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EMPOWERING INSTITUTIONAL INVESTORS IN CONCENTRATED OWNERSHIP CONTEXTS: THE CASE OF ITALY

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EMPOWERING INSTITUTIONAL INVESTORS IN CONCENTRATED OWNERSHIP CONTEXTS: THE CASE OF ITALY

Gaia Balp & Giovanni Strampelli***

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I. INTRODUCTION

The ever-increasing diffusion of institutional ownership is reshaping corporate governance at publicly traded companies worldwide.[1] In line with this global trend, a key structural development in recent years has been the growth of institutional investors throughout the European Union, where corporate ownership and voting are becoming increasingly institutionalized and the relevance of other owner categories is decreasing.[2] Indeed, individual investors directly hold no more than 10-11% of the market capitalization, while they held 28% in 1975, and the proportion of retail investors among all shareholders is less than half the level it was in the 1970s.[3]

In spite of the fact that the number of listed companies with a controlling shareholder is still fairly high in the EU as well as in other areas,[4] institutional investors have become the dominant

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[1] *See* A. DE LA CRUZ ET AL, OWNERS OF THE WORLD'S LISTED COMPANIES 5 (2019), http://www.oecd.org/corporate/Owners-of-the-Worlds-Listed-Companies.pdf.

[2] *Id.* at 11 (noticing that "in European listed companies strategic individuals and families own 8% of the total market capitalisation; the public sector owns 9%; private corporations own 13%; institutional investors own 38% and the remaining ownership share corresponds to other free-float including retail investors."). *See also* OBSERVATOIRE DE L'ÉPARGNE EUROPÉENNE [OEE] & INSEAD OEE DATA SERVICE [IODS], UNDER THE TENDER: WHO OWNS THE EUROPEAN ECONOMY? EVOLUTION OF THE OWNERSHIP OF EU-LISTED COMPANIES BETWEEN 1970 AND 2012, 55 (2013), https://publications.europa.eu/en/publication-detail/-/publication/db5b2604-e1d7-11e5-8a50-01aa75ed71a1/language-en.

[3] *See* Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Action Plan on Building a Capital Markets Union*, at 18, COM (2015) 468 final (Sept. 30, 2015).

[4] *See* Julian Franks, *Institutional Ownership and Governance*, EUR. CORP. GOVERNANCE INST., Feb. 12, 2020, at 5-8, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3530849 (click "Open PDF in Browser").

owners of public equity,[5] as they "hold 41% of global market capitalisation and in advanced economies they have also become significant owners in individual companies."[6]

The rise in institutional ownership in the EU has come with a significant impact on European issuers' corporate governance. Crucially, institutional investors have grown into prominent players in corporate voting. Indeed, voting turnout at European general meetings increased over the last decade,[7] chiefly as a consequence of institutional investors' more active engagement with investee companies, including voting.[8] On EU-average, the level of voter turnout increased by some 10% between 2008 and 2018, from 60.4% to 70.2%, "including an increase of more than one percentage point from 2017 to 2018."[9] In many EU Member States, such an outcome was driven to a significant degree by the

[5] Christoph Van der Elst, *The Corporate Response to Shareholder Activism*, 15 ERA F. 229, 231 (2014) (noting that over the last several years "large companies in several continental European countries have experienced a significant drop in ownership concentration levels," and "the ownership structure of the largest companies became more dispersed.").

[6] DE LA CRUZ ET AL., *supra* note **Error! Bookmark not defined.**.

[7] *See* European Securities and Markets Authority, *Undue Short-Term Pressure on Corporations*, at 56 (ESMA30-22-762) (Dec. 18, 2019) (stating that "evidence collected at national level shows that both the attendance and exercise of voting rights in the shareholders' meeting have picked up in certain cases […]. However, this tendency is not consistent across countries, mainly due to entrenched and markedly differing sets of rules and approaches to holding general meetings which frequently provide barriers to foreign shareholder participation in meetings.").

[8] *See* Serdar Celik & Mats Isaksson, *Institutional Investors and Ownership Engagement*, 2013/2 OECD J. FIN. MKT. TRENDS 93, 94 (2013), https://read.oecd-ilibrary.org/finance-and-investment/institutional-investors-and-ownership-engagement_fmt-2013-5jz734pwtrkc#page1.

[9] ARNAUD CAVÉ ET AL., INSTITUTIONAL SHAREHOLDER SERVICES, INC., EUROPEAN VOTING RESULTS REPORT 2 (2018), https://www.issgovernance.com/file/publications/2018_European_Voting_Results_Report.pdf.

mandatory implementation, following the 2007 SRD I,[10] of the record date regime throughout the Union,[11] by enhanced regulatory and market pressure on institutional investors and asset managers to take on stewardship responsibilities as a part of intermediaries' investment management activities,[12] and by the rise of the proxy advisory industry.

Proxy advisory services—particularly proxy analysis and voting recommendations—are a cost-effective solution to help institutions comply with stewardship and voting requirements. Proxy analysis fills information gaps and, for a fee, provides relief from the costly and time-intensive work required to gather and process the relevant information; voting recommendations ultimately provide a cognitive shortcut helping client investors to make informed voting decisions and be compliant with regulatory requirements that enhance institutions' stewardship and engagement role with investee companies. More so, the notion that proxy advisors wield influence on voting outcomes is widespread in

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[10] Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies, 2007 O.J. (L 184) 17 [hereinafter SRD I].

[11] *See, e.g.,* Christoph Van der Elst, *Shareholders as Stewarts: Evidence of Belgian General Meetings* 5 (Fin. Law Inst. Working Paper Series, WP 2013-05, 2013), https://ssrn.com/abstract=2270938 (assuming that the increase in attendance rates at Belgian listed companies' 2012 annual meetings "is due to the abolishment of the 'blocking of shares'"). Prior to the SRD I, share blocking during a certain period prior to the general meeting, and up to the end of the meeting, was a requirement for participation and voting in many Member States. Share blocking was found to inhibit institutional shareholder voting since it overly restricted the ability to trade shares and was therefore prohibited and replaced by a system based on a "record date" (Article 7 of SRD I) under which only shareholders of record as of a specified cut-off date in advance of the general meeting are entitled to vote, irrespective of whether such shareholders will actually still hold their shares on the day of the meeting.

[12] *See* ARNAUD CAVE ET AL., *supra* note **Error! Bookmark not defined.**, at 2.

Europe.[13] For example, as far as Italy is concerned, it is especially worth noting that the Italian Supervisory Market Authority (Consob) found that the effect of proxy advisors on investors' voting regarding say-on-pay is "at least as strong as (and probably stronger than) that observed in the US," consistent with the weight of foreign institutions in the shareholder base of Italian listed companies and with the features of listed companies in terms of small or medium cap firms on a comparative basis.[14]

European corporate ownership is also growing ever more international, with non-EU shareholders—most of which are institutional intermediaries—holding about 44% of the shares issued by companies listed in the EU.[15] Given that a substantial proportion of the shares under foreign ownership is held by large U.S.-based investors,[16] this factor has, not unpredictably, fueled voting at

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[13] *See* Eur. Comm'n, *Green Paper on The EU Corporate Governance Framework*, COM (2011) 164 final (Apr. 5, 2011); Eur. Comm'n, Proposal for a Directive of the European Parliament and the Council amending Directive2007/36/EC as regards the encouragement of long-term shareholder engagement and Directive 2013/34/EU as regards certain elements of the corporate governance statement, 2, COM (2014) 0213 final, (2014) 0121 (COD), (Apr. 9, 2014) [hereinafter Eur. Comm'n, Explanatory Memorandum]; EUR. SEC'S MKT. AUTH., AN OVERVIEW OF THE PROXY ADVISORY INDUSTRY. CONSIDERATIONS ON POSSIBLE POLICY OPTIONS 17 (ESMA/2012/212, No. 66) (Mar. 22, 2012); EUR. SEC'S MKT. AUTH., FINAL REPORT. FEEDBACK STATEMENT ON THE CONSULTATION REGARDING THE ROLE OF THE PROXY ADVISORY INDUSTRY 12 (ESMA 2013/84) (Feb. 19 2013).

[14] Massimo Belcredi et al., *Proxy Advisor and Shareholders Engagement. Evidence from Italian Say-on-Pay* 26-28 (CONSOB, Working Paper no. 81, 2015), ssrn.com/abstractid=2616258.

[15] Eur. Comm'n, Explanatory Memorandum, *supra* note **Error! Bookmark not defined.**, at 3. *See also* DE LA CRUZ ET AL., *supra* note **Error! Bookmark not defined.**, at 14.

[16] *See* DE LA CRUZ ET AL., *supra* note **Error! Bookmark not defined.**, at 15, fig 6. Regarding Italy *see* NADIA LINCIANO ET AL., 2016 REPORT ON CORPORATE GOVERNANCE OF ITALIAN LISTED COMPANIES, 13-14 (CONSOB Statistics and Analyses) (2016),

European corporations. In effect, also due to a number of regulatory measures adopted over time, U.S.-based institutions have a longer-standing tradition of being more active voters.

Within the institutionalized scenario for corporate ownership and voting in the EU, the Italian landscape is no exception, in spite of concentrated corporate ownership of publicly listed corporations and the fact that Italy's stock market development still lags behind other European countries.[17] According to the OECD, "[t]he proportion of households' financial assets managed by institutional investors has been growing in recent years."[18] If, in 2017, "only one-third of Italian households' financial assets were managed by institutional investors compared to 40% in the Euro area and two-thirds in the United Kingdom," this is largely because the share of household financial assets held by pension funds is low compared

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https://ssrn.com/abstract=2947709 (reporting that, at the end of 2015, institutional investors were major shareholders in nearly 36% of the market, holding on average 6.9% of the share capital in 83 firms; foreign institutional investors owned major holdings especially in larger firms and in the financial sector). Referred to the UK, *see* OFF. FOR NAT'L STAT., OWNERSHIP OF UK QUOTED SHARES: 2016, para. 3, 5, 11, https://www.ons.gov.uk/economy/investmentspensionsandtrusts/bulletins/ownershipofukquotedshares/2016.

[17] At the end of 2018, total market capitalisation decreased by 15 percent compared to 2017, reaching around 542 billion euros; companies listed on the MTA increased slightly, from 237 to 240, as also did those traded on the AIM Italia-MAC market, from 95 to 113. *See* COMMISSIONE NAZIONALE PER LE SOCIETÀ E LA BORSA (CONSOB), REPORT ON CORPORATE GOVERNANCE OF ITALIAN LISTED COMPANIES 2019 5-6 (2020), http://www.consob.it/web/consob-and-its-activities/report-on-corporate-governance [hereinafter CONSOB REPORT 2019]. *See also* ORG. FOR ECON. CO-OPERATION & DEV., OECD CAPITAL MARKET REVIEW OF ITALY 2020: CREATING GROWTH OPPORTUNITIES FOR ITALIAN COMPANIES AND SAVERS 17, 23 (2020), http://www.oecd.org/corporate/ca/OECD-Capital-Market-Review-Italy.pdf [hereinafter OECD] (noticing that "During the last ten years, on average less than four companies per year became listed on the regulated market of the Italian stock exchange and the Italian market capitalisation as per cent of GDP remains well below that of its European peers.").

[18] OECD, *supra* note **Error! Bookmark not defined.**, at 42.

to other European peers.[19] In fact, private pension plans are merely voluntary in Italy, and the public pension system is predominant.

As regards ownership structure, Consob found that, by the end of 2018, 203 out of 231 companies listed on the Italian Stock Exchange (accounting for 88% of the total number of publicly listed corporations) were controlled companies, and about 77% of which were controlled by a single stockholder holding either more than half of the share capital (123 companies) or a lower stake (57 firms).[20] Consob also reported that the ultimate controlling agent is the family in 152 listed firms, accounting for the 33% of the market capitalization; the State (and other local authorities) in 23 large companies (37.8% of the market capitalization); a financial entity in 11 cases (mainly small firms).[21]

Non-controlled, widely held companies are thus clearly still limited in number, although they grew from 11 in 2010 to 13 in 2018 (5.6% of the total number of listed firms, representing 20.5% of market capitalization). Concentrated ownership is also an explanation for the low free-float ratios in the Italian regulated market.[22] Ultimately, however, "the differences between the concentration level of the Italian listed corporate sector and those of France, Germany, and Spain are insignificant."[23] Moreover, the use of control-enhancing mechanisms in Italian listed companies

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[19] *Id.* (emphasizing that "[t]he assets held by Italian pension funds account for a modest 9.4% of GDP, which is far below the OECD average of 50.7%.").

[20] *See* CONSOB REPORT 2019, *supra* note **Error! Bookmark not defined.**, at 13.

[21] *Id.* at 16.

[22] *See* OECD, *supra* note **Error! Bookmark not defined.**, at 34 (illustrating that "[a]t 60%, the Italian stock market has the lowest free-float ratio among comparable European countries and well below the European average of 75%. Moreover, only 29% of the companies listed in the Italian regulated market have more than 50% of their shares readily available in the market (free float), compared to 41% in France and 45% in Germany.").

[23] *Id.*, at 94.

significantly decreased over the last twenty years.[24] Indeed, in 2016, 18.2% of MTA-listed issuers belonged to pyramidal or mixed business groups compared to 44% in 1998.[25] In addition, while nonvoting shares gradually decreased over time,[26] three firms have provided for a category of multiple voting shares and forty-seven issuers have introduced loyalty shares in their bylaws.[27]

In line with the trend observed in other countries, despite the predominance of controlled companies, institutional investors are relevant shareholders in a not-negligible number of Italian listed companies.[28] As the OECD confirmed, "in Italy, institutional investors hold, on average, lower stakes in listed companies compared to the global average (41%), but at similar levels with many European peers."[29] In fact, institutional investors hold relevant stakes in sixty companies listed in Italy, accounting for 26.9% of the market.[30] Noticeably, Italian institutional investors are relevant shareholders[31] in twelve companies only, whereas foreign

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[24] *See* CONSOB REPORT 2019, *supra* note **Error! Bookmark not defined.**, at 22.

[25] *See* CONSOB REPORT 2019, *supra* note **Error! Bookmark not defined.**, at 20.

[26] *Id.*, at 14, 21 (reporting non-voting shares were issued by 14 listed companies by the end of 2018, compared to 70 by the end of 1998, and 120 by the end of 1992).

[27] *Id.* (showing that "[l]oyalty shares have vested their increased voting power (active loyalty shares) in 28 firms, where the leverage and the wedge are equal respectively to 1.3 and to 12%").

[28] *See supra* note **Error! Bookmark not defined.**.

[29] OECD, *supra* note **Error! Bookmark not defined.**, at 92 (with institutional investor ownership weighted by total market capitalization as of end 2018 averaging 26.9% in Italy, compared to 27.5% in France, 28.3% in Germany, 26.5% in Spain, 38.3% in Sweden, 23.1% in Norway, and 32.1% in Finland—but 61.0% in the United Kingdom).

[30] *Id.*

[31] For the purposes of Consob's statistics, major institutional investors are defined as investment funds, banks and insurance companies subject to reporting obligations according to Consob rules and whose shareholdings are lower than 10%.

institutional investors hold relevant stakes in fifty-one companies.[32] In effect, domestic and foreign ownership of publicly listed equities evolved along opposite lines over the last decade, with Italian institutions' holdings steadily decreasing since 2011, and nonresident institutions' holdings increasing and stabilizing since 2015 onwards.[33] National and foreign institutional share ownership differ also in regard of the size of investee companies and the industry they belong to. Italian institutions tend to more frequently concentrate major stakes on small-sized and industrial companies, while foreign institutions' investments rather target large firms and the financial industry, with 35% of FTSE MIB firms,[34] and 25% of financial industry firms, featuring major foreign holdings.[35] Such

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[32] CONSOB REPORT 2019, *supra* note **Error! Bookmark not defined.**, at 19-20.

[33] *See* OECD, *supra* note **Error! Bookmark not defined.**, at 17 (illustrating that "[t]he limited size of the Italian market is also reflected in the fact that only 7% of the Italian institutional investors' portfolios were invested in corporate shares and bonds issued by Italian firms at the end of 2017. Instead, Italian investors had directly or indirectly through foreign investment funds, allocated around EUR 190 billion to equity investments in foreign firms. In terms of value, this sum represents almost two-thirds of the total free-float market capitalisation of all Italian listed companies.").

[34] *See FTSE MIB*, BORSA ITALIANA, https://www.borsaitaliana.it/borsa/indici/indici-in-continua/dettaglio.html?indexCode=FTSEMIB&lang=en (last visited Mar. 17, 2020) ("The FTSE MIB is the primary benchmark index for the Italian equity markets capturing approximately 80% of the domestic market capitalization . . . The FTSE MIB Index measures the performance of 40 Italian equities and seeks to replicate the broad sector weights of the Italian stock market.").

[35] CONSOB REPORT 2019, *supra* note **Error! Bookmark not defined.**, at 19-20. According to further Consob Staff analysis, institutional ownership in the 100 largest non-financial companies publicly listed in Italy by active national and foreign asset managers (mutual, sovereign, and hedge funds) averaged 13.5% over the period 2010-2015 (compared to 15% in Spain, through to nearly 25% in France and Germany, and up to nearly 50% in the UK)*; see* Francesco Fancello et al., *Non-bank*

divergent evolutionary patterns for domestic and foreign institutional ownership might possibly be explained by the fact that corporate ownership of publicly listed companies in the financial industry, especially the banking industry, is radically different from that of industrial companies. At the end of 2014, only six listed banks were actually controlled companies, whereas the remaining twelve, accounting for 21% of the total market capitalization, were either widely held companies or cooperative companies, which typically feature one-member-one-vote voting structures.[36] In turn, dispersed bank ownership was largely a consequence of the privatization process the industry underwent over the 1990s, which then triggered large-scale acquisitions and mergers.[37]

In line with the developments at the EU level, the increasing weight of institutional investors within the shareholder base of Italian listed companies has been accompanied by a tendency for investors to be more active owners. In 2018, the annual general meeting season recorded record highs in terms of the share capital represented at the meeting (72.6% on average) and the institutional investors' participation (exceeding 21% of the company's capital).[38] Over the period 2012-2018, institutional investors' attendance rates grew significantly in terms of the investors attending and the percentage of the share capital represented at the meeting.[39] Significantly, foreign institutions have attended the meetings of all of the hundred largest Italian companies since 2015; in 2018, they cast on average around 29% of the votes.[40] More so, in the 2018

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institutional investors' ownership in non-financial companies listed in major European countries 7-29, (CONSOB, Working Paper No. 86 2018), http://www.consob.it/documents/46180/46181/wp86.pdf/e12aebb0-3f2c-45b7-964c-71d0198a8613.

[36] *See* Angela Ciavarella et al., *La corporate governance delle società quotate italiane. Focus sul settore bancario* [Corporate governance trends in Italian listed banks], BANCARIA 82, 82 (It.) (Apr. 2016), https://bancaria.it/assets/PDF/2016-04.pdf.

[37] *Id.* at 84-85.

[38] *See* CONSOB REPORT 2019, *supra* note **Error! Bookmark not defined.**, at 40-41.

[39] *Id.*

[40] *Id.* at 7.

proxy season, institutional investors collectively held a majority of the votes cast at the general meetings at one-third of the thirty-five most capitalized Italian listed companies.[41] Altogether, as noticed by Consob, "[l]arger institutional investors or those with a stronger stewardship vocation are increasingly active in direct communication with companies for a number of issues, including corporate governance. In addition, investors have shown increasing interest in issuers' approach to social and environmental issues."[42]

The Italian experience clearly shows that the structure of corporate ownership does not necessarily affect shareholder engagement with investee companies and that non-activist institutional investors can play a major stewardship role also in concentrated ownership contexts. Indeed, institutional investor engagement with Italian publicly listed corporations is not only focused on a few companies with widely dispersed ownership and no one shareholder holding a stake large enough to secure voting control but also concerns controlled companies, where a stockholder or a coalition of shareholders hold the (absolute or relative) majority of the votes.

Importantly, the Italian case also helps explain how the regulatory framework can contribute to create an environment favorable to non-activist institutional investors' active ownership. The Italian regime for corporate elections at listed companies is particularly illustrative of this aspect. In fact, the right to appoint directors on the board is key to encourage institutional investors' stewardship at controlled companies and has proven to be one of the most effective means of ensuring consideration for minority interests and enhancing oversight over the controlling shareholders or management. More generally, at Italian companies, institutional investors can exercise a wider range of powers granted to the shareholders as compared to the powers available to U.S.

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[41] Antonella Olivieri, *'L'avanzata dei fondi: in Borsa comandano in una blue chip su tre'* [The rise of mutual funds: They control one third of blue chips], IL SOLE24ORE (It.) (Aug. 4, 2019).

[42] *See Annual Report 2018*, CONSOB 5, 25 (2019), http://www.consob.it/documents/46180/46181/ar2018.pdf/cdc8a77f-f096-4e92-af53-94305683aec9.

shareholders. Institutions can exert pressure on the controlling shareholder and the company's management by exploiting further minority shareholder rights provided for under national law, such as say-on-pay votes and the enhanced role to be played by the shareholders in the context of related party transactions.

All the above confirms that there is indeed a link between shareholders' rights and institutions' ability to engage convincingly with investee companies regarding corporate governance. Given that, in recent years, controlled companies have been on the rise at the international level, partly as a consequence of going public with a dual-class structure,[43] the issue this Article deals with is of interest for many countries, including the U.S., where controlled companies "constitute a sizeable minority of large, publicly[-]traded firms."[44]

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[43] *See* Clifford G. Holderness, *The Myth of Diffuse Ownership in the United States*, 22 REV. FIN. STUD. 1377, 1378 (2009); Ronald J. Gilson, *Controlling Shareholders and Corporate Governance: Complicating the Comparative Taxonomy*, 119 HARV. L. REV. 1641, 1660 (2006); Ronald J. Gilson & Alan Schwartz, *Corporate Control and Credible Commitment*, 43 INT'L REV. L. & ECON. 119, 119-20 (2015); María Gutiérrez & Maribel Sáez Lacave, *Strong Shareholders, Weak Outside Investors*, 18 J. CORP. L. STUD. 277, 281 (2018) (noting that "[a]s controlled firms grow in importance, tunneling, self-dealing, and other types of investor expropriation could become significant concerns in the US.").

[44] Lucian A. Bebchuk & Assaf Hamdani, *Independent Directors and Controlling Shareholders*, 165 U. PA. L. REV. 1271, 1279 (2017)*; see also* Albert H. Choi, *Concentrated Ownership and Long-Term Shareholder Value*, 8 HARV. BUS. L. REV. 53, 54-56 (2018); Ronald J. Gilson & Alan Schwartz, *Corporate Control and Credible Commitment*, 43 INT'L REV. L. & ECON. 119, 119-20 (2015); Jens Dammann, *The Controlling Shareholder's General Duty of Care: A Dogma that Should Be Abandoned*, 2015 U. ILL. L. REV. 479, 483 (2015); Edward Kamonjoh, *Controlled Companies in the Standard & Poor's 1500: A Follow-up Review of Performance & Risk,* IRRC INST. 15 (2016), https://www.issgovernance.com/library/controlled-companies-standard-poors-1500-follow-review-performance-risk/ (reporting that, as of October 2015, 7% of the constituents of the S&P 1500 index were controlled firms:

Against this backdrop, this Article proceeds as follows. Part II briefly draws the Italian basic corporate governance framework. Building on the Italian case, Part III sets the scene by illustrating how minority-empowering shareholder rights can contribute to creating an environment favorable to non-activist institutional investors active ownership. While acknowledging that not all of the many tools introduced by the Italian legislature have proven successful in driving increased institutional investor engagement with Italian investee companies, it shows that some indeed have, as is most notably the case for say-on-pay votes, alongside the record date regime with regards to attendance at the shareholder meeting and the slate voting system with regards to director elections. Part IV follows up on the previous analysis by reporting some evidence regarding the practice of shareholder voting and engagement in Italy. Part V illustrates how the rise in activist, hedge fund-driven intervention can impact non-activist institutions' stewardship role at controlled companies. Part VI sets out some concluding remarks.

II. SETTING INSTITUTIONAL INVESTOR-ORIENTED CORPORATE GOVERNANCE: THE ITALIAN BASIC REGULATORY FRAMEWORK

The basic regulatory framework for shareholder voting and engagement in Italy is set by the Civil Code, applicable to any corporation, and Legislative Decree No. 58 of February 24, 1998 (so-called Consolidated Law on Finance – *Testo unico della finanza*, hereinafter referred to as 'CLF'), which lays down additional rules for publicly listed corporations. Regulations implementing the CLF

"there are two primary control mechanisms in the updated study group: 1) multi-class capital structures with unequal voting rights (78 study companies); and 2) control through ownership of at least 30 percent of a class of single-vote stock by a person or group (27 firms).").

are drawn by Consob, the Italian Financial Markets Supervisory Authority.[45]

Another distinctive feature of the corporate governance framework in Italy and in other European countries is the crucial played by soft law.[46] As far as Italy is concerned, the Corporate Governance Code sponsored by Borsa Italiana, the Italian Stock Exchange, provides for nonbinding best practice principles and recommendations applicable to publicly listed companies based on a comply-or-explain approach that is explicitly endorsed by the law.[47] In effect, under Article 123-bis(2)(a) CLF, publicly listed corporations are required, ahead of the annual general shareholder meeting, to publicly file a corporate governance report detailing,

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[45] *See* Commissione nazionale per le società e la borsa (Consob), Regulation no. 11971 of May 14, 1999 (Regulation implementing Italian Legislative Decree No. 58 of 24 February 1998, concerning the discipline of issuers), http://www.consob.it/web/consob-and-its-activities/laws-and-regulations/documenti/english/laws/reg11971e.htm?hkeywords=&docid=2&page=0&hits=21&nav=false [hereinafter Consob Regulation No. 11971]. Additional rules and regulations relevant to corporate governance may also apply, depending on the industry the company belongs to. Most noticeably, banks and the parent companies of banking groups are subject to a set of rules set by Legislative Decree No. 385 of September 1, 1993 (so-called Consolidated Law on Banking – *Testo unico bancario*), as well as the Bank of Italy in implementing Circular no. 285 of December 17, 2013 (‘*Disposizioni di vigilanza per le banche*’), as subsequently amended. Similarly, insurance companies are subject to specific rules imposed on them by Legislative Decree No. 209 of September 7, 2005 (so-called Private Insurance Code – *Codice delle assicurazioni private*) and implementing regulations set by Ivass, the supervisory authority.

[46] Klaus J. Hopt, *Comparative Company Law 2018* 24-26 (Eur. Corp. Governance Inst. (ECGI), Law Working Paper No. 460/2019, 2019) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3421389.

[47] First released in 1999, the Corporate Governance Code was updated several times; most recently, the Code underwent major reviews following the model of the UK Stewardship Code 2020. The new January 2020 version of the Italian Code will apply starting in 2021. *See* CORP. GOVERNANCE COMM., CORPORATE GOVERNANCE CODE (2020), https://www.borsaitaliana.it/comitato-corporate-governance/codice/2020eng.en.pdf.

amongst other things, compliance with the Corporate Governance Code, or explaining the reasons for not adopting any of the Code's provisions. Based on corporate governance reports, 94% of the companies listed on the MTA (the leading regulated equity market managed by Borsa Italiana for mid and large-size companies[48]) on December 31, 2018 had adopted the then current version of the Corporate Governance Code.[49] Eleven out of the fourteen companies not adopting the Code referred to specific firm characteristics—particularly small size and concentrated ownership—as an explanation for the determination not to adopt the Code.

Traditionally, the Italian corporate structure is based on the shareholder-elected board of directors,[50] which may delegate managing powers to a executive managing director or an executive committee,[51] and the board of statutory auditors (*collegio*

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[48] Borsa Italiana currently manages three equity markets, with companies being listed on Mercato Telematico Azionario (MTA) and Alternative Investment Market (AIM Italia), and financial vehicles being listed on the Market for Investment Vehicles (MIV) and the Partnership Equity Markets. As of end 2018, 242 companies were listed on MTA and 113 on AIM Italia. The MTA market is split into two segments, the Standard listing segment and the Star segment, which requires additional corporate governance standards to be adopted and is open to companies that have less than EUR 1 billion market capitalisation. *See* OECD, OECD CAPITAL MARKET REVIEW OF ITALY 2020: CREATING GROWTH OPPORTUNITIES FOR ITALIAN COMPANIES AND SAVERS, 33 (2020), https://www.oecd.org/corporate/ca/OECD-Capital-Market-Review-Italy.pdf.

[49] *See* ASSONIME & EMITTENTI TITOLI, REPORT ON CORPORATE GOVERNANCE IN ITALY: THE IMPLEMENTATION OF THE ITALIAN CORPORATE GOVERNANCE CODE, 4 (2019), http://www.assonime.it/_layouts/15/Assonime.CustomAction/GetPdfToUrl.aspx?PathPdf=http://www.assonime.it/attivita-editoriale/studi/Documents/nsexecutivesummary.pdf.

[50] *See* Codice civile [C.c.] [Civil Code] art. 2364 (It.) (laying down the decision-making authority of the shareholders meeting, amongst which the appointments to the board of directors and the board of statutory auditors).

[51] *See* C.c. [Civil Code] art. 2381 (It.).

sindacale). The board of directors thus includes executive and nonexecutive members elected for a term of up to three years.[52] The board of statutory auditors, whose members are elected by the shareholders as well, is in charge of overseeing compliance with the law and the adequacy of the company's organizational and accounting systems.[53] If it is considered that nonexecutive members of the board of directors chiefly play a supervisory role, given that most of the management functions are delegated to executives, Italian listed companies feature a corporate structure which, as a matter of fact, owes most of its substantive inspiration to the Anglo-American one-tier board system, rather than the German two-tier system. The board of statutory auditors cannot be regarded as a functional equivalent to the German *Aufsichtsrat*, since, unlike the latter, it lacks any power to interfere with the board of directors' decision making, either strategic or managerial, and are left alone the power to appoint the members of the board of directors.

Following a wide-reaching company law reform enacted in 2003, a corporation may choose to adopt a one-tier or a two-tier management and control system as an alternative to the traditional structure, which applies as a default rule unless it is opted out in the articles of association.[54] Under the one-tier structure, an oversight committee is appointed within the shareholder-elected board of directors, whose members must be nonexecutive and independent.[55] Under the two-tier structure, a supervisory board is elected alongside the management board. The supervisory board is elected by the shareholders, whereas the authority to elect the members of the management board is vested with the supervisory board.[56] Additional powers vested with the supervisory board render the Italian two-tier system the nearest equivalent the German model, though differences persist. Despite the availability of such set of

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[52] *See* C.c. [Civil Code] art. 2388 (It).

[53] *See* C.c. [Civil Code] art. 2400, 2403, and 2403-bis (It.).

[54] *See* C.c. [Civil Code] art. 2380, 2409-octies, and 2409-sexiesdecies (It.).

[55] *See* C.c. [Civil Code] art. 2409 septiesdecies and 2409-optiesdecies (It.).

[56] *See* C.c. art. 2409-novies and 2409-duodecies.

corporate structures, more than fifteen years after reform, the vast majority of Italian listed companies have maintained the traditional corporate structure. At the end of 2017, Italian listed companies adopting the traditional corporate structure accounted for 91% of the market capitalization, with just four firms adopting the one-tier structure or the two-tier structure.[57] We will, therefore, only refer to the so-called traditional corporate structure under which corporate power is vested with the board of directors, while the shareholders are essentially intended to take on a monitoring role to be backed up by the board of statutory auditors.

The fact that the board of directors is key within the corporate structure does not, however, entail the irrelevance of the shareholders meeting. The shareholders meeting actually retains its role as the ultimate tool for director accountability, since it holds the power, above all, to elect (and remove) the members of the board of directors and to approve any amendments to the articles of association.[58] It should be noted that, within corporate ownership structures characterized by the principal-principal agency problem, such as those of many Italian listed companies,[59] shareholder monitoring becomes a matter of minority oversight and minority challenges to the authority of the board and the controlling stockholders. Therefore, unsurprisingly, the evolutionary process that the national corporate governance regulation underwent historically, ever since the enactment of the unified Civil Code in 1942, through to the 1998 CLF and further subsequent developments, including the transposition of SRD I and SRD II,[60] has been a process strongly shaped around the direct and indirect empowerment of minority shareholders: whether by enhancing

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[57] *See* CONSOB REPORT 2019, *supra* note **Error! Bookmark not defined.**, at 17.

[58] *See* C.c. art. 2364 and 2365 (laying down the decision-making powers that rest with the shareholders meeting, either ordinary or extraordinary).

[59] *See infra* Part II.

[60] *See* Council Directive 2017/828, of the European Parliament and of the Council of 17 May 2017 Amending Directive 2007/36/EC as Regards the Encouragement of Long-Term Shareholder Engagement, 2017 O.J. (L 132/1) 3 [hereinafter SRD II].

minority shareholder rights and prerogatives, supporting minority shareholders' actual ability and even willingness to exercise those rights, or strengthening oversight by the board of statutory auditors and further gatekeepers.

A parallel force shaping corporate governance in Italy is the development of financial intermediaries' regulation, starting from reforms enacted in 1974 (which established the Consob as the national financial markets supervisory authority) onwards. With the aim of ensuring end-investor protection, intermediaries' regulation has wielded indirect influence on corporate governance. In a context increasingly characterized by intermediated investments, regulation has progressively focused on institutional investors as owners and has enhanced their oversight role, especially regarding voting obligations.[61] Regulatory action in this area is further supported by self-regulation. Following the EFAMA Stewardship Code,[62] first adopted in 2011, Assogestioni, the Italian asset managers' non-profit association, adopted Stewardship Principles in 2013. The Italian Stewardship Principles were last revised in 2016.[63] In line with the EFAMA Code, as well as a growing number of similar stewardship initiatives, the Italian Stewardship principles target collective investment management and portfolio management companies with the aim of "promot[ing] discussion and cooperation between Investment Management Companies and listed companies

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[61] *See infra* Part III.A.

[62] *See* EUR. FUND AND ASSET MGMT ASS'N, STEWARDSHIP CODE. PRINCIPLES FOR ASSET MANAGERS' MONITORING OF, VOTING IN, ENGAGEMENT WITH INVESTEE COMPANIES (2018), https://www.efama.org/Publications/Public/Corporate_Governance/EFAMA%20Stewardship%20Code.pdf.

[63] MASSIMO BELCREDI & LUCA ENRIQUES, INSTITUTIONAL INVESTOR ACTIVISM IN A CONTEXT OF CONCENTRATED OWNERSHIP AND HIGH PRIVATE BENEFITS OF CONTROL: THE CASE OF ITALY 8–9 (Eur. Corp. Governance Inst. (ECGI), Law Working Paper No. 225/2013 2014) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2325421; *See* ASSOGESTIONI, ITALIAN STEWARDSHIP PRINCIPLES FOR THE EXERCISE OF ADMINISTRATIVE AND VOTING RIGHTS IN LISTED COMPANIES (2016), https://ecgi.global/code/italian-stewardship-principles-2016 [hereinafter ITALIAN STEWARDSHIP PRINCIPLES 2016].

in which they invest," thereby indirectly impacting listed companies "which are called upon to promote dialogue with investors, asset managers and their respective advisors," as well as institutional investors "that entrust the management of their assets to third parties, and are requested to share with their managers certain decisions on how to interact with the investee companies."[64]

As will be shown, by leveraging enhanced shareholder rights and further shareholder-friendly regulatory measures,[65] Assogestioni has greatly contributed to shaping the practice of institutional investor engagement in Italy. In particular, the enabling and coordinating role performed by the Association actually underpins the rise of effective forms of collective engagement by mainstream, non-activist institutions,[66] thus providing an alternative to hedge fund-driven activist intervention, which has become quite popular in Italy in spite of the still predominant ownership concentration of publicly listed corporations.[67]

III. STIMULATING INSTITUTIONAL INVESTOR VOTING AND ENGAGEMENT IN ITALY

In and of itself, the surge of institutional ownership is not enough to stimulate institutional investors to take on a more active corporate governance role. The Italian case clearly shows that regulatory factors also contributed to supporting the increase in institutional shareholder voting and engagement at publicly listed companies. Over the last two decades, Italy gradually reshaped the legal framework for participating in shareholders meetings and voting so as to craft an engagement-friendly regulatory environment.[68] In fact, "a number of self-enforcing rules (especially

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[64] *Id*. at 11.

[65] *See infra* Part III.A-C.

[66] *See infra* Part III.D. and Part IV.A. *See* Gaia Balp & Giovanni Strampelli, *Institutional Investor Collective Engagements: Non-Activist Cooperation vs Activist Wolf Packs*, in 14 OHIO ST. BUS. L.J. (forthcoming).

[67] *See infra* Part V.

[68] *See* Belcredi & Enriques, *supra* note 63, at 7.

on voting) and a broader set of minority shareholder rights have made today's Italian legal environment no less friendly to activist investors than most other jurisdictions."[69] Enhanced shareholder rights and asset managers' quasi-duty to vote as a part of their fiduciary duties to end-investors can be regarded as parallel forces driving increased voting in spite of non-activist, traditional institutions' weak incentive structures.

Soft regulation in the form of corporate governance and stewardship principles also contributed support to institutions' more active ownership. In effect, "provisions strengthening shareholders' rights operate in conjunction with those set by stewardship and corporate governance codes that target institutional investors as shareholders in order to foster their constructive engagement with investee companies as a part of institutions' investment management activities."[70]

A. Asset Managers' Quasi-Duty to Vote and Institutions' Engagement Policy

When analyzing the EU regulatory environment as a supportive factor for shareholder voting, one relevant issue to consider is that, based on the framework for discretionary portfolio and collective investment management, intermediaries are entitled to vote on behalf of the shares owned by the funds they manage. Because of this entitlement, according to Article 21 of Directive 2010/43/EU and Article 37 of the Commission Delegated Regulation (EU) No. 231/2013, mutual funds and alternative investment funds are required to set up a voting policy determining *when and how* to exercise voting rights, whereas voting determinations are to be made

[69] *Id.*

[70] Gaia Balp, *The Corporate Governance Role of Retail Investors*, 31 LOY. CONSUMER L. REV. 47, 59-60 (2019).

to the exclusive benefit of the funds and the investors in the funds.[71] Voting is thus conceived of as a duty that intermediaries owe to end-investors wherever—based on a cost-benefit analysis—it is in the best interest of the beneficial owners of the shares. The end-investor best-interest standard overarching the entire regulation of investment intermediaries does not, in itself, entail a duty to vote *every share*.[72] However, investment managers are clearly not allowed to simply remain passive and choose not to vote because, depending on the investment strategies adopted, voting passivity can be at odds with institutions' duty to manage investments in the best interest of their clients.[73] Regulation thus provides an incentive structure which, "rel[ying] on the presumption that shareholder voting preserves, or even increases, the long-term value of the

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[71] Commission Directive 2010/43/EU of 1 July 2010 implementing Directive 2009/65/EC of the European Parliament and of the Council as regards organisational requirements, conflicts of interest, conduct of business, risk management and content of the agreement between a depositary and a management company, 2010 O.J. (L 176) 42, 53-54 [hereinafter Commission Directive 2010/43/EU]; Commission Delegated Regulation (EU) No 231/2013 of 19 Dec. 2012 supplementing Directive 2011/61/EU of the European Parliament and of the Council with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision, 2013 O.J. (L 83) 1, 31.

[72] *See* Commission Directive 2010/43/EU, *supra* note 71, at 44 (explicitly considering that "[a]s the case may be, the decision not to exercise voting rights could be considered in certain circumstances as being to the exclusive benefit of the UCITS depending upon its investment strategy. However, the possibility for an investment company to vote itself or to give specific voting instructions to its management company should not be excluded.").

[73] *See* Christian Strenger & Dirk A. Zetzsche, *Corporate Governance, Cross-Border Voting and the (Draft) Principles of the European Securities Law Legislation—Enhancing Investor Engagement Through Standardisation*, 13 J. CORP. L. STUD. 503, 515-17 (2013).

investment," eventually translates into some kind of "implicit duty to vote."[74]

In keeping with the EU provisions, Article 35-decies 1(e) of the Italian CLF states that asset management companies "must provide, in the investors' interests, for the exercise of the voting rights associated with the financial instruments of the collective investment schemes managed unless required otherwise by law."[75] Despite the wording used within the legislation ("must provide"), the prevailing view is that Article 35-decies CLF does not establish an obligation for asset management companies to exercise their voting rights under all circumstances.[76] In keeping with their general duty to "operate diligently, correctly, and with transparency in the best interests of the collective investment schemes managed, the relevant investors and the integrity of the market," as set by Article 35-decies 1(a) CLF, asset management companies are

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[74] *Id.* at 515; *see also* Marco Maugeri, *Proxy advisors, esercizio del voto e doveri "fiduciari" del gestore* [Proxy advisors, voting rights and asset managers' fiduciary duties], PROFILI EVOLUTIVI DELLA DISCIPLINA SULLA GESTIONE COLLETTIVA DEL RISPARMIO 667, 680-682 (Roberta D'Apice ed., 2016) (It.) (further explaining that requirements to adopt voting strategies are organizational in nature and impose upon recipient investment services providers a duty concerning their internal set-ups in terms of the procedures to be applied. Hence, if exercising voting rights is conceived of as a standard of conduct, then it is in the interest of end-investors, not in that of investee companies).

[75] Commissione Nazionale per le Società e la Borsa (CONSOB), Legislative Decree No. 58 of 24 Feb. 1999, http://www.consob.it/web/consob-and-its-activities/laws-and-regulations/documenti/english/laws/fr_decree58_1998.htm?hkeywords=&docid=0&page=0&hits=21&nav=false [hereinafter CONSOB].

[76] *See* Renzo Costi, *Risparmio gestito e governo societario* [Asset management and corporate governance], *in* GIURISPRUDENZA COMMERCIALE 313, 322 (1988) (It.); *see also* Renzo Costi & Luca Enriques, *Il mercato mobiliare* [The Financial Market], 8 TRATTATO DI DIRITTO COMMERCIALE, 420 (Gastone Cottino ed., 2004) (It.).

expected to vote only when it is in the interest of the ultimate beneficiaries of the funds managed.[77]

In addition, Article 124-quinquies CLF—implementing Articles 3g and 3f SRD II—requires institutional investors and asset managers, if only based on a comply-or-explain approach, to adopt an engagement policy that, inter alia, illustrates how they exercise voting rights and other shareholder rights.[78] In addition, institutional investors and asset managers are required to publicly disclose each year how their engagement policy has been implemented and provide a general description of their voting behavior, an explanation of the most significant votes, and the use they made of proxy advisory services.[79] Although it remains questionable whether the newly added rules for institutional investors and asset managers may actually contribute to increasing the quality of investors' engagement with investee companies, the requirement that institutions disseminate information regarding their engagement and actual voting conduct, and the reasons thereof, indirectly adds to pressure on exercising voting rights.[80]

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[77] Mario Stella Richter Jr., *L'esercizio del voto con gli strumenti finanziari gestiti* [Asset managers' voting], *in* I CONTRATTI DEL MERCATO FINANZIARIO 791, 800 (Enrico Gabrielli & Raffaele Lener eds., 2nd ed. 2010) (It.).

[78] CONSOB, *supra* note 75.

[79] *Id.*

[80] In particular, investors with less commitment towards shareholder engagement could take on a formalistic stance in complying with Article 3f and further promote over-reliance on advisory services. In addition, "disclosure of engagement dialogue may undermine its essential deftness, fluidity, and focus on achieving a 'win-win' outcome for both parties. Public disclosure may fundamentally change the type and frequency of engagement and more robust and adversarial-type interactions may result," thereby "undermining the success of informal private engagement by institutional investors." Deirdre Ahern, *The Mythical Value of Voice and Stewardship in the EU Directive on Long-term Shareholder Engagement: Rights Do Not an Engaged Shareholder Make*, 20 CAMBRIDGE YEARBOOK OF EUR. LEGAL STUD. 88, 106 (2018).

B. Participation in the Shareholder Meeting: Information and Duty to Call

Reforms enacted in 2010 to transpose the SRD I into Italian law[81] contributed to shifting the making of voting decisions prior to, and outside of, the shareholders meeting and to promoting better shareholder information and the efficiency in the mechanics of shareholders meetings, thereby contributing to the smoothening of any disincentives institutional investors may have previously encountered in participating in the meetings.

One clear example of such pro-shareholder regulatory efforts may be drawn from Article 125-bis (4) CLF concerning the contents of the notice of call to shareholders meetings. Article 125-bis (4) CLF requires that the notice include, among further items, "a clear, precise description" of the procedures to be applied in order to attend and vote at the shareholders meeting and to exercise further shareholder rights, such as the right to ask questions ahead of the meeting or to prompt the board of directors to take action (typically by requiring that additional items be put on the agenda or by submitting further proposals on items already on the agenda).[82]

Article 125-bis (4) CLF can be viewed as the summary of a wider set of provisions all emphasizing the active role investors are expected to play in regard of the shareholders meeting. First, acknowledging that being active owners requires adequate and timely information, Article 125-ter CLF requires that the board of directors make a report on each item on the agenda available by a specified deadline significantly ahead of an upcoming shareholder meeting, thereby obliging institutions' needs to organize and prepare for appropriate voting determinations and by limiting the chilling effect associated with the delivery of relevant company information much too close to the date of the meeting.[83] In effect, prior to the introduction of the record date system into national

[81] SRD I was transposed into Italian law by Legislative Decree No. 27/2010.

[82] CONSOB, *supra* note 75.

[83] *Id.*

law,[84] inadequate timings for information delivery had proven to adversely affect participation in the meeting and voting.[85]

Second, a shareholder-friendly, efficiency-promoting intent clearly underpins Article 127-ter (1) CLF, which grants any shareholder the right to submit questions on the items on the agenda prior to the shareholders meeting and to receive the relevant answers "at the latest" during the meeting.[86]

Finally, active ownership is further incentivized by the right granted to shareholders who hold a specified minimum shareholding threshold—usually institutional investors[87]—to directly activate the shareholders meeting. First, shareholders holding—either individually or collectively—at least 5% of the share capital have the right to call a general meeting.[88] In addition, shareholders holding—either individually or collectively—at least 2.5% of the

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[84] *See infra* Part III.C.5.

[85] *See* Fabio Bianconi, *L'attivismo delle minoranze in Italia: un commento* [Minority Shareholder Activism: A Comment], *in* FTSE MIB Proxy Season 2010 70-71 (2011), http://www.proxitalia.com/dld/files/Downloads/Pubblicazioni/FTSE%20 MIB%202010%20-%20Georgeson.pdf (It.) (finding a negative correlation to exist between the delayed delivery of the board's report (less than 20 days ahead of the meeting), institutional investors' attendance to the meeting, and the level of consensus to the board's voting proposals). Still another relevant disincentive for foreign institutions' participation is the unavailability of the board's reports in English: *see* Valentina Allotti & Paolo Spatola, *Le assemblee delle società quotate: il d.lgs. n. 27 del 27 gennaio 2010, le prime esperienze applicative nel 2011 e il decreto correttivo del 2012* [Listed Companies and Shareholder Meetings in Italy] (Note e Studi Assonime 14/2012) 21 (2012), https://www.eticanews.it/wp-content/uploads/2013/04/Assonime.pdf (It.) (according to which over 70% of respondent companies only deliver the notice of call to shareholder meetings also in English); referred to the EU context, *see also* Chris Mallin, *Institutional Investors: The Vote as a Tool of Governance* 16 J. MANAG. GOV., 177, 194 (2012).

[86] *See* Pederzini Elisabetta, *Commento all'articoolo 127-ter* [Comment on Article 127-ter], COMMENTARY ON THE CONSOLIDATED LAW ON FINANCE, 995-998 (Vincenzo Calandra Buonaura ed., 2020) (It.).

[87] Stella Richter, *supra* note 77, at 800.

[88] *See* CODICE CIVILE [CIVIL CODE], art. 2367 (It.).

share capital may ask for additional matters to be put on the agenda of the general meeting and may table new proposed resolutions for a vote.[89] Making voting proposals can serve not only to oppose the board and controlling stockholders but also to remedy the much criticized board-friendly practice of bundling together two or more issues into the same item on the agenda in such a way as to prevent these issues to be voted on separately. Noticeably, bundling—most typically concerning the approval of the financial statements and dividend distributions, the approval of a set of changes to the articles of association, or director elections and compensation—has been targeted in Italy also by proxy advisors for being in contrast to best practice and inhibiting voting by proxy.

C. Regulatory Incentives to Participate in the Shareholder Meeting

Beyond enhancing shareholder information rights, both passive and active, and providing shareholders with the power to proactively initiate the calling of a shareholders meeting and make voting proposals, regulatory action taken ahead and in the wake of SRD I was intended to also provide a set of tools incentivizing active and long-term ownership. These tools range from additional voting rights or dividends, conceived of as a reward for shareholder loyalty, to multiple voting rights, in such a way simplified proxy voting and proxy solicitation, say-on-pay votes, and the enhanced role to be played by the shareholders in the context of related party transactions. While not all of these tools have proven successful in accomplishing the policy goal set and actually driving increased shareholder engagement with Italian investee companies, some indeed have, as is most notably the case for say-on-pay votes, alongside the record date regime as regards attendance at the shareholder meeting and the slate voting system as regards director elections.

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[89] *See* Article 126-bis CLF. Both the right to call a special meeting and to put items on the agenda cannot be exercised for items in relation to which, under Italian law, shareholders may be called to resolve on draft resolutions that have to be submitted or drafted by directors.

1. The Limited Relevance of Loyalty-Based Dividend and Vote Rewards for Supporting Institutional Shareholder Engagement

With the explicit aim of encouraging longer-term investments, two mechanisms were introduced in 2010 and 2014 to reward shareholder loyalty in terms of cash flow rights or control rights. On the one hand, Article 127-quarter CLF allows for a dividend-increasing mechanism to be adopted in the articles of association by which "each share held by the same shareholder for a continuous period of time indicated in the articles, in any case of no less than one year or the lesser period running between two consecutive payment dates of the annual dividend, shall assign the right to an increase of no more than 10% of the dividend distributed to the other shares." Significantly, additional dividends may not be granted to, de jure or de facto, controlling stockholders, whether individually or jointly in control, nor to any shareholder wielding a significant influence on the company or taking part in a shareholder agreement accounting for more than the shareholding thresholds relevant to the rules on the mandatory bid laid down in Article 106 CLF. Therefore, quite evidently, the investor category especially targeted by the dividend-increasing incentive is that of mainstream institutional investors, which typically do not seek to gain control over the company, who are unwilling to take part in shareholder agreements due to the chilling effect associated with the rules on concerted action and the triggering of mandatory bids, and whose holdings, unlike those of some activist hedge funds, usually do not allow them to individually exert any significant influence over the company. It is thus traditional institutions, such as pension and mutual funds, whether actively managed or passive, that are candidates to possibly be rewarded for loyalty.

On the other hand, Article 127-quinquies CLF allows for loyal shareholders to enjoy additional, time-phased voting rights—up to two votes depending on the arrangements made in the articles of association—for each share uninterruptedly held by them for no less than two years, with additional voting rights expiring upon the sale of the shares. Tenured voting may be adopted by any listed company as an incentivizing tool, provided, however, that no multiple voting structure is in place. Hence, additional voting rights and multiple voting may only be alternative. Noticeably, multiple voting structures—up to three votes per share—are allowed under

Italian law since 2014 when they were introduced with the aim of inducing family-owned firms (which make up the core of business organizations in Italy) to list more shares on the stock market without necessarily losing control and thus rendering Italian companies less reliant on bank lending.[90] Shares with multiple voting rights can be issued by private companies only; companies that issued such shares prior to listing are, however, allowed to maintain such shares but prevented, if they so choose, from issuing new such shares and from adopting additional, time-phased voting rights. At the same time, eliminating the ban on multiple voting rights, which had characterized corporate voting in Italy ever since the enactment of the Civil Code in 1942, was also the reaction to the migration of some leading Italian companies from Italy to the Netherlands.[91]

Private ordering showed little interest in dividend-increasing mechanisms, whether due to the many practical problems associated with the implementation of the relevant provisions or simply because, arguably, the long-term related financial incentive provided by heightened dividends cannot outweigh short-term opportunities associated with trading stocks.[92]

To the contrary, time-phased voting has proven to be more successful if it is considered that 51 out of 231 companies listed on the Italian exchange had adopted tenured voting.[93] Importantly, however, given that time-phased voting requires the articles of

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[90] *See* OECD, *supra* note **Error! Bookmark not defined.**, at 34-35.

[91] *See, e.g.*, Marco Ventoruzzo, *The Disappearing Taboo of Multiple Voting Shares: Regulatory Responses to the Migration of Chrysler-Fiat* 1 (Eur. Corp. Governance Inst., Working Paper No. 288/2015, 2015), http://ssrn.com/abstract_id=2574236.

[92] *See generally* Mario Stella Richter Jr., *I troppi problemi del dividendo maggiorato* [The Too Many Problems of Increased Dividends], 117 RIVISTA DI DIRITTO COMMERCIALE 89 (2011) (It.).

[93] *See* OECD, *supra* note **Error! Bookmark not defined.**, at 35. *See also* Chiara Mosca, *Should Shareholders Be Rewarded for Loyalty? European Experiments on the Wedge Between Tenured Voting and Takeover Law*, 8 MICH. BUS. & ENTREPRENEURIAL L. REV. 245, 246 (2019).

association to be amended, and that in order to enjoy the loyalty reward a shareholder is required to file a request with the company, the findings that adopters are almost exclusively family-owned controlled firms and that registrant shareholders are almost exclusively controllers, especially de jure controllers, are quite deceiving from the standpoint of the achievement of the policy goal to incentivize institutional shareholder long-term engagement, if not unsurprising.[94] Altogether, the clear dominance of controlling shareholders in the ownership of companies adopting time-phased voting seems to contradict the reasoning according to which tenured voting encourages longer-term investments by investors other than controlling shareholders. Quite to the opposite, the practice of time-phased voting in Italy questions the effectiveness of such mechanism as a means for retaining shareholders over the long term or, at any rate, as a tool for encouraging institutional investor engagement with investee companies. In a context of high levels of ownership concentration, tenured voting rather appears to further empower pre-existing long-term shareholders. In effect, since controllers did not reduce their stake despite enjoying additional voting rights, the overall net effect of time-phased voting actually allowed those who were already in control to gain control over the extraordinary shareholders meeting as well, where a two-thirds majority of the share capital represented at the meeting is required for making any decision.[95] Similarly, the fundamental lack of institutional investors and asset managers among the beneficiaries of time-phased voting supports the view that time-phased voting seems not, in and of itself, to subsidize institutional shareholder engagement.[96]

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[94] Emanuele Bajo et al., *Bolstering Family Control: Evidence from Loyalty Shares* (Eur. Corp. Governance Inst. 25 (ECGI, Finance Working Paper No. 619/2019, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3428887.

[95] *See* Mosca, *supra* note 93, at 271.

[96] *See* Giovanni Strampelli, *Are Passive Index Funds Active Owners? Corporate Governance Consequences of Active Investing*, 55 SAN DIEGO L. REV. 803, 843 (2018) (highlighting that tenure voting and loyalty

2. *Proxy Voting and Remote Voting*

As mentioned above, one aim of the SRD was to remove some procedural hurdles which could have inhibited shareholder participation in the shareholders meeting. Along the same lines, Italian rules on proxy voting and proxy solicitation were simplified in 2010 so as to render them less restrictive than they previously were. Changes were also made to the rules on voting by correspondence and electronic means.

Removing unnecessary restrictions to proxy voting is a tool for facilitating shareholder participation. Additionally, other tools that allow cost-effective participation at a distance and in absentia or voting in advance of the meeting, such as electronic real-time transmission of the meeting, real-time two-way communication enabling shareholders to address the meeting from a remote location, electronic voting, and voting by correspondence. However, in regards to voting at a distance or in absentia, practical experience in Italy casts doubts on the efficacy of the measures adopted to achieve the policy goal set.

Under Article 2370 (4) Civil Code and Article 127 CLF, voting at a distance is allowed both by correspondence and by remote. Unlike voting by correspondence, voting by remote theoretically allows for direct and potentially interactive participation in the meeting. However, electronic and online voting are not mandatory under Italian law, but neither is voting by correspondence. It rests with the issuers to determine whether or not to adopt any of these

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dividends, cannot alter the conduct of institutional investors and, especially of the so-called passive index fund managers "[b]ecause passive investors as permanent shareholders cannot sell shares included in the reference index, they commit to the long term—irrespective of the level of their voting rights—and may forego loyalty benefits simply because of portfolio rebalancing").

enabling tools.[97] Thus, despite the alternative-design approach adopted at the regulatory level, enhanced shareholder empowerment relies primarily on the arrangements that individual companies may take in this respect, and a shareholder willing to vote her shares without appointing a proxy agent will, or will not, be enabled to do so remotely or in advance of the meeting depending on whether her investee company actually offers her (one or more of) those tools. As a matter of fact, in Italy voting by correspondence has remained virtually ignored.[98] Similarly, Italian-listed companies do not necessarily offer investors the opportunity to participate in the meeting and vote the shares at a distance via electronic means, possibly to account for cost considerations concerning the relevant technology. At any rate, it is unclear whether large institutional investors, who routinely employ proxy advisors to help them make voting determinations, would really refrain from voting the shares only because of the need, absent electronic voting, to appoint a local proxy agent.[99] This state of affairs helps explain why appointing a

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[97] Interestingly, out of the 28 countries in the European Economic Area that responded to a query by the European Securities and Markets Authority, only Hungary and Iceland reported that they had mandated provision of electronic means to enable shareholders attend the meeting, including for voting. *See* EUR. SEC'S MKT. AUTH., REPORT ON SHAREHOLDER IDENTIFICATION AND COMMUNICATION SYSTEMS, 28-29 (ESMA 31-54-435) (Apr. 5, 2017). Detail implementing provisions for voting by correspondence and voting via electronic means are set by Articles 140 to 143-ter Consob Regulation no. 11971.

[98] *See* Carlo Bellavite Pellegrini, *Corporate Governance e assemblea delle società quotate in Italia: un'indagine empirica* [An empirical inquiry into corporate governance and the shareholders meeting at corporations publicly listed in Italy], 51 RIVISTA DELLE SOCIETÀ 416 (2006) (It.). The changes made to Article 127 CLF in the SRD I transposition process were minor in nature and did not change the substance of voting by correspondence in any meaningful way.

[99] *See* Marco Cian, *Intervento e voto in assemblea: le nuove tecnologie come mezzo per promuovere l'attivismo degli investitori istituzionali?* [Participating and voting in the shareholders meeting: new technologies as a tool to promote institutional investor activism?], *in* GOVERNO DELLE SOCIETÀ QUOTATE E ATTIVISMO DEGLI INVESTITORI ISTITUZIONALI (Corporate governance and institutional investor activism) 104 (Marco Maugeri ed., 2015).

proxy agent remains the voting tool most used by institutional shareholders.[100] Voting by proxy is possible under Italian law in different ways, either according to the regime set by Article 2372 Civil Code, or that provided for by Articles 135-novies to 135-undecies CLF for publicly listed corporations, which underwent major simplification over time.

On the other hand, proxy fights based on the proxy solicitation regime set by Articles 136 to 138 CLF remain episodic in the Italian context despite the changes made in 2010 to the relevant rules. The changes aimed to remove the many substantive limitations which, alongside high costs, had previously prevented proxy solicitations from ever growing into a workable pathway for active share ownership. A shareholder willing to solicit proxies is no longer under the obligation to enlist an intermediary to carry out the process, as she was before the 2010 changes. In addition, a soliciting shareholder is no longer required to meet certain requirements in terms of minimum shareholding thresholds, nor to solicit proxies from all of its fellow shareholders. In its current version, Article 136 (1)(b) CLF allows for a soliciting party to address a minimum of 200 shareholders, hence allowing the soliciting party to selectively address its fellow shareholders.[101] Alongside the possibility to disseminate proxy materials (a proxy statement and a proxy form) via a website chosen by the soliciting person, which may also be the issuer's site if the issuer so agrees,[102] such measures

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[100] It remains to be seen whether implementation of Articles 3a and 3b of SRD II concerning shareholder identification and the transmission of information along the investment chain, by allowing companies to improve communication with their shareholder base and facilitating the exercise of shareholder rights, will also encourage issuers' voluntary adoption of electronic means for participating in the voting process as a tool by which to support shareholder engagement.

[101] Under Italian Consolidated Law on Finance, Article 136 (1)(b) CLF, proxy solicitation is defined as "a request to more than two hundred shareholders for proxy to be conferred in relation to specific voting proposals, or accompanied by recommendations, statements or other indications capable of influencing the vote".

[102] *See* Italian Consolidated Law on Finance, Article 136 (3) of Consob Regulation No. 11971.

contributed to reducing the costs associated with the process, to be borne by the soliciting party, thus theoretically enabling a shareholder to more cost-effectively strengthen its voting power in regard to specific voting proposals by soliciting proxies from like-minded fellow shareholders. Moreover, one-way proxies are no longer mandatory for any soliciting shareholder as they previously were. Enabling two-way proxies, which, importantly, are mandatory where the soliciting person is the issuer itself,[103] reduces the chilling effect associated with one-way proxies for solicited shareholders actually wishing to vote by proxy, but to do so in a way other than that proposed by the soliciting party. Lower costs and greater flexibility seem to have revitalized proxy solicitation as a lever for active share ownership, at least to some extent. Although soliciting proxies is still not commonplace in Italy, probably as a consequence of concentrated ownership with major stakeholders able to control the voting outcomes at shareholders meetings, it has become increasingly frequent, at least under specific circumstances concerning the issuer.[104]

3. Say-on-Pay Votes on the Remuneration Policy and Director Compensation Transparency

In order to empower shareholders, the Italian legislature broadened the list of the issues falling within the remit of the general meeting over time.[105] For example, defensive measures against

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[103] *See* Italian Consolidated Law on Finance, Article 138 (2) of Consob Regulation No. 11971.

[104] One proxy fight that became famous for being "Italy's fiercest proxy contest in decades" occurred in 2012 when a shareholders meeting was called by Salini at Impregilo to remove the Gavio group-dominated board; the context in which the case occurred was a peculiar one, since it was characterized by both hedge fund activism targeting Salini and an unstable ownership structure as a consequence of shareholder coalitions dominating the company with stakes less than 30% of the share capital. *See* Belcredi & Enriques, *supra* note 63, at 26-27. *See also* Proxitalia, http://www.proxitalia.com/Page.asp/id=404/operazioni-concluse, accessed February 12, 2020 (providing an illustrative list of proxy fights managed at Italian listed companies).

[105] Belcredi & Enriques, *supra* note 63, at 7-8.

hostile takeovers, unless the company has opted out of the so-called board neutrality rule, need to be authorized by the shareholders meeting. Similarly, the requirement that any amendments to the articles of association be approved by a supermajority of two-thirds of the share capital represented at the meeting is clearly aimed at incentivizing attendance by minority shareholders.

Further still, after introducing a precatory say-on-pay vote in regard of the company's remuneration policy in 2012, the current version of Article 123-ter CLF—as amended by Legislative Decree no. 49 of 10 May 2019 implementing Article 9a SRD II—has made say-on-pay votes binding. The company must hold Say-on-pay at least every three years, or whenever the board proposes any changes to the remuneration policy last approved by the shareholders. Hence, companies "shall only allocate fees in compliance with the remuneration policy most recently approved by the shareholders."[106] As an explanation for rendering say-on-pay binding in nature, the draft explanatory report to Legislative Decree no. 49/2019 emphasizes the need to align the provisions on the remuneration policy of all listed companies to those that were already in force for banks and insurance companies, which provide for a binding say-on-pay votes.[107] In addition, the scope of application of binding say-on-pay votes on the remuneration policy was broadened to also include compensation to the members of the board of statutory auditors, alongside that regarding the members of the board of directors, general managers and executives with strategic responsibilities (see Article 123-ter (3)(a) CLF).

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[106] *See* CONSOB, Article 123-ter (3-bis) CLF.

[107] *See* Draft Explanatory Report to Legislative Decree, no. 49/2019 (February 8, 2019), 7 (in Italian only), http://documenti.camera.it/apps/nuovosito/attigoverno/Schedalavori/getTesto.ashx?file=0071_F001.pdf&leg=XVIII#pagemode=none. *See also* BANK OF ITALY, *Circular no. 285/2013,* Part I, Title IV, Chapter 2, Sec II, para 1 (Dec. 2013), https://www.bancaditalia.it/compiti/vigilanza/normativa/archivio-norme/circolari/c285/aggiornamenti/Testo-int-30-agg.pdf (It.) (providing that remuneration policies for corporate boards be approved by the shareholders meeting by a binding vote).

As a tool for enhanced director accountability, say-on-pay votes are meant to strengthen institutional investor monitoring.[108] First, from the standpoint of shareholder oversight, significant levels of against and withhold say-on-pay votes quite clearly shows that a portion of the shareholders withdrew support from the board, and their dissent is made public.[109] Second, say-on-pay votes can be regarded as being functionally complimentary to the rights granted to shareholders under the slate voting system for director elections,[110] to obtain that at least one director be elected by minorities. If it is considered that minority-elected directors are very often elected to the remuneration committee within the board, the combined potential effect of say-on-pay votes and slate voting can provide minorities with a form of intra-board monitoring over the determinations concerning board compensation that may favor alignment with international best practices (first and foremost in regard to enhanced transparency), thus further encouraging shareholder engagement.[111] Interestingly, following the first implementation of precatory say-on-pay, a positive correlation has been found to exist between the presence of minority-elected directors within the remuneration committee and increased institutional investor participation in the shareholder meetings.[112] Moreover, low-quality information in the remuneration report has been found to be positively correlated with higher levels of against and withhold say-on-pay votes, suggesting that shareholders do lever say-on-pay votes as a tool for corporate stewardship.[113] The

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[108] *See, e.g.*, Commission Recommendation (EC) No. 385/2009, recital 10, according to which "to increase accountability, shareholders should be encouraged to attend general meetings and make considered use of their voting rights. In particular, institutional shareholders should take a leading role in the context of ensuring increased accountability of boards with regard to remuneration issues", https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:120:0028:0031:EN:PDF.

[109] *See infra* Parts III.D.1 and IV.

[110] *See infra* Parts III.D.1 and IV.

[111] *See infra* Part IV.

[112] *See infra* Part IV.

[113] *See* Belcredi et al., *supra* note **Error! Bookmark not defined.**, at 20, 25-26.

significance of say-on-pay votes on the remuneration policy is, in fact, further heightened by the fact that the fees actually paid to directors, general managers, executives with strategic responsibilities, and members of the board of statutory auditors during the financial year need to be submitted to a shareholders' vote, if still non-binding.[114] Moreover, the board of directors is required to illustrate yearly how the company has taken account of the vote cast the previous year on the fees paid.[115]

4. Related Party Transactions and Shareholder Oversight

The rulings on related party transactions are among the most significant rulings intended to reduce principal-principal agency costs associated with controllers' potential for self-dealing,[116] which was first introduced in Italy as early as 2010 to be only slightly amended in 2019 in the process of transposing Article 9 (c) SRD II into national law. The general provisions on related party transactions are drawn in Articles 2391-bis of the Civil Code, which vests Consob with the authority to lay down rules aimed at ensuring that related party transactions are transparent, are illustrated in the board's annual report to the financial statements and comply with procedural and substantive fairness requirements, and Article 154-ter (4) CLF, which requires the board's interim report to half-yearly financial statements to also include information on significant, related party transactions.[117] The contents of such information, as

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[114] *See* ArticleCLF [C.c.] art. 123-ter (6) (It.) (providing that the shareholders meeting resolves in favor or against the section of the remuneration report to be drawn by the board of directors illustrating, in a clear and understandable manner, each of the items comprising remuneration, as well as the fees paid during the financial year, and that such resolution is not binding).

[115] *See* CLF [C.c] art. 123-ter (4) (b-bis) (It.).

[116] *See generally* Luca Enriques, *Related Party Transactions: Policy Options and Real-World Challenges (With a Critique of the European Commission Proposal)*, 16 EUR. BUS. ORG. L. REV. 1 (2015).

[117] *See* CIVIL CODE [C.c] art. 2391-bis (It.); CLF [C.c] art. 154-ter (4) (It.).

well as substantive regulation of related party transactions, are laid down by Consob in Regulation no. 17221 of March 12, 2010, which envisages safeguards aimed at protecting the company and its non-controlling shareholders against potential value diversion or misappropriation by controllers and further related parties, including detailed provisions involving independent directors in the decision-making process and, in some cases, empowering dissenting minorities to prevent the transaction. Regulation 17221 is currently in the process of being updated following the SRD II.[118] However, if it is considered that such regulation will not undergo major changes, its current version is still fully meaningful to provide an overview of the general regime related party transactions are subjected to in Italy.

First, Article 4 of Regulation no. 17221 requires that the board of directors adopt a specified internal procedure to ensure transparency as well as substantial and procedural fairness of related party transactions.[119] Second, Article 5 of the same regulation requires that the company publicly disclose material transactions in accordance with Article 114 (5) CLF[120] and Article 17 of Regulation (EU) no. 596/2014.

Further, according to Article 8 of Regulation no. 17221, the board of directors may approve material, related party transactions (transactions "of greater importance," as identified through a set of

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[118] *See* Commissione nazionale per le società e la borsa (Consob), Resolution No. 17221 (Mar. 12, 2010),

http://www.consob.it/web/consob-and-its-activities/laws-and-regulations/documenti/english/laws/reg17221e.htm?hkeywords=resolution+17221&docid=9&page=0&hits=20&nav=false,

(regulations containing provisions relating to transactions with related parties). Public consultation concerning the proposed amendments to Regulation 17221/2010 was launched on October 31, 2010.

[119] *See* Consob Regulation No. 17221, art. 4 (2010).

[120] *See* CLF [C.c] art. 114 (5) (It.) (Providing that Consob may require the issuers, the subjects which control them, board members, managers and persons who hold major holdings or who are parties to a shareholders' agreement to publish the information and documents needed to inform the public); Commission Regulation 596/2014, art. 17, 2014 J.O. (L 173) 1 (EU).

quantitative parameters) only if favorable advice has been previously given by a committee of independent directors involved in the negotiations; however, company-specific related party procedures may stipulate that the board may approve the transaction despite the negative opinion from the committee if and only if a shareholders meeting is convened and a majority of unrelated shareholders approve the transaction (the so-called 'whitewash').[121] Instead, the board may approve transactions "of lesser importance" notwithstanding the negative opinion of the committee, which, in addition, is not required to lead the negotiations and is without recourse to the shareholders meeting whitewash.[122] According to Annex 1 of Regulation no. 17221 (concerning definitions functional to the definitions of related parties and related party transactions), an entity is a related party to a company if, among others, the party "controls the company, is controlled by, or is under common control."[123]

Once again, the interaction between the Italian regimes for related party transactions and for director elections through the mandatory slate voting system needs to be considered in order to fully understand how such interaction can support active shareholder monitoring and stewardship. In effect, since ex ante independent scrutiny of related party transactions is required to ensure that the transaction is fair for the company and all of its shareholders, minority board representation ensured by slate voting can also improve self-dealing oversight. At Italian-listed companies, the presence of minority-elected directors appointed by institutional investors has had a positive impact on the adequacy of internal procedures for addressing related party transactions.[124] In

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[121] *See* Consob Regulation No. 17221, art. 8, 2010,

[122] *See* Consob Regulation No. 17221, art. 7, 2010.

[123] *See* Consob Regulation No. 17221, annex 1, 2010 (emphasis added).

[124] *See* Marcello Bianchi et al., *Regulation and Self-Regulation of Related Party Transactions in Italy: An Empirical Analysis* (Eur. Corp. Governance Inst. 25 (ECGI, Finance Working Paper No. 415/2014, 2014),

particular, "the presence of at least one minority director is indeed associated with adoption of stricter internal codes, not only when minority directors are members of the committee of independent directors vetting internal codes, but also when they merely sit on the board."[125] Indeed, the very reason why mandatory slate voting was originally adopted in Italy for board elections at listed companies was to secure minority board representation as a monitoring tool deployed by active shareholders, in keeping with the view that institutional investors should be encouraged to act as corporate stewards.[126] Further findings from the Italian context seem to support the hypothesis that non-executive minority directors reduce principal-principal agency costs associated with controllers' potential self-dealing, and positively affect firm value, "even in presence of factors (uncertainty about future financial results and high information asymmetry) that might exacerbate the risk of hold-up by minority shareholders."[127] Thus, "the benefits associated to the active monitoring role by the independent minority directors outweigh the costs of potential frictions within the board."[128]

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https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2383237. It should be noticed that Regulation no. 17221 introduced both stricter procedural requirements and heightened disclosure obligations, however leaving some freedom to the board of directors in drawing the individual company's internal procedure for RPTs: the board is thus allowed to opt-up or opt-down from some of the provisions set forth in the regulation as defaults.

[125] *Id.* at 25 (also finding that, to the contrary, the degree of board independence, as measured by the percentage of independent directors sitting on the board, does not have an impact on the strictness of such internal procedures).

[126] *See* Giovanni Strampelli, *How to Enhance Directors' Independence at Controlled Companies*, 44 J. CORP. L. 103, 135-36 (2018). *See also* Marco Ventoruzzo, *Empowering Shareholders in Directors' Elections: A Revolution in the Making,* 8 EUR. CO. & FIN. L. REV. 105, 141 (2011).

[127] Nicola Moscariello et al., *Independent Minority Directors and Firm Value in a Principal–Principal Agency Setting: Evidence from Italy*, 23 J. MGMT. AND GOV. 18–19 (2019).

[128] *Id.*

5. *The Pivotal Impact of the Record Date System on Boosting Institutional Investors' Voting*

Although they do significantly empower minority shareholders, most of the regulatory measures illustrated above would still not have provided institutional investors with an incentive strong enough to subsidize increased participation in the shareholders meeting had it not been for the mandatory adoption of the record date regime to regulate attendance and voting in the meeting. In fact, the blocking requirement imposed on the shares for up to two days prior to the meeting, which was previously enshrined in Article 2370 Civil Code, amounted to a significant economic impediment on institutional investor attendance, since it seriously restricted the ability of investors to freely trade their shares for a not insignificant number of days ahead of the meeting.[129] Thus, the shift toward the mandatory record date system (*See* Article 83-*sexies* CLF) has greatly reduced the main economic disincentive associated with participating in the meeting and has indeed proven to be crucial in boosting institutional investor voting, especially with regards to foreign institutions.[130] As the evidence available quite clearly shows, after introducing the record date regime in 2010, institutional investors' participation in the shareholders meetings has virtually doubled at non-controlled Italian listed companies, and has remarkably increased even at de jure controlled companies, in spite of the fact that control over voting outcomes is still secured to the controlling blockholders.[131]

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[129] *See* B. Espen Eckbo & Giulia Paone, *Reforming Share-Voting Systems: The Case of Italy* 7-8 (Tuck School of Bus. Working Paper No. 2011-93), https://ssrn.com/abstract=1822287.

[130] Belcredi & Enriques, *supra* note 63, at 21.

[131] *See* Mario Notari, *Diritti di voice degli azionisti e tutela delle minoranze* [Shareholders' voice and protections of minority shareholders], *in* IL TESTO UNICO DELLA FINANZA. UN BILANCIO DOPO 15 ANNI [CONSOLIDATED LAW ON FINANCE AT 15] 247, 256-257. (Filippo Annunziata ed., Egea 2015) (It.).

D. SHAREHOLDER ENGAGEMENT

As illustrated above,[132] various actions have been taken in order to support, facilitate and incentivize institutional investor participation and voting at shareholders meetings. However, other forms of engagement that usually take place outside the general meeting exist which remain substantially unregulated, despite their increasing relevance within the practice of engagement.[133]

Article 124-*quinquies* CLF (almost literally transposing Article 3g(1)(a) SRD II) now requires—if only on a comply or explain basis—that institutional investors publish their engagement policy yearly to illustrate, among other things, the ways in which "investors monitor investee companies on important issues, including strategy, financial and non-financial results as well as risks, capital structure, social and environmental impact and corporate governance, interact with investee companies, . . . cooperate with other shareholders, and communicate with the relevant stakeholders of the investee companies."[134] In line with the principles set by virtually any stewardship code, whether national or international, Article 124-*quinquies* CLF makes it clear that engagement is more than just voting and includes "investment decision-making, monitoring assets and service providers, engaging with issuers and holding them to account on material issues, collaborating with others, and exercising rights and responsibilities."[135]

The importance of shareholders' engagement is clearly recognized also by the Italian Corporate Governance Code 2020

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[132] *See supra* Part III.A-C.

[133] *See generally* Joseph A. McCahery et al., *Behind the Scenes: The Corporate Governance Preferences of Institutional Investors*, 71 *J. Fin.* 2905, 2911–16 (2016); Giovanni Strampelli, *Knocking at the Boardroom Door: A Transatlantic Overview of Director-Institutional Investor Engagement in Law and Practice*, 12 VA. L. & BUS. REV. 187 (2018).

[134] CONSOB, Article 124-quinquies CLF.

[135] FIN. REP. COUNCIL, THE UK STEWARDSHIP CODE 2020 (Oct. 2019), 7, https://www.frc.org.uk/getattachment/5aae591d-d9d3-4cf4-814a-d14e156a1d87/Stewardship-Code_Dec-19-Final.pdf.

according to which "[t]he board of directors promotes dialogue with shareholders and other stakeholders which are relevant for the company, in the most appropriate way."[136] To that end, the Code recommends "the board of directors adopts and describes in the corporate governance report a policy for managing dialogue with the generality of shareholders, taking into account the engagement policies adopted by institutional investors and asset managers."[137]

Some engagements may best be conducted privately by a single investor, and many take place behind closed doors.[138] However, there are forms of public engagement which have proven quite effective in the Italian context. In particular, Italian experience with director elections through the slate voting system suggests coordinated engagements by institutional investors can have a positive impact on investee companies, especially with regard to corporate governance issues. Closely following EFAMA,[139] the Italian Stewardship Principles acknowledge that the collective one "may be the most effective method of engagement."[140] Over the years, Assogestioni has been increasingly taking on an active role in providing operational support to its affiliates,[141] thus developing a peculiar pathway for collective engagement and showing that investor associations can play a proactive role within the framework for stewardship, as they can catalyze investors' stewardship efforts by favoring the redistribution of the engagement costs among the

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[136] CORP. GOVERNANCE COMM., *supra* note 47, at 5.

[137] *Id.*, at 6.

[138] *See supra* note 133. *See also* Elroy Dimson et al., Coordinated Engagements 9 (July 1, 2020) (Working Paper) (on file with SSRN), https://ssrn.com/id=3209072.

[139] *See* EUR. FUND AND ASSET MANAG'NT. ASS'N, *supra* note **Error! Bookmark not defined.**, at 4 (recommending that asset managers "should consider acting with other investors, where appropriate." Guidance to Principle 4 further emphasizes that shareholder collaboration may sometimes be "the most effective manner in which to engage.").

[140] Assogestioni, *supra* note 63, at 17-18.

[141] *See generally* Strampelli, *supra* note 126, at 134-35.

institutional investors that carry out engagement activities collectively.[142]

Individual and collective engagements might further be facilitated by the new rules on shareholder identification set by Article 83-duodecies CLF, as amended following the SRD II.

1. Director (and Statutory Auditor) Elections Through Slate Voting

The most distinctive feature of the Italian corporate governance framework is the right to board representation that is granted to minority shareholders through the slate voting system (*voto di lista*), which is mandatory for corporate elections at all listed companies. It proved to be crucial to empower institutional investors insofar as minorities enjoy the right to elect at least one member of the board of directors and one member of the board of statutory auditors. Under slate voting, corporate boards are elected from competing slates of nominees, which are usually submitted by sponsoring shareholders. The majority of directors are elected from the slate receiving the largest number of votes at the shareholders meeting (so-called "majority slate"), but at least one director must be picked from the slate that obtains the largest number of votes after the majority slate (so-called "minority slate")[143] and that is not linked in

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[142] With the aim of favoring the sharing of engagement-related benefits and costs among investors, costs are allocated in proportion of the "size" of associated asset managers: *see* ASSOGESTIONI, *Bylaws* 34 (2016), http://www.assogestioni.it/index.cfm/3,813,11301/statuto-marzo-2016.pdf (stating that each member must pay a fee comprised of a fixed amount and a variable amount, which is established by dividing the remaining portion of the budget amongst all members in proportion with the assets collected and/or managed at the end of the previous year). *See also* Balp & Strampelli, *supra* note **Error! Bookmark not defined.**, at 45-48.

143 *See* Art. 147-ter (3) (1998) (under which "the member elected from the minority slate must satisfy the integrity, experience and independence requirements established pursuant to Articles 148(3) and 148(4). Failure to satisfy the requirements shall result in disqualification from the position."). *See generally* Guido Ferrarini et al., *Corporate Boards in Italy*, *in* CORPORATE BOARDS IN LAW AND PRACTICE 367, 392–393 (Paul Davies et al. eds., 2013).

any way, either directly or indirectly, to the majority slate that won the most votes.[144] In particular, under Article 147-ter CLF, shareholders holding a minimum threshold of shares—set by Consob and currently varying between 0.5% and 4.5%[145]—are entitled to present lists of candidates for election to the board of directors. The same applies to elections to the board of statutory auditors according to Article 148 CLF, under which the chair of the board must be picked from the statutory auditors elected from the minority slate. Mandatory slate voting was first introduced in 1998, limited however to elections to the board of statutory auditors.[146] In 2005, ensuing the financial scandal around Parmalat, slate voting was extended to elections to the board of directors as well.[147]

Minority shareholders willing to submit a slate of director nominees and ready to bear the (non-negligible) costs associated are thus offered a way of gaining access to the boardroom and having a direct insight into the company's affairs. Arguably, cost considerations are part of an explanation for the crucial role that Assogestioni has been playing in the process of selecting director

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144 Article 144 (6) of Consob Regulation no. 11971 clearly states "[a] shareholder may not submit or vote for more than one list, including through nominees or trust companies. Shareholders belonging to the same group and shareholders participating in a shareholder agreement involving the shares of the issuer may not submit or vote for more than one list, including through nominees or trust companies. A candidate may only be present in one list, under penalty of ineligibility." Massimo Belcredi & Guido Ferrarini et al., *Board Elections and Shareholder Activism: The Italian Experiment*, *in* BOARDS AND SHAREHOLDERS IN EUROPEAN LISTED COMPANIES: FACTS, CONTEXT AND POST-CRISIS REFORMS 378–83 (Massimo Belcredi & Guido Ferrarini eds., 2013). *See* Belcredi & Enriques, *supra* note 63**Error! Bookmark not defined.**, at 8–9.

145 *See* 11971 Consob Regulation Art. 144-quater (1999). The minimum threshold set by Consob varies depending on the company's capitalization. Shareholders are not, however, prevented from setting a lower shareholding threshold in the articles of association.

146 *See* Belcredi & Ferrarini, et al., *supra* note 144, at 367.

147 *Id.*

nominees and submitting minority slates ever since the introduction of slate voting. If it is considered that, under the Italian Stewardship Principles, "[t]he presentation of candidates for election as independent minority members of boards of investee companies, also through the [Assogestioni] Investment Managers' Committee, represents a continuous and constructive method of engaging with investee companies,"[148] submitting slates of director nominees has indeed grown into an increasingly significant tool for exerting investor active ownership.[149] More so, slate voting, combined with the proactive role played by Assogestioni as an enabling entity, has proven to be a fundamental lever by which to support (non-activist) institutional investors' collective action as a viable and cost-effective pathway for engaging investee companies.

Assogestioni does not promote shareholder collaboration loosely, but indeed provides institutionalized support for collective engagement by leveraging the national regulatory framework for corporate elections at listed companies. Based on a formalized procedure, candidates for election as minority representatives to corporate boards are selected in accordance with the "principles for the selection of candidates for corporate bodies of listed companies" drawn up by the Assogestioni Corporate Governance Committee.[150] The Investment Managers' Committee is in charge of selecting candidates with the assistance of an independent advisor. The independent advisor is charged with maintaining a database of possible candidates and submitting to the Investment Managers' Committee a short list of those that appear to best meet the

[148] Assogestioni, *supra* note 63, at 17.

[149] *See infra* Part IV.2.

[150] Such committee is composed of members of Assogestioni's board and representatives of member companies. *See* Assogestioni, PROTOCOL OF DUTIES AND RESPONSIBILITIES OF THE CORPORATE GOVERNANCE COMMITTEE AND THE INVESTMENT MANAGERS' COMMITTEE 20–21 (2017) (such committee is composed of members of Assogestioni's board and representatives of member companies).

requirements for each corporate office.[151] Further still, candidates must have adequate professionalism, integrity, and independence;[152] to avoid possible conflicts of interest, legal representatives of investment management companies and, unless at least one year has elapsed since the relevant appointments were relinquished, anyone who has served in a senior management or an executive role at an investment management company may not be selected as a candidate.[153] In addition, to ensure that candidates be independent vis-à-vis the company for which they are nominated, "[m]embers of governing or supervisory bodies and senior managers of institutions and companies that have significant business ties with the company for which they are nominated may be selected as candidates provided that at least one year has elapsed since the end of these appointments."[154] If elected, candidates are required not to accept any senior management position or corporate appointment at the same company or at any other company belonging to the same corporate group for at least one year after the end of their term, unless they are nominated once again as candidates by the Investment Managers' Committee.[155]

Ever since its adoption, slate voting has been conceived of as a lever to secure minority board representation and subsidize active

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151 *Id.,* at 24-26 (specifying that "[e]ven when minority slates are presented for elections to boards, the Committee members undertake no obligation in regard to the exercise of voting rights during general meetings.") The Investment Managers' Committee is composed solely of representatives of member investment management companies or other Italian or foreign institutional investors, who communicate each time to the Committee's secretariat their interest in participating in the submission of the individual slates for minority candidates' election to the boards of Italian investee listed issuers).

152 *Id.*, at 26.

153 *Id.*, at 28–29 (also stating that persons who hold a senior management or executive role in investment management companies may not be selected as candidates for company boards).

154 *Id.*, at 29.

155 *Id.*, at 30.

shareholder monitoring.[156] Noticeably however, chiefly on account of the ownership structures of Italian listed companies, such systems for board elections can sometimes lead to unexpected and, to some extent, counterintuitive situations. Specifically, at so-called de facto controlled companies, where controllers hold less than 50% of the voting rights, institutional investors collectively may actually own the majority of the votes or, at any rate, a proportion of the votes larger than that of the controlling stockholders.[157] Hence, it is increasingly the case—especially at larger corporations where de facto controllers hold a relatively small stake—that the list submitted by institutional investors under the coordination of Assogestioni actually receives more votes than that submitted by (de facto) controlling shareholders, and sometimes even an absolute majority of the votes.[158] If it is considered that, based on the engagement strategy adopted by Assogestioni, affiliated institutions only present so-called short lists of director nominees in order to avoid taking control of the company by electing a majority of the board,[159] where minority-submitted lists receive the majority of the votes cast, a majority of the shareholders ends up appointing a minority of the directors, whilst a minority (as the de facto controlling shareholder) appoints a majority. Paradoxical as it may appear, such outcome is in line with the approach to investor

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[156] *See* Strampelli, *supra* note 126, at 135–36.

[157] ORG. FOR ECON. CO-OPERATION & DEV., CAPITAL MARKET REVIEW OF ITALY 2018: MAPPING REPORT 53-54 (2018)), www.oecd.org/corporate/OECD-Capital-Market-Review-Italy-Mapping-Report-2018.pdf.

[158] Mario Stella Jr. Richter & Federico Ferdinandi, *The Evolving Role of the Board: Board Nomination and the Management of Dissenting Opinions*, 4 ITALIAN L.J. 611, 613 (2018).

[159] *See* Assogestioni, *supra* note 150, at 23. Interestingly, also hedge funds most often take advantage of short-slate rules, since the submission of a short slate can encourage them "to seek board representation with the possible objective of putting the company up for sale, but without themselves acquiring control. Because hedge funds are not typically strategic bidders and traditionally did not want control (which carried some risk of liability), this rule well served their needs". *See* John C. Coffee Jr. & Darius Palia, *The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Governance*, 41 J. CORP. L. 545, 560 (2016).

stewardship adopted by the Italian Stewardship Principles, according to which the appointment of some independent directors only "serve[s] as a method of monitoring."[160] Consistent with such approach, engagement promoted by Assogestioni is primarily aimed at minimizing "the agency costs arising from the presence of a controlling shareholder by sharing management decisions, and thus by exercising closer monitoring,"[161] and not—in contrast to the usual approach of hedge funds—at influencing firms' strategic and financial decision-making, also by replacing management.[162]

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[160] Assogestioni, *supra* note 63, at 16; in fact, the regulatory framework for acquisition of major holdings or control in European listed companies applicable to traditional UCITS funds —but not to alternative funds reserved to professional investors (AIFs, such as hedge funds)—prevents mutual UCITS funds from acquiring or exercising control (or significant influence) over investee companies in order to limit risk concentration. *See* Simone Alvaro & Filippo *Annunziata, Shareholdings of Alternative Investment Funds in Listed Companies and in Banks: A Legal Perspective*, 14 (Consob Legal Research Paper No. 17, 2018), http://www.consob.it/documents/46180/46181/lp17.pdf/2ca235bc-17a1-4bda-9efb-569d9ff361b8. This, in turn, helps explain why hedge funds may submit long, or even full, slates of director nominees to a shareholder vote. *See also* Coffee & Palia, *supra* note 159, at 560 (noting that "[t]he goal of the short slate rule also was to encourage 'constructive engagement' through minority board representation-without a confrontational battle between activists and the issuer.").

[161] Matteo Erede, *Governing Corporations with Concentrated Ownership Structure: An Empirical Analysis of Hedge Fund Activism in Italy and Germany, and Its Evolution*, 10 EUR. CO. & FIN. L. REV. 328, 371 (2013). *See also* Belcredi & Ferrarini et al., *supra* note 144, at 414; Luigi Zingales, *Italy Leads in Protecting Minority Investors*, FIN. TIMES (Apr. 13, 2008), https://www.ft.com/content/357c40c4-094d-11dd-81bf-0000779fd2ac (considering that a vote for a minority list sponsored by Assogestioni is not "a vote against the management but a vote to ensure truly independent board members and avoid the representation of other opportunistic minority shareholders, who might have other goals in mind").

[162] Erede, *supra* note 161, at 370.

2. *Shareholder Identification as a Tool for favoring Collective Shareholder Initiatives*

With a view to promoting institutional investors' active ownership, Article 83-duodecies CLF, last amended in 2019 to transpose SRD II, explicitly conceives of shareholder identification as a means by which to "facilitate issuers' communication with shareholders as well as the exercise of shareholder rights, *including in a coordinated manner*."[163]

Issuers are entitled to require intermediaries along the investment chain to identify the shareholders, however limited to those holding more than 0.5% of the voting rights;[164] the costs associated with the process of identifying the shareholders are borne by the issuer (see Article 83-duodecies (1)). Importantly, Article 83-duodecies (3) CLF imposes an obligation on the company to start the identification process upon request of minority shareholders, whereas the minimum threshold required for the shareholders to make such request is the same set for submitting a slate of director nominees under Article 147-ter CLF. Hence, the threshold shareholders are required to meet to initiate the process varies between 0.5% and 4.5% of the share capital depending on the size

[163] *See* Article 83-duodecies (1) CLF (emphasis added).

[164] Noticeably, under the previous version of Article 83-duodecies CLF companies (or shareholders holding a certain stake) were allowed to request shareholder identification only where such right was actually set out in the articles of association; in turn, no restriction applied as regards the shareholders to be identified, since the request was not restricted to shareholders holding more than a certain percentage of shares or voting rights. According to the draft explanatory report, setting the minimum threshold to exercise the right to request the identification above 0.5% of the share capital was needed in order to avoid that shareholder identification be used as a defensive measure by directors or controlling shareholders against smaller shareholders aiming at building up more relevant stakes. It should be noticed, however, that setting such threshold entails that companies will not be able, as a matter of fact, to (also) identify their retail shareholder base, if they wished so. As a result, an issuer's interest in reaching out to its retail shareholders may diminish at companies where the shareholder base includes a significant proportion of retail investors.

of the company and its ownership structure. Where the process is started upon shareholder request, the costs are shared between the issuer and the requesting shareholders based on criteria set by Consob in such way as to oblige the need that shareholder requests be in line with the aim of facilitating shareholder coordination.[165] In any case, data concerning shareholder identification are made available to shareholders "on a commonly-used electronic storage device free of charge,"[166] irrespective of whether the process was initiated by the issuers or the shareholders.

As is apparent, shareholder identification, alongside the rules on top-down and bottom-up transmission of information relevant to the exercise of shareholders' rights along the investment chain (see Article 83-novies (1)(g-bis), Article 82 (4-bis) CLF, and implementing regulations), are clearly intended to support the exercise of shareholder rights as a policy goal. Shareholder identification encourages engagement between a company's investor relations department and its shareholders since it can improve communication with the shareholder base and allows the company to develop more targeted communication programs; the right granted to minorities to activate the identification process adds to shareholder active ownership since it favors non-activist institutional investor collective action—whether through voting, convening a general meeting, putting a new item on a meeting's agenda, asking questions, etc., or simply by facilitating sharing views on agenda items, corporate action and governance, or gauging

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[165] *See* Article 133-bis of Consob regulation No. 11971 (providing that cost allocation be regulated by each issuer in the articles of association; if the articles of association fail to do so, the costs of shareholder identification will be borne entirely by the issuer. However, if the shareholders make a request for shareholder identification in the six months following the end of the fiscal year, and in any case prior to the annual general meeting, and no identification request is made directly by the issuer in the same period of time, the company will fully incur the costs for disclosure of the shareholder identification data and the number of shares registered on the securities accounts).

[166] *See* Article 83-duodecies (4) CLF.

preferences, e.g. in view of an important and uncertain vote, and up to challenging the board or controlling shareholders.

IV. THE PRACTICE OF SHAREHOLDER VOTING AND ENGAGEMENT IN ITALY

This section briefly follows up on the analysis above by reporting some evidence regarding the practice of shareholder voting and engagement in Italy. We focus on say-on-pay and director elections through slate voting since these tools have proven to catalyze institutional investors' preferences in the Italian context.

A. SAY-ON-PAY VOTES

Alongside enhanced attendance rates at shareholders meetings,[167] increased institutional investor engagement with companies publicly listed in Italy can be quite clearly inferred from data concerning say-on-pay votes ever since first-time application of Article 123-ter (6) CLF in 2012, whose outcomes seem in line with those characterizing other Member States: altogether, for-votes prevail over against and withhold votes, with investors mostly tending to side with directors.[168] However, against votes are all but

[167] *See supra* Part II.

[168] See Georgeson et al., FTSE MIB Proxy Season 2013, 34-41 (2013), https://archivioceradi.luiss.it/files/2011/10/FTSE-MIB-2013-Evoluzione-degli-assetti-proprietari-ed-attivismo-delle-minoranze.pdf, according to whom for say-on-pay votes averaged 88% of the voting capital in 2012 and 90% in 2013. See also Belcredi et al., supra note **Error! Bookmark not defined.**, at 9, according to whom against and withhold votes averaged 5% in 2012. Such divergent findings are arguably attributable to the different width of sample issuers examined in the analyses (limited to FTSE MIB issuers in the first case; including all 226 publicly listed companies in the second case). Hence, higher dissent levels found in the first study emphasize that non-national institutions tend to concentrate investments in blue chips. In both cases, consensus over remuneration policies was found to be only slightly higher than that observed in the United States and the UK, and in line with that found in other countries with higher levels of ownership concentration, such as Germany.

irrelevant, more so if ownership concentration is considered.[169] Where major stakeholder votes are left aside, consensus over remuneration at larger issuers averaged 57% of the votes in 2012 and 67% in 2013. Interestingly enough, against votes nonetheless accounted for more than 50% in 10 out of 32 FTSE MIB companies in 2013, chiefly as a consequence of foreign institutional investor votes.[170] In fact, over the first years of say-on-pay application, increased attendance at shareholders meetings by foreign institutions has been found to positively correlate with both the size of investee firms and higher rates of against votes, with foreign institutions also seeming to drive the votes of domestic institutions.[171] Hence, institutional investor scrutiny appears to be stronger at larger firms.[172] In turn, the fact that dissent over remuneration policies negatively correlates with ownership concentration is generally explained by closer monitoring performed by controlling shareholders.[173]

Where against votes were found to be a majority, this occurred under particular circumstances and within complex contexts, typically in situations where the firm was facing financial distress, suits were brought against corporate directors, or all directors resigned in the context of control contests.[174] Out of such circumstances, higher dissent rates were typically found to be associated with unsatisfactory information in the remuneration policy proposed by the board, exceedingly generous compensation

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[169] *See* Belcredi & Enriques, *supra* note 63, at 18-19.

[170] *See* Georgeson et al., *supra* note 168168, at 35.

[171] *See* Belcredi et al., *supra* note **Error! Bookmark not defined.**, at 28-29, 32 (according to whom non-national institutions perform a dissent-aggregation function vis-à-vis domestic investors).

[172] *Id.*at 25, 26, 28.

[173] *Id.* at 27-28.

[174] *Id*. at 22.

levels, especially in regard to CEO severance contracts or performance-based vesting conditions in equity grants.[175]

Against and withhold say-on-pay votes by institutional investors have increased in 2018 to about 8% of the share capital and 41% of the total number of shares held by them.[176] Interestingly, since 2017, dissent has grown markedly at Italian blue chips, reversing the decreasing trend for FTSE MIB companies over the 2012-2016 period.

Altogether, relative average say-on-pay consensus in Italy has been interpreted not as a measure of institutional investors' unawareness and conformity in opinions, but as a confirmation of the efficacy of say-on-pay as a lever by which to promote higher levels of transparency concerning remuneration policies, as well as a signal for enhanced transparency[177] achieved as a response to

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[175] *See id.* at 27; *see also* Georgeson et al., *supra* note 168, at 41 (stating that such findings are in line with those referred to the UK, where non-binding say-on-pay was introduced in 2002); *see* Fabrizio Ferri & David A. Maber, *Say on Pay Votes and CEO Compensation: Evidence from the UK*, 17 REV. FIN. 527, 529 (2013) (indicating that these very same reasons motivate negative voting recommendations issued by proxy advisors as well); *see, e.g.*, Frontis Governance, *Studio sulle remunerazioni nelle società quotate in Italia. Esercizio 2011* [A Study on 2011 Remunerations at Publicly Listed Companies in Italy] 29 (2012), http://www.frontisgovernance.com.

[176] Consob, *supra* note 42, at 35 (noticing that institutional investors' dissent appears to be lower at widely held companies and when institutional investors hold a major stake).

[177] *See* Frontis Governance, *Studio sulle remunerazioni nelle società quotate in Italia. Esercizio 2012* [A Study on 2012 Remunerations at Publicly Listed Companies in Italy] 6 (2013), http://www.frontisgovernance.com/attachments/article/315/Studio%20Remunerazioni%202012%20-%20Abstract.pdf. (discussing the key role played by transparency in regard to the value of say-on-pay votes); *see* Guido Ferrarini et al., *Understanding Directors' Pay in Europe: A Comparative and Empirical Analysis* 14-15 (EGCI Law Working Paper 126/2009, 2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1418463.

increased shareholder oversight.[178] Interestingly, proxy advisors have been found to have a remarkable impact on the outcome of say-on-pay proposals, and a clear correlation has been found between negative proxy advisor recommendations and lower vote results. In the 2019 proxy season, for instance, "in the FTSE MIB, the five remuneration reports with the lowest level of support all received a negative recommendation from the majority of the [most significant] proxy advisors."[179]

Further still, the (previously) non-binding nature of say-on-pay votes has not been found to reduce investors' oversight incentive. Rather, precatory say-on-pay, even if well below a majority vote, has seemed to exert a disciplining effect on the remuneration committees within the board of directors, given that shareholder resolutions adopted with relatively high against and withhold votes signal lack of trust with the directors and expose the board to adverse reputational effects.[180] Therefore, say-on-pay can also serve to support fruitful shareholder-director dialogue as a form of engagement, quite the same way as so-called withhold or vote-no campaigns have proven to do in the United States.[181] It remains to be seen whether, and if so how, the transition towards binding say-on-pay votes will change investors' attitude on investee companies' compensation practices.[182] When looking at binding say-on-pay

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[178] *See* Ferri & Maber, *supra* note 175, at 530 (finding that say-on-pay can have a disciplining effect in that it induces ex-ante changes in remuneration policies aimed at limiting votes: all in all) ("UK investors perceived say on pay to be a value enhancing monitoring mechanism and were successful in using say on pay votes to pressure firms to remove controversial pay practices and increase the sensitivity of pay to poor performance").

[179] Georgeson, Georgeson's 2019 Proxy Season Review 97 (2019), https://www.georgeson.com/it/2019-season-review.

[180] *See* Ferrarini et al., *supra* note 177, at 17-18.

[181] *See* Ferri & Maber, *supra* note 175, at 531.

[182] Based on Article 7(2)(b) of Legislative Decree no 49/2019 (transposing SRD II into national law), the updated version of Article 123-ter CLF which includes binding say-on-pay on remuneration policies applies only starting from the 2020 proxy season. *See* D.L. 49/2019 (It.).

that was already in place at publicly listed banks and insurance companies, it should be noticed that comparatively lower levels of dissent have been regarded as motivating more responsible shareholder voting.[183]

B. Slate Voting

Beyond say-on-pay, director elections have become the main target of institutional investors, both domestic and foreign, at Italian listed companies.[184] This is chiefly a consequence of the enactment of slate voting, on the one hand, and the record date regime for shareholder voting on the other. Crucially, director elections at publicly listed companies feature a substantive convergence of foreign and domestic institutional investor votes on the slates submitted by Italian asset managers through Assogestioni, with institutional investors' votes often coming quite close to the votes cast by the major stakeholders in the company.

Even though slate voting was introduced earlier,[185] until 2010, institutional investors were only able to appoint corporate board members within a small group of listed companies.[186] As a matter of fact, Italian institutions concentrated the submission of slates of director nominees on a limited number of major issuers featuring better relative performance and better corporate governance, as well

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[183] *See* Belcredi et al., *supra* note **Error! Bookmark not defined.**, at 32.

[184] *See* Massimo Belcredi & Guido Ferrarini, *The European Corporate Governance Framework: Issues and Perspectives* 47 (ECGI Law Working Paper no. 214/2013, 2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2264990. Such finding is in line with the wider European context. *See* Mallin, *supra* note **Error! Bookmark not defined.**, at 192 (reporting that resolutions in most EU countries show "a clear emphasis being placed on board composition and the appointment of directors to the board").

[185] *See supra* Part III.C.3.

[186] Belcredi & Enriques, *supra* note 63, at 19–20.

as on longer-term investee companies.[187] However, since 2010, following the introduction of the record date system,[188] participation by institutional investors in voting at board elections has increased significantly and, over the years, a growing number of directors and statutory auditors have been elected by institutional investors.[189] Moreover, several bylaws, especially at larger corporations, have actually made room for two or three minority-appointed directors, and the average number of directors appointed by minorities is approximately two.[190] Currently, 100 out of 232 listed companies' boards include at least one minority-appointed director.[191] Minority-appointed directors represent, on average, 17% of the members of the boards where they are present.[192] At the same time, the boards of statutory auditors at 112 listed companies include at least one minority-appointed member.[193]

As mentioned above, owing to the enabling role played by Assogestioni in the process of selecting director nominees, a significant proportion of minority-elected directors have been picked from the lists coordinated by the Association. In 2019, sixty-four slates of director nominees were submitted to the vote by minority institutions, appointing seventy-six candidates in forty-

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[187] Such finding further suggested that institutions might have wished to concentrate engagement efforts on a small number of major firms also due to "political" and lobbying intents. *See* Belcredi & Enriques, *supra* note 63, at 20 and 30; Belcredi et al., *supra* note 144, at 414.

[188] *See supra* Part III.C.5.

[189] Belcredi & Enriques, *supra* note 63, at 21.

[190] Piergaetano Marchetti et al., *Dissenting Directors*, 18 EUR. BUS. ORG. L. REV. 659 (2017).

[191] Assonime, *La Corporate Governance in Italia: Autodisciplina, Remunerazioni e Comply-or-Explain*' [Corporate governance in Italy: Soft law, remunerations and comply-or-explain] 37 (2019), http://www.assonime.it/attivita-editoriale/studi/Pagine/note-e-studi-1-2019.aspx; CONSOB REPORT 2019, *supra* note 17, at 17.

[192] CONSOB REPORT 2019, *supra* note 17, at 17.

[193] *Id.*

nine listed companies.[194] It should be noticed that, although the shareholdings of the Italian institutional investors that formally submit the lists do not exceed, on average, 3.5% of the votes cast, the lists promoted by Assogestioni are able to catalyze the votes of a sizeable number of Italian and foreign fellow institutional investors, so that minority slates frequently end up receiving more than 30%—and sometimes around 50%—of the votes cast.[195] Given the decreasing weight of Italian mutual funds in the Italian stock market, the support of foreign institutional investors has proven to be essential in this respect.

Altogether, collective engagement promoted by Assogestioni with a view to board elections can be seen as a fairly effective tool for monitoring investee companies; minority-appointed independent directors within the board can favor some form of oversight within the board itself, given that such directors are primarily expected to protect minority interests, also by enhancing board disclosure.[196]

V. HEDGE FUND-DRIVEN ACTIVISM AND ENGAGEMENT

While the Italian corporate governance framework is mainly meant to empower non-activist institutional investors, one noticeable factor that has been shaping institutional investor ownership in Italy over the very last few years is the growing relevance of activist hedge fund intervention. Interestingly, after the United States, activism among large economies is "relatively most frequent in Italy, the Netherlands, Germany and Switzerland (in declining order), none of which are typically labeled as having

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[194] ASSOGESTIONI, STAGIONE ASSEMBLEARE 2019 [2019 Proxy Season Review] 10 (2019), http://www.assogestioni.it/index.cfm/3,161,12799/stagione-assembleare-2019.pdf.

[195] *Id.*

[196] *See, e.g.*, Moscariello et al., *supra* note 127, at 165 (finding a positive relationship between the proportion of independent minority directors and firm value); Piergaetano Marchetti et al., *supra* note 190, at 659 (finding that minority-appointed directors are more likely to dissent than directors appointed with a majority of the votes).

active markets for corporate control."[197] Further still, in relative terms, activism is "less frequent [in the United States and the UK] after adjusting for the number of listed companies than in Italy or Germany."[198] In Italy, indeed, hedge funds have "taken position in a great variety of listed companies regardless of the presence of controlling shareholders."[199] Such findings may be surprising at first sight, given that controlled companies predominate within the Italian corporate landscape. The truth is, however, that minority-empowering shareholder rights, particularly the right to appoint directors on the board, coupled with mainstream institutional voting support to activist proposals,[200] can be the drivers of activist intervention at controlled companies which feature a significant proportion of institutional investors in the shareholder base, especially where de facto control is in place, as they indeed have proven to be in the Italian context. The presence of U.S. institutional investors in the shareholder base seems to provide further support

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[197] Marco Becht et al., *Returns to Hedge Fund Activism: An International Study*, 30 REV. FIN. STUD. 2933, 2940 (2017).

[198] *Id.*

[199] Erede, supra note 161, at 354 (further noting that "differences in the ownership structure of the target companies also seem to have had no impact on activists' investment choices": Ibid 358). See also Belcredi & Enriques, supra note 63, at 20–22, 31 (noticing the rise, in recent years, of hedge funds successfully resorting to legal tools and remedies made available by reforms in the last two decades to aggressively target listed companies engaging in controversial transactions); Elisabetta Bellini, Hedge Fund Activism in Italy, 9 J. Corp. L. Stud. 201, 231, 233 (2009).

[200] See, e.g., J.P. Morgan, The activist revolution. Understanding and navigating a new world of heightened investor scrutiny 8 (2015), https://www.jpmorgan.com/jpmpdf/1320693986586.pdf, (emphasizing that "[n]o other factor has had as significant an impact on the success of shareholder activism as the changing attitude and behavior of traditional long-only investors: public pension funds, institutional investors and money managers.").

for activism. In effect, U.S. institutional investors exert significant influence on the level of activism in non-U.S. countries.[201]

Against this backdrop, while the increase in the presence of activist investors on the Italian capital markets can further incentivize mainstream institutions' active conduct, it may also, to some extent, influence the role played by non-activist institutional investors in Italy. Due to their different incentive structures, activist investors are more willing than mainstream institutions to engage in costly, and often confrontational, initiatives aimed at bringing about a change in the target company's policies or management. Hence, even non-activist institutional investors might be willing to support activist intervention in spite of the collaborative and constructivist stance for shareholder engagement adopted by Italian legislature and soft law principles. Put differently, the rise in activists' interventions could lead to the diffusion of an engagement approach quite different from that which EU and Italian law aims to stimulate.

One illustrative example concerns the 2018 battle for control of Telecom Italia between Vivendi and Elliott Advisors, showing that this form of "cooperation" between activist and mainstream institutional investors can enhance the relevance of activist-driven initiatives and lead to a more confrontational model of engagement in Italy. In the Telecom Italia case, indeed, the majority of mainstream institutional investors decided to side with Elliott Advisors and the cooperation between activist and non-activist institutional investors helped Elliott Advisors to appoint ten out of fifteen members on the board at Telecom Italia.[202] In effect,

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201 See Becht et al., supra note 197, at 2968–69 (noticing that "[t]he increase and spread of U.S. foreign institutional holdings has significantly contributed to hedge fund activism becoming a global phenomenon").

202 Whether the diffusion of such initiatives can be beneficial for the Italian capital markets is difficult to predict, as the potential effects of increased shareholder activism also depend, to a certain extent, on the ownership structure of target companies. See Gaia Balp, Activist Shareholders at De Facto Controlled Companies, in 13 Brooklyn J. Corp. Fin. & Com. L. 348 (2019) (noting that, as far as de facto controlled companies are concerned, "an activist's power to exert substantial

enhanced institutional investor participation at shareholders meetings renders voting outcomes more difficult to predict, even in contexts of concentrated ownership. This in turn can increase the potential for successful activist intervention. At de facto controlled companies, where corporate control is contestable, this might especially be the case where shareholder slates are submitted to be voted on at director elections, proxy fights occur, or the general meeting is to vote on material related party transactions.

VI. CONCLUSION

The case of Italy quite clearly shows that institutional investors can play a major role within contexts of concentrated corporate ownership, and that legislature can greatly contribute to favoring institutions' active ownership by creating a friendly regulatory environment. Indeed, despite high levels of ownership concentration of publicly listed companies, institutional investors have grown into prominent players on the Italian corporate governance scene. Different factors, both economic and regulatory, contributed to bringing about such outcome. Within a context dominated by the principal-principal agency problem, regulatory action taken over time has been one strongly shaped around empowering minority shareholders, whether by enhancing minority shareholder rights or supporting minorities' actual ability and willingness to exercise shareholder rights. Moreover, intermediaries' regulation has focused on institutional investors and asset managers as owners and has enhanced their oversight role, especially as to voting obligations. Coupled with support provided by self-regulation, particularly the Italian Stewardship Principles, these factors have driven institutional investors to become more active owners and more engaged stewards at Italian listed companies.

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influence over the company's management premised on a small equity stake, coupled with the presence of a much larger, but (theoretically) disempowered, blockholder is likely to cause instability at the corporate-governance level").

Particularly, say-on-pay votes, enhanced shareholder oversight of related party transactions, and slate voting for director elections, alongside the pivotal effect of the record date regime on boosting institutions' participation in the shareholders meeting, have proven most successful at driving increased institutional investor engagement with Italian listed companies. Moreover, say-on-pay votes, related party transaction oversight, and slate voting have proven to mutually combine in the Italian practice of shareholder engagement. First, say-on-pay is a tool complimentary for minority representation on the board of directors to foster institutional investor stewardship. In fact, the presence of minority-elected directors within the board's remuneration committee has been found to positively correlate with increased institutional investor participation in the shareholder meetings, and higher levels of transparency concerning the remuneration policies were quite often achieved as a response to relevant against and withhold say-on-pay votes. Second, minority board representation ensured by slate voting can improve self-dealing oversight since ex ante independent scrutiny of related party transactions is required. Additionally, at Italian listed companies, the presence of minority elected directors has actually had a positive impact on the adequacy of internal procedures for addressing related-party transactions.

On the other hand, Italian experience with director elections through slate voting suggests that coordinated engagements by institutional investors can have a positive impact on investee companies. The Italian Stewardship Principles emphasize the relevance of collective engagements, and Assogestioni, the Italian non-profit asset manager association, greatly contributed to developing a peculiar pathway for collective engagements which leverages slate voting to catalyze investors' stewardship efforts. By redistributing engagement-associated costs among the affiliated investors, Assogestioni promotes shareholder collaboration within a formalized framework for the selection of candidates and the submission of short lists of director nominees as a tool for shareholder monitoring. As a matter of fact, slate voting, subsidized by the proactive role played by Assogestioni as an enabling entity and combined with the incentivizing effect of the record date system, has proven to be a fundamental lever by which to support mainstream institutional investors' collective action as a viable and cost-effective pathway for engaging and monitoring investee

companies in Italy. An ever-growing number of directors and statutory auditors are actually elected by institutional investors.