Shareholder activism in Italy

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A Q&A guide to the use of shareholder activism in Italy.

The Q&A gives an overview of the use and goals of shareholder activism, the regulation of shareholder activism, and the strategies and tools used by shareholder activists. It also considers how shareholder activism may be prevented, and the practical steps that a company can take to minimise the risk of being targeted.

To compare answers across multiple jurisdictions, visit the shareholder activism *Country Q&A tool*.

The Q&A is part of the global guide to shareholders' rights in private and public companies law. For a full list of jurisdictional Q&As visit *www.practicallaw.com/shareholdersrights-guide*.

Use of shareholder activism

1. Provide an outline of the use of shareholder activism in your jurisdiction.

Shareholder activism has been defined in a number of different ways. Typically, some view it as the actions by one or more shareholders to put pressure on the management to change things in the company, or as an attempt to use the rights of a shareholder in a publicly traded company "to elicit dialogue and/or change at an organisation" (*AON, Shareholder Activism, AON Hewitt Radford, 2016*). Others identify it - perhaps more appropriately from an Italian perspective - as the exercise and enforcement of rights by minority shareholders with the objective of enhancing long-term shareholder value. This definition seems to best describe shareholder activism in the Italian corporate environment, which fundamentally consists of closely held corporate entities and relatively few publicly traded companies, where activism is invariably represented by the attempt to legally seek the protection for minority shareholders that is often missing] in the bye-laws of the company where there is also no shareholders' agreement to protect them.

In general terms, shareholder activism in Italy is represented by the activities of:

- Investors of corporations (limited liability companies (*società a responsibilità limitata*) (S.r.l.s) or joint stock companies (*società per azioni*) (S.p.A.s) attempting to influence the company's management as regards corporate policies and strategies.
- Minority shareholders attempting to put pressure upon management or other shareholders (which almost always coincide in closely held companies) by exercising their rights, most often to the extreme and in many

cases abusing them, usually to create enough trouble to cause the other shareholders to eventually buy them out to put an end to fatiguing quarrels and judicial disputes. Thus, 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 the volume of cases, activism by minority shareholders exceeds so greatly any other form of similar activity that, save for the case studies dealt with below, we have concentrated our analysis 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, such as the relatively recent case of Vivendi attempting to raid out Italian media giant Mediaset).

Broadly speaking, Italian corporate and financial regulations do not provide strong support for shareholder activism. In the absence of clear cut provisions to the contrary that would have to be contained in the company's bye-laws (in the case of S.r.l.s) or in shareholders' agreements (in the case of S.p.A.s), majority shareholders enjoy almost unlimited rights to the detriment of other shareholders. 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.

However, in the last 20 years there have been significant legislative changes that have helped to encourage shareholder activism. For publicly traded 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 information from management (*Article 2476, paragraph 2, Italian Civil Code*).

At the time of its introduction, the corporate law reform of 2003 was welcomed by many as a significant step towards the protection of minority shareholders in closely held companies. In particular, one specific remedy was introduced for S.r.l.s in the new text of Article 2476, paragraph 2 of the Italian Civil Code, which 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 very limited use. Actions involving shareholder activism – with the exception of the possibility of seeking a provisional remedy if the circumstances should so permit - are still channelled through ordinary types of court action. Particularly in large cities, where the workload of the courts and the backlog of litigation is enormous, the procedural route to be followed makes it virtually impossible to obtain a swift and efficient remedy. This inability to obtain an appropriate, and appropriately timed, judicial remedy can effectively frustrate minority shareholders from seeking assistance from the courts in the first place. The fact that a minority shareholder may now be better informed about management decisions, and the facts underlying those decisions, does not equate with minority shareholders actually being able prevent those actions or decisions where they disagree.

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", which is afforded under certain specific circumstances and allows minority shareholders to sell their interest to the other shareholders or to the company, as the case may be. Whilst this was initially welcomed as a saviour for the minorities, over time it has proven to be not effective a protection as it was thought it would be. This right can in fact be only be exercised under specific factual circumstances that, in reality, are very unlikely to occur (for example, this

right arises among other things upon the company transferring its registered office broad, an event that is unlikely to happen in most companies). As a result, shareholder activism remains the only potential remedy for a minority shareholder who is continuously outvoted in meetings by the majority shareholders, has no right in the management of the company and has no other protections or way out under the law. We envisage that instances of shareholder activism will continue to grow until the law introduces remedies for minority shareholders that are crystal clear, efficient and easy to implement at any judicial level.

Regulation of shareholder activism

2. What are the main regulatory or legislative provisions relevant to shareholder activism in your jurisdiction?

Regulatory/legislative provisions
The main regulatory provisions used to facilitate shareholder activism are:

- 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, alleged mismanagement actions, withdrawal actions, actions for the appointment of a judicial commissioner in lieu of the board, and the rights of 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, 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 shareholders in listed companies (Shareholder Rights Directive) on shareholders' rights in listed companies. Generally, the new rules increased transparency, encouraged shareholders' attendance at the shareholders' meeting and 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 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 established also by another provision (*Article 127 ter of 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 at the latest. 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.
- Italian Companies and Exchange Commission (*Commissione Nazionale per le Società e la Borsa*) (Consob) Regulation on Listed Companies No 11971 of 14 May 1999, as amended from time to time.

Case studies

Algebris Investments and Assicurazioni Generali. One of the most contentious cases in Italy concerned the UK-based activist hedge fund Algebris Investments (Algebris) and its effort to prompt changes in the governance of Assicurazioni Generali (Generali), the biggest Italian insurance company and one of the largest in Europe.

On October 2007, the activist Algebris argued that Generali, due to weak corporate governance and misaligned management incentives, was undervalued by the market. Algebris sought three major changes:

- To lower the executives' compensation.
- To modify the governance structure.
- To address and solve the conflict of interest that exisitng between the Italian investment bank Mediobanca and Generali.

Company representatives replied to Algebris that the positive performance of the group was the best response for its corporate governance structure. Meanwhile, Algebris actively contacted other shareholders and sought their back up in its initiative. It organised roadshows in the US, Italy and in other relevant markets, obtaining some support. Meanwhile, Generali representatives defended the company's governance on the grounds of its positive financial performance.

After having lost its battle at the board members' election meeting in April 2008 (which was its attempt to obtain some representation in the target company), in early July 2008 Algebris promoted a new action. It filed a report with the newly elected board of internal auditors, chaired by the representative elected from the Assogestioni's slate, who was the opponent of Algebris' candidate at the yearly elections. Algebris requested the statutory auditors' intervention to investigate on some investments made by Generali concerning Telco and Banca Carige, and its ownerships in other companies, RCS and Autogrill. All these matters had in common the alleged conflicting role of Mediobanca. However, the internal auditors rejected Algebris' claim. In their report on the 2008 financial statements, they disagreed with Algebris and certified the lack of evidence of any violations of the law or the bye-laws by the management. After having acknowledged the lack of any results following its 2008 struggles, Algebris practically exited Generali upon selling almost all of its interest. However, some of the changes sought by Algebris were eventually implemented by the company. In April 2010, the company appointed a sole Group CEO. Furthermore, in April 2011, Assicurazioni Generali also appointed a non-executive chairman and established an investment committee and a governance committee.

Amber Capital and Banca Popolare di Milano. In 2007, the US fund Amber Capital (Amber), along with two other shareholders, publicly criticised the management of the Italian bank Banca Popolare di Milano (BPM) over certain governance issues and the failed merger of BPM with another bank, Banca Popolare dell'Emilia Romagna (BPER). In August 2007 Amber, together certain other shareholders, complained with the bank's management about the governance and the external growth strategy. The complaint was utterly turned down by the management.

Since a straightforward attack - albeit in the form of a mere written complaint - had not proven effective Amber was bound to revisit its strategy and took a softer, morally persuasive approach by forming an association called "BPM 360 Gradi" that should have lobbied to foster the changes sought initially. The association mission was fundamentally to encourage the participation and the full representation of all BPM shareholders. Following many efforts by the association and a series of contentious events, Amber's request to be granted voting shareholder status was eventually accepted by the board of directors of BPM. A few months following that decision, the Bank of Italy started an investigation on the governance of BPM. Although there is no official link between the pressure exercised by Amber and the association and the investigation launched by the Bank of Italy, it can be no mere coincidence that some significant changes were eventually adopted by the board following the initiatives put in place by Amber, whether directly or indirectly through the association.

Goals of shareholder activism

3. What are the principal goals of activist shareholders where shareholder activism is used?

The most common form of shareholder activism in Italy, which occurs on a much larger scale than institutional investor activism, is from minority shareholders attempting to put pressure on management or other shareholders to exercise their rights, often with a view to exiting the company by being bought out by the majority (*see Question 1*).

Institutional investors that engage in activism, including hedge fund investors, are generally focussed on introducing changes that concern:

- The company's governance structure and board composition.
- Remuneration policies.
- Incentive plans.
- Corporate governance monitoring.
- Extraordinary transactions.

Shareholder activism in publicly traded or publicly held companies is typically aimed at making changes [to] the composition of the board of directors or the board of statutory auditors. It is not unusual for minority shareholders who intend to change the composition of the board to support the requests of other minority shareholders to do the same (for example, official figures show that during 2017, almost 80% of minority shareholders voted in favour of the slates (that is, the lists of board member candidates) that were submitted by other minority shareholders).]

The goals of the activist shareholder can also generally involve questions of corporate governance, including the election of independent directors, with a view to increasing the supervisory role of such directors within the board and introducing remedies against a lack of corporate information. Activist shareholders often also push to obtain higher dividends than those traditionally distributed, or other forms of shareholder returns, by amending the business plan.

Strategies used by activist shareholders

4. What are the key strategies used by activist shareholders?

Generally, activist shareholders tend to make use of the shareholders' rights provided to minority shareholders under Italian law (*see Question 2, Regulatory/legislative provisions*). Usually activist shareholders 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, by establishing strategic alliances with the target companies wherever possible, rather than deploying more aggressive strategies. Sometimes activist shareholders will pursue their goals in different stages. At the first stage, the activist campaign usually begins with private talks and negotiations with the management of the target company. If this proves insufficient to achieve the initial purpose, a second stage may well involve the shareholder activists generally resorting to other public actions (for example, 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.

Tools available to activist shareholders

5. Outline the range of legal and regulatory tools available to activist shareholders.

The main legal and regulatory tools available to shareholder activists are as follows:

- **Article 2367 of the Italian Civil Code.** Shareholders who own at least 10% of the overall corporate capital have the right to request that the general meeting is convened and to set out the meeting's agenda. This percentage falls to 5% in the case of companies that have access to capital markets (that is, those that are publicly traded or publicly held (*Article 2325 bis, Italian Civil Code*)).
- **Article 2374 of the Italian Civil Code.** Shareholders who represent at least one-third of the overall corporate capital at any general meeting have the right to request that the meeting is adjourned for up to a maximum of five days if they are not sufficiently informed about the agenda of the meeting.
- **Article 2377 of the Italian Civil Code.** Shareholders who represent at least 5% of the voting shares in respect of a resolution of the general meeting can challenge that resolution (the threshold falls to 0.1%

in the case of open companies, as defined in Resolution 11971/99 of the Italian Companies and Exchange Commission (*Commissione Nazionale per le Società e la Borsa*) (Consob)).

- **Article 2409 of the Italian Civil Code.** Shareholders who own at least 10% of the overall corporate capital (or 5% in the case of companies that have access to capital markets) have the right to file a complaint with the court to report any "grounded suspicions" about serious irregularities in the management of the company.
- **Article 2408 of the Italian Civil Code.** Any shareholder has the right to file complaints with the board of statutory auditors (BSA) concerning the management of the company. In such a case, the BSA gives notice to the shareholders' meeting of the complaint received. However, if the complaint is brought up by shareholders who represent at least 5% of the overall corporate capital (or 2% in the case of companies that have access to capital markets, and this threshold can be even lower if the bye-laws so provide), the BSA investigates the matters brought to its attention and report its findings and conclusions to the general meeting. Any shareholder has the right to challenge any board resolution that is in breach of his or her rights.
- **Article 2393 *bis* of the Italian Civil Code.** Shareholders who represent at least 20% of the overall corporate capital can sue any liable directors directly. This threshold can be changed by the company's bye-laws, but it cannot exceed one-third of the overall corporate capital. In companies that have access to capital markets, this threshold is 2.5% (or less, if so provided in the bye-laws).
- **Article 2393, paragraph 6 of the Italian Civil Code.** Shareholders who represent at least 20% of the overall corporate capital (or 5% in the case of open companies) can veto any waiver and/or settlement of the company's legal action against the directors.
- **Articles 125 *bis* and 127 *ter* of the Decree No. 58/1998 (as amended under Decree No. 27/2010).** This introduced the right for the shareholders to submit questions on the items of the agenda prior the annual general meeting, which must be answered by the management at the latest during the meeting.
- **Consolidated Law on Finance (Decree No. 58/1998).** Under this law, shareholders who individually, or jointly, represent at least 2.5% of the issued share capital, are entitled, within ten days (or in the case of specific items, five days) from the publication of the notice calling the shareholders' meeting, to request to add one or more items on the agenda, or to submit new resolution proposals on items which are already on the agenda. In addition, any single shareholders, including activists, may freely intervene during the shareholders' meeting to discuss the agenda. Shareholders are not entitled to request the inclusion on the agenda of the shareholders' meeting items that can only be exclusively submitted by the directors of the company or by law (for example, special transactions such as mergers and demergers).

Prevention of shareholder activism

Red flags

6. Are there any red flags that a company should look out for to provide an early indication that it may have become the target of shareholder activism?

To a certain extent, the increase in shareholder activism has motivated many companies to be more proactive about examining their performances and capabilities, and determining more suitable ways to deal with it, both strategically and financially. Shareholder activists usually target companies where management is unable to address significant issues concerning the market or investments in general.

Among the many factors that are monitored by shareholder activists, generally the main factor tends to be unsatisfactory financial performance. The absence of an adequate strategy to deal with a challenge from a shareholder activist is also an indicator that activists may use to their advantage. Turnover in leadership can also be another red flag, as a challenge from an activist shareholder can be more difficult to for a new management team to resolve, as it often takes some time for any new team to build a strong strategy together.

To determine whether or not a company is a target, it is necessary for the company to understand its competitive position and carry out a valuation of both its historical performance and capital structure. This self-assessment should be carried out regularly, as only through continuous monitoring and dialogue with industry counterparts, analysts and key shareholders can a company have a true perception of the overall situation and therefore effectively identify whether it may be vulnerable to an activist campaign.

Minimising the risk of being targeted

7. What practical steps can a company take to minimise the risk of being targeted by 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 this a specific team of managers and consultants should be established who are 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 bye-laws 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. It is now possible for non-listed companies to issue shares with a maximum of three votes per share (listed companies cannot issue multiple voting shares, but companies that go public can maintain multiple voting shares if they had been previously issued). 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 exercise two votes each). The adoption of such shares increases the

voting rights for controlling and 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 share can also be used to alter the proportions between ownership of, and 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 bye-laws can contain this type of limitation, which is aimed at altering the proportions between voting and cash flow rights. The bye-laws may contain other provisions limiting or affecting share ownership, provided that those provisions remain within the limits provided by the law.

Steps to take when faced with shareholder activism

8. What steps can a company take when it is faced with shareholder activism?

The steps to be taken by a company once it has been targeted by a shareholder activist depend on the strategies carried out by the activist. In general, a board meeting should be convened to assess the best way to deal with the situation and how best to respond to the requests made by the activist.

If an activist investor knocks on the door, the targeted company should:

- Evaluate its approach (whether diplomatic or aggressive).
- Consider the activist's ideas and objectives, in order to identify areas of consensus.
- Actively interact with the company's key shareholders, to be able to demonstrate to other investors that management and the board are aligned with the objective of long-term shareholder value.

Reform

9. Are there any current trends, developments or reform proposals that have or will affect the area of shareholder activism in your jurisdiction?

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% and 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:

- The financial terms regarding the transaction.
- Whether the purchaser is acting alone or jointly with other investors.
- Whether the purchaser intends to buy additional shares in the target, or to acquire control of the company.
- Whether the purchaser wants to change the composition of the company's board of directors or the board of statutory auditors.

Online resources

Altalex
W *www.altalex.com*

Description. This website provides updated versions of the Italian Civil Code in Italian (no English version is available).

Normattiva
W *www.normattiva.it*

Description. A useful database of Italian legislation (no English version is available).

Contributor profile

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Areas of practice. Corporate and M&A; private equity; real estate finance.

Recent transactions

- Assistance to a family group of shareholders of a publicly held company operating in the field of household appliances and luxury lighting system in connection with a series of typical activist actions that eventually led to a settlement of all the litigation cases brought against management and the other controlling shareholders (2014 to 2016).
- Assistance to a family group of shareholders in a mid-cap food company in connection with a series of litigation and arbitration actions against management and the controlling shareholders in an attempt to obtain detailed information on the management operations of the company (2014 to 2017).
- Assistance to the majority shareholders of a limited liability company, part of an international group operating in the pharmaceutical business, in connection with a number of initiatives that typically qualify as shareholder activism brought by a minority shareholder who claimed to have legitimately exercised his right of withdrawal following an M&A transaction that turned out to change the company's purpose.

Languages. English and French (bilingual), Spanish (fluent)

Professional associations/memberships. International Bar Association and the Association of the Bar of the city of New York.

Publications. Several publications and articles in the field of corporate law, with particular emphasis on leverage buy-outs and the protection of minority shareholders. General co-editor (worldwide) and contributor for Italy of **[several Thomson Reuters Global Guides.]** Co-author of the Italian chapter of the book "Alternative Investment Funds", published by the International Comparative Legal Guide - Global Legal Group.

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