanca-Generali conglomerate group was at the centre of a galaxy of interlocking directorates, passive investments, and active minority shareholdings among directly or indirectly competing firms and groups. Some authors referred to this characteristic as the circular ownership of Italian listed companies:[23] a 'petrified forest' where structural links represented an objective limit to the competitive dynamic that these markets could have otherwise exhibited.[24]

Some tables and figures illustrate the impressive thickness and density of the web of personal links between Italian banks, insurance companies, and financial firms before 2011.

According to the Italian Competition Authority, at the beginning of 2008 many banks (roughly 40% of the sample) had no members of their governing bodies interlocked with other banks. However, some had ten or even more interlocked persons. In terms of firm dimension, banks having seven or eight interlocked directors represented more than 47% of the total asset value in the sample. Similar results were found in the insurance and financial sectors.[25]

[20] Note that even if firms do not compete horizontally or vertically, personal and ownership ties may have anticompetitive effects. They reinforce minority control against hostile takeovers, preventing the positive effects that an efficient market for corporate control may have on firm performance. On the use of these ties as a means to secure control, see e.g. M Bianchi, M Bianco, and L Enriques, 'Pyramidal Groups and the Separation between Ownership and Control in Italy', in F Barca and M Becht (eds), *The Control of Corporate Europe* (Oxford University Press 2002) 156; A Rinaldi and M Vasta, 'The Structure of Italian Capitalism, 1952–1972: New Evidence Using the Interlocking Directorates Technique' (2005) 12 Financ History Rev 173–98; RM Barker, *Corporate Governance, Competition, and Political Parties: Explaining Corporate Governance Change in Europe* (Oxford University Press 2010) esp 258–66; L Bellenzier and R Grassi, 'Interlocking Directorates in Italy: Persistent Links in Network Dynamics' (2014) 9 J Econ Interact Coord 183–202.

[21] For further references and a review of the literature on the Italian case, see L Fattobene, M Caiffa, and E Di Carlo, 'Interlocking Directorship across Italian Listed Companies: Evidence from a Natural Experiment' (2018) 22 J Manag Gov 393, 397–400.

[22] See e.g. M Bianco and E Pagnoni, 'I legami creati tra le società quotate dagli *interlocking directorates*: il caso delle banche' (1997) Moneta e credito 215–44; P Santella, C Drago, and A Polo, 'The Italian Chamber of Lords Sits on Listed Company Boards: An Empirical Analysis of Italian Listed Company Boards from 1998 to 2006' (2010) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1027947 accessed on 20 August 2021.

[23] M Bianchi, S Fabrizio, and G Siciliano, 'La proprietà "circolare" nei gruppi quotati italiani', in *Rapporto IRS sul mercato azionario 1998* (Il Sole 24 Ore Libri 1998) 203–22.

[24] See Pini (n 12) 578.

[25] AGCM (n 1) 78–79, 84–95. The data refer to the period 31 December 2007–20 May 2008. With respect to banks, the sample included 53 banking enterprises considered at the group level, thus excluding interlockings within the same group.

TABLE 11.1 *Percentage of listed and non-listed banks, insurance companies, and asset management companies with interlocking directorates in competing companies (sample: 145 companies; period: 31 December 2007–20 May 2008)*

	Listed companies	Non-listed companies
% of companies with interlocking directorates	89.2	62.3
% of companies with interlocking directorates (in terms of total assets)	97.3	71.3

Note: Interlocking directorates within the same group were excluded.
Source: adapted from AGCM, La corporate governance di banche e compagnie di assicurazioni (IC 36) (2008), table 27, 88

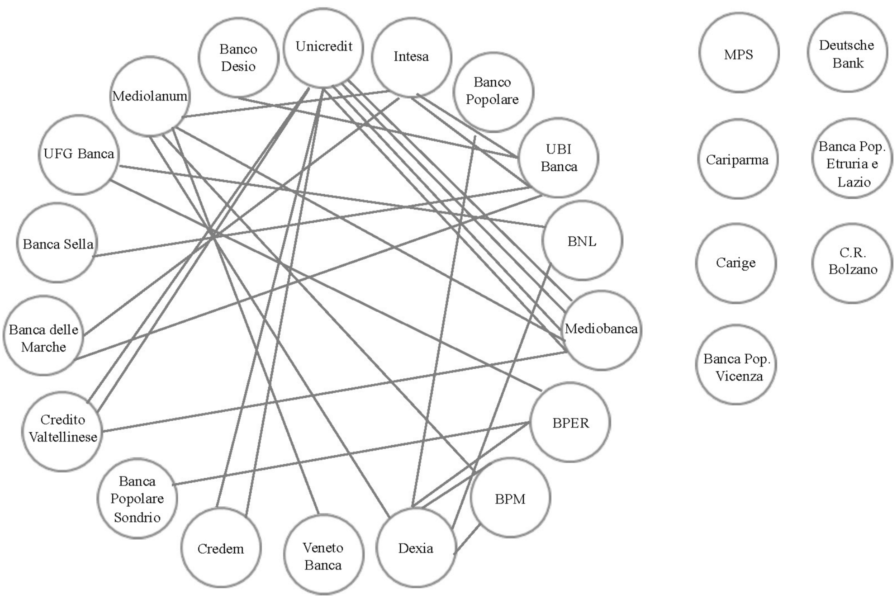

FIGURE 11.1 Interlocking directorates between the 25 largest banking groups in Italy on 31 December 2010
Source: Federico Ghezzi and Chiara Picciau, 'Il divieto di *interlocking* nel settore finanziario: spunti da un'analisi empirica sui principali 25 gruppi bancari italiani' (2020) 65 *Rivista delle società* 1659, 1680

Table 11.1 gives an idea of the widespread use of interlocking directorates in the Italian financial sector more generally.

Figure 11.1 instead shows the degree of concentration in the Italian banking sector on 31 December 2010. The lines represent interlocking directorates between the

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25 largest banking groups in Italy (controlling at the time a total of 130 banks). In a perfectly competitive market, one should expect a picture only made up of isolated points.[26] Figure 11.1 instead displays only a few isolated firms.

11.4 REASONS FOR THE INTRODUCTION OF AN *EX-ANTE* BAN ON INTERLOCKING DIRECTORATES BETWEEN FINANCIAL FIRMS

Despite the prevalence of interlocking directorates, the Italian antitrust legislation, which is largely modelled on the EU legislation, had the same limits and gaps of the latter, including the absence of specific tools and remedies to counteract the potential anticompetitive effects of interlocking directorates.[27] While the Italian Competition Authority could and did intervene on several occasions to sever interlocking directorates,[28] its enforcement tools were not designed to deal specifically with these inter-company links, nor were they always effective and timely for that purpose.[29] Yet, the financial sector exhibited at that time all the characteristics that, according to economic theory, would justify the introduction of an *ex-ante* interlocking prohibition: (*i*) significant market power of the main interlocked companies; (*ii*) a history of underdeveloped competition in the affected markets (due to state ownership, past regulation on premiums, interest rates, and credit allocation, as well as evidence of collusive behaviour and information exchanges);[30] and (*iii*) stability and pervasiveness of the interlocking directorates' network, which may have functioned as a reciprocal trust creator in a context of tacit collusion. For this reason, the Italian

[26] D Carbonai and G Di Bartolomeo, 'Interlocking directorates as a trust substitute: The case of the Italian non-life insurance industry' (2006) University of Teramo Department of Communication Working Paper No 1–2006, 13–14 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=953648 accessed on 20 August 2021 (also showing a strongly interconnected picture within the insurance sector in 2004).

[27] A ban on interlocking directorates is still absent in the European legislation. See, also for further references, Chapter 10 by F Thépot, 'Interlocking Directorates in Europe: An Enforcement Gap?'.

[28] See e.g. the following merger authorisations: AGCM, *Banca Intesa/San Paolo IMI*, 20 December 2006, Bollettino 49/2006; AGCM, *Banche Popolari Unite/Banca Lombarda e Piemontese*, 12 April 2007, Bollettino 13/2007; AGCM, *Unicredito Italiano/Capitalia*, 18 September 2007, Bollettino 33/2007; AGCM, *Banca Monte dei Paschi di Siena/Banca Antonveneta*, 7 May 2008, Bollettino 18/2008; AGCM, *Istituto Centrale delle Banche Popolari Italiane/SI Holding*, 26 March 2009, Bollettino 12/2009.

[29] Italian company law deals with interlocking directorates among competitors from a duty of care and a duty of loyalty standpoint, but it does not completely prevent them. See e.g. R Santagata, '*Interlocking directorates* ed «interessi degli amministratori» di società per azioni' (2009) 54 Rivista delle società 310–46; M Miola, 'Interlocking directorates e doveri degli amministratori', in R Santagata (ed), *I legami personali negli organi amministrativi delle società tra autonomia privata e regole di mercato* (Giappichelli 2011) 1–73; M Cera, '*Interlocking directorates* nelle società bancarie, finanziarie e assicurative: evoluzioni e problemi' (2010) 63(I) Banca borsa titoli di credito 276–94. On the inadequacy of the Italian antitrust legislation and enforcement, see Ghezzi, 'Legami personali' (n 13) 1014–18; Falce (n 18) 460–61.

[30] cf P Coccorese, 'Information Exchange as a Means of Collusion: The Case of the Italian Car Insurance Market' (2010) 10 J Ind Compet Trade 55–70.

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Competition Authority, in its sector inquiries,[31] public speeches, advocacy activity,[32] and annual reports,[33] strongly favoured creating an *ad hoc* provision prohibiting interlocking directorates between banking, insurance, and financial companies.

An additional reason for introducing an interlocking ban came at the end of 2008, when the global financial crisis hit Italy with particular severity. While every sector of the Italian economy was affected by a harsh recession, the financial sector experienced the most severe effects. The weakness of the financial sector and its inability to react promptly to the crisis were ascribed, among other factors, to a lack of competition and to the presence of a net of personal and ownership links between banks and other financial firms.[34]

These circumstances led a new 'government of experts' – appointed at the end of 2011 to fight the crisis and headed by former EU Competition Commissioner Mario Monti – to introduce a statutory provision dealing with interlocking directorates in the financial sector.[35]

11.5 THE MAIN FEATURES OF THE 2011 PROVISION DEALING WITH INTERLOCKING DIRECTORATES IN THE BANKING, INSURANCE, AND FINANCIAL SECTORS

Article 36 of the so-called 'Save-Italy' Decree[36] provides that the members of boards of directors, supervisory boards or boards of statutory auditors, as well as the 'top managers' of a company or group of companies operating in the banking, insurance, and financial sectors[37] shall not accept or hold any such offices in a competing

31 AGCM (n 1) 99–100, 147–48.

32 See the hearing of the President of the Italian Competition Authority before the Finance and Treasury Committee of the Italian Senate, addressing the relationship between banks and firms: Senato della Repubblica, XVI legislatura, 6° commissione permanente (Finanze e Tesoro), 'Indagine conoscitiva sui rapporti tra banche e imprese con particolare riferimento agli strumenti di finanziamento' – Audizione del Presidente dell'Autorità garante della concorrenza e del mercato (10 February 2009) www.senato.it/service/PDF/PDFServer/DF/210365.pdf accessed on 20 August 2021.

33 See e.g. the presentation of the Italian Competition Authority's annual report for 2009 by the Authority's President: AGCM, *Relazione annuale. Presentazione del Presidente Antonio Catricalà* (15 June 2010), 6 www.agcm.it/dotcmsDOC/relazioni-annuali/relazioneannuale2009/Presentazione10.pdf accessed on 20 August 2021, where the President complained that 'our repeated calls for a legislation on principles of banking governance remained unheard' (our translation from Italian).

34 cf A Baccini and L Marroni, 'Regulation of Interlocking Directorates in the Financial Sector: A Comparative Case Study' (2016) 41 Eur J Law Econ 431, 436 (recalling that the aim of the interlocking ban was 'to improve competition in the financial system').

35 The scope of the provision is limited to the banking, insurance, and financial sectors, even though the decisional practice of the Italian Competition Authority showed that personal links characterised many other industrial sectors and markets.

36 Article 36 was originally introduced by Law Decree No 201 of 6 December 2011 (the so-called 'Save Italy Decree'), later converted with amendments into Law No 214 of 22 December 2011.

37 Banking, insurance, and financial markets are regulated and supervised. For a discussion regarding which activities fall within the scope of the interlocking ban, see Falce (n 18) 464–65.

company or group of companies.[38] These offices are deemed to be incompatible with one another.

Persons holding two or more incompatible offices must choose which one to terminate within 90 days of the appointment. If the term has expired without a decision being made by the interested person, the interlocker is dismissed from all offices by a decision of the corporate bodies in which he/she serves or, if they do not take action, by the regulatory agency supervising the company (the Bank of Italy for banks; Consob for financial firms; and IVASS for insurance companies).

With the entry into force of the prohibition in 2012, hundreds of people had to step down from one or more incompatible offices,[39] with some of the largest Italian banks and insurance companies, including Intesa Sanpaolo, UniCredit, Mediobanca, and Generali, deeply affected by the measure.[40]

Yet, the interlocking ban raised many interpretive issues and was harshly criticised for its inflexibility and lack of clarity.[41] For this reason, the regulatory agencies decided to issue a joint set of interpretive guidelines.[42] An initial complication

[38] The guidelines on the application of Article 36 issued by the competent Italian supervisory authorities (see n 42 of this chapter) reference actual – not merely potential – competition in one or more relevant product and geographic markets. Given that the boundaries between different geographic markets can change over time and that financial entities can enter new markets or expand their activity in new product markets, the competitive relationship between banking, insurance, and financial firms may evolve over time. Interlocking directorates that were previously allowed under Article 36 may therefore become forbidden at a later date. This implies that directors and firms should monitor compliance with Article 36 on an ongoing basis.

[39] See Assonime, *Rassegna stampa* (11 October 2012) www.assonime.it/_layouts/15/Assonime.CustomAction/GetPdfToUrl.aspx?PathPdf=http://www.assonime.it/assonime/area-stampa/comunicati/Documents/241685/Rassegna_Stampa_11_ottobre_2012.pdf accessed on 20 August 2021; also cited by S Brugnoli, 'Il divieto di interlocking nel Decreto Salva Italia. Analisi normativa e criteri per l'applicazione' (2015) Rivista di diritto societario 425, 439–40.

[40] Unfortunately, data on the application of Article 36 are not available. The regulatory authorities do not publish any data on the subject. The only information generally available comes from press releases of financial firms stating that, in compliance with Article 36, a member of the board of directors or of the internal control body had to resign because of a concurring appointment in a competing firm.

[41] This was partly due to the fact that the interlocking ban was included in an emergency law decree aimed at addressing Italy's difficult financial situation, which contained hundreds of different provisions.

[42] The competent regulatory authorities issued a set of guidelines on the application of Article 36. See Banca d'Italia, Consob, and ISVAP, *Criteri per l'applicazione dell'art. 36 del d.l. 'Salva Italia' (c.d. 'divieto di interlocking')* (20 April 2012). The same authorities subsequently issued a 'FAQ' document also dealing with enforcement and procedure: Banca d'Italia, Consob, and ISVAP, *Criteri per l'applicazione dell'art. 36 del d.l. 'Salva Italia' (c.d. 'divieto di interlocking'). Frequently Asked Questions* (13 June 2012). They also signed a protocol with the Italian Competition Authority to coordinate their enforcement actions under Article 36: Banca d'Italia, Consob, ISVAP, and AGCM, *Protocollo d'intesa per il coordinamento tra Banca d'Italia, CONSOB, ISVAP e AGCM ai fini dell'applicazione dell'art. 36 del d.l. Salva Italia (c.d. 'divieto di interlocking')* (14 June 2012). The guidelines on the application of Article 36 were updated in 2018: Banca d'Italia, Consob, and IVASS, *Aggiornamento dei criteri per l'applicazione dell'art. 36 del d.l. 'Salva Italia' (c.d. 'divieto di interlocking')* (21 December 2018). All these documents are available at www.bancaditalia.it/compiti/vigilanza/accordi/accordi-consob/index.html accessed on 20 August 2021.

stemmed from the fact that Article 36 does not establish any *de minimis* exemption for situations in which the same person holds office in two very small firms that have no market power and thus are no threat to competition. The guidelines hence introduced a threshold based on the turnover of the companies involved.[43] The interlocking directorates' prohibition applies when at least two of the companies (or groups of companies) involved achieve a net (group) turnover exceeding 30 million euros.[44]

According to Article 36, the competitive relationship must be evaluated at the group level. It is reasonable to apply the ban when the interlocked companies are directly competing in the same markets or when one of them controls one or more companies that are in direct competition with the interlocked company.[45] In the latter case, even though there is no direct competition between the interlocked companies, the controlling company may influence the decisions of the subsidiaries that are direct competitors of the interlocked company. However, as the guidelines specify, once a competitive relationship between two financial groups has been ascertained, any interlocking between them is prohibited under Article 36. This applies regardless of the competitive relationship between the interlocked companies or the possibility to (indirectly) affect competition. Imagine two groups that are deemed to compete on the life insurance market because each has a subsidiary operating in that market. Since the two groups are considered to compete in a relevant market, any interlocking directorate between any company belonging to each of the two groups – even that between a bank subsidiary of the first group and a leasing company of the second group, neither of which controls a company in the life insurance market – is prohibited.

The wide reach of the prohibition is partly mitigated by the fact that the guidelines introduced a second *de minimis* threshold. If the personal tie concerns two non-competing companies belonging to different groups and the turnover of each company is less than 3% of the total turnover of the group, the interlocking ban does not apply.[46] However, it remains true that the scope of Article 36, as applied in the context of competing financial groups, may include interlocking directorates that do not and cannot restrict competition, not even on a theoretical level. This result is at odds with the purpose of the provision and may unduly limit the freedom of a

43 The introduction of this threshold is welcome, but there is no basis for it in Article 36. The guidelines therefore seem to have *amended* the statute by introducing *de minimis* exemptions that were not included in Article 36. This may raise problems, since Italian courts are certainly not bound by the guidelines.

44 For banks and other financial intermediaries, turnover means one-tenth of their total assets, excluding memorandum accounts. For insurance companies, it is the value of the gross premiums collected.

45 For example, no interlocking should exist between a leasing company of group A and the parent company of another leasing company belonging to group B.

46 Consider groups A and B, both operating in the banking market. A has a leasing subsidiary which represents 2% of the total turnover of group A, and B has an insurance subsidiary representing 1% of the total turnover of group B. In this case, according to the *de minimis* threshold mentioned in the text, the interlocking ban should not apply.

financial company to select the members of the board of directors (or of other corporate bodies) that it deems fittest for the office.

Article 36 applies not only to executive and non-executive members of the board of directors and to top managers but also to members of the board of statutory auditors and, in two-tier governance systems, to members of the supervisory board, whose main task is to monitor compliance with sectoral laws and regulations that are often complex. In order to efficiently perform this activity, many Italian banks and insurance companies used to 'share' the same skilled professionals. The broadening of the interlocking ban to these other bodies was thus strongly opposed by both the companies and the professionals involved. While these objections seem understandable,[47] they are not founded in an antitrust perspective. Members of the board of statutory auditors (as well as members of supervisory boards in two-tier systems) participate in the meetings of the board of directors and have an ongoing relationship with the directors and officers of the company. They may hence influence board decision-making and management and are in a position to obtain, share, or release strategic information about the company.

On a final note, the 'sanction' set forth in Article 36 is rather peculiar. The burden of non-compliance is on individuals, not on companies. In fact, if the director does not opt in due time for one of the incompatible offices, he/she must step down from *all* of them. The purpose is, clearly, to provide the interlocker with a strong incentive to promptly put an end to the forbidden multiple appointments. The role given to supervisory agencies is thus a residual one. They must intervene only if (*i*) the director didn't opt in a timely manner for one of the incompatible offices and (*ii*) the interlocked companies didn't declare the director's removal.[48]

11.6 NO MORE INTERLOCKING DIRECTORATES? THE DISPUTED EFFECTS OF THE ITALIAN ANTI-INTERLOCKING PROVISION

One of the main open questions regarding Article 36 concerns its effectiveness at eliminating interlocking directorates in the financial sector. To be sure, the sanction for non-compliance might not deter interlockings, as it may not always be administered in practice. If the people appointed to multiple incompatible offices do not point out the existence of a prohibited interlocking, it is for the firms involved (and for their boards) to uncover the situation and ask the person to choose between

[47] From the company's perspective, Article 36 may require the substitution of a reliable and skilled professional with someone less talented or competent (in this respect, see also Section 11.9 of this chapter). From the standpoint of the professional involved, the obligation to step down from all offices but one also implies a loss of salary and reputation.

[48] Even if no specific powers are provided for by Article 36, the supervisory authorities and the Italian Competition Authority could play a more active role, for example by making available detailed product and geographic market definitions and/or inviting interlocked firms to terminate a specific interlocking directorate prior to adopting formal measures. On this point, see Ghezzi, 'La nuova disciplina' (n 13) 222–23.

the incompatible offices. This may not be easy. Therefore, a prohibited interlocking may go undetected and unsanctioned because of the silence of the interested party and the inaction of the firm.

It is true that the competent supervisory authorities should also be aware of the prohibited interlocking, given the availability of databases on the composition of the corporate bodies of the supervised firms, and could thus remove the interlocker from all incompatible offices. However, these proceedings are not public. We therefore do not know whether the authorities have actually intervened or instead tolerated violations of the interlocking prohibition that did not raise antitrust concerns in specific cases.

In the absence of official data, a first indication on the possible effect of the interlocking ban is provided by studies that have examined the density of the interlocking directorates' network in general. Some studies seem to confirm that the interlocking ban has led to a reduction in personal ties among listed companies,[49] even though companies at the centre of the network, which often include financial firms, appear to have maintained some relevant connections.[50] This is probably due to the fact that the interlocking ban applies only within the banking, insurance, and financial sectors. Personal ties between financial and non-financial firms are therefore still allowed. It is also possible that direct personal (and ownership) links between financial firms have been substituted by indirect links, that is, by interlocking directorates involving a non-financial firm in between the previously interlocked financial firms.[51]

A more specific study on the effectiveness of the interlocking ban, which considered 95 financial firms and adopted a broad definition of 'competition', compared the interlocking directorates detected in the financial sector in 2008 with those observed in 2015.[52] According to the study, the number of interlockings in the financial industry appears to have decreased after the introduction of the ban, but not by much, at least with respect to personal ties across different sectors (for example, between a bank and an insurance company or between the latter and a financial firm). Even within sectors interlocking directorates seemed to still be widespread. For instance, the study claims that, in 2008, 60% of banks had personal links with

49 See Fattobene, Caiffa, and Di Carlo (n 21) 395 (claiming that the 'reduction of the personal ties among directors is certainly due to the regulatory reform of the Interlocking Ban'). With specific reference to banks, see G Barone, F Schivardi, and E Sette, 'Interlocking Directorates and Competition in Banking' (2020) CEPR Discussion Paper DP14654, 3 https://repec.cepr.org/repec/cpr/ceprdp/DP14654.pdf accessed on 20 August 2021.

50 C Drago, R Ricciuti, and P Santella, 'An Attempt to Disperse the Italian Interlocking Directorship Network: Analysing the Effects of the 2011 Reform' (2016) FEEM Working Paper No 82.2015 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2715441 accessed on 20 August 2021; C Drago and R Ricciuti, 'Communities Detection as a Tool to Assess a Reform of the Italian Interlocking Directorship Network' (2017) 466 Physica A 91–104.

51 This possibility is envisaged by Baccini and Marroni (n 34) 449.

52 R Creatini and O Main, '*Interlocking directorates*: un problema risolto?' (2015) 17 Mercato Concorrenza Regole 539–60.

other banks, compared with a slightly lower 50% in 2015, while interlocking directorates among insurance firms only declined from 71% to 45% in the same period.[53] In other words, the study suggests that the Italian interlocking ban cannot reach all existing interlockings and/or that its enforcement has been vastly ineffective.[54]

However, the implications of the study seem to be limited, considering that it adopted a very broad definition of competitor in the financial sector, even broader than the already extensive notion employed in Article 36.[55] Moreover, it does not account for the *de minimis* exemptions introduced by the supervisory authorities, nor does it explicitly assess whether the interlocked firms were horizontal competitors within each sector.[56]

11.7 INTERLOCKING DIRECTORATES IN THE ITALIAN BANKING SECTOR: A CASE STUDY

We have therefore gathered our own data on the number of interlocking directorates after the introduction of the interlocking ban, focusing for the time being only on personal ties between banks.[57] Specifically, we determined whether, at the end of 2018, there were any interlocking directorates between the 25 largest banking groups in Italy.[58] This is a representative sample (consisting of more than 90% of the market

[53] *ibid.* at 549 (esp table 1).

[54] While the measures taken by the Italian Competition Authority when assessing concentrations have allegedly been more effective. See Creatini and Main (n 52) 553–57. In the United States, a similar claim has been made with respect to the application of Section 8 of the Clayton Act to horizontal directors, i.e. directors who serve on boards of companies operating within the same industry. At least some of these companies would in fact qualify as competitors under Section 8. See Y Nili, 'Horizontal Directors' (2020) Northwest Univ Law Rev 1179–1262.

[55] For instance, in the study conducted by Creatini and Main (n 52), a bank and an insurance company are considered competitors regardless of whether they actually compete in any relevant market or control a competitor.

[56] These last factors could explain why personal ties have persisted especially among non-banking financial firms, provided that many of them are of limited size in terms of assets or operate in different product and geographic markets. See Creatini and Main (n 52) 557, with reference to asset management companies and other financial firms.

[57] The findings and data reported in this section are part of (and draw from) a broader empirical study, to which the reader may refer, in which we examined the interlocking directorates among the 25 largest banking groups in Italy on the following dates: 31 December 2010 (before the introduction of the interlocking ban); 31 December 2012 (after the interlocking ban entered into force); and 31 December 2018. See F Ghezzi and C Picciau, 'Il divieto di *interlocking* nel settore finanziario: spunti da un'analisi empirica sui principali 25 gruppi bancari italiani' (2020) 65 Rivista delle società 1659–93. In another study, we extended the empirical analysis to the insurance sector: see F Ghezzi and C Picciau, 'Evaluating the Effectiveness of the Italian Interlocking Ban: An Empirical Analysis of the Personal Ties among the Largest Banking and Insurance Groups in Italy' (2022) 18 J Compet Law Econ 29-74.

[58] The 25 largest banking groups operating in Italy on 31 December 2018 were the following: UniCredit, Intesa Sanpaolo, Cassa Depositi e Prestiti, Banco BPM, Banca Monte dei Paschi di Siena, UBI Banca, BNL, Mediobanca, BPER Banca, Crédit Agricole Italia, Banca Mediolanum, Credito Emiliano, Banca Popolare di Sondrio, Credito Valtellinese, Deutsche Bank, Banca Carige, Dexia Crediop, Banca Sella

both in terms of assets and bank branches).[59] Given the size of the banks and banking groups involved, we can assume that they are competitors in at least some geographic or product markets and that they do not fall within the exemption thresholds.

For each bank, we identified the members of the board of directors, the members of the internal control body, and the general manager. In the case of banks controlled by other firms, we extended the analysis to the parent company (with the exclusion of foreign parent companies, to which the ban does not apply). This process ensured that we captured in our data the potential cases of a director, general manager, or member of the internal control body of a bank or of a bank controlling company holding an analogous office in a rival bank, which are equally prohibited by Article 36.

The results of our analysis, carried out using 31 December 2018 as a reference point, are clear. Among the banks and banking groups considered, there is not even a single relevant interlocking directorate.[60] More precisely, using a concept of competition closer to traditional antitrust principles (comprising companies that are active in the same geographic or product banking markets and their controlling firms), we can conclude that the anti-interlocking provision was meticulously followed, at least as of 31 December 2018 and by the Italian banking sector's largest players.[61]

This conclusion helps assess whether the interlocking ban affected the degree of competition in banking markets. A second, more general issue is, in fact, whether the reduction in the number of interlocking directorates has in any way enhanced competition in the relevant markets.

If interlocking directorates can have anticompetitive effects, then the introduction of an interlocking ban should have a positive impact on price (e.g., the interest rates in the banking sector or insurance premiums in the insurance market). Unfortunately, it is very difficult to find any data on the causal relationship between the interlocking ban and prices (or quantities). However, a recent study focusing on the effects of the interlocking ban in the Italian banking sector tried to fill the gap by using a difference-in-differences framework. The study takes advantage of the fact that the legislative reform took place almost unexpectedly, which allows a comparison between the situation before and after the introduction of the ban as a

Holding, Banca Popolare di Bari, Banco di Desio e della Brianza, Cassa di Risparmio di Asti, Banca di Credito Cooperativo di Roma, Unipol Banca, Banca Popolare dell'Alto Adige, and Banca Generali. Several of these groups comprised more than one bank. Our study considered a total of 58 banks.

59 Note that the banks and groups not included in the 25 largest banking groups were of very limited size. In 2018, the total assets of the first Italian banking group (UniCredit) amounted to 828 billion euros, compared with 9.09 billion euros of assets of the Cassa di Risparmio di Bolzano, the first group excluded from our study. It is thus fair to assume that the latter's market share was very small on a national basis.

60 Interlocking directorates persist, however, within the same group.

61 In a separate study, we show a similar result using 31 December 2012 as a reference point. See Ghezzi and Picciau, 'Il divieto di *interlocking*' (n 57) 1679, 1682–83. See also Ghezzi and Picciau, 'Evaluating the Effectiveness' (n 57) 58. One can thus conclude that the ban has generally been effective at eliminating the most troublesome interlocking directorates in an antitrust perspective.

quasi-natural experiment.[62] The results seem to support the procompetitive effects of the interlocking prohibition. In fact, the major finding of the study is that the severance of interlocking directorates resulted in a drop in the interest rates applied to 'treated' relationships: that is, credit relationships between a firm and a bank interlocked with another bank that also granted credit to the same firm. The drop was between 10 and 30 basis points vis-à-vis all other credit relationships, defined as 'controls'.[63] The study also showed that interest rates became more dispersed after the introduction of the ban, and provided some evidence of a slight increase in the quantity of credit used for treated relationships.[64]

11.8 THE BAN ON INTERLOCKING DIRECTORATES AND ITS CONSEQUENCES ON OWNERSHIP TIES

A related issue is whether the reduction in interlocking directorates has caused a corresponding decrease in the strength or number of ownership links that previously connected Italian listed firms, including banking, insurance, and financial companies. The available empirical evidence does not specifically address this question, and economists have actually suggested that further research be undertaken to investigate if and how ownership ties between these firms have changed since the enactment of the ban.[65]

Indeed, it could be expected that Italian ownership patterns have been influenced by the anti-interlocking provision. Recall that some ownership links might have been established, in whole or in part, for collusive or anticompetitive purposes. If the interlocking ban makes it more difficult to obtain this result, by severing an important communication channel among previously interlocked companies, the existing ownership connections between those companies could also lose importance.

According to the Italian financial market authority (Consob), concentrated ownership still largely prevailed among Italian listed companies in 2019 (50 of the 228 companies listed on the Italian stock exchange at the end of 2019 were financial companies).[66] However, the number of companies not belonging to any group has

[62] For further details on the empirical design of the study and on the data and robustness checks performed to confirm the results, see Barone, Schivardi, and Sette (n 49).

[63] See *ibid*. According to the study, 'a relationship between firm *i* and bank *j* [is] *treated* if firm *i* is also borrowing from another bank which shares a board member with bank *j* in December 2011' (*ibid. at* 1). Obviously, the relationship between the firm and the second bank is also considered 'treated'. Relationships are defined as 'controls' in all other cases.

[64] *ibid.* at 2, 12, 14.

[65] See Fattobene, Caiffa, and Di Carlo (n 21) 422; G Di Bartolomeo and P Canofari, 'Interlocking Directorates and Concentration in the Italian Insurance Market' (2015) 15 J Ind Compet Trade 351, 361 (stressing the need for further research on the relationship between minority shareholdings and interlocking directorates).

[66] Consob, *2020 Report on corporate governance of Italian listed companies* (2021) 10, 13 (esp table 1.1) www.consob.it/documents/46180/46181/rcg2020.pdf/023c1d9b-ac8b-49a8-b650-3a4ca2aca53a accessed on 20 August 2021.

TABLE 11.2 *Stakes held by banks and insurance companies in Italian listed companies (years 2010 to 2019)*

	Banks and insurance companies (Italian and foreign)		Italian banks and insurance companies	
	Number of stakes held in Italian listed companies	Mean stake	Number of stakes held in Italian listed companies	Mean stake
2010	56	5.3	44	5.3
2011	55	5.3	46	5.2
2012	51	5.3	42	5.2
2013	41	5.4	36	5.3
2014	40	5.2	33	5.3
2015	24	5.1	19	5.4
2016	12	6.4	8	7.2
2017	11	6.8	7	6.8
2018	8	6.7	5	6.7
2019	14	5.7	6	6.8

Source: adapted from Consob, 2020 Report on Corporate Governance of Italian Listed Companies (2021), tables 1.10–1.11

continued to increase in the recent past.[67] Moreover, the '[d]ata confirm the decline in the number of major holdings owned by banks and insurance companies, especially by Italian ones'.[68] As Table 11.2 shows, the mean stake held by Italian banks and insurance firms in Italian listed companies has remained more or less stable in the period between 2010 and 2019, with only a slight increase after 2015. However, the number of holdings that these financial firms have in Italian listed companies has sharply decreased from a total of 44 in 2010 to six in 2019.

These data do not allow us to draw any sure conclusion with respect to the effect of the interlocking ban on the ownership patterns in the Italian financial sector. The

[67] cf Consob (n 66) 10–11, 19 (esp table 1.13). This and other similar trends have, however, been documented even earlier. For a review of previous work on the changing ownership patterns of Italian listed firms since the reforms enacted in Italy starting in the 1990s, see A Zattoni and F Cuomo, 'Institutional Change and Ownership Patterns in Italy', in M Goranova and L Verstegen Ryan (eds), *Shareholder Empowerment: A New Era in Corporate Governance* (Palgrave Macmillan 2015) 280–89.

[68] Consob, *2019 Report on corporate governance of Italian listed companies* (2020) 13 www.consob.it/documents/46180/46181/rcg2019.pdf/941e4e4e-60db-4f89-afb3-32bddb8488e0 accessed on 20 August 2021. To be sure, with respect to 2019, the Italian securities market supervisory authority (Consob) observed that 'data on the major holdings by Italian institutional investors, especially banks and insurance companies, show a reversal in the declining trend experienced in the last decade'. cf Consob (n 66) 11. However, as mentioned in the text, the number of shareholdings held by Italian banks and insurance firms in Italian listed companies in 2019 was still significantly lower than the number observed in 2010 (*ibid*. at 18, esp table 1.11), confirming a general decline over time. It is in any case too soon to determine whether this is a temporary reversal or not.

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data merely show that banks and insurance firms have curtailed their investments in listed companies, but do not enable us to establish the cause of this reduction. More specifically, on the basis of the available data it is not possible to ascertain whether the shareholdings that have been sold by banks and insurance firms were previously held in interlocked companies. Nor is it possible to determine whether the severance of the ownership connections corresponds in any way to a reduction in personal ties. Nevertheless, and despite a significant degree of stability in the ownership of Italian listed firms,[69] the data show that transformations have been underway precisely with respect to some of the financial firms (Italian banks and insurance companies) to which the interlocking prohibition applies.

Identifying what propelled these changes remains in any case difficult. The task is made even more daunting by the fact that at least some of the aforementioned trends seem to have a more distant origin. For instance, even before the introduction of the 2011 interlocking ban some commentators had pointed out a decline in ownership links,[70] and the same is true with respect to the decrease in the number of firms belonging to pyramidal or other groups and to the reduction of the average stake held by controlling shareholders in listed companies.[71] As a matter of fact, these and other transformations might also be explained by a number of other reforms that have been enacted in Italy in recent decades: from the privatisations of the early 1990s to the introduction of new legislation on issuers and public offerings, among others.[72] Therefore, while one might have a hunch that the interlocking ban did have some effect on ownership ties, there is yet no sure way to tell.

11.9 INTERLOCKING DIRECTORATES AND THE COMPETENCE OF FINANCIAL FIRMS' BOARDS

Unambiguous conclusions cannot even be reached with respect to the impact of the interlocking ban on the composition and competence of corporate boards in Italy. Some commentators have pointed out that interlocking directorates may serve the positive function of enabling companies to attract scarce expertise[73] that might

69 See Zattoni and Cuomo (n 67) 282, 288–90.

70 See e.g. M Bianco and others, 'The evolution of ownership and control structure in Italy in the last 15 years' (2008), esp table 9, www.bancaditalia.it/pubblicazioni/altri-atti-convegni/2008-corporate-governance-ita/evolution_ownership_control_structures.pdf accessed on 20 August 2021; Bertoni and Randone (n 9) (showing that while ownership links among Italian listed companies became sparser in the period between 1999 and 2004, personal ties increased).

71 See e.g. Bianco and others (n 70).

72 See Zattoni and Cuomo (n 67) 275–89.

73 See e.g. BM Gerber, 'Enabling Interlock Benefits While Preventing Anticompetitive Harm: Toward an Optimal Definition of Competitors Under Section 8 of the Clayton Act' (2007) 24 Yale J on Regulation 107, 112–15; PC Dooley, 'The Interlocking Directorate' (1969) 59 Am Econ Rev 314, 316; Travers Jr (n 14) 834–38.

be valuable especially when firms undergo complex operations (such as a listing or a takeover);[74] in highly regulated businesses (such as the banking, insurance, and financial sectors);[75] or for small firms.[76] One may thus fear that an interlocking ban would prevent companies from selecting and sharing the most competent and talented professionals, in a context where expertise, competence, and talent are rare.

While this argument is surely appealing and has some foundation, it is impossible to determine whether the Italian anti-interlocking provision has actually diminished the overall competence of the governing bodies of companies operating in the financial sector. The interlocking ban is just one of the many provisions that, over the last decades, have affected the composition and diversity of corporate boards.

For instance, the Italian Consolidated Law on Finance,[77] which was introduced in 1998 and amended several times afterwards, limits the number of directorships and control offices that members of the internal control bodies of issuers, including many financial firms, may hold at the same time.[78] It also provides that issuers must have at least one independent director or two independent directors when the board is composed of more than seven members[79] (the fraction raises to one-third of the board for firms adopting the one-tier corporate governance model).[80]

74 More generally, on the correlation between firm complexity and board interlocks, S Johnson, K Schnatterly, JF Bolton, and C Tuggle, 'Antecedents of New Director Social Capital' (2011) 48 J Manag Stud 1782–1803.

75 See e.g. Ghezzi, 'La nuova disciplina' (n 13) 208 (esp at fn 28); Pini (n 12) 591.

76 With respect to the potential benefits of interlocking directorates for small firms, see e.g. Nili (n 54) 1193; Brugnoli (n 39) 430.

77 Legislative Decree No 58 of 24 February 1998 (Italian Consolidated Law on Finance).

78 Art 148-*bis* of the Italian Consolidated Law on Finance empowers Consob to limit the number of directorships and control positions that may be concurrently held by members of the internal control bodies of companies whose financial instruments are either listed or widely distributed among the public (cf Art 116 of the same statute). Pursuant to Art 144-*terdecies* of Consob Regulation No 11971 of 14 May 1999 as subsequently amended, the members of the internal control body of companies whose financial instruments are listed or widely distributed among the public may not hold the same position in more than five of such companies. Art 144-*terdecies* also places limits on the number of directorships that they can hold (cf Annex 5-*bis*, Model I, to the same Regulation). These provisions do not address the simple cumulation of directorships in multiple companies. However, according to Art 3, Recommendation No 15, of the Italian Corporate Governance Code (2020), the boards of directors of large listed companies should establish the maximum number of directorships or control positions in other issuers or large firms that are considered compatible with the exercise of the duties of director of the company. The goal is to ensure that the members of the issuer's governing bodies have sufficient time to devote to their role.

79 Art 147-*ter*, para 4, of the Italian Consolidated Law on Finance.

80 Pursuant to the combination of Art 147-*ter*, para 4, of the Italian Consolidated Law on Finance and Art 2409-*septiesdecies*, para 2, of the Italian Civil Code, if a company has adopted the one-tier system of corporate governance, at least one-third of the members of the board of directors must, in any case, satisfy independence requirements. If the issuer has instead adopted the two-tier system of governance, Art 147-*quater* of the Italian Consolidated Law on Finance establishes that when the management board has more than four members, at least one of them must satisfy independence requirements.

For certain large listed companies, an even higher number of independent directors is recommended, under a comply-or-explain approach, by the Italian Corporate Governance Code.[81]

Italian issuers must also make sure that at least two-fifths of the members of the board of directors and of the board of statutory auditors (or the supervisory board in two-tier governance systems) consist of the less-represented gender (typically, women).[82] Other specific personal requirements apply to board members of financial firms.[83]

Clearly, these provisions, which have only been briefly sketched here, may already limit the freedom of financial firms to select which people to appoint to their governing bodies.[84] As a result, it may be hard, if not impossible, to discern whether any observed change or decline in the competence of the boards of financial firms is due to the interlocking ban or to these other requirements.

However, upon closer inspection, several reasons indicate that the interlocking prohibition does not (significantly) prevent financial firms from acquiring and sharing valuable talent and competence.

First, if competence and skill are hard to find, the solution should be investing in training and education, inside and outside the firm, not enabling the same person to serve on a large number of boards at the same time. Indeed, nudging firms to go beyond the usual panel of candidates for a job may foster investment in managerial and technical skills by aspiring candidates. Such investments are particularly important because even the most talented and competent professionals may not do their job well when overworked by holding offices in many different firms.[85]

Second, one may very well doubt that competence and expertise are so hard to find. Education rates have improved across the developed world,[86] and financial firms increasingly draw from a wider set of candidates, including women and

[81] Pursuant to Art 2, Recommendation No 5, of the Italian Corporate Governance Code (2020), boards of directors of listed companies should comprise at least two independent directors (who do not also chair the board). In large listed companies with concentrated ownership, independent directors should represent at least one-third of the board. In other large listed companies, at least half of it.

[82] See Art 147-*ter*, para 1-*ter* and Art 148, paras 1-*bis* and 4-*bis* of the Italian Consolidated Law on Finance. Pursuant to Art 147-*quater*, para 1-*bis*, the same gender quotas apply to the management board in two-tier governance systems if the board has at least three members. Board diversity is also encouraged by the Italian Corporate Governance Code. See Art 2, Principle VII and Recommendation No 8 of the Italian Corporate Governance Code (2020).

[83] See, for example, Art 26 of Legislative Decree No 395 of 1 September 1993, as subsequently amended (Italian Consolidated Law on Banking) and the Decree of the Ministry of Economy and Finance No 169 of 23 November 2020.

[84] See Brugnoli (n 39) 443–46.

[85] On all these aspects, F Ghezzi, 'Interlocking directorates in the financial sector: the Italian way' (Antitrust Alliance Meeting conference presentation, Turin, 11 May 2012).

[86] See, for instance, the data on the expansion of tertiary education in OECD countries: OECD, *Education at a Glance 2019: OECD Indicators* (OECD Publishing 2019), https://read.oecd-ilibrary.org/education/education-at-a-glance-2019_f8d7880d-en#page3 accessed on 20 August 2021. cf Petersen (n 11) 850.

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foreign professionals.[87] With respect to the Italian case, one must also consider that interlocking directorates are prohibited only between competing banking, insurance, and financial companies or groups. The prohibition thus does not prevent financial firms from sharing skilled and talented board members with non-financial companies or groups.[88]

To be sure, one might argue that financial firms do not simply need competent and talented individuals, but people with very specialised knowledge and expertise, and with the additional personal requirements set forth in prudential regulation. Finding the right people may therefore be particularly difficult. Yet, consider that, according to the guidelines on the application of Article 36, the notion of 'top managers' – to whom the interlocking ban applies, in addition to board members and members of the internal control body of financial firms – only comprises the general manager and the manager responsible for the corporate financial reporting of the firm.[89] This leaves out a variety of highly specialised, high-ranking officers and managers who could serve as directors or members of the internal control body of other financial companies. If these people do not hold multiple offices is because financial firms generally do not allow it (consider that top managers typically are employees). In short, the Italian interlocking ban, by itself, does not seem to significantly limit the ability of financial firms to acquire skills that are already fruitfully employed elsewhere.

Third, and most importantly, there is yet no empirical support for the proposition that limiting interlockings has a negative impact on the competence of the board or on firm value. Similar concerns have been raised in the past with respect to gender quotas and have been disproven by empirical studies that show that increasing board diversity, also with respect to gender, generally improves performance.[90] Indeed, even artificially intelligent algorithms, programmed to select the best performing directors for a given firm, suggest that diversity is the right way to go.[91]

87 Going forward, opening national markets for board positions to international candidates could bring interlocking directorates to the attention of European lawmakers. Notably, some commentators have already shown the existence of an emerging network of interlocking directorates at the European level. See EM Heemskerk, 'The Rise of the European Corporate Elite: Evidence from the Network of Interlocking Directorates in 2005 and 2010' (2013) 42 Econ Soc 74–101; Bellenzier and Grassi (n 20) 187 (also citing Heemskerk's work).

88 Ghezzi (n 85).

89 Banca d'Italia, Consob, and ISVAP, *Criteri per l'applicazione dell'art. 36 del d.l. 'Salva Italia' (c.d. 'divieto di interlocking')* (n 42) para 3, no 1.1.

90 See e.g. DA Carter, BJ Simkins, and WG Simpson, 'Corporate Governance, Board Diversity, and Firm Value' (2003) 38 Financ Rev 33–53; NL Erhardt, JD Werbel, and CB Shrader, 'Board of Director Diversity and Firm Financial Performance' (2003) 11 Corporate Gov: An Intl Rev 102–11; S Terjesen, E Barbosa Couto, and P Morais Francisco, 'Does the Presence of Independent and Female Directors Impact Firm Performance? A Multi-country Study of Board Diversity' (2016) 20 J Manag Gov 447–83; G Bernile, V Bhagwat, and S Yonker, 'Board Diversity, Firm Risk, and Corporate Policies' (2018) 127 J Financ Econ 588–612.

91 See I Erel, LH Stern, C Tan, and MS Weisbach, 'Selecting Directors Using Machine Learning' (2021) 34 Rev Financ Stud 3226, 3229, 3251–53.

In any case, the impact of these reforms is still uncertain and needs to be evaluated over time, in light of the perhaps unexpected effects of many of these new measures. For instance, while the introduction of gender quotas in listed firms has increased the number of women sitting on corporate boards, it has perhaps also led to the spread of female interlockings across issuers.[92] Issuers have started to appoint women on company boards, but they continue to draw from a limited set of candidates who sit on the boards of many listed firms at the same time. It remains to be seen whether this is just an adjustment phase or a new future trend.

11.10 CONCLUSIONS

Interlocking directorates among competitors may facilitate collusion and endanger competition. In Italy, they typically accompanied direct and indirect ownership ties and were a systemic and widespread phenomenon particularly in the banking, insurance, and financial sectors. This is why, in 2011, the Italian lawmaker introduced an *ex-ante* prohibition on interlocking directorates in the financial sector. Despite the breadth of the prohibition, which arguably even covers situations in which a threat to competition is not likely or lacking, some empirical studies questioned the effectiveness of the ban, claiming that relevant personal links persisted, together with possible anticompetitive effects.

Using the banking sector as a case study, we have argued instead that there is some indication that the Italian interlocking ban has met its goal. The data we collected on interlocking directorates among the 25 largest banking groups in Italy on 31 December 2018 show that, on that date, there were no relevant personal ties among the largest banks and banking groups. This result is in line with other studies that claim that, after the introduction of the prohibition, bank lending rates in Italy fell, which should indicate that the interlocking ban had a procompetitive effect.

However, further research is needed not only to ascertain the effects of the ban but also to determine whether it had any impact on the ownership of Italian firms and on the competence of their governing bodies. While it is highly unlikely that board competence was significantly affected by the ban, ownership ties might have changed as a result. Indeed, it is curious that the Italian lawmaker decided to ban interlocking directorates without also intervening on ownership ties, such as minority shareholdings. However, at least in some cases the interlocking ban might have killed two birds with one stone.

[92] cf Consob (n 66) 33, 54 (esp table 2.29). Consob's data show that the number of female interlockers holding office on the corporate boards of Italian listed companies rose from 80 in 2013 to 283 in 2019 and then decreased to 280 at the end of 2020.

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