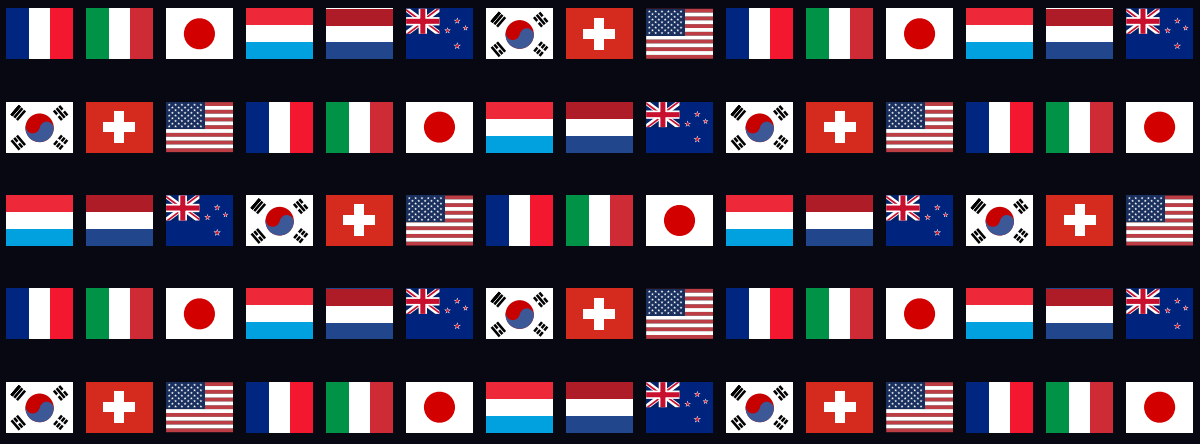
SHAREHOLDER ACTIVISM & ENGAGEMENT

Italy



LEXOLOGY
Getting The Deal Through

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Shareholder Activism & Engagement

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Quick reference guide containing side-by-side comparison of local insights regarding Shareholder Activism and Engagement, including key features by jurisdiction (such as frequently affected industries); shareholder activist strategies, processes and guidelines; litigation (including derivative litigation); shareholders' and directors' duties; company response strategies; shareholder communication and engagement; and recent trends.

Generated 03 August 2023

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GENERAL

Primary sources

What are the primary sources of laws and regulations relating to shareholder activism and engagement? Who makes and enforces them?

In the past 20 years, significant legislative changes have been introduced to encourage shareholder activism and engagement, as well as corporate transparency and accountability. Currently, shareholder activism and engagement are addressed by legal provisions (hard and soft law) insofar as the relevant campaign concerns a listed entity (ie, companies with shares admitted to trading on a regulated market). The primary sources of laws and regulations relating to shareholder activism and engagement are as follows:

- Directive 2007/36/EC on the exercise of certain rights of shareholders in listed companies (Shareholder Rights Directive or SRD, as amended by Directive (EU) 2017/828 on the encouragement of long-term shareholder engagement), as well as other relevant pieces of EU legislation, such as Regulation (EU) No 596/2014 on market abuse (Market Abuse Regulation or MAR);
- the (Testo Unico della Finanza or CFA); and
- the Corporate Governance Code for listed companies (the CG Code, adopted in January 2020 and effective from 1 January 2021) issued by Borsa Italiana SpA (the Italian stock exchange).

The Italian securities and markets commission issues implementing hard and soft law (eg, Q&A and guidelines) and is entrusted with enforcement on matters related to listed companies, including shareholder activism and engagement. A number of best practice guidelines have been adopted by issuers and asset managers' associations, such as the Principles for Listed Companies' Dialogue with Investors , issued by Assonime (the Association of Italian joint stock companies), and the Italian Shareholder Director Exchange Guidelines , issued by Assogestioni (the Italian Association on asset management).

Law stated - 21 April 2023

Shareholder activism

How frequent are activist campaigns in your jurisdiction and what are the chances of success?

The Italian stock market is characterised by concentrated ownership, as most listed companies are controlled either by a single shareholder, family members (usually descendants or other relatives of the founder) or investors bound by a shareholders' agreement. Ownership concentration is a natural barrier protecting the company and its directors against activist campaigns; resolutions at both general meeting and board of directors' level are generally determined by the controlling shareholders. Indeed, albeit infrequently across the market, activist campaigns do occur, especially if the company performs significantly below market expectations or faces troubled times (eg, stand-alone or group financial difficulties) or if sensitive transactions are being carried out (eg, reorganisations or major related transactions).

Law stated - 21 April 2023

How is shareholder activism generally viewed in your jurisdiction by the legislature, regulators, institutional and retail shareholders and the general public? Are some industries more or less prone to shareholder activism? Why?

The legislature and regulators are generally neutral in terms of their view of shareholder activism. They are committed to preserve market integrity and efficiency, as well as prevent (and prosecute, if necessary) market abuse (eg, insider trading and market manipulation). Red flags usually arise – and stronger actions are implemented by the government and other public authorities – if the company targeted by an activist operates in sensitive or strategic sectors (eg, defence, public health, infrastructure, energy, media etc). Since ownership in highly concentrated, controlling shareholders and members of the board of directors (who are usually representatives of the former) are generally well protected against potential activist campaigns, therefore they are fairly confident that – in most cases – activist shareholders have limited tools to implement their strategies. Recently in Italy, companies operating in telecom/media and infrastructure proved to be particularly prone to shareholder activism (however, this might be due to the relatively fragmented ownership structure of such companies, rather than their industry).

Law stated - 21 April 2023

What are the typical characteristics of shareholder activists in your jurisdiction?

Shareholder activists are usually hedge funds or general meeting hecklers; no sizeable activist campaigns have been carried out by competitors. Recently, the most notable and troublesome campaigns have been initiated by large foreign hedge funds that displayed the required firepower and experience to carry out truly effective campaigns.

Law stated - 21 April 2023

What are the main operational governance and sociopolitical areas that shareholder activism focuses on? Do any factors tend to attract shareholder activist attention?

Activist campaigns don't seem to focus on specific operational governance and sociopolitical areas (such as say-on-pay, sustainability and environmental, social and corporate governance matters). Recently, companies operating in telecom/media and infrastructure proved to be particularly prone to shareholder activism and activist campaigns tend to occur if the company performs significantly below market expectations or faces troubled times (eg, stand-alone or group financial difficulties) or if sensitive transactions are being carried out (eg, reorganisations or major related transactions).

Law stated - 21 April 2023

SHAREHOLDER ACTIVIST STRATEGIES

Strategies

What common strategies do activist shareholders use to pursue their objectives?

Activist shareholders use a variety of strategies to pursue their objectives. Activists usually:

- request that the directors call a shareholders meeting;
- submit questions or proposals ahead of an already-called meeting;
- solicit shareholders to grant them with proxies for an upcoming general meeting;
- structure and file lists of candidate directors, with the aim of appointing, as the case may be, a minority or a majority of the board members;
- launch media campaigns against the company or its strategy, board or management; and
- in the most extreme cases, launch mandatory or voluntary bids over all or part of the outstanding vote-bearing shares of the company, seeking to gain control over the latter.

All the above actions are unilateral and therefore may be pursued by the activist without the need for cooperation by the company or other shareholders. Indeed, the activist may be willing to engage in meetings or exchanges with the company; in this case, cooperation is essential, as the board of directors and the management of the company cannot be forced to engage with any activist shareholder.

Law stated - 21 April 2023

Processes and guidelines

What are the general processes and guidelines for shareholders' proposals?

As regards listed companies, article 126-bis of the Consolidated Financial Act (CFA) grants shareholders representing at least 2.5 per cent of the corporate capital the right to request that the directors supplement the agenda of an already-called shareholders meeting (ie, submit a shareholders' proposal). With this request, the shareholders may either request the addition of a new item on the agenda (provided that this item does not require the drafting of a directors' report, eg, in case of mergers or demergers), or request that a resolution proposal is added to an already-included item. The requesting shareholders shall provide the company with a report on the relevant proposal, to be made public prior to the meeting. The company shall reject the shareholders' proposal if it is unlawful, redundant or dilatory; if the rejection is ungrounded, the relevant shareholders may request the competent court to order the directors to supplement the agenda. The law sets forth specific deadlines for submitting shareholders' proposals, depending on the matter of the proposal; however, any shareholder may make resolution proposals to already-included items during the meeting.

Law stated - 21 April 2023

May shareholders nominate directors for election to the board and use the company's proxy or shareholder circular infrastructure, at the company's expense, to do so?

Pursuant to article 2383 of the Italian Civil Code (ICC), the members of the board of directors are appointed by the ordinary shareholders meeting. Listed companies are statutorily required to apply the list-voting mechanism aimed at granting the appointment of at least one minority director. Namely, article 147-ter CFA grants shareholders representing at least 2.5 per cent of the corporate capital (or the lower threshold set by the by-laws or by the Italian securities and markets commission) with the right to file a list of candidates, which will be balloted at the shareholders meeting. The lists shall be filed with the company's records no later than 25 days before the meeting called to appoint the directors; the lists admitted to ballot (ie, those meeting the applicable requirements) shall be made available to the public no later than 21 days before the relevant meeting. The majority of the directors to be appointed is selected among the candidates included in the list that obtained the greatest number of votes cast at the meeting (known as the majority list); at least one minority director, or the greater number set by the by-laws, is selected among the candidates included in the second list by number of votes (so-called minority list). Institutional investors (asset managers, pension funds etc) usually file joint lists, including only a very limited number of candidates, to be sure not to appoint the majority of the directors (the aim is not to control the board composition). With reference to listed companies:

- the board of directors shall include at least one or two independent directors, depending on whether the board is composed of up to or more than seven members ('independence' is defined under article 147-ter and 148 CFA and the Corporate Governance Code); and
- statutory diversity requirements apply, providing that at least 40 per cent of the board seats shall be reserved for the least represented gender.

In terms of using the company's proxy or shareholder circular infrastructure, under Italian law and practice, shareholders usually appoint an individual proxy to participate to the meeting and cast their votes; institutional investors usually appoint the same person, who will act as proxy for them at the relevant meeting. However, especially after the pandemic, listed companies usually appoint a company's proxy to whom the shareholders may provide voting instructions, at the company's expense. Circular infrastructures (eg, votes to be cast by electronic means before the meeting) are not widespread.

Law stated - 21 April 2023

May shareholders call a special shareholders' meeting? What are the requirements? May shareholders act by written consent in lieu of a meeting?

Pursuant to article 2367 ICC and 125-ter CFA, shareholders holding at least 5 per cent of the corporate capital shall have the right to request the directors to call a shareholder meeting, for the purposes of resolving on specific items, which shall be detailed by the requesting shareholders (provided that such item does not require the drafting of a directors' report, eg, in case of mergers or demergers). The meeting can only resolve on the matters reserved to shareholders' competence (ie, the shareholders are prevented from resolving upon any management matter, which falls under the directors' exclusive competence). The company shall reject the shareholders' proposal if it is unlawful, redundant or dilatory; if the rejection is ungrounded, the relevant shareholders may request the competent court to order the calling of the meeting. Written consent is not available to listed companies or closely held joint stock companies, but only to limited liability companies.

Law stated - 21 April 2023

Litigation

What are the main types of litigation shareholders in your jurisdiction may initiate against corporations and directors? May shareholders bring derivative actions on behalf of the corporation or class actions on behalf of all shareholders? Are there methods of obtaining access to company information?

Directors' duties and responsibilities are governed – as a general rule – under the ICC (article 2381 and 2390 seq ICC). In case of breach of their duties of loyalty and care, directors shall be jointly liable towards the company for any damages caused by or deriving from their negligence, with the exclusion of the powers attributed, to the managing director or the executive committee, if any. However, non-executive directors are not totally exempt from liability. In case the relevant member (1) negligently fails to obtain data or information from the managing director or the executive committee, or (2) knew that a detrimental action was being carried out, but did not do their best to prevent or limit the consequences thereof, they shall be jointly liable with the managing director or the members of the executive committee. In this regard, the business judgement rule applies. Direct suits ('corporate suits', under article 2393 ICC) shall be authorised by the shareholders meeting and then be brought on by the board of directors. Any recovered amount shall be paid to the company, not to the shareholders. Should the shareholders meeting not reach the required majority, qualified minority shareholders (representing at least 5 per cent of the corporate capital) may bring a derivative suit on behalf of the corporation (article 2393-bis ICC). Any recovered amount shall be paid to the company, with the net sum of the legal costs borne by the shareholders acting as plaintiffs in the derivative suit. In case an investor suffers a direct damage following a negligent or wilful misconduct of a director (ie, not an indirect damage, such as a reduction of the value or the revenues of the company), said investor may claim damages from the relevant

director (article 2395 ICC). Class actions are not common in Italian litigation practice. With the aim of preserving corporate secrets and the exclusive governance competence vested into the directors, shareholders of listed companies and private joint stock companies are not granted a generic right to obtain access to company information; however, if a suit is brought to court and the company is not willing to provide the shareholders with the information necessary to conduct and complete the relevant trial, the court may issue an order to display and provide the required information and documents.

Law stated - 21 April 2023

SHAREHOLDERS' DUTIES

Fiduciary duties

Do shareholder activists owe fiduciary duties to the company?

The Italian legal framework doesn't feature fiduciary duties fully comparable to those of the US or UK systems. In any case, all shareholders shall behave fairly and in good faith in their dealings with the company, its directors and management, as well as the other shareholders. All shareholders shall conduct their business so as not to harm or impair the company's interest. Indeed, shareholders may act in their own interest and to their sole benefit; nonetheless, their behaviour should not be unfair or in bad faith.

Law stated - 21 April 2023

Compensation

May directors accept compensation from shareholders who appoint them?

Directors' compensation shall be resolved upon by the shareholders meeting, even though the board itself may grant further compensation to the benefit of the directors holding particular offices (eg, managing director, chairperson, committee members etc), provided that the shareholders meeting shall in any case have the right to set out an aggregate maximum amount (article 2389 of the Italian Civil Code (ICC)). Indeed, listed companies are subject to specific rules on directors' compensation, such as those under Directive (EU) 2017/828 (Shareholder Rights Directive 2 or SRD 2), the Consolidated Financial Act (CFA) and the Corporate Governance Code (CG Code), which address the remuneration of directors and top management with a variety of rules, especially in terms of transparency and shareholders' approval (say-on-pay). As a general rule, a director may accept compensation from the shareholders who selected them in their list of candidates. However, this compensation shall be due as consideration for activities and services different from those that the relevant person renders as a director of the company. The director should carefully consider whether any such compensation might impair their loyalty to the company and independence requirements under the CFA or the CG Code.

Law stated - 21 April 2023

Mandatory bids

Are shareholders acting in concert subject to any mandatory bid requirements in your jurisdiction? When are shareholders deemed to be acting in concert?

As regard listed companies, the acquiror shall launch a mandatory bid over all the outstanding vote-bearing sharesfollowing the acquisition of a shareholding representing more than:

- 30 per cent of:

- the aggregate vote-bearing shares; or
- the aggregate voting rights, if the target listed entity is a small or medium-sized enterprise (SME) under the CFA (SMEs may set a different threshold in their by-laws, ranging from 25 per cent to 40 per cent); or

- 25 per cent of:
  - the aggregate vote-bearing shares; or
  - the aggregate voting rights, if the target listed entity is not a SME under the CFA.

A number of exemptions are set forth by the law (eg, if there is a controlling shareholder holding at least 50 per cent of the corporate capital or voting rights; if the target entity is insolvent or pre-insolvent; if the triggering of the relevant threshold derives from a voluntary bid previously launched by the bidder towards all the holders of vote-bearing shares; etc).

The above mandatory bid rules apply also to shareholders and persons acting in concert. Persons are deemed to be acting in concert if they cooperate on the basis of an agreement, express or implied, oral or in writing, even if legally invalid or ineffective, which is aimed at (1) acquiring, maintaining and strengthening control over the company, or (2) obstructing a different mandatory or voluntary bid. The law (article 101-bis CFA) sets forth a number of instances in which it is assumed that persons are acting in concert (eg, having entered into a shareholders agreement under article 122 CFA; being the controlling entity of, or a controlled entity to, the relevant person; being an affiliate of the relevant person; being a director, manager, financial advisor, parent, relative or spouse of the relevant person). It should be noted that the Italian securities and markets commission (CONSOB) Regulation No. 11971/1999 (Issuers Regulation) details the CFA in this regard and sets forth a number of exemptions and exclusions. Persons are not deemed to be acting in concert if they, inter alia:

- coordinate to submit a shareholders' proposal;

- request the calling of a shareholders meeting;
- bring a derivative suit on behalf of the corporation;
- file a list of candidate directors (insofar as the list is aimed at appointing just a minority of the directors);
- object to say-on-pay resolutions; or
- obstruct related party transactions.

Law stated - 21 April 2023

Disclosure rules

Must shareholders disclose significant shareholdings? If so, when? Must such disclosure include the shareholder's intentions?

With regard to listed companies:

- pursuant to article 120 CFA, investors holding more than 3 per cent of the corporate capital or voting rights of the company (5 per cent if the company is a SME under the CFA) shall notify such holding to the company and the CONSOB and disclose it to the market (further communications are due when the following thresholds are triggered: 5 per cent, 10 per cent, 15 per cent, 20 per cent, 25 per cent, 30 per cent, 50 per cent, 66.6 per cent and 90 per cent); and
- pursuant to article 122 CFA, where investors holding more than the mentioned thresholds enter into a shareholders agreement, such investors shall inform of the agreement the company, the CONSOB and the market.

Also, with regard to listed companies, any investor triggering certain holding-thresholds (namely, 10 per cent, 20 per cent and 25 per cent of the corporate capital or voting rights) shall state the objectives it intends to pursue in the following six months, setting out, inter alia:

- the means of financing used for acquiring the relevant holding;
- whether it acted alone or in concert with other persons;
- whether it intends to make further stock purchases or acquire control over the company and, in such case, the strategy it intends to adopt;
- its intentions as to any agreements and shareholders' agreements to which it is a party to; and
- whether it intends to appoint or remove directors or statutory auditors.

Law stated - 21 April 2023

Do the disclosure requirements apply to derivative instruments, acting in concert or short positions?

For the purpose of verifying the triggering of the above significant shareholdings, the relevant persons shall consider, inter alia:

- the shares held directly and indirectly, including also those held by controlled companies, fiduciaries and other intermediate persons;
- any derivative instrument or other agreement granting such person the unconditional or discretionary right to acquire the underlying shares by physical settlement (provided that, in case the number of underlying shares is variable, the maximum theoretical amount shall be considered; set-off between long and short positions is forbidden); and
- long and short positions.

Law stated - 21 April 2023

Insider trading

Do insider trading rules apply to activist activity?

To the extent that the company is subject to insider trading rules (most notably, listed companies), the activities carried out by an activist may fall within the scope of application of such rules (eg, insider trading and market manipulation). The target should also be cautious in this regard, particularly if dealing with price sensitive information.

Law stated - 21 April 2023

COMPANY RESPONSE STRATEGIES

Fiduciary duties

What are the fiduciary duties of directors in the context of an activist proposal? Is there a different standard for considering an activist proposal compared to other board decisions?

The Italian legal framework doesn't feature fiduciary duties fully comparable to those of the US and UK systems. Nonetheless, directors shall pursue to the greatest extent the interest of the company, with loyalty and care. Namely,

directors shall:

- abstain from carrying out any activity in competition with that of the company;
- use for their own advantage or the advantage of third parties any corporate information (including information on business opportunities);
- in case the company is listed, abide by the specific requirements applicable to related party transactions;
- act with the degree of care required in relation to their office, their professional skills and the particular features of the company; and
- define, approve and implement an organisational, management and accounting structure suitable in light of the company's purpose and size (said structure shall also be fit for timely discovering distress or insolvency situations and monitoring the going concern of the business) (article 2381 and 2390 seq of the Italian Civil Code (ICC)).

The above duties apply to the same degree and extent in the context of both ordinary business and activist campaigns. In case an activist submits a proposal, the directors shall scrutinise it with loyalty and care, in the interest of the company, its shareholders and relevant stakeholders (as a whole). Activists shall be treated fairly, likewise to any shareholder. In principle, activist proposals should not be considered differently to any other board decision; however, as a matter of fact, board proposals are usually prioritised.

Law stated - 21 April 2023

Preparation

What advice do you give companies to prepare for shareholder activism? Is shareholder activism and engagement a matter of heightened concern in the boardroom?

Corporate transparency, fair treatment of shareholders and safe and sound corporate governance mechanisms are key in case of shareholder activism. Statutory duties of loyalty and care apply without exception in the context of activist campaigns and proposals. Setting internal procedures addressing engagement, dialogues with shareholders and potential activist campaigns and proposals might be particularly helpful to prevent disruptions in dealing with any such occurrences. Considering the relatively limited number and frequency of activist campaigns, activism by external shareholders (ie, non-controlling shareholders) is usually a matter of heightened concern in the boardroom. Shareholder engagement and dialogues are becoming more widespread across the market; therefore, boards are getting accustomed to them.

Law stated - 21 April 2023

Defences

What defences are available to companies to avoid being the target of shareholder activism or respond to shareholder activism?

While there are virtually no absolute defences to avoid being the target of shareholder activism (as it is an external action by a shareholder or a third party), corporate transparency, fair treatment of shareholders and safe and sound corporate governance mechanisms are the first line of defence in case of shareholder activism, thus protecting the company, as well as its directors and management. If the activist campaign consists of requesting the directors to call a shareholders meeting; submitting questions or proposals ahead of an already-called meeting; or soliciting shareholders to grant the activist with proxies for an upcoming general meeting, the defences deployed by the

company typically consist of a combination of:

- assessing whether the relevant request should be accepted or rejected, on the basis of legal grounds (the request may be rejected if it is unlawful, redundant or dilatory);
- privately or publicly answering to the request, setting the grounds for acceptance or rejection; and
- implementing a media campaign aimed at countering the activist campaign.

If the activist campaign consists in a mandatory or voluntary bid over all or part of the outstanding vote-bearing shares of the company, article 104 of the Consolidated Financial Act (CFA) provides that the by-laws or the shareholders meeting may authorise the board to adopt defences aimed at obstructing the bid. The company or its controlling shareholder might also consider soliciting proxies in case of an upcoming general meeting. If the activist launches a media campaign against the company or its strategy, board or management, the latter would typically initiate a counter media campaign, trying to discredit the activist's strategy and objectives.

Law stated - 21 April 2023

Proxy votes

Do companies receive daily or periodic reports of proxy votes during the voting period?

Under Italian law and practice, shareholders usually appoint an individual proxy to participate to the meeting and cast their votes. Institutional investors usually appoint the same person, who will act as proxy for them at the relevant meeting. However, especially after the pandemic, listed companies usually appoint a company's proxy to whom the shareholders may provide voting instructions, at the company's expense. Circular infrastructures (eg, votes to be cast by electronic means before the meeting) are not widespread. Since in such cases the votes are formally (and legally) cast at (not prior to) the shareholders meeting – considering also that the proxies owe confidentiality duties to their principals – the company doesn't receive daily or periodic reports of proxy votes during the voting period. Additionally, in case of solicitation of proxies pursuant to article 136 seq CFA (ie, a shareholder or a third party addressing shareholders and seeking to collect proxies from them for a upcoming general meeting) the solicitor cannot disclose the amount of proxies received from time to time, as confidentiality shall be ensured up until the meeting is held.

Law stated - 21 April 2023

Settlements

Is it common for companies in your jurisdiction to enter into a private settlement with activists? If so, what types of arrangements are typically agreed?

Considering the relatively limited number and frequency of activist campaigns, it is uncommon for companies to enter into private settlements with activists. This is also due to the ownership concentration in listed companies, whereby it is unlikely that both listed companies and their controlling shareholders will enter into negotiations with the relevant activist and ultimately reach a private settlement.

Law stated - 21 April 2023

SHAREHOLDER COMMUNICATION AND ENGAGEMENT

Shareholder engagement

Is it common to have organised shareholder engagement efforts as a matter of course? What do outreach efforts typically entail?

With the aim of preserving corporate secrets and the exclusive governance competence vested into the directors, shareholders of listed companies and joint stock companies are not granted the right to demand engagement with the board of directors or the company's management for the purposes of being informed of the business activity of the company. As for listed companies, the latest version of the Corporate Governance Code (CG Code) explicitly states that the board of directors shall assess the opportunity of engaging with the shareholders and the other relevant stakeholders. Even though there is no right for shareholders of joint stock companies – including listed ones – to demand engagement with the board of directors, this does not mean that engagement per se cannot occur. In other terms, while the directors cannot be forced to engage in exchanges with the shareholders, they may nonetheless decide to do so discretionally and autonomously. It is of paramount importance that the directors engage shareholders fairly and treat them equally (provided that flexibility may be applied). In case the company is listed, market abuse rules shall be taken in due account (especially, though not limited to, those on the disclosure of price sensitive information and on market soundings), as pointed out also by the Italian securities and markets commission (CONSOB) in its Q&A of 18 March 2021 on selective disclosure towards shareholders.

In market practice, it is common for the controlling shareholder to appoint the majority of the directors and provide steering at a group level, which might include a listed company; the controlling entity might also manage and coordinate the latter under article 2497 seq ICC (ie, set the business strategies, objectives etc). Indeed, for the purpose of doing so, the controlling shareholder engages on a regular basis with the listed entity's directors and managers. Minority shareholders might be interested in engaging with the company in a similar manner, however the directors and managers might not be willing do to so, especially to preserve corporate secrets and goals.

Institutional investors (asset managers, pension funds etc) are usually more successful in engaging with listed entities, provided that the above safeguards in terms of equal treatment and prevention of market abuse shall always be in place (to the benefit of both the company and the relevant investors). In this regard, it should be noted that the national legal framework has been recently supplemented with the relevant implementing measures of the provisions under Directive (EU) 2017/828. Namely, article 124-quarter seq of the Consolidated Financial Act (CFA) set forth that asset managers and institutional investors holding stakes in listed companies shall, inter alia:

- make available to the market a commitment policy which describes how their investment intertwines with their general investment strategy (eg, investment monitoring and engagement, risks, financial and nonfinancial results, exercise of voting rights, social and environmental impact etc); and
- disclose, at least on a yearly basis, their actual implementation of such commitment policy and how their voting rights have been exercised.

Law stated - 21 April 2023

Are directors commonly involved in shareholder engagement efforts?

Directors are, in almost all instances, involved in shareholder engagement efforts, especially the chair and the CEO (in Italy, the CEO is a director, to whom the board has delegated executive powers). The CG Code provides that, on the one hand, the board of directors shall foster constructive engagement channels with the shareholders and the other relevant stakeholders, also by means of structuring dialogues with them, to be held on a regular basis or ad hoc; on the other hand, the chair shall ensure that the board (as a whole) is informed in a timely fashion of the developments and

content of the dialogues held with the shareholders/stakeholders. Both the Principles for Listed Companies' Dialogue with Investors issued by Assonime and the Italian Shareholder-Director Exchange Guidelines issued by Assogestioni set forth that the board shall be central in engagement and dialogue matters. Directors' involvement is particularly appropriate since the board of directors is the corporate body ultimately entrusted with setting the company's strategy, as well as preserving the integrity of its sensitive and confidential corporate information. An increasing number of listed companies has adopted engagement and dialogues policies, aimed at defining clear rules in that regard (the CG Code provides that the policy shall be adopted by the board, upon joint proposal by the Chair and the CEO).

Law stated - 21 April 2023

Disclosure

Must companies disclose shareholder engagement efforts or how shareholders may communicate directly with the board? Must companies avoid selective or unequal disclosure? When companies disclose shareholder engagement efforts, what form does the disclosure take?

As far as disclosure on shareholder engagement efforts is concerned, the CG Code requires listed companies to provide adequate disclosure in this regard, namely in their yearly corporate governance reports (to be made available to the public in accordance with article 123-bis CFA). An increasing number of listed companies have adopted engagement and dialogues policies, aimed at defining clear rules in that regard. In most cases, said policies are available to the shareholders on the company's website; therefore, companies do disclose how shareholders may communicate directly with the board. Directors shall treat shareholders equally, provided that flexibility may be applied. In case the company is listed, market abuse rules shall be taken in due account (especially, though not limited to, those on the disclosure of price sensitive information and on market soundings), as pointed out by the CONSOB in its Q&A of 18 March 2021 on selective disclosure towards shareholders. Therefore, if adequate safeguards are implemented and price sensitive information (as defined under article 7 of the Market Abuse Regulation) is not selectively disclosed, engagement and dialogues may be carried out. Disclosure may also be given in openly accessible conference calls organised by the company, which are usually held periodically (eg, when yearly, half-year or quarterly financial reports are made available to the public). In this case, minutes are generally prepared by the investor relations manager and published on the company's website.

Law stated - 21 April 2023

Communication with shareholders

What are the primary rules relating to communications to obtain support from other shareholders? How do companies solicit votes from shareholders? Are there systems enabling the company to identify or facilitating direct communication with its shareholders?

Shareholders may communicate freely among themselves, provided that if they enter into a shareholders agreement pursuant to article 122 CFA (that explicitly mentions consultation agreements) strict disclosure duties apply, as mentioned above; also, coordination might be deemed as acting in concert, thus entailing a duty to launch a mandatory bid over all the outstanding vote-bearing shares of the company. Companies publish the calling notice for the relevant shareholders meeting on their website (an excerpt shall also be published in newspapers) and invite the shareholders to exercise their voting (and other corporate) rights. The calling notice shall describe in a clear and detailed manner, inter alia:

- the procedure to be followed to attend the meeting and exercise the voting rights;
- how to submit questions to the company and submit a shareholders' proposal;

- whether the board has appointed a company's proxy that the shareholders may use to cast their votes at the company's expense;
- how individual proxies should be granted in order for them to be valid and effective; and
- the requirements for submitting lists of candidate directors.

With regard to listed companies, corporate disclosure is generally made via the company's website. As mentioned, especially after the pandemic, listed companies usually appoint a company's proxy to whom the shareholders may provide voting instructions, at the company's expense. This is proving to be a very effective instrument to enhance shareholders' rights. With the aim of facilitating direct communication with its shareholders, article 83-duodecies CFA provides that the company shall have at any time the right to request the identification of shareholders holding more than 0.5 per cent of the corporate capital, with the view to facilitating the exercise of shareholder rights and shareholder engagement with the company.

Law stated - 21 April 2023

Access to the share register

Must companies, generally or at a shareholder's request, provide a list of registered shareholders or a list of beneficial ownership, or submit to their shareholders information prepared by a requesting shareholder? How may this request be resisted?

With the aim of facilitating coordination between shareholders, article 83-duodecies CFA provides that qualified shareholders (ie, shareholders representing at least 2.5 per cent of the corporate capital or the lower threshold set by the by-laws or by the CONSOB in accordance with article 147-ter CFA) shall have the right to request the identification of shareholders holding more than 0.5 per cent of the corporate capital. The Issuers Regulations provide specific rules on cost allocation between the requesting shareholders and the company. The company cannot resist any such request, insofar as it has been made by qualified shareholders and its aim is that of facilitating the exercise of shareholder rights (ie, it is not redundant or dilatory).

Law stated - 21 April 2023

UPDATE AND TRENDS

Recent activist campaigns

Discuss any noteworthy recent, high-profile shareholder activist campaigns in your jurisdiction. What are the current hot topics in shareholder activism and engagement?

Activist campaigns have recently focused on major companies operating in telecom/media, concentrating in times where strategic transactions are being carried out (eg, Telecom–KKR; Telecom–Elliot–Vivendi; Retelit–Shareholder Value Management). Activist campaigns might spread further across the market as many listed companies are considering going-private transactions (de-listings), as specialised investors (eg, hedge funds) may seize the opportunity to invest and initiate activist campaigns with the aim of extracting benefits out of such particularly sensitive transactions. Engagement with shareholders has been significantly growing in the past years and has captured public authorities' attention. We expect this trend to continue in the coming years.

Law stated - 21 April 2023

Jurisdictions

France	Darrois Villey Maillot Brochier
Italy	Orrick, Herrington & Sutcliffe LLP
Japan	Nishimura & Asahi
Luxembourg	NautaDutilh
Netherlands	NautaDutilh
New Zealand	Russell McVeagh
South Korea	Hannuri Law Firm
Switzerland	Bär & Karrer
USA	Wachtell, Lipton, Rosen & Katz