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Shareholders' Rights & Shareholder Activism

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Contents

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1. Shareholders' Rights

1.1 Types of Company

The types of the 'capital' companies (corporations), ie, those that afford limited liability to their shareholders, as opposed to 'persons' companies' (partnerships), are the following:

- the *società a responsabilità limitata*, or 'Srl' (literally, limited liability company);
- the *società per azioni*, or 'SpA' (usually translated as joint stock company); and
- the *società in accomandita per azioni* or 'SapA' (limited partnership).

The first two are true limited liability companies contemplated by our legal system, whilst the last is somewhat hybrid in nature, in so far as it ensures the limitation of liability only to some of its partners.

In Srls and SpAs, the liability of the stockholders is limited to the amount of their contribution to the company.

In SapAs, there are two kinds of partners:

- limited, who enjoy limited liability status;
- general, who are responsible for the management of the company and are unlimitedly and jointly liable for the company's undertakings.

Broadly speaking, and at the risk of putting across a somewhat generic statement, Srl companies tend to be the form that best suits businesses of smaller size. In addition, in the views of our law makers (which were confirmed and emphasised further at the time of the last major corporate law reform, in 2003) Srl companies are tailored, structured in terms of governance and overall corporate functioning, to operate businesses that are typically owned by one or a small group of stockholders, unlike SpAs.

Statistics indicate that Srls are the most commonly used type of companies, a reflection of the Italian economy, which is rather fragmented and boasts mainly small and medium enterprises. Conversely, SpAs are usually used in relation to bigger enterprises where larger capital and more flexibility in the circulation of shares are required. The governance structure of an SpA is generally more complex and, as such, it may offer a better protection to minority shareholders (for example, it requires the need to appoint a board of statutory auditors, whose main duty is to vet the legitimacy of the operations of the board).

Foreign investors traditionally seem to favour the use of SpAs in connection with the conduction of their business, except for the cases of the initial phase of the acquisition of an Italian target, in which case an Srl type of vehicle is most often used. There are no restrictions, in principle, regarding the nationality or other similar requirements on those investing in these companies, except regarding subscription of bonds, which is allowed — without limitation — to professional investors only.

This answer does not address the SapA limited partnerships, because of the rather scarce use of this form of company and its hybrid nature.

SpA and Srl companies are bound to obey minimum capital requirements for their incorporation, which are as follows:

- For an Srl, EUR10,000 (Article 2463, Civil Code), of which 25% must be paid in at the time of the incorporation. Capital contributions can be made also in kind, in which case the value of the assets contributed shall have to be appraised by an expert (usually a certified accountant chosen by the incorporating shareholders) to secure that it has been assessed on a fair market basis. If the capital of an Srl is lower than EUR10,000, or if it is equal to at least that amount but the Srl is owned by only one stockholder, the contributions in money must be paid up in full at the time of its incorporation.
- For an SpA, EUR50,000 (Article 2327, Civil Code). The same requirements above apply to SpAs, as well as the amount to be paid up at the time of the incorporation and where the company is owned by only one shareholder. The same rule regarding the contributions in kind and their evaluation also applies, except that in the case of an SpA, where the expert conducting the appraisal cannot be selected and appointed by the incorporating stockholders, this must be done by the court sitting in the company's place of business upon the request of the incorporating shareholder(s).
- Our system also contemplates a 'simplified' type of Srl company, in that it requires only EUR1 as minimum capital for its incorporation. The rationale for its introduction was the attempt to favour younger people (up to the age of 35) and encourage them to engage in business activities in a corporate, albeit simplified, form. A relatively recent reform (2013) has extended the possibility to incorporate a company of this type to those of an older age by cancelling the initial age requirement. This objective notwithstanding, the number of simplified Srls seems to be much lower than law makers expected, and the choice of a 'standard' Srl corporate form appears to continue to be the preference of business people at large.

1.2 Type or Class of Shares

As indicated above, shares pertain to, and can only be issued by, SpA companies, to the exclusion of the other main type of Italian limited liability company, the Srl. In the case of an Srl company, its corporate capital is represented by the sum of the various percentage interests owned by the stockholders that total 100%. These interests are called 'quotes' (literally, 'portions') but are not represented by a written instrument.

The general rule is that all shares must have the same value and grant the same rights to the shareholders (ordinary shares). However, if so permitted by the by-laws, special classes of shares can be issued by an SpA company to grant rights to the shareholders that are different with respect to those pertaining to shares of common stock. These rights can be of administrative (eg, voting) or economic (eg, preferred) nature (Article 2348(2), Civil Code). The types of shares other than common stock that are specifically regulated by applicable laws, and that are most often used, are the following:

- '*azioni privilegiate*' (preferred shares), which may grant certain privileged rights with respect to, for example, the distribution of dividends or the liquidation of the company's assets;
- '*azioni a voto limitato con esclusione del diritto di voto o a voto multiplo*', shares that have limited, non-voting or multiple voting rights;
- '*azioni ai prestatori di lavoro*', shares issued in favour of employees (stock options);
- '*azioni di godimento*' (literally, enjoyment shares, usually without voting rights). These are attributed to the existing shareholders in the case of reduction of the company's capital and are issued in substitution of the ordinary shares that are cancelled as a result of the reduction of the company's capital. Their rationale is to give the shareholders the possibility to mitigate through future and hoped for earnings the damages of having received their ordinary shares at nominal value, which on principle should have a higher market value;
- '*azioni con prestazioni accessorie*' (shares that entail the performance of certain ancillary services by their owners, in addition to their payment); these can only be registered shares and, due to their personalised nature, cannot be transferred without the directors' consent;
- '*azioni correlate*' (tracking shares) whose economic rights (yield) depend on the company's performance in a certain specific business carried out by the company;
- '*azioni proprie*' (redeemable shares), which can be repurchased by the company or other shareholders; and
- '*azioni di risparmio*' saving shares (without voting rights), which can be issued only by public (listed) companies.

As regards other equity instruments, the Civil Code expressly covers the issuance of participation financial instruments (Article 2346(6), Civil Code) and other hybrid instruments such as convertible bonds (Article 2420 bis, Civil Code).

Despite their somewhat limited use, the participation securities are usually issued to third parties in exchange for the provision of work or services. They incorporate economic rights which are generally connected to the financial results achieved by the company, as well as some administrative rights (except for the voting right in the general meeting) in accordance with the bylaws.

Bonds can be issued by SpA companies as an additional and parallel form of financing, subject to certain conditions and limitations. On principle, their total amount cannot exceed the total value of the sum of the company's capital and of its reserve funds. Exceptions to this general limitation are the possibility that the bonds are underwritten for a larger amount by professional investors, such as banks and/or insurance companies, or are otherwise secured by a first degree-mortgage on the company's real estate assets.

In the past, Srl companies were not allowed to issue bonds and this prohibition often caused their owners to transform their company into an SpA. Srls are now allowed to issue bonds with the strong caveat that they can only be underwritten by professional investors. In recent years, the law makers have endeavoured to foster the possibility that Srl companies operating small businesses may receive a parallel form of financing through the issue of other specific bonds called 'minibonds'. However, due to the requirements at the basis of their issuance combined with direct lending being still the primary source of financing and the generally sceptical attitude of local markets towards bonds, this instrument is not as dramatically successful as it was initially conceived to be. Statistics indicate that, since their introduction in 2012 to 2018, the total value of issued 'minibonds' is slightly over EUR25 billion.

1.3 Primary Sources of Law and Regulation

The Civil Code and other specific statutes are the main sources of law governing shareholders' rights. In addition, an important and primary source of law are the company's bylaws, which are an agreement in nature and regulate the rights of the shareholders under the principle of freedom of contract, albeit subject to public policy, mandatory rules of law. In parallel, shareholders agreements are of great importance (see **1.5. Shareholders' Agreements/Joint Venture Agreements**).

Below are the sources of law that are relevant in respect of the so called 'shareholders' activism' and the most important recent changes.

- Legislative Decree No 58/1998, whose most significant measures concern the lowering of the relevant thresholds to call the shareholders' meeting, and the increase of the voting quorum required in an extraordinary shareholders' meeting;
- Law No 262/2005, which introduced the slate voting system mechanism *(voto di lista*) for the election of directors and introduced an obligation on companies listed in Italian or EU regulated markets to reserve a place on the board of directors for minority shareholders; and
- Legislative Decree No 27/2010, which ratified Directive 2007/36/EC on the exercise of certain rights of shareholders in listed companies (Shareholder Rights Directive) on shareholders' rights in listed companies.

Generally, the new rules have increased transparency, encouraged shareholders' attendance at the shareholders' meeting and have implicitly fostered shareholder activism, allowing shareholders to receive more information and to bear lower costs in connection with the vote in shareholders' meetings.

1.4 Main Shareholders' Rights

Generally speaking, the rights afforded to shareholders are as follows:.

- Economic rights, eg:
  (a) the right to receive dividends;
  (b) the right to receive a proportional part of the company's net assets at the time when the company is wound up;
  (c) pre-emptive rights in the case of an issue of new stock (and, for SpAs, also in the case of an issue of convertible bonds); and
  (d) the right to withdraw from the company, which is a most effective remedy for minority shareholders, especially if it is specifically and well-articulated in the company's bylaws or in a shareholders' agreement.
- Administrative rights, eg:
  (a) the right to participate and vote in general meetings and to challenge the resolutions of the meeting; and
  (b) the right in Srl companies for those who are not involved in management to be fully informed about the operations of the company and the right to access all documents concerning the company at large (Article 2476, second paragraph, Civil Code).

1.5 Shareholders' Agreements / Joint Venture Agreements

Shareholders agreements and joint venture agreements are fully enforceable so long as they do not contain provisions that are against the law or in breach of public policy or mandatory rules. As indicated, their contents is based on the principle of freedom of contract. Shareholders agreements concerning privately held (non-listed) companies are rather common. They typically provide rules on the exercise of voting rights, super majority requirements at board or shareholders' meeting level, lock up arrangements, and wayout provisions such as put and call options, drag and tag along undertakings, piggyback rights and similar arrangements.

The duration of shareholders' agreements cannot exceed five years, three in the case of public (listed) companies. Shareholders agreements are applicable to both SpA and Srl companies, although, in the case of Srls, their use seems to yield invariably to the adoption of a rather articulated bylaws where all the typical provisions mentioned above are contained. The rationale for this choice is that, whilst the legal effects of a shareholder's agreement are limited to their parties and on principle are of 'obligatory' nature (ie, the breach of any such agreement entails the right to damages only), the bylaws are enforceable against third parties. Thus, for example, a voting syndicate covenant contained in the bylaws will be fully enforceable and the resolution taken, despite its breach, can be challenged in court, whereas, if it should be contained in a shareholders' agreement, it would only give the injured shareholder party the right to claim the damages resulting from its breach.

1.6 Rights Dependent Upon Percentage of Shares

There are some rights of relevance that under the law are linked to a certain percentage interest to be validly exercised. Among these are:

- the right to call a shareholders' meeting (see **1.9 Calling Shareholders' Meetings**); and
- the right to lodge a liability action against the director(s) and/or the statutory auditor(s). In privately held SpA companies, this right belongs to the shareholders who own a minimum of 20% of the entire corporate capital, whilst in publicly held SpAs this threshold is lowered to 2.5%.

1.7 Access to Documents and Information

There is a rather sharp distinction in this respect between an SpA and an Srl company.

Shareholders of SpAs have only a few and somewhat impractical rights of this type, mainly because of the mandatory presence of a controlling body (the board of statutory auditors or the supervisory board) which have the duty to vet the legitimacy of the management operations, and the possibility, for those who own no less than 10% in privately held and 5% of the entire corporate capital in listed companies, to report to the local court any legitimate suspicions of 'irregularities in management' (Article 2409 Civil Code). If the petition regarding the existence of these irregularities is upheld, the court may appoint a trustee in lieu of the director(s) to inspect the irregularities and may revoke the auditors for as long as it deems necessary. Procedures of this type can be harmful to the company in that, during the deputyship of the trustee, the company's business may slow down as a result of the lack of management. Moreover, if the irregularities are not settled and the company is not put back in an ordinary management situation, in some cases this may lead to the liquidation of the company. In the views of many a scholar, the strength of this remedy in SpA companies as a true deterrent available to shareholders justifies, in parallel with the existence of an internal controlling body, the rather scarce substance of the shareholders' direct rights. Among these are the right to inspect, and obtain copies of, the shareholders' book and the book of the general meetings' minutes (Article 2422, Civil Code). Shareholders also have the right to receive and inspect the draft financial statement fifteen days prior to its approval by the general meeting (Article 2429(3), Civil Code).

Conversely, Srls shareholders enjoy much broader, and theoretically unlimited, rights of access to the company's documents and information, regardless of the percentage of their ownership interest in the company. The rationale for this principle, which is established in Article 2476, Civil Code, lies not only in the absence (except in some cases) of a controlling body and of the remedy under Article 2409 of the Civil Code, as in the case of SpAs, but also in the 2003 corporate law reform structuring the functioning of an Srl upon the assumption that it should operate as a sort of a partnership, albeit corporate and limited as to the liability of their owners and, as such, it should be transparent and fully inspectable regarding its management operations.

As a result, stockholders in Srls have the continued right to:

- obtain information on the management of the company and inspect all the relevant documents; and
- access the company's books.

In the exercise of these rights, Srl stockholders can be assisted by third-party experts (Article 2476(2), Civil Code). To prove as effective as they have been conceived, these rights require, however, the assistance of an efficient and timely court to give them appropriate enforcement, which in some cities does not seem to be always available.

1.8 Shareholder Approval

The main case of mandatory approval by the shareholders is that required in connection with the company's yearly accounts. Apart from those specific cases where the approval is required by the company's bylaws, the other main issues for which it is necessary concern:

- the election of the director(s) and of the (board of) statutory auditor(s) or of the supervisory board, and the compensation of their members;
- the determination to bring a liability action against any such members, whether separately or collectively; and
- the distribution of dividends upon the approval of the company's accounts.

The above issues fall under the competence of the general shareholders' meeting in 'ordinary' form.

Any issue or transaction that entails a change in the company's bylaws (including, eg, mergers, demergers and the change in the form of the company) and the issue of new shares or bonds also require the approval of the shareholders' meeting, except in its 'extraordinary' form.

The main difference between the form in which the meeting takes place (ordinary vs extraordinary) lies in the type of issues to be approved and the quorum required for the approval (a simple majority in the first case and two thirds of the voting rights of those shareholders attending the meeting).

The company's bylaws may require supermajority quorums for the approval of certain resolutions.

1.9 Calling Shareholders' Meetings

In Srl companies, this right pertains to those who own no less than one third of the entire corporate capital, and who can exercise it in case the director(s) should reject their request to call the meeting. In SpA companies, the ownership interest required is lower (eg, 10% in privately held, non-listed companies), although the request is to be submitted to the board of directors at first and, failing their acceptance, to the board of statutory auditors (or the supervisory board in the case of the dual governance system companies). Failure by the latter to uphold the request to call the meeting will leave to the shareholders the choice to request that the meeting is called via a court order.

Notice of the meeting must comply with the requirements set out in the company's bylaws. These can make reference to the applicable provisions of the Civil Code or may provide that, as in the case of SpAs, the notice is sent out by any other means of communication that constitutes valid proof that the meeting has been validly called, in all cases no less than eight days in advance. In Srls, the same principle applies apply. In the absence of any specific requirements, the notice of call must be sent in compliance with the Civil Code provision under Article 2479 bis, which establishes that the meeting must be called by a notice sent by registered letter no less than eight days in advance.

Shareholders are supposed to be duly informed of the matters to be discussed at the meeting, and the agenda shall be sufficiently detailed in its notice communication. Shareholders who claim not to have been adequately informed, and who own at least one third of the shares represented at the meeting, have the right to request that the meeting is postponed by no more than five days and can do this only once (Article 2374, Civil Code). There is a significant split of authority regarding the application of this rule to Srls, since it is specifically provided for SpA companies only. Even assuming that it does indeed apply to Srls, this right appears to be of relative use for the dissenting shareholders, whose main remedy against a resolution adopted despite their lack of information objection remains to challenge it in court, if the circumstances so permit.

1.10 Voting Requirements and Proposal of Resolutions

Shareholders can participate in the meeting personally or by proxy, which can be given to another shareholder or to a third person but not to members of the board of directors, auditors and/or employees of the company or of its subsidiary (controlled) companies.

The right to request the insertion of a specific item in the agenda is linked to the right to call a meeting, see **1.9 Calling Shareholders' Meetings**.

Quorum requirements are addressed in **1.8 Shareholder Approval**.

1.11 Shareholder Participation in Company Management

Shareholders may participate in the management of the company, and very often do, but have no specific right under the law to be appointed as directors.

1.12 Shareholders' Rights to Appoint / Remove / Challenge Directors

In both types of companies, the initial directors are those in place at the time of the incorporation (Article 2328, Civil Code). Afterwards, they are appointed by the shareholders' general meeting in ordinary form (for quorum requirements see **1.8 Shareholder Approval**).

In Srls, directors can be appointed by means of a written consultation or written consent.

In SpAs, directors can be revoked by the shareholders' meeting at any time and for any reason, save for their right to damages if the revocation is made without just cause. On principle, the mere revocation or withdrawal of the executive powers given to a member of the board, including the CEO, but not of their office, does not give rise to the right to damages.

Conversely, in Srls, there are no specific legal provisions concerning the revocation and replacement of directors. However, the same Civil Code rule on the right of access to the documents and information of the company (Article 2476) provides that, when a liability action is brought against the director(s), the plaintiff has the right to request that the court revokes the director(s) as an interim, cautionary measure. Scholars and a significant portion of the case law, are in favour of the possibility that despite the absence of a specific provision on the revocation, the right to revoke a director is intrinsically linked to the right of their appointment, which is indeed specifically provided for by the Civil Code for Srl companies.

SpA shareholders who represent at least 5% of the corporate capital of privately held companies have the right to challenge the resolutions of the board of directors, but only when the resolutions are in breach of their rights as shareholders and not on the grounds of mere business dissent (Article 2388, Civil Code). In these cases, the same rules on the objection to the shareholders' resolution will govern the relevant legal action, to the extent applicable (Articles 2377 and 2378, Civil Code).

On the contrary, stockholders in Srl companies cannot challenge the board of directors' resolutions.

In both types of companies, any shareholder (or third party) who suffered a loss as a direct result of the directors' negligence or misconduct has the right to sue the director(s) for damages.

1.13 Shareholders' Right to Appoint / Remove Auditors

In both SpAs and Srls, the initial members of the board of statutory auditors (or the sole auditor in Srls, if present) are appointed at the time of the company's incorporation (Article 2328, Civil Code). Afterwards, they are appointed by the general meeting of the shareholders. In Srls, they can also be appointed by written consultation or written consent. While the existence of a controlling body such as a board of auditors is required for SpA companies, auditors need not be appointed in Srl companies, except when certain conditions occur, eg, the level of the volume of sales and the number of employees exceed certain thresholds. The rationale for this rule lies in the principle that — at least theoretically — Srl stockholders have larger control over the management actions and operations.

Auditors can be revoked only for just cause and by a court approved resolution.

Auditors must satisfy certain requirements as regards their professional qualifications, eligibility and compatibility (for example, must be certified accountants) and these are set out by the law.

1.14 Disclosure of Shareholders' Interests in the Company

The ownership interests in Srl companies and the list of the names of the shareholders are registered in the companies' Registrar (*Registro delle Imprese*) in the local chamber of commerce where the company's seat is located. Any transfers of ownership or of any interests in Srl companies must also be registered. All this information will include the relevant chamber of commerce certificate along with the names of the directors, the indication of their powers and the name of the auditors.

1.15 Shareholders' Rights to Grant Security over / Dispose of Shares

The company's stock can be validly pledged unless it is expressly prohibited by the bylaws or the shareholders' agreements. In such a case, and unless otherwise agreed between the parties to the pledge agreement, the voting rights are exercised by the pledgee. However, the exercise of the pre-emptive rights belongs to the pledgor (Article 2352, Civil Code).

Similarly, the right of disposal of shares is free and unlimited unless it is restricted or prohibited by the bylaws or the shareholder agreement. In this case, the lock up covenant has a different legal weight depending on where it is provided for (see **1.5 Shareholders' Agreements/Joint Venture Agreements**).

1.16 Shareholders' Rights in the Event of Liquidation / Insolvency

If the insolvency situation causes the company to resort to one of the reorganisation procedures contemplated by the Bankruptcy Law (Royal Decree 267/42), the applicable legal provisions focus mainly on the protection of the interest of the company's creditors and, in certain cases, on the prosecution of the business activity of the company (the settlement with creditors' procedure).

The shareholders' right to the reimbursement of the shareholders' loans is subject to the satisfaction of all other creditors (secured and unsecured).

In the case where the reorganisation procedure ends up with the liquidation of the company, the shareholders have the right to the reimbursement of their contributions to the corporate capital, provided that all other creditors have been fully satisfied.

The shareholders meeting (in SpAs, in the extraordinary form) can resolve to wind up the company.

In the case of liquidation, the shareholders meeting (in SpAs, in its extraordinary form) can appoint liquidators, revoke them for just cause and resolve on the manner in which the winding-up must take place. When this procedure is completed, the liquidators draw up the final balance sheet, which must be approved by all shareholders (Article 2487, Civil Code). Each shareholder has the right to challenge it in court, within 90 days from the date of its filing in the Companies' Register. Shareholders have the right to be attributed in the proceeds resulting from the sale of the company's assets. If the bylaws or a resolution of the shareholders meeting should so provide, the shareholders' stakes can be liquidated in kind.

The liquidation procedure can be revoked at any time by the shareholders meeting (in SpAs in its extraordinary form), subject to the prior elimination of the cause at the origin of the liquidation. The revocation is effective upon expiration — 60 days from the date of filing the resolution in the Companies' Register (Article 2487 ter, the Civil Code).

2. Shareholder Activism

2.1 Legal and Regulatory Provisions

The main regulatory provisions are as follows:

- The Italian Civil Code (Articles 2367, 2374, 2377, 2393, 2408, 2409, 2473 and 2476), which contains the provisions regarding the calling of a shareholders' meeting, the adjournment of a meeting in the absence of sufficient information and the cancellation of resolutions, and the rules concerning liability actions against the directors, the report to the board of statutory auditors, any alleged mismanagement actions, withdrawal actions, actions for the appointment of a judicial commissioner in lieu of the board, and the rights to information on management actions and operations.
- Legislative Decree No 58/1998, the most significant measures of which concern the lowering of the relevant thresholds to call the shareholders' meeting of public (listed) companies, and the increase of the voting quorum required in an extraordinary shareholders' meeting.
- Law No 262/2005, which introduced the slate voting system mechanism ('*voto di lista*') for the election of directors and introduced an obligation on companies listed in Italian or EU regulated markets to reserve a place on the board of directors to minority shareholders.
- Legislative Decree No 27/2010, which ratified Directive 2007/36/EC on the exercise of certain rights of the shareholders in listed companies (Shareholder Rights Directive). Generally speaking, the new rules have increased transparency, encouraged shareholders' attendance at the shareholders' meeting and have implicitly fostered shareholder activism, allowing shareholders to receive more information and to bear lower costs in connection with the vote in shareholders' meetings. Amongst the changes of higher relevance is the shorter term allowed to intervene and vote at a shareholders' meeting. Previously, shares were de facto 'blocked' from being transferred during the days preceding the meeting so as to continue to enjoy voting rights, whereas the new text of Article 2370 of the Italian Civil Code provides that to be validly voted the shares must now be deposited no more than two weekdays in advance. Furthermore, shareholders are now supposed to be warned in the notice of call about their right to put questions concerning the items on the agenda of the meeting (Article 125 bis, Decree No 58/1998, as amended under Decree No. 27/2010). This right, which is further established by another provision (Article 127 ter, Decree No 58/1998 as amended by Decree No 27/2010) imposes upon management the duty to answer any such questions before or at the meeting. Last but not least, the use of proxies has also been made easier.
- Law No 116/2014, which introduced new categories of shares in Italy, namely multiple voting shares ('*azioni a voto multiplo*') with reference to non-listed joint stock companies and shares with increased voting rights ('*azioni a voto maggiorato*') with reference to listed joint stock companies.
- The Regulation on Listed Companies No 11971 of 14 May 1999, as amended from time to time, issued by the

Italian Companies and Exchange Commission ('Commissione Nazionale per le Società e la Borsa').

- In June 2017 Directive (EU) 2017/828/EU as regards the encouragement of long-term shareholder engagement, amending Directive 2007/36/EC on the exercise of certain rights of shareholders in listed companies (Shareholder Rights Directive), was adopted by the European Commission to remedy the failings and weaknesses identified in the corporate governance systems of listed companies. The amendments focus on enhancing transparency between investors and companies and must be implemented into national law by all EU member states by June 2019.
- Law Decree No 148/2017 has been introduced with the purpose, among other things, of improving transparency and increasing the level of information provided to shareholders in corporate extraordinary transactions. One of the most important provisions introduced is the 'early warning' provision, under which any purchaser of a number of shares equal to, or exceeding, 10%, 20% or 25% of a listed company's share capital must publicly disclose the plan that it intends to pursue with regard to that shareholding in the six months following its purchase. This disclosure statement must also contain further specific information, namely:
  (a) the financial terms regarding the transaction;
  (b) whether the purchaser is acting alone or jointly with other investors;
  (c) whether the purchaser intends to buy additional shares in the target, or to acquire control of the company; and
  (d) whether the purchaser wants to change the composition of the company's board of directors or the board of statutory auditors.

2.2 Level of Shareholder Activism

In general terms, shareholder activism in Italy is represented by actions brought by:

- investors attempting to influence the company's management as regards corporate policies and strategies; and
- minority shareholders attempting to put pressure upon management or other shareholders by the extreme and possibly undue or abused of exercise of their rights, with the view to cause the other shareholders to eventually buy them out to put an end to fatiguing quarrels and judicial disputes. It is not incorrect to say that this is the most common form of shareholder activism and occurs on a larger scale than that conducted by investors.

In terms of volume, activism by minority shareholders exceeds greatly any other form of similar activity. For this reason, this answer concentrates on the aspects of activism that concern minorities and their disagreements with the management or the majority shareholders. We have deliberately not covered those very few cases where activism is synonymous with a shareholder behaving as a corporate raider (for example, the relatively recent case of Vivendi attempting to take over Italian media giant Mediaset).

By and large, Italian corporate and financial regulations do not provide strong support for shareholder activism. In the absence of specific, steadfast provisions to the contrary (which would have to be contained in the company's bylaws or in shareholders' agreements) majority shareholders enjoy full control of the company. Consequently, minority shareholders' involvement and participation in corporate governance, and their influence at the level of the shareholders' meetings, is invariably limited, save for a few exceptions which nonetheless confirm this general principle.

In the last 20 years there have been significant legislative changes that have helped to encourage shareholder activism. As for public (listed) companies, the Finance Text Law (Consolidated Text on Financial Laws, enacted by Legislative Decree No 58/1998), among other things, increased the importance of transparency and the provision of information on corporate governance. Furthermore, Directive 2007/36/EC on the exercise of certain rights of shareholders in listed companies (Shareholder Rights Directive), ratified by Legislative Decree No 27/2010, significantly increased the rights of minority shareholders in listed companies. For closely held companies, the corporate law reform of 2003 (Legislative Decree No 6 of 17 January 2003) introduced certain amendments that have formed the basis of shareholder activism in these types of companies. These amendments included the right to withdraw from a company in certain specific cases (Articles 2437 and 2473, Italian Civil Code) and the right to transparency and access to the company's information (Article 2476, paragraph 2, Italian Civil Code) (see **1.7 Access to Documents and Information**).

The corporate law reform of 2003 was welcomed by many as a significant step towards the protection of minority shareholders in privately held companies. In particular, the specific remedy introduced for Srls in the new text of Article 2476, paragraph 2 of the Civil Code (see **1.7 Access to Documents and Information**) should have finally allowed minority shareholders to learn about every single aspect of the management and operations of their company. However, in practice, this remedy, and the reform more generally, have proven to be of limited use. Actions involving shareholder activism, with the exception of the possibility of seeking a provisional remedy in court if the circumstances should so permit, are still channelled through ordinary types of court action.

The principal remedy contemplated by the 2003 reform in favour of minority shareholders who would eventually want to leave the company not to continue to suffer the majority's tyranny is no doubt the right of withdrawal from the company ('*diritto di recesso*'), which is afforded to shareholders

under certain specific circumstances provided by the Civil Code. However, this right can be exercised only under specific factual circumstances that, in reality, are rather unlikely to occur (for example, the company's transfer of its registered office broad).

2.3 Shareholder Activist Strategies

Activist shareholders tend to make use of the shareholders' rights provided to minority shareholders under Italian law. Usually, activists aiming for minority board representation look for the support of institutional investors (other than hedge fund investors), which invariably submit their list of candidates after having sought the support of other shareholders. To that end, the strategies used tend not to be aggressive. Often, activist shareholders prefer to conduct their activities quietly, establishing strategic alliances with target companies wherever possible, rather than deploying more aggressive strategies. Sometimes, activist shareholders will pursue their goals in different stages. At first, the activist campaign usually begins with private talks and negotiations with the management of the target company. If this proves insufficient, a second stage will cause the shareholder activists to resort to public actions such as letters and press announcements. Typically, at this second stage activist shareholders will try to increase their voting power, or will use strategies aimed at obtaining support from other shareholders.

2.4 Targeted Industries / Sectors / Sizes of Companies

So far, the telecommunications sector seems to have been targeted more than other sectors.

2.5 Most Active Shareholder Groups

Minorities are, by definition, the most active shareholders, although it is not uncommon that hedge funds target a company that has management problems and/or cash reserves available for distribution. In cases such as these, the fund's objective will be to buy an interest in the target company with the view to increasing its values and reselling it at a capital gain some time after, once the objective has been achieved.

2.6 Proportion of Activist Demands Met in Full / Part

A precise answer to this is not currently available.

2.7 Company Response to Activist Shareholders

Companies should ensure that their board of directors focuses on investor relations and maintains good relations with institutional investors. This can be achieved by putting in place a dedicated team that has the specific task of understanding these investments and the voting policies employed by its own investors. In addition, the board of directors should be prepared to entertain talks and negotiate with shareholder activists and, with this in mind, the board must also be provided with all the relevant information that it will need in order to understand the shareholder activist environment. It is also important for companies to be prepared against the approaches of activist shareholders, and to ensure the establishment of this specific team of managers and consultants who should be prepared to face the private requests of institutional investors that have an activist shareholder agenda.

There are also a number of provisions that can be included in the company bylaws in order to minimise the risk of being targeted by activist shareholders:

- The issuance of multiple voting shares and shares with increased voting rights, which were introduced in 2014 to make corporate law more flexible. Furthermore, both listed and non-listed companies are allowed, on principle, to issue loyalty shares (that is, shares that are owned for at least 24 months, which are entitled to two votes each). The adoption of such shares increases the voting rights for controlling, long-term shareholders, providing an additional means for a company to face aggressive forms of shareholder activism conducted by short-term investors.
- The issuance of special classes of shares (for example, non-voting shares, shares with limited and/or conditional voting rights). These types of shares can also be used to alter the proportions between the ownership of, and the control over, the company.
- The placement of statutory limits on voting rights. Another way to respond to shareholder activism is to limit the maximum number of votes that a single shareholder can cast. Only the bylaws can contain this type of limitation, which is aimed at altering the proportions between voting and cash flow rights. The bylaws may contain other provisions limiting or affecting share ownership, provided that such provisions comply with applicable laws.

3. Remedies Available to Shareholders

3.1 Separate Legal Personality of a Company

Companies are recognised as a separate legal personality, distinct from its shareholders, as regards the Srl and SpA companies. This is the basic principle of limited liability companies, whose assets are separated from those of the shareholders and where the liability of the shareholders is limited to their capital contribution in the company.

3.2 Legal Remedies Against the Company

Remedies of this sort are mostly related to actions that are put in place by the director(s) who act on behalf of the company and have the right to undertake binding obligations on its account. Apart from the cases mentioned, see **3.3 Legal Remedies Against the Company's Directors**, the two

instances that are most relevant for purposes of this answer are the judicial action that challenges the validity of a shareholders' meeting resolution, eg, regarding the approval of the yearly accounts and the destination of the profits, if any, and the exercise of the withdrawal from the company ('*diritto di recesso*') (see **2.2 Level of Shareholder Activism**).

3.3 Legal Remedies Against the Company's Directors

Companies in Italy do not have officers as may be recognised in US or UK companies.

Directors have the duty to:

- manage the company and carry out any activities which are necessary for the pursuit of its corporate purpose (Article 2380 bis(1), Civil Code);
- represent the company in compliance with the provisions of the bye-laws and of the resolution by which they were appointed (Article 2384(1), Civil Code) - all the directors must perform their duties in compliance with applicable laws and the company bylaws; and
- the level of diligence requested is based on the nature of their office and by the specific competence (professional qualifications or experience) of the directors (Article 2392(1), Civil Code).

Directors of SpAs are liable towards the company for any damages suffered as a consequence of the breach of their fiduciary duty, the conflict of interest rules, the obligation to act in an informed manner and any other obligations or rule provided for by applicable laws or the bylaws.

In these cases, the director's liability action can be exercised following a resolution of the ordinary shareholders meeting, or directly by the shareholders that represent at least 20% of the corporate capital in privately held open companies (Article 2393 and 2393 bis, Civil Code, respectively). The action is subject to a statute of limitations period of five years from the date when the director ceases holding their office.

Liability actions in Srl companies entail the right for the stockholders to demand that the court revokes the directors provisionally, and by way of urgency, in the case of serious irregularities. The stockholders who intentionally approved or authorised the directors' challenged actions are jointly liable with the directors (Article 2476, Civil Code).

In both SpA and Srl companies, any shareholder (or third-party creditor) who suffered a loss as a direct result of the directors' negligence or misconduct has the right to sue the directors for damages.

A director dissenting from a decision of the board has the right to protect themselves and insulate their liability in connection with the decision as long as they record their dissent in the book of board of directors' resolutions and informs the chairman of the board of statutory auditors of their dissent (Article 2392(3), Civil Code).

Furthermore, the directors of SpAs who are in a situation of conflict of interest in respect to certain transactions to be carried out by the company must inform the board and the board of statutory auditors. In such a case, the advantages of the transaction for the company must be clearly outlined in the relevant resolution of the board of directors (Article 2391, Civil Code).

As regards Srls, the agreements made on behalf of the company by directors who are in a situation of conflict of interest can be invalidated on the request of the company, if the other contractual party was or should have been aware of the conflict.

For both types of companies, the resolutions adopted by the board of directors with the determining vote of the director who is in a situation of conflict of interest can be challenged within 90 days by the other directors and the auditors (Articles 2391(3) and 2475 ter, Civil Code).

3.4 Legal Remedies Against Other Shareholders

There are no legal remedies available to shareholders against other shareholders as such, save for the general principle that anyone's rights deserve legal protection against the tortfeasor or the breaching party. As regards minorities' rights against the majority, see **1. Shareholders' Rights**.

3.5 Legal Remedies Against Auditors

The auditors must perform their duties with the professionalism and diligence required by the nature of their office (Article 2407(1), Civil Code).

The auditors are jointly and severally liable with the directors for the directors' actions and omissions in cases where the damages caused by the directors could have been avoided if the auditors had correctly exercised their surveillance duties. The auditors can also bear individual and joint liability for the breach of their specific obligations.

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As regards the liability action against the auditors, the same rules set out in relation to the liability of directors of SpAs apply (Article 2407(3), Civil Code).

3.6 Derivative Actions

In Srl companies, a liability action against the director(s) can be brought by the company and/or by any stockholder. In the latter case, the action is indeed brought in favour and to the benefit of the company rather than of the single stockholder.

3.7 Strategic Factors in Shareholder Litigation

The local court's past attitude towards issues to be litigated is certainly a strong point to be considered, along with the opinion of particularly specialised lawyers as regards the soundness of the issue to be litigated.