

Institutional Investor Stewardship in Italian Corporate Governance

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Abstract

In spite of the highly concentrated ownership of listed companies, Italy is one of the countries in which institutional investors are on the rise and are playing an increasingly active role in the governance of their investee companies. Against this background, the goal of this paper is to provide a comprehensive analysis of institutional investors' stewardship in Italy, by illustrating some distinctive features, which make the Italian regulatory system unique in promoting active institutional ownership. In particular, a distinctive characteristic of the Italian corporate governance system is the so-called slate (or list) voting system, which enables minority shareholders to appoint at least one board member. In addition, the implementation of the Shareholder Rights Directive and, specifically, the record date system for participating in and voting at general meetings has contributed significantly in turning institutional investors into major players in the corporate governance arena. Moreover, this favorable regulatory context is coupled with the particularly effective role played by the Investment Management Association representing most Italian and foreign asset managers operating in Italy (Assogestioni) that publishes the Italian Stewardship Principles and promotes collective engagement initiatives aimed at facilitating the appointment of members of the management and the statutory auditors' boards through the slate voting system.

Keywords: institutional investors, stewardship codes, shareholder engagement, slate voting system, record date

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Institutional Investor Stewardship in Italian Corporate Governance

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(Dionysia Katelouzou & Dan W. Puchniak eds, Cambridge University Press,
Forthcoming)*

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I. INTRODUCTION

Despite the limited size of the national equity market,¹ Italy is one of the countries in which institutional investors, both national and foreign, are on the rise and are playing an increasingly active role in the governance of their investee companies. There is no doubt that this increasing role of institutional investors has been favoured to a large extent by the influence of the global stewardship movement. Indeed, Italy is one of the continuously increasing number of jurisdictions where a stewardship code or a similar initiative exists.² In 2013, Assogestioni³ (the non-profit Investment Management Association representing most Italian and foreign asset managers operating in Italy) published the first version of the Italian Stewardship Principles.

Nevertheless, leaving aside the significant influence of the international and European stewardship movement, the Italian regulatory system has some distinctive features, which make it unique and help to promote active institutional ownership. In particular, as is widely recognised,⁴ one distinct characteristic of the Italian corporate governance system is the so-called slate (or list) voting system, which enables minority shareholders to appoint at least one board member. In addition, the implementation of the Shareholder Rights Directive⁵ and, specifically, the record date system for participating in and voting at general meetings has contributed significantly in turning institutional investors into major players in the corporate governance arena. Moreover, this favourable regulatory context is coupled with a particularly effective form of collective engagement by institutional investors promoted by Assogestioni, which seeks to facilitate the appointment of a minority of the members of the management and the statutory auditors' boards through the slate voting system.

Against this backdrop, and with a view to provide a comprehensive analysis of institutional investors' stewardship in Italy, this Chapter will proceed as follows. Part II will illustrate the rise of institutional investors in Italy by analysing available evidence on ownership patterns of listed companies and statistics concerning institutional investors' voting behaviour. Part III will provide an overview of the relevant statutory provisions and the Italian Corporate Governance Code recommendations that are relevant for institutional investors' stewardship. Part IV will provide an in-depth analysis of the Italian Stewardship Principles. Part V will illustrate the specific characteristics of the Italian

¹ See e.g. OECD, 'OECD Corporate Governance Factbook 2019' (2019) 20-24 <<http://www.oecd.org/corporate/corporate-governance-factbook.htm>> accessed 21 December 2019.

² For an overview of the countries where a stewardship code exists see Katelouzou and Puchniak, introductory chapter; Katelouzou and Siems, *The Global Diffusion of Stewardship Codes* in this book; Bhakti Mirchandani, 'Model Stewardship Code for Long-Term Behavior' (*Harvard Law School Forum on Corporate Governance*, 9 July 2019) <<https://corpgov.law.harvard.edu/2019/07/09/model-stewardship-code-for-long-term-behavior>> accessed 21 December 2019.

³ For a brief description of the history and activities of Assogestioni see <https://www.icgn.org/partners/assogestioni>.

⁴ See e.g. Giovanni Strampelli, 'How to Enhance Directors' Independence at Controlled Companies' (2018) 44 *J CORP L* 103, 133.

⁵ European Parliament and Council Directive (EC) 2007/36 on the exercise of certain rights of shareholders in listed companies [2007] OJ L 184 [hereinafter SRD I].

Stewardship regime, in particular, the slate voting system and the institutional investor-driven appointment of independent directors. Part VI will discuss some concerns that have been raised due to the absence of effective enforcement of the Italian Stewardship Principles and analyse some solutions that could help to enhance its role. Part VII will then conclude by considering future developments.

II. INSTITUTIONAL OWNERSHIP IN ITALY

International corporate governance surveys usually label Italy as a concentrated-ownership country, where most publicly listed companies are controlled by a single shareholder or a group made up of a limited number of shareholders. For example, statistics recently provided by the OECD confirm this view by showing that Italian companies display the most concentrated ownership when compared to other EU member states including France, Germany and Spain, with the largest single, largest three and largest five shareholders holding an average of 38%, 50%, and 54% of the share capital respectively.⁶

Accordingly, the Italian Financial Markets Supervisory Authority (Consob) found that, at the end of 2018, 203 out of 231 companies listed on the Italian Stock Exchange (representing 86% of the total number of companies) were controlled, in about 77% of the cases, by a single shareholder holding either more than half of the capital (123 companies) or a lower stake (57 companies).⁷ Consob also reported that:

[t]he 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).⁸

Against this background, the number of non-controlled, widely held companies is still limited, although it grew from 11 in 2010 to 13 in 2018.⁹

Despite the predominance of controlled companies, institutional investors are still relevant shareholders in a significant number of Italian listed companies. They hold relevant stakes, averaging 7.6%, in 62 listed companies, accounting for 26.8% of the market.¹⁰ Interestingly, while Italian institutional investors are relevant shareholders¹¹ in only 13 companies, foreign institutional investors hold relevant stakes in 51 companies.¹²

⁶ OECD, 'Capital Market Review of Italy 2018: Mapping Report' (OECD Capital Market Series, 2018) 55 <www.oecd.org/corporate/OECD-Capital-Market-Review-Italy-Mapping-Report-2018.pdf> accessed 21 December 2019.

⁷ Consob, 'Report on corporate governance of Italian listed companies' (2019) 13 <<http://www.consob.it/web/consob-and-its-activities/report-on-corporate-governance>> accessed 21 December 2019.

⁸ *ibid* 16.

⁹ *ibid*.

¹⁰ *ibid* 18.

¹¹ 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%.

¹² Consob (n 7) 18.

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 in exercising their voting rights. In 2018, the annual general meeting season registered record highs for both the share capital represented at meetings (72 % on average) and participation by institutional investors (around 21% of the company's capital).¹³ From 2012 to 2018, attendance rates for institutional investors grew significantly in terms of both the investors attending as well as the percentage of share capital represented.¹⁴ Significantly, foreign institutional investors attended meetings for all 100 of the largest Italian companies since 2015 and, in 2018, cast on average around 29% of the votes.¹⁵ Namely, for the 2018 proxy season, institutional investors collectively held a majority of the votes cast at the general meetings of one third of the 35 most capitalized Italian listed companies.¹⁶

As far as voting by institutional investors is concerned, available evidence regarding votes on remuneration policies shows that institutional investors mostly tend to side with directors, although dissent is increasing significantly and is far higher than other shareholders.¹⁷ Abstentions and votes against policies by institutional investors have increased over the last year to about 8% of the share capital and 41% of the total number of the shares held by them.¹⁸ Interestingly, since 2017, dissent has grown markedly in Italian blue chips, reversing the decreasing trend for Ftse Mib¹⁹ companies from 2012 to 2016.

That said, it must be pointed out that this evidence does not tell the full story. First, it must be considered that stewardship involves not only exercising votes at general meetings but also engaging with investee companies, through monitoring and interacting with these companies, which usually takes place behind the scenes. Indeed, the still limited empirical analyses show that private discussions with directors have become one of the most popular forms of shareholder engagement by institutional investors.²⁰ However, as they are generally conducted behind closed doors, the actual relevance of such engagement between investors and investee companies cannot be reliably estimated.²¹

¹³ *ibid* 39.

¹⁴ *ibid* 40.

¹⁵ *ibid* 40.

¹⁶ 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* (Milano, 4 August 2019) 8.

¹⁷ Consob (n 7) 39.

¹⁸ *Ibid* 39, noting that institutional investors' dissent appears to be lower in widely held companies and when institutional investors hold a major stake.

¹⁹ The FTSE MIB is the primary benchmark Index for the Italian equity markets including the 40 most capitalized companies and capturing approximately 80% of the domestic market capitalization.

²⁰ Elroy Dimson and others, 'Active Ownership' (2015) 28 *REV FIN STUD* 3226; Joseph A McCahery and others, 'Behind the Scenes: The Corporate Governance Preferences of Institutional Investors' (2016) 71 *J FIN* 2911-12; David Solomon and Eugene Soltes, 'What Are We Meeting for? The Consequences of Private Meetings with Investors' (2015) 58 *J L. & ECON* 326-28.

²¹ See Lucian A Bebchuk and Michael S Weisbach, 'The State of Corporate Governance Research' (2010) 23 *REV FIN STUD* 942. In Italy, Assogestioni provides some data on engagement activities of institutional investors. However, the relevance of such statistics is rather limited, since they only

In addition, in order to better understand the actual influence exerted by institutional investors over Italian listed companies, it must also be considered that, over the last few years, the population of institutional investors has been undergoing significant change. In particular, the role of activist investors and the number of interventions by them are growing. Although comprehensive data on shareholder activism in Italy is lacking,²² a recent study by Becht and others found, for the period of 2000 to 2010, that, '[w]hile the United States and the United Kingdom have the largest number of engagements, in relative terms, activism is less frequent after adjusting for the number of listed companies than in Italy or Germany'.²³ Impressively, according to this study, Italy is the country where activism is most frequent in relative terms, after the United States.²⁴

III. THE ITALIAN REGULATORY FRAMEWORK FOR INSTITUTIONAL INVESTOR STEWARDSHIP

The conventional wisdom that Italy is a country where minority shareholders and, in particular, institutional investors are inadequately protected is outdated in many respects. In fact, the current legal environment seems to be – at least in terms of the 'law in the books' – minority shareholder-friendly and favourable to institutional investor stewardship. As regards to the exercise of voting rights, a number of rules seek to promote active conduct by institutional investors.

Article 35-decies 1(e) of the Consolidated Law on Finance (*Testo Unico della Finanza*) 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'.²⁵ Despite the wording used within the legislation ('must provide'), the prevailing view is that Article 35-decies does not establish an obligation for asset management companies to

consider a restricted number of Italian institutional investors. See Assogestioni, 'Monitoraggio sullo stato di applicazione dei Principi Italiani di Stewardship per l'esercizio dei diritti amministrativi e di voto nelle Società quotate' [Monitoring the application of the Italian Stewardship Principles for the exercise of administrative and voting rights in listed companies] (2017) 15-16 <<http://www.assogestioni.it/index.cfm/1,815,0,49,html/principi-italiani-di-stewardship>> accessed 21 December 2019.

²² For an overview of the available anecdotal evidence see Simone Alvaro and others 'Institutional Investors, Corporate Governance and Stewardship Codes: Problems and Perspectives' (2019) CONSOB Legal Research Papers No. 19, 28 <<https://ssrn.com/abstract=3393780>> accessed 21 December 2019.

²³ Marco Becht and others, 'Returns to Hedge Fund Activism: An International Study, (2017) 30 REV FIN STUD 2933, 2940. See also Massimo Belcredi and Luca Enriques, 'Institutional Investor Activism in a Context of Concentrated Ownership and High Private Benefits of Control: the Case of Italy' (2014) European Corporate Governance Institute (ECGI), Law Working Paper No. 225/2013 13-15 <<https://papers.ssrn.com/sol3/papers.cfm?abstractid=2325421>> accessed 21 December 2019.

²⁴ Marco Becht and al (n 23) 2941.

²⁵ *Testo Unico della Finanza* [Consolidated Law on Finance], Legislative Decree 24 February 1998, n. 58, updated on 10 May 2019, Legislative Decree no. 49, art 35-decies 1(e).

exercise their voting rights under all circumstances.²⁶ 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’²⁷, asset management companies are expected to vote only when it is in the interest of the ultimate beneficiaries of the funds managed.²⁸ In addition, Article 124-quinquies – implementing Article 3g SRD II²⁹ – requires institutional investors and asset managers to adopt an engagement policy that, inter alia, illustrates the ways in which they exercise voting rights and other rights associated with shares.³⁰ Similarly, institutional investors and asset managers must publicly disclose each year how their engagement policy has been implemented and provide a general description of voting behaviour; an explanation of the most significant votes and the use of the services of proxy advisors.

In recognition of the importance of institutional investors’ voting and in keeping with the goal of incentivising their active conduct, minority shareholders holding a minimum shareholding threshold, i.e. usually institutional investors,³¹ are also vested with additional powers. First, as far as the procedural aspects of the general meeting are concerned, shareholders holding at least 5% of the share capital either individually or collectively have the right to call a general meeting.³² In addition, shareholders holding at least 2.5% of the share capital, either individually or collectively, may ask for additional matters to be placed on the agenda of the general meeting and table new proposed resolutions for a vote.³³ Moreover, Article 127-ter grants all voting shareholders the right to submit questions in advance of the shareholders’ meeting.³⁴ In addition, in order to promote participation by minority shareholders, the proxy voting and proxy solicitation systems were deregulated and simplified in 2010.³⁵

Secondly, the list of the issues falling within the remit of a general meeting has broadened over time.³⁶ For example, defensive tactics against hostile takeovers (unless the company has opted out of the so-called board neutrality rule) need to be authorised by a shareholders’ meeting.³⁷ Moreover, after introducing a non-binding ‘say on pay’ vote

²⁶ Renzo Costi, ‘Risparmio gestito e governo societario’ [Asset management and corporate governance] (1988) *Giurisprudenza commerciale* 322; Renzo Costi & Luca Enriques, ‘Il mercato mobiliare’ [Financial market] in Gastone Cottino (ed) *Trattato di diritto commerciale* vol. VIII (Cedam 2004) 420.

²⁷ Consolidated Law on Finance (n 25), art 35-decies 1(a)

²⁸ Mario Stella Richter jr, ‘L’esercizio del voto con gli strumenti finanziari gestiti’ [Asset managers’ voting] in Enrico Gabrielli and Raffaele Lener (eds) *I contratti del mercato finanziario* (2nd edn, Utet 2010) 800.

²⁹ On the SRD II see Dionysia Katelouzou and Konstantinos Sergakis, ‘Enforcement of Shareholder Stewardship’, in this volume.

³⁰ Consolidated Law on Finance (n 25), art 124-quinquies.

³¹ Stella Richter (n 28).

³² See *Codice Civile* [Civil Code] RD 16 March 1942, no. 262, art 2367.

³³ Consolidated Law on Finance (n 25), art 126-bis. Both the right to call a special meeting and that 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.

³⁴ Consolidated Law on Finance (n 25), art 127-ter.

³⁵ See Consolidated Law on Finance (n 25), art 136-144.

³⁶ Belcredi and Enriques (n 23) 7-8.

³⁷ See Consolidated Law on Finance (n 25), art 104.

on the company's compensation policy in 2012, the current version of Article 123-ter of the Consolidated Law on Finance³⁸ makes the 'say on pay' vote binding.³⁹ Similarly, the requirement of a supermajority of two thirds of the share capital represented at the meeting in order to approve any amendments to the articles of association is clearly aimed at incentivising attendance by minority shareholders.

Thirdly, as will be illustrated in depth below, the most peculiar feature of the Italian corporate governance framework is the power granted to minority shareholders to appoint at least one member of the management and supervisory boards respectively. In particular, the Consolidated Law on Finance introduced the slate voting system for elections to the boards of statutory auditors in all listed firms in 1998.⁴⁰ In the wake of the Parmalat financial scandal, slate voting was then extended to elections of management board members.⁴¹

However, none of these provisions have proven to be decisive in actually stimulating participation by institutional investors. While they do empower minority shareholders, the provisions illustrated above are unable to effectively incentivize attendance and voting by minority shareholders by reducing the attendant costs. In fact, the blocking requirement imposed on their shares for up to two days prior to the meeting amounted to a significant impediment on institutional investor attendance at general meetings, as it seriously restricted the ability of investors to freely trade their portfolio of shares for a significant number of days.⁴²

Thus, as the evidence available clearly demonstrates,⁴³ the introduction of the record date system⁴⁴ in 2010 (upon the implementation of SRD I) has proven to be key in promoting institutional investor participation in the general meetings of their investee companies. Unsurprisingly, the introduction of the record date system has greatly reduced transaction costs associated with participation in the general meeting and has proven to be important, especially for foreign institutional investors.⁴⁵

While various actions have been taken in order to stimulate institutional investor participation and voting at shareholders' meetings, other forms of engagement that

³⁸ As amended by Legislative Decree no. 49 of 10 May 2019 implementing Article 9a SRD II.

³⁹ Consolidated Law on Finance (n 25), art 123-ter.

⁴⁰ Massimo Belcredi and others, 'Board Elections and Shareholder Activism: The Italian Experiment' in Massimo Belcredi and Guido Ferrarini (eds) *Boards and Shareholders in European Listed Companies: Facts, Context and Post-Crisis Reforms* (OUP 2013) 367.

⁴¹ *ibid.*

⁴² B. Espen Eckbo, and Giulia Paone, 'Reforming Share-Voting Systems: The Case of Italy' (2011). Tuck School of Business Working Paper No. 2011-93, 7-8 <<https://ssrn.com/abstract=1822287>> accessed 21 December 2019.

⁴³ See Part II.

⁴⁴ According to the Consolidated Law on Finance (n 25), art 83-sexies, shareholders of Italian listed companies are allowed to attend shareholders' meetings by means of a notice of share ownership issued by their financial intermediary to the issuer, based on the intermediary's records at the close of business on the seventh trading day prior to the date of the meeting ("record date"). Therefore, shareholders may attend a meeting and exercise voting rights even if they transfer their shares after the record date.

⁴⁵ Belcredi and Enriques (n 23) 21.

usually take place outside the general meeting remain substantially unregulated, despite their increasing relevance within the practice of engagement.⁴⁶

Article 124-quinquies, which only requires that the engagement policy must be published annually by institutional investors, 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.⁴⁷

Similarly, while recognizing that the board ‘shall endeavour to pursue a continuous dialogue with the shareholders based on the understanding of their reciprocal roles’, the current version of the Italian Corporate Governance Code (unlike other codes) does not provide any specific guidance as to how such dialogue should be conducted.⁴⁸

Hence, against this background, the Italian Stewardship Principles fill an important gap within the Italian regulatory framework, as they provide detailed guidance on how investors should monitor investee companies and engage with them, and explicitly aim to promote discussion and cooperation between institutional investors and the listed companies in which they invest.⁴⁹

IV. THE ITALIAN STEWARDSHIP PRINCIPLES

The Italian Stewardship Principles, adopted by Assogestioni, were first published in 2013, and subsequently revised in 2015 and 2016.⁵⁰ They largely follow the model of the EFAMA Code for External Governance⁵¹ (currently known as the EFAMA Stewardship

⁴⁶ See Part II.

⁴⁷ Consolidated Law on Finance (n 25), art 124-quinquies.

⁴⁸ Luca Enriques, ‘The Role of Italian Companies’ Boards in the Age of Disruptive Innovation’ (*Oxford Business Law Blog*, 6 December 2016) <<https://www.law.ox.ac.uk/business-law-blog/blog/2016/12/role-italian-companies%E2%80%99-boards-age-disruptive-innovation>> accessed 21 December 2019. A slightly more detailed recommendation is provided by the new version of the Italian Corporate Governance Code adopted in December 2019 and applicable starting from the first financial year that begins after 31 December 2020. According to the new Code, ‘[t]he board of directors promotes dialogue with shareholders and other stakeholders which are relevant for the company, in the most appropriate way’ and to this end ‘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’. See Corporate Governance Committee, ‘Corporate Governance Code’ (2020) 5-6, <https://www.borsaitaliana.it/comitato-corporate-governance/codice/2020eng.en.pdf>.

⁴⁹ Assogestioni, ‘Italian Stewardship Principles’ (2016) 11 <<https://www.assogestioni.it/articolo/principi-italiani-di-stewardship>>.

⁵⁰ Italy is among the jurisdictions where stewardship codes are adopted by institutional investors themselves. See Jennifer G Hill, ‘Good Activist/Bad Activist: The Rise of International Stewardship Codes’ (2018) 41 SEATTLE UNIVERSITY LAW REVIEW 497, 506-513, advancing a taxonomy of the stewardship codes based on the type of bodies issuing stewardship principles (regulators or quasi-regulators on behalf of the government, private industry participants, investors).

⁵¹ EFAMA, ‘EFAMA Code for External Governance’ (2011) 6 <https://www.efama.org/Publications/Public/Corporate_Governance/11-

Code following the 2018 revision⁵²) adopted by the European Fund and Asset Management Association (of which Assogestioni is a member), which in turn shares many common features with the UK Stewardship Code 2012.⁵³ In line with the EFAMA model, the Italian Stewardship Code consists of six brief, general principles and related recommendations which provide detailed guidance on the principles' implementation.⁵⁴ According to Principle 1, asset managers should have a documented policy available to the public on whether, and if so how, they exercise their ownership responsibilities.⁵⁵ The policy should illustrate, inter alia, how investee companies are monitored and conflicts of interest are managed. Principle 2 generally recommends that asset managers should monitor their investee companies, while Principle 3 provides more detailed guidance on how asset managers should engage with the investee companies and, if necessary, escalate stewardship activities, also involving other institutional investors according to Principle 4.⁵⁶ Principle 5 recommends that asset managers should exercise their voting rights in a considered way.⁵⁷ Finally, Principle 6 deals with the report on their exercise of ownership rights and voting activities and highlights the importance of having a policy on external governance disclosure.⁵⁸

While their structure closely resembles that of the EFAMA Code 2011, the Italian Stewardship Principles include some recommendations that are strictly related to the national regulatory framework and, especially, to the slate voting system for the election of the management and supervisory boards as well as dialogues, usually taking place behind closed doors, between the board of directors and major shareholders. Therefore, the following analysis will mainly focus on Principles 3, 4 and 5 including the recommendations that are more closely related to the Italian regulatory framework.

A. VOTING

The Italian Stewardship Principles are no doubt based on the fundamental assumption that, in order to enhance the value of their portfolio and to create added value for their

4035%20EFAMA%20ECG_final_6%20April%202011%20v2.pdf > accessed 21 December 2019 [hereinafter EFAMA Code 2011].

⁵² EFAMA, 'EFAMA Stewardship Code' (2018), <https://www.efama.org/Publications/Public/Corporate_Governance/EFAMA%20Stewardship%20Code.pdf> accessed 21 December 2019 [hereinafter EFAMA Code 2018]. For an overview of the EFAMA Code 2018 see Dionysia Katelouzou and Konstantinos Sergakis, 'When Harmonisation is not Enough: Shareholder Stewardship in the European Union',

⁵³ On the UK Stewardship Code see P.Davies, *The UK Stewardship Code 2010-2020. From Saving the Company to Saving the Planet?*; Dionysia Katelouzou and Eva Micheler, 'TITLE' in this book.

⁵⁴ For an overview of the text similarities between the EFAMA Code and the Italian stewardship principles, see Dionysia Katelouzou and Mathias Siems, *The Global Diffusion of Stewardship Codes* in this book.

⁵⁵ Assogestioni (n 49), 15.

⁵⁶ *ibid* 15-18.

⁵⁷ *ibid* 18.

⁵⁸ *ibid* 18-19.

clients, institutional investors should monitor investee companies by exercising voting rights and engaging with them.⁵⁹

As regards to the exercise of voting rights, institutional investors are required to vote in a considered manner, by defining ‘an effective and adequate strategy for exercising the participation and voting rights’.⁶⁰ In order to ensure that, and to keep with Article 35-decies 1(e) of the Consolidated Law on Finance,⁶¹ voting rights are exercised by institutional investors solely in the interest of their clients. The voting strategy should establish procedures and measures for ensuring that the exercise of voting rights complies with the objectives and investment policies of each fund managed, and for preventing or adequately managing potential conflicts of interest resulting from the exercise of voting rights.⁶²

Where institutional investors decide to exercise voting rights in an investee company, Principle 5 recommends that they should, if possible, vote in a uniform manner for all shares held. However, this statement is not entirely convincing as it is inconsistent with the Italian Stewardship Principles’ purpose of ‘prevent[ing] or manag[ing] any conflicts of interest deriving from the exercise of voting rights’.⁶³ While it may be the case that leading institutional investors usually adopt standardized voting policies, which they tend to apply quite strictly to all portfolio companies listed in the same market or located within a given geographic area,⁶⁴ adherence to a uniform voting policy irrespective of individual fund objectives and characteristics may be detrimental for some beneficiaries.⁶⁵

Interestingly, Vanguard – the world’s second largest asset manager – recently announced that it will no longer adopt centralised proxy voting across all of its funds; instead, its externally managed funds – including almost all active funds managed by Vanguard – will adopt their own proxy voting policies.⁶⁶ Although this move may have been prompted by different regulatory concerns,⁶⁷ there is no doubt that it also aims to limit any potential conflicts of interest among different fund categories that might be brought about by the application of uniform voting policies across the whole portfolio.⁶⁸ In addition, it is also worth mentioning that neither the EFAMA Code 2011 – which

⁵⁹ *ibid* 12, recognises that the interaction between institutional investors and investee companies aims to ensure that governance and investment process are closely linked.

⁶⁰ Principle 5 of the Italian Stewardship Principles, see Assogestioni (n 49), 15.

⁶¹ Consolidated Law on Finance (n 25), art 35-decies 1(e).

⁶² Principle 5 of the Italian Stewardship Principles, see Assogestioni (n 49)18.

⁶³ *ibid*.

⁶⁴ For example, BlackRock adopts global engagement principles – defining the general framework and purposes of engagement – and regional proxy guidelines that apply to specific markets (e.g. the U.S, the UK, other European countries).

⁶⁵ Sean J Griffith and Dorothy S Lund, ‘Conflicted Mutual Fund Voting in Corporate Law’ (2019) 99 BOSTON UNIV L REV (2019) 1151, 1182-1186; Ann M Lipton, ‘Family Loyalty: Mutual Fund Voting and Fiduciary Obligation’ (2017) 19 TRANSACTIONS: TENNESSEE J BUS L 175.

⁶⁶ Ann M Lipton, ‘Vanguard’s Votes’ (*Business Law Prof Blog*, 11 May 2019) <https://lawprofessors.typepad.com/business_law/2019/05/vanguards-votes.html> accessed 21 December 2019.

⁶⁷ *ibid*.

⁶⁸ *ibid*.

largely inspired the Italian Stewardship Principles – nor the current EFAMA Code 2018 recommends that institutional investors vote in a uniform manner for all the shares held. Instead, the EFAMA Code 2018 only states that applicants should seek to vote for all shares held.⁶⁹

B. ENGAGEMENT

Although the exercise of voting rights is recognised as an important element of investor stewardship, the Italian Stewardship Principles mainly focus on engagement, which is the interaction with investee companies and their boards taking place on a regular basis, usually in private meetings held separately from the shareholders' meeting. In fact, in defining the purposes of the Italian Stewardship Principles, particular emphasis is placed on the interaction between institutional investors and investee companies and the quality of that communication.⁷⁰ Moreover, according to Principle 5, before voting against management proposed resolutions that could have a significant effect on the company, institutional investors are advised to consider engaging with the investee company. Therefore, in line with the aim of promoting cooperation between investors and listed companies, casting a vote against the management is regarded as a last resort, to be used only when interaction with investee companies, and in particular with board members, does not lead to the expected result.

Thus, Principle 3, which states that institutional investors 'should establish clear guidelines on when and how they will intervene in investee companies to protect and enhance value',⁷¹ lies at the heart of the engagement framework designed by the Italian Stewardship Principles. This principle in fact sets the tone for investors' conduct insofar as it recommends that institutional investors establish clear guidelines on when and how they will escalate their stewardship activities.⁷²

In particular, according to Principle 3, institutional investors should determine whether and how to communicate any issue or problem arising in relation to their monitoring of the investee company.⁷³ Institutional investors are expected to be keen to engage with investee companies with regards to corporate governance or the approach to environmental and social issues, or when, for example, they have significant concerns regarding strategy and performance.

In keeping with the pro-cooperation purpose underlying the Italian Stewardship Principles,⁷⁴ according to Principle 3 engagement should start with collaborative contact

⁶⁹ EFAMA Code 2018 (n 52) 8.

⁷⁰ Assogestioni (n 49) 12.

⁷¹ *ibid* 18.

⁷² See Hill (n 50) 520-521, noting that some stewardship codes (for example, the UK Stewardship Code) envisage a more confrontational model of stewardship than that accepted by other codes (for example, the Japanese Code).

⁷³ Assogestioni (n 49) 16.

⁷⁴ *ibid* 12.

with the investee companies.⁷⁵ Recommendations on the escalation of engagement make it clear that private meetings between institutional investors and investee companies, and in particular their board members, are the key element within the engagement process. It is only if the board fails to react constructively that institutional investors must decide whether and how to escalate their action, considering too the possibility of involving other institutional investors pursuant to Principle 4.⁷⁶ Initiatives aimed at increasing pressure on the company include, inter alia, releasing a public declaration before or during the annual or any extraordinary shareholders' meeting, submitting resolutions at shareholders' meetings, calling a shareholders' meeting or asking for additional matters to be placed on the agenda of a shareholders' meeting that has already been called in order to propose specific initiatives to the shareholders (e.g. making changes to the companies' boards).

In line with international best practice,⁷⁷ Principle 3 recognises that not only the chairperson of the board of directors but also other non-executive directors may be involved in private meetings with institutional investors.⁷⁸ Also depending on the allocation of functions within the board and the topics under discussion, the executive directors, the lead independent director, the chairperson of the board of statutory auditors, the chairperson of an internal committee or other independent directors, including minority-appointed board members, may attend meetings with institutional investors.⁷⁹

V. THE CHARACTERISTIC FEATURE OF THE ITALIAN STEWARDSHIP REGIME: THE SLATE VOTING SYSTEM AND THE INSTITUTIONAL INVESTOR-DRIVEN ELECTION OF MINORITY-APPOINTED DIRECTORS

As mentioned above,⁸⁰ the most distinctive characteristic of the Italian corporate governance regulatory framework is the so-called slate system for the election of members of the management and statutory auditor boards. Under this system, minority shareholders can appoint at least one director and one member of the supervisory board. Article 147-ter of the Consolidated Law on Finance states that shareholders holding a minimum threshold of shares – set by the Consob and currently varying between 0.5% and 4.5%⁸¹ – can present lists of candidates for election to the management board and the

⁷⁵ *ibid* 16.

⁷⁶ *ibid* 17, Principle 4 states that 'cooperation with other investors may be the most effective method of engagement. It may be appropriate to carry out collective engagement, for example in the case of significant corporate events or issues of public interest (such as serious economic or sectoral crises)'.

⁷⁷ Giovanni Strampelli, 'Knocking at the Boardroom Door: A Transatlantic Overview of Director-Institutional Investor Engagement in Law and Practice' (2018) 12 *VA L & BUS REV* 187, 231-237.

⁷⁸ Assogestioni (n 49) 16.

⁷⁹ See Part V.B.

⁸⁰ See Part III.

⁸¹ Consob, Regulation no. 11971 of May 14, 1999 (Regulation implementing Italian Legislative Decree No. 58 of 24 February 1998, concerning the discipline of issuers) (Regulation no. 11971), art 144-quater. The minimum threshold of shares set by the Consob varies according to the company's capitalisation. The Consob Regulation does not prevent shareholders from establishing a lower shareholding threshold.

board of statutory auditors. At least one member must be elected from the minority-submitted slate, having obtained the largest number of votes,⁸² and the shareholders who submit the minority slate must not be related in any way, either directly or indirectly, to the shareholders who voted on the list that received the largest number of votes.⁸³ According to Article 148 of the Consolidated Law on Finance, the slate voting system also applies to the election of members of the board of statutory auditors, and the chair of the board must be selected from the statutory auditors elected from the minority slate.⁸⁴ In line with these provisions, the Italian Stewardship Principles state that:

[t]he presentation of candidates for election as independent minority members of boards of investee companies, also through the [Assogestioni's] Investment Managers' Committee, represents a continuous and constructive method of engaging with investee companies.⁸⁵

This recommendation is key to the Italian stewardship framework, since the presentation of candidates at elections of board members is becoming an increasingly significant stewardship tool in Italy.

A. COLLECTIVE ENGAGEMENT AND THE ELECTION OF MINORITY-APPOINTED BOARD MEMBERS

Even though the slate voting system was introduced some years before,⁸⁶ until 2010, institutional investors were only able to appoint directors and statutory auditors within a small group of listed companies.⁸⁷ Since 2010, due to the introduction of a record date system for participating in and voting at general meetings,⁸⁸ participation by institutional investors in voting at board elections has increased significantly and, over the years, growing numbers of directors and statutory auditors have been elected by institutional investors.⁸⁹ Currently, 100 out of 232 listed companies' boards include at least one

⁸² Consolidated Law on Finance (n 25), art 147-ter (3). In companies organised under the one-tier system, 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 and others, 'Corporate Boards in Italy' in Paul Davies and al (eds), *Corporate Boards in Law and Practice* (OUP 2013) 367, 392–393.

⁸³ Consob Regulation no. 11971 (n 81), art 144(6), clearly states that '[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'. See Belcredi and Enriques (n 23) 8–9; Belcredi and others (n 40) 378–383.

⁸⁴ Consolidated Law on Finance (n 25), art 148.

⁸⁵ Assogestioni (n 49) 17.

⁸⁶ See Part III.

⁸⁷ Belcredi and Enriques (n 23) 19–20.

⁸⁸ See Part III.

⁸⁹ Belcredi and Enriques (n 23) 21.

minority-appointed director.⁹⁰ Minority-appointed directors represent, on average, 17% of the members of the boards where they are present.⁹¹ Moreover, the boards of statutory auditors in 112 listed companies include at least one minority-appointed member.⁹²

A significant proportion of the minority-supported members of these boards have been appointed by institutional investors under the coordination of Assogestioni. In 2019, Assogestioni presented 64 slates and appointed 76 candidates in 49 listed companies.⁹³ Although the shareholdings of the Italian institutional investors that formally present the lists usually do not exceed, on average, 3.5% of the votes cast, the lists promoted by Assogestioni are able to attract the votes of a sizable number of other Italian and foreign institutional investors, and frequently receive more than 30% – and sometimes around 50% – of the votes cast.⁹⁴ 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.⁹⁵ This is also due to the support of proxy advisory firms, which usually prefer lists submitted by institutional investors over those presented by the controlling shareholders.

In light of such outcomes, collective engagement promoted by Assogestioni with a view to appoint board members is deemed to be a fairly effective tool for monitoring investee companies. The presence of independent directors appointed by institutional investors can favour some form of monitoring within the board itself, by enhancing board disclosure, given the fact that such directors are primarily expected to protect minority interests.⁹⁶

The Investment Managers' Committee operating under the auspices of Assogestioni⁹⁷ plays a central role in selecting candidates for boards and submitting

⁹⁰ Assonime, 'La Corporate Governance in Italia: Autodisciplina, Remunerazioni e Comply-or-Explain' [Corporate governance in Italy: Soft law, remunerations and comply-or-explain] (2019) 37 <<http://www.assonime.it/attivita-editoriale/studi/Pagine/note-e-studi-1-2019.aspx>> accessed 14 March 2020; Consob (n 7) 17.

⁹¹ Consob (n 7) 17.

⁹² *ibid.*

⁹³ Assogestioni, 'Stagione Assembleare 2019' [2019 Proxy Season Review] (2019), 10 <<https://www.comitatogestori.it/articolo/stagione-assembleare-2019>> accessed 14 March 2020.

⁹⁴ *ibid.*

⁹⁵ As far as the role of foreign institutional investors is concerned, it is worth noting that, while it can reduce the costs associated with participating in, and voting at, shareholder meetings, the introduction of the record date system does not lower the costs associated with selecting director nominees and submitting the slate. Nevertheless, such costs do not represent an effective hurdle as costs associated with candidates' selection are borne by Assogestioni.

⁹⁶ Finding a positive relationship between the proportion of independent minority directors and firm value, see e.g. Nicola Moscarillo and others, 'Independent minority directors and firm value in a principal-principal agency setting: evidence from Italy' (2019) 23 *J Management and Governance* 165; Finding that minority-appointed directors are more likely to dissent than directors appointed with a majority of the votes, see Piergaetano Marchetti and others, 'Dissenting Directors' (2017) in 18 *EBOR* 659.

⁹⁷ The Investment Managers' Committee is composed solely of representatives of the member investment management companies or other Italian or foreign institutional investors. They communicate their interest in participating in the presentation of the individual lists for the election or cooptation of minority candidates for the corporate bodies of Italian investee listed issuers to the Committee's secretariat each time. See Assogestioni, 'Protocol of Duties and Responsibilities of the Corporate Governance Committee and the Investment Managers' Committee' (2017) 22

minority slates to be voted on. In particular, candidates 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, which is composed of members of the Association’s Board and representatives of member investors.⁹⁸ Candidates for election as minority representatives to the corporate bodies of investee listed issuers are selected by the Investment Managers’ Committee with the assistance of an independent advisor, who is in charge of both maintaining a database of possible candidates and submitting to the Investment Managers’ Committee a shortlist of those that appear to best meet the requirements for each corporate appointment.⁹⁹

Furthermore, the selection principles drawn up by the Assogestioni Corporate Governance Committee require that candidates must have adequate professionalism, integrity, and independence.¹⁰⁰ Specifically, in order to avoid possible conflicts of interest and to foster the candidates’ independence from the institutional investors supporting the candidacy, legal representatives of investment management companies cannot be selected as candidates for corporate boards.¹⁰¹ In addition, any person who has served in a senior management or executive role at an investment management company may not be selected as a candidate until at least a year has elapsed since the relevant appointment was relinquished.¹⁰²

The selection principles drawn up by the Assogestioni Corporate Governance Committee also aim to promote the candidates’ independence from the company for which they are nominated. In particular:

members 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.¹⁰³

Furthermore, if elected, candidates are requested to refrain from accepting any senior management position or corporate appointment at the same company or at any other company from the same group for at least one year after the end of their term, unless they are nominated again as candidates by the Investment Managers’ Committee.¹⁰⁴

That said, it is also worth noting that the engagement strategy adopted by Assogestioni and affiliated institutional investors is quite different from that usually adopted by activist hedge funds.¹⁰⁵ Assogestioni seeks to achieve less confrontational

<https://www.comitatogestori.it/sites/comitatogestori.it/files/protocollo_compiti_e_funzioni_ccg_e_c_g.pdf> accessed 14 March 2020.

⁹⁸ *ibid* 20–21.

⁹⁹ *ibid* 24–25.

¹⁰⁰ *ibid* 26.

¹⁰¹ *ibid* 29.

¹⁰² *ibid* 28–29.

¹⁰³ *ibid* 27.

¹⁰⁴ *ibid* 28.

¹⁰⁵ Matteo Erede, ‘Governing Corporations with Concentrated Ownership Structure: An Empirical Analysis of Hedge Fund Activism in Italy and Germany, and its Evolution’ (2013) 10 *EUROPEAN COMPANY AND FINANCIAL LAW REVIEW* 328, 370.

engagement with the management of portfolio companies,¹⁰⁶ and focuses almost exclusively on the election of directors, through the presentation of minority lists comprised of a number of candidates representing less than half of the positions to which appointments are to be made.¹⁰⁷ This clearly shows that the institutional investor engagement promoted by Assogestioni is primarily aimed at minimising ‘the agency costs arising from the presence of a controlling shareholder by sharing management decisions, and thus, by exercising closer monitoring.’¹⁰⁸ Unlike the usual approach of hedge funds, the aim is not to force major changes in corporate strategy or replacing management.

Thus, the Italian institutional investor-driven approach to engagement seems to represent an alternative to activist-driven engagement. First, the coordination role performed by Assogestioni – or a similar coordinating entity – could help overcome collective action and resource-related problems underlying the stewardship passivity of institutional investors by favouring the sharing of stewardship-related benefits and costs among investors.¹⁰⁹ Second, institutional investor-driven engagement also covers companies that raise potential agency problems posed by controlling shareholders but are not targeted by activist hedge funds. For example, while larger controlled firms are generally less likely to be targeted by hedge funds, experience in Italy shows that institutional investors coordinated by Assogestioni have been successful in appointing minority directors at major Italian listed companies with controlling shareholders. Third, the criteria for selecting independent directors adopted by Assogestioni imply a strict assessment of the candidates’ skills and independence, and seek to ensure that there are no ties either with the institutional shareholders who nominate them or with the company for which they are nominated.¹¹⁰

For all of the above reasons, the Italian system suggests that slate voting, coupled with the coordination role performed by a coordinating entity, can foster the involvement of institutional investors in the appointment of some independent directors and make these directors useful in reducing the agency costs affecting listed companies.

Moreover, the institutional investor-driven approach fostered by the Italian Stewardship Principles and the coordinating role played by Assogestioni do not aim to

¹⁰⁶ *ibid.*

¹⁰⁷ Assogestioni (n 97) 25.

¹⁰⁸ Erede (n 105) 371. See also Belcredi and others (n 83) 414; Luigi Zingales, ‘Italy Leads in Protecting Minority Investors’ *Financial Times* (London, 13 April 2008) <<https://www.ft.com/content/357c40c4-094d-11dd-81bf-0000779fd2ac>> accessed 8 August 2019, observing 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”.

¹⁰⁹ Gaia Balp and Giovanni Strampelli, ‘Institutional Investor Collective Engagements: Non-Activist Cooperation vs Activist Wolf Packs’ (2019) 14 OHIO ST BUS L J (forthcoming).

¹¹⁰ The selection process adopted by Assogestioni significantly differs from that of activist investors. As it is widely recognised, activist investors usually do not seek for independent directors and quite frequently appoint their employees as directors. See e.g. Lazard, ‘2018 Review of Shareholder Activism’ (2019) 8 <<https://www.lazard.com/media/450805/lazards-2018-review-of-shareholder-activism.pdf>> showing that in 2018 22% of directors appointed by activist investors were their employees; John C. Coffee and others, ‘Activist Directors and Agency Costs: What Happens When an Activist Director Goes on the Board’ (2019) 104 CORNELL L REV 381, 382, finding that approximately 70% of hedge fund-nominated director slates include a hedge fund employee.

replace the activist-driven approach.¹¹¹ For example, institutional investors might avoid intervening directly, preferring to support hedge fund campaigns and proxy fights when they believe that the hedge funds' strategy can improve the governance of targeted companies and enhance their value. Since the success of activist campaigns frequently depends on support from institutional investors,¹¹² institutional investors could discipline activist hedge funds by making them more inclined to adopt good corporate governance practices and to select directors who are actually independent.¹¹³ Therefore, the ability to play a more active role in the election of independent directors could help mainstream institutional investors exert a disciplining effect on hedge funds, even where institutional investors refrain from presenting their own candidates.¹¹⁴

Nevertheless, in light of the ownership patterns of Italian listed companies illustrated above, the slate voting system can lead to some unexpected and, to some extent, counter-intuitive consequences. In particular, in so-called 'de facto controlled' companies, where the controlling shareholder holds less than half of the share capital, institutional investors can collectively own the majority of the share capital or a stake larger than that of the controlling shareholders.¹¹⁵ Therefore, it is increasingly the case that the list submitted by the institutional investors under the coordination of Assogestioni receives more votes, sometimes even an absolute majority of the votes, than the list submitted by the de facto controlling shareholders.¹¹⁶ This is especially the case in larger corporations where the de facto controlling shareholder holds a relatively small stake.¹¹⁷ Hence, given that institutional investors present only minority lists, this means that the majority of the shareholders appoint a minority of directors, whilst the minority (the de facto controlling shareholder) appoints a majority.

¹¹¹ See Dionysia Katelouzou, 'Hedge Fund Activism and Shareholder Stewardship: Incompatible, Reciprocal or Something in Between?', 15-23.

¹¹² See Part VII below.

¹¹³ Attracta Mooney, 'Activists become wolves in sheep's clothing' *Financial Times* (London, 21 July 2019) <<https://www.ft.com/content/bf1e6037-bbdd-3465-ab0c-d111e301624e>> accessed 21 December 2019.

¹¹⁴ It is worth mentioning that, in theory, the coordination role played by a non-profit organization representing institutional investors might also favor more "proactive" institutional investors' initiatives against potential value-disrupting activists' campaigns. For example, it seems that such an approach – by facilitating investors' coordination and sharing of costs – might favor the implementation of an intriguing proposal set forth by Coffee. He suggests that institutional investors who fear that they are being disenfranchised by hedge funds' private settlements could form 'a steering committee and assemble a team of outside directors (who were not their employees) that they could seek to place on corporate boards in the event of an activist attack. This would take some advance preparation, but the effort and expense could be shared among the dozen (or more) institutions participating in such a committee. This committee could contact the corporation at the outset of an activist campaign to suggest either its own nominees or its desire to be involved in the settlement process.' See John C. Coffee, 'The Agency Costs of Activism: Information Leakage, Thwarted Majorities, and the Public Morality' (2017) European Corporate Governance Institute (ECGI), Law Working Paper No. 373/2017, 26–27 <<https://ssrn.com/abstract=3058319>> accessed 21 December 2019.

¹¹⁵ OECD (n 6) 53-54.

¹¹⁶ Mario Stella Richter jr and Federico Ferdinandi, 'The Evolving Role of the Board: Board Nomination and the Management of Dissenting Opinions' (2018) 4 *ITALIAN L J* 611, 613.

¹¹⁷ *ibid.*

This result, whilst paradoxical, is not surprising as it is consistent with the objectives pursued by institutional investors. Indeed, institutional investors only submit a short list of director nominees, since they do not want to appoint a majority of directors and take control of the company.¹¹⁸ This approach is in line with the Italian Stewardship Principles, according to which the appointment of some independent directors only ‘serve[s] as a method of monitoring’.¹¹⁹

In addition, the support provided to the minority list assembled by the Investment Managers’ Committee generally does not result in the formation of a group that can be considered to exercise control.¹²⁰ In line with the ESMA guidelines,¹²¹ Consob has clarified that any cooperation between shareholders in relation to the submission of lists of candidates for elections to corporate bodies pursuant to Articles 147-ter and 148 of the Consolidated Law on Finance will not be classified as concerted action, ‘provided that said lists include a number of candidates that is less than half of the members to be elected or are by design predetermined for the election of representatives of minority interests’.¹²² Moreover, in order to avoid the regulatory risks associated with concerted action, the protocol adopted by Assogestioni states that:

[t]he Investment Managers’ Committee shall not under any circumstances pass any resolutions concerning the exercise of voting rights in the general meetings of investees that are listed issuers, and the Committee members shall have no requirement to consult in relation to the exercise of this right. Even when minority lists are presented for elections to corporate bodies, the Committee members shall not undertake any obligation regarding the exercise of voting rights during general meetings.¹²³

¹¹⁸ See Assogestioni (n 97) 23. Interestingly, as noted by Coffee and Palia, this is true also for the hedge funds that most often take advantage of short-slate rules. Indeed, the submission of a short slate can encourage ‘hedge funds 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 and Darius Palia, ‘The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Governance’ (2016) 41 J CORP L 545, 560.

¹¹⁹ Assogestioni (n 49) 16; Coffee and Palia (n 118) 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’.

¹²⁰ Therefore, in this respect, talking about minorities that become majorities could be partially misleading.

¹²¹ European Securities and Markets Authority, ‘Information on shareholder cooperation and acting in concert under the Takeover Bids Directive’ (2019) 6-7 <https://www.esma.europa.eu/sites/default/files/library/esma31-65-682_public_statement_concerning_shareholder_cooperation_and_acting_in_concert.pdf> accessed 21 December 2019, stating that, when determining whether or not shareholder cooperation in relation to board appointments will lead to the shareholders being regarded as persons acting in concert, a number of factors must be considered, including ‘the number of proposed board members being voted for pursuant to a shareholders’ voting agreement’; ‘whether the shareholders have cooperated in relation to the appointment of board members on more than one occasion’; ‘whether the appointment of the proposed board member(s) will lead to a shift in the balance of power on the board’.

¹²² Consob Regulation no. 11971 (n 81), art 44-quarter 2(b).

¹²³ Assogestioni (n 97) 23.

B. INTERACTIONS BETWEEN INSTITUTIONAL INVESTORS AND MINORITY-APPOINTED DIRECTORS

The appointment of independent minority-supported directors through slate voting raises some regulatory issues and the question as to whether directors drawn from the minority slate are allowed to make direct contact with the minority shareholders who elected them. In particular, since minority slates are frequently supported by institutional investors, some practitioners have raised concerns about the potential threat for board collegiality and the risk of market abuse infringements posed by the fact that the establishment of a direct channel of communication with minority-elected directors would grant institutional investors direct and permanent access to the board.¹²⁴

Further, in light of such concerns, guidance provided by the Italian Stewardship Principles concerning the role of minority-appointed directors engaging in dialogue with shareholders was significantly overhauled in 2016.¹²⁵

Under the 2015 version of Principle 3, any institutional investors that had significant concerns regarding the strategy and performance of investee listed issuers were encouraged to intervene by requesting a meeting with the management and/or board members, including non-executive directors elected by institutional investors themselves.¹²⁶ More specifically, according to the 2015 version of Principle 3, engaging in discussions with independent minority board members was viewed as a permissible way for institutional investors to intervene, enabling them to communicate actively. However, this was subject to the following provisos: that it was carried out in accordance with an organised and collective procedure; and that it occurred at the request of minority members of the board, or on the initiative of institutional investors, provided in the latter instance that a meeting had previously been held with the chairperson, executive directors, or the lead independent director of the investee issuer.¹²⁷

The previous version of Principle 3 raised concerns among issuers, who considered it to not be fully in line with international practice and were concerned that its application could lead to information asymmetries within the board.¹²⁸ According to critics, the Italian Stewardship Principles allowed minority members of the board to engage in dialogue directly with the institutional investors who had elected them, without

¹²⁴ Strampelli (n 77) 234-237.

¹²⁵ Assogestioni, 'Monitoraggio sullo stato di applicazione dei Principi Italiani di Stewardship per l'esercizio dei diritti amministrativi e di voto nelle società quotate - Report 2016' [Monitoring the application of the Italian Stewardship Principles for the exercise of administrative and voting rights in listed companies] (2016) 3 <<http://www.assogestioni.it/index.cfm/1,815,0,49,html/principi-italiani-di-stewardship>> accessed 21 December 2019.

¹²⁶ Assogestioni, 'Italian Stewardship Principles' (2015) 11 <<https://ecgi.global/code/italian-stewardship-principles-2014>>.17.

¹²⁷ *ibid.*

¹²⁸ Gabriele Galateri, 'Lavorare nell'interesse di tutti gli azionisti' [Working in the interest of all shareholders] *Il Sole24ore* (Milan, 30 March 2016) <<http://www.intermediachannel.it/lavorare-nellinteresse-di-tutti-gli-azionisti>> accessed 21 December 2019. But see Luigi Zingales, 'I consiglieri di maggioranza e il loro ruolo nel board' [Majority-appointed directors: Their role within the board] *Il Sole24ore* (Milan, 27 March 2016) <<http://www.ilsole24ore.com/art/commenti-e-idee/2016-03-27/i-consiglieri-maggioranza-e-loro-ruolo-board-081206.shtml?uuiid=ACDwMYvC>>.

requiring the participation of other board members, the auditing body, or other managers, and without any consideration as to the allocation of functions within the management and statutory auditors' boards.¹²⁹

Following these criticisms, the Italian Stewardship Principle 3 was revised in 2016. Presently, the revised version of Principle 3 recommends that institutional investors meet with the board members, including minority-appointed members, taking the allocation of functions within corporate bodies into account.¹³⁰ Furthermore, the principle makes it clear that dialogue between directors and institutional investors should be conducted according to an organised and collective procedure. In particular, this procedure seeks to ensure compliance with the general principle of freedom from any mandate and independence vis-à-vis the shareholders who proposed or voted for the candidate.¹³¹ The revised version of Principle 3 seems capable of overcoming the criticisms levelled against the previous version. In line with international best practices, the selection of the board's minority members involved in dialogue is no longer dependent only on the nominating shareholders but also on the role played by a given director within the board (e.g. the lead independent director or the chair of a board's committee).¹³² In addition, Principle 3 stresses that the organised and collective procedure regulating dialogue aims to prevent board members from disclosing any information that could compromise the investors' ability to trade the company's shares without the prior consent of their counterparties.¹³³

That being said, it is important to note that the significance of the compliance risks associated with dialogue between certain board members and institutional investors largely depends on the way in which such exchanges are conducted.¹³⁴ According to the distinction drawn by the EFAMA Code 2018, board/shareholders dialogues 'can consist in unilateral communication from asset managers to board members (one-way engagement), or in bilateral dialogue (bi-engagement)'.¹³⁵ Therefore, while bi-engagement dialogue entails the mutual exchange of information, institutional investors in one-way engagements are usually willing to communicate their concerns about specific

¹²⁹ Assogestioni (n 126) 17.

¹³⁰ Assogestioni (n 49) 16.

¹³¹ Ibid 17.

¹³² According to the Shareholder-Director Exchange (SDX) protocol – a set of guidelines to provide a framework for shareholder-director engagements adopted by a working group of leading U.S. independent directors and representatives from some of the largest and most influential long-term institutional investors –, '[t]he company will specify participating directors based on the specific topic(s) to be discussed. Participants will be chosen based on experience, expertise, board role, and past relationship with the investor. The independent non-executive chairman, lead director, or relevant board committee chair will be one of the attendees.' See e.g. The Shareholder-Director Exchange (SDX), 'Introduction and Protocol' (2014) 14 <<http://www.sdxprotocol.com/download-pdf>>.

¹³³ Assogestioni (n 49) 17.

¹³⁴ The relevance of compliance risks associated with the presence of minority-appointed directors may also depend on the type of appointing institutional investors. See e.g. Coffee and al (n 110) 422, showing that 'information leakage increases with the intervention of hedge fund activists in a way that differs meaningfully from interventions by other investors'.

¹³⁵ EFAMA (n 52) 7.

aspects of the company's governance and strategies to directors, without, however, receiving any information in return from the directors.¹³⁶

Hence, as legal risks are obviously higher in two-way dialogues, participants of such dialogue are advised to adopt specific procedures in order to avoid the disclosure of non-public material information. For example, in the United States, the SDX Protocol¹³⁷ recommends that investee companies select two or more individuals to represent them in engagements, in order to ensure regulatory compliance, mitigate risks of misunderstanding, and improve communication after the engagement.¹³⁸ Moreover, as far as topics to be discussed are concerned, the SDX Protocol states that:

it is inappropriate for shareholder-director engagement to include discussion of general business operations, current and projected financial results, strategic execution, and other operational and performance issues for which company management is directly responsible.¹³⁹

By contrast, as they do not imply any exchange of information, a more flexible approach to the selection of the directors who are to be involved in the meetings, or of the relevant topics, can be accepted in relation with one-way contacts. Therefore, institutional investors could be allowed to ask for a meeting with a single director who, depending on the role played by him or her within the board, may also be a minority-appointed director.

However, the possibility for an individual board member to engage in direct dialogue with the shareholders who proposed or approved his or her election can impede the board's cohesiveness and undermine trust among directors. Clearly, risks for board cohesiveness are much less significant within one-way dialogues with a limited number of shareholders who are willing to communicate their concerns and opinions to directors, without receiving any information from them in return. Nevertheless, in order to prevent information asymmetries within the board, any director who is contacted by the shareholders have a duty to share the information received with the entire board. In addition, to limit the risk of the inadvertent disclosure of inside information, it would be preferable for the selected director to meet the shareholders along with another director, with a company manager (the person usually responsible for investor relations), or with the board secretary.

VI. THE ENFORCING GAP OF THE ITALIAN STEWARDSHIP PRINCIPLES

Like most stewardship codes adopted around the world, the Italian Stewardship Principles are applied on a 'comply or explain' basis.¹⁴⁰ Therefore, signatories to the Principles are free to not apply some of the recommendations, provided that they explain the reasons

¹³⁶ *ibid.*

¹³⁷ SDX (n 132) 13.

¹³⁸ *ibid* 14.

¹³⁹ *ibid* 13.

¹⁴⁰ See Dionysia Katelouzou and Konstantinos Sergakis, 'Enforcement of Shareholder Stewardship', in this book providing an overview of the enforcement mode across all the stewardship codes.

for doing so.¹⁴¹ In order to enhance transparency and incentivise the application of the Stewardship Principles, it is recommended that institutional investors publicly declare their intention to adhere to the Stewardship Principles (e.g. on their website or in their annual financial statements). Moreover, signatories should commit to publishing an annual report containing easily understandable information about the methods used to apply the Principles.¹⁴²

Nevertheless, as Assogestioni has no power to enforce compliance with the Italian Stewardship Principles, there remains the question of whether the lack of adequate enforcement mechanisms will limit the relevance of the Italian Stewardship Principles.¹⁴³

The disclosure obligation concerning the engagement policy imposed by Article 124-quinquies of the Consolidated Law on Finance – implementing Article 3g SRD II – does not seem to be sufficient in enhancing the relevance of the Italian Stewardship Principles. Indeed, Article 124-quinquies does not require disclosure of whether, and if so how, institutional investors adhere to a set of stewardship principles, and can only indirectly incentivise the actual compliance with the Italian Stewardship Principles.

Other measures should therefore be considered in order to promote more effective compliance with Italian Stewardship Principles. As Simone Alvaro, Marco Maugeri and I have recently noted,¹⁴⁴ a tiering system similar to that adopted by the FRC,¹⁴⁵ or, preferably, a legal obligation to state within the engagement policy regulated by Article 124-quinquies of the Consolidated Law on Finance, whether and how stewardship principles have been adopted, could help in this regard.¹⁴⁶ In addition, as a stronger incentive, the legislator could explicitly state that the actual adoption of the stewardship principles provides a relevant indication of compliance with the general duty of institutional investors to operate diligently, correctly and with transparency in the best interests of their beneficiaries, as required under Article 35-decies 1(a) of the Consolidated Law on Finance.¹⁴⁷

¹⁴¹ Assogestioni (n 49) 11.

¹⁴² *ibid.*

¹⁴³ As far as the UK Stewardship Code is concerned, see John Kingman, ‘Independent Review of the Financial Reporting Council’ (2018) 42 <<https://www.gov.uk/government/publications/financial-reporting-council-review-2018>>.

¹⁴⁴ Alvaro and others (n 22) 58-62. See also John Coates, ‘The Future of Corporate Governance Part 1: The Problem of Twelve’ (2018) Harvard Public Law Working Paper No. 19-07, 20-21 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3247337> accessed 21 December 2019 suggesting, as a tougher form of regulation, to turn the contents of the stewardship codes into affirmative legal obligations, with some form of public enforcement or auditing.

¹⁴⁵ In 2016, the FRC has categorised signatories to the Stewardship Code into tiers based on the quality of their Code statements. Nevertheless, the efficacy of such tiering exercise remains controversial. See Alvaro and al (n 22) 60.

¹⁴⁶ As currently compliance with Italian Stewardship Principles is voluntary and based on a comply or explain principle, not adhering issuers are not required to provide any disclosure. In addition, Italian Stewardship principles do not set out an obligation to illustrate in detail how they comply with the principles. See Dionysia Katelouzou and Konstantinos Sergakis, ‘Enforcement of Shareholder Stewardship’, in this book.

¹⁴⁷ For a similar proposal in the UK context, see I. H.-Y. Chiu and D. Katelouzou, ‘Making a Case for Regulating Institutional Shareholders’ Corporate Governance Roles’ (2018) *J Bus L* 67.

VII. CONCLUSION

The analysis set out above has shown that the Italian regulatory framework adequately supports institutional investor stewardship. However, given also the economic disincentives towards investing appropriate resources into engagement activities,¹⁴⁸ some potential developments could affect the actual ability of the Italian Stewardship Principles to promote active ownership by institutional investors remain. For example, evidence shows that institutional investors only submit lists of director nominees in a fairly limited number of publicly listed companies, and in fact, almost exclusively at larger investee companies.¹⁴⁹ Moreover, the future of the slate voting system seems uncertain, as there have been calls for it to be revised or for alternative solutions to be used, such as the presentation of a unitary list of candidates by the incumbent board.¹⁵⁰

That said, it must also be considered that the actual relevance of the Italian Stewardship Principles depends on developments affecting financial market actors and the principles themselves. As mentioned above, the increase in the presence of activist investors in the Italian capital markets could influence the role played by institutional investors in Italy and lessen the relevance of stewardship codes. Indeed, given their different incentive structures, activist investors are more willing than mainstream institutional investors to take costly initiatives with a view to change the target company's policies or management. Therefore, even institutional investors who adhere to the Italian Stewardship Principles might decide to support activist initiatives, which usually feature a more confrontational approach that largely diverges from the characteristic of stewardship principles. For example, the recent battle for control of Telecom Italia between Vivendi and Elliott Advisors has shown that this form of 'cooperation' between activist and mainstream institutional investors could enhance the relevance of activist-driven initiatives and lead to a more confrontational model of engagement in Italy. In the Telecom Italia case, 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 15 members of the Telecom Italia board.¹⁵¹

It is also worth recalling that the Italian Stewardship Principles are currently undergoing a review and that a revised version of the principles is expected to be released in 2020. Should Assogestioni decide to follow the approach adopted by the FRC for the review of the UK Stewardship Code, the relevance of the Stewardship principles could

¹⁴⁸ Alvaro and al (n 22) 32-44.

¹⁴⁹ Assogestioni (n 93) 10.

¹⁵⁰ See e.g. Stella Richter jr and Ferdinandi (n 116) 613-614.

¹⁵¹ 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' (2019) 13 BROOKLYN J CORP FIN & COM L 348 noting that, as far as de facto controlled companies are concerned, "an activist's power to exert substantial 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".

be significantly affected. Although no information as to which path Assogestioni intends to follow is available yet, it can be reasonably assumed that the explicit incorporation of ESG factors into the stewardship framework could in some sense alter the role of the Italian Stewardship Principles and to some extent, broaden their role, especially if guidance will be provided as to how ESG factors should be incorporated into stewardship activities.¹⁵² There is, in fact, a growing consensus throughout the investment industry of the importance of incorporating ESG factors into the investment process.

¹⁵² Dionysia Katelouzou, ‘Shareholder stewardship: a case of (re)-embedding the institutional investors and the corporation?’, in Beate Sjøfjell and Christopher M. Bruner (eds), *Cambridge Handbook of Corporate Law, Corporate Governance and Sustainability* (CUP, 2019); Iris H-Y Chiu and Dionysia Katelouzou, ‘In need of a revised Stewardship Code for “shareholder stewardship” as a matter of corporate governance relations in UK listed equity’ (2019) 1 <[https://www.frc.org.uk/getattachment/201c2704-302f-4fdd-a4d9-f1eb71b9539d/Chiu,-Dr-\(University-College-London\)-Katelouzou,;.aspx](https://www.frc.org.uk/getattachment/201c2704-302f-4fdd-a4d9-f1eb71b9539d/Chiu,-Dr-(University-College-London)-Katelouzou,;.aspx)> accessed 21 December 2019.

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