SHAREHOLDERS' RIGHTS IN AGENCY CONFLICTS: SELECTED ISSUES IN THE TRANSATLANTIC DEBATE[*]

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ABSTRACT

The purpose of this Article is to provide the reader with a detailed analysis of the existing regulations on shareholders' rights, recently updated by the Shareholders' Rights Directive II, as well as in light of the U.S. regulation on the topic. The paper aims to adequately address and explore each selected, crucial issue—namely Proxy Advisors, Institutional Investors and Say on Pay—through a comparative perspective and in order to highlight the possible convergence between Europe and the United States. In particular, we intend to focus on the strong efforts of the Shareholders' Rights Directive II (i) to re-evaluate the role of institutional investors as key players in corporate governance dynamics; (ii) to reform the role of proxy advisors as a fundamental link between shareholders and markets, and (iii) to modify the remuneration issue in order to achieve a correct rebalancing of agency conflicts between shareholders and directors.

JEL classification: K22, Business and Securities Law

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I. INTRODUCTION

An effective and sustainable commitment by shareholders represents one of the pillars of an efficient corporate governance model that must be based on a system of checks and balances among corporate players. Therefore, a more active and intense involvement of shareholders can substantially contribute to the considerable improvement of both financial and non-financial corporate performance, including environmental, social and governance factors, that are specifically mentioned in the Principles of Responsible Investment supported by the United Nations. Bearing it in mind, the Directive (EU) 2017/828 as regards the encouragement of long-term shareholder engagement (Shareholders' Rights Directive II, hereinafter, also, SHRD II)[1] aims to review the current framework by[2] *(i)* offering a renewed set of tools aimed to ensure a more comprehensive and informed involvement of shareholders within corporate life, and, more generally, *(ii)* designing new corporate governance mechanisms, the most suitable for European public companies. The purpose of this Article is to carry out a preliminary and introductory analysis—supported by a comparative view of the U.S. regulation—of the position of shareholders in the context of public (and listed) companies, paying careful attention to the following issues: Proxy Advisors, Institutional Investors and Directors' Remuneration[3] (specifically investigating the effects of Say on Pay (hereinafter SoP) in a context of concentrated ownership).[4] In particular, we intend to discuss the themes above and compare their impact on the U.S. and EU company law agendas, in view of the amendments to the Directive.

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[1] EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION, DIRECTIVE (EU) 2017/828 OF THE EUROPEAN PARLIAMENT AND THE COUNCIL OF 7 MAY 2017 AMENDING DIRECTIVE 2007/36/EC AS REGARDS THE ENCOURAGEMENT OF LONG-TERM SHAREHOLDER ENGAGEMENT, 2017/828 (2017) [hereinafter SHRD II].

[2] *See* Jean-Philippe Robé, *The Shareholders Rights Directive II: The Wrong Cure for a Deadly Disease*, 17 ERA FORUM 45 (2016) (for a comprehensive and detailed overview of the legislative path to the Shareholders' Rights Directive II is provided, through the Committee on Legal Affairs of the European Parliament proposal and the European Parliament reply, highlighting that the Commission is one of the numerous victims of the agency theory) (quoting Ferdinando Giugliano, *BoE's Haldane says corporations putting shareholders before economy*, Financial Times, July 25, 2015, www.ft.com/content/7d347016-32f4-11e5-b05b-b01debd57852 (The Bank of England's chief economist, who has taken a swipe at the way corporations are run, accused business leaders of serving the short-term interests of shareholders at the expense of the wider economy, arguing that the UK and the U.S. should look at different models of corporate governance that place greater weight on the interests of employees and customers, "but [it] should draw the consequences and improve the rules of governance of European countries to get them internalizing the consequences of their management decisions over affected interests."). *See* also Benoit Lecourt *et al.*, *Réflexions collectives sur la nouvelle directive «Droits des actionnaires» du 17 mai 2017*, REV. DES SOCIÉTÈS 675 (2017); Alain Couret, *Révision de la directive sur les droits des actionnaires des sociétés cotées*, BULL. JOLY Sociétès 407 (2017).

[3] This piece will not deal with any internet or, more widely, technology-related issue. *See* Dirk Zetzsche, *Virtual Shareholders Meetings and the European Shareholders Rights Directive. Challenges and Opportunities* (Ctr. for Bus. and Corp. L. Working Paper No. 0029, 2007), ssrn.com/abstract=996434 (for a discussion on internet and technology with regard to the first version of the SHRD).

[4] *See* Yonca Ertimur, Fabrizio Ferri & David Oesch, *Shareholder Votes and Proxy Advisors: Evidence from Say on Pay*, 51 J. ACCT. RESEARCH 951, 951-952 (2013) (emphasizing that proxy advisors' key role is "processing a substantial amount of executive pay information on behalf of institutional investors, hence reducing their cost of making informed voting decisions.").

II. PRELIMINARY REMARKS: BACKGROUND AND STATE OF THE ART

As a preliminary—and necessarily concise—remark, it is essential to focus on the current framework, which is going to be implemented by the new regulation. In this regard, we believe it is important to briefly mention some aspects of corporate law, as it has been conceived and updated in recent years, in the EU and U.S. models. In this context, the starting point for the analysis is the Action Plan for Company Law and Corporate Governance (COM/2003/0284) of May 21, 2003. This document, in fact, must be seen as one of the cornerstones of the EU harmonization process, as it was, *inter alia*, designed to: (i) increase transparency (to be implemented through an annual corporate governance statement); (ii) modernize the board of directors (to be implemented through changes in composition, remuneration and accountability); (iii) enhance the convergence of corporate governance codes; (iv) revise the regulation on share capital (through a revision of the Second Company Law Directive, adopted by the Council on December 13, 1976, introducing an alternative system of share capital protection); and (v) provide for new provisions on groups and pyramids of companies. Nevertheless, at this stage it must be underlined that, alongside the guidelines identified above, the EU Commission has sought to strengthen shareholders' rights through a completely new approach, considering a plethora of investor-related issues, which have gradually tried to influence the decision-making process of the companies in which they were involved. In this respect, the EU "Lawmakers" have worked on *(i)* a redefinition of the position of shareholders within the company; and *(ii)* a better definition of the role of boards of directors of listed companies.

As far as the first point is concerned, the "call for action" derived from the consideration that even if companies belong to their shareholders,[5] their rights have been frustrated by the miserable, greedy, and sometimes even fraudulent behavior of managers, who have adopted a more risky (and remunerative) short-term approach to the management of the company.[6] In this regard, even before the SHRD II, the EU

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[5] Martin Gelter, *EU Company Law Harmonization Between Convergence and Varieties of Capitalism*, *in* RESEARCH HANDBOOK ON THE HISTORY OF CORPORATION AND COMPANY LAW 323 (Harwell Wells ed. 2018).

[6] The business (also, to some extent, the US one, as in MICHAEL T. JACOBS, SHORT-TERM AMERICA: THE CAUSES AND CURES OF OUR BUSINESS MYOPIA 7-8 (1991)) is short-term oriented, it sacrifices long-term projects and profitability for short-term gains. The root cause of this phenomenon can be found in the fact that "investors are overly concerned with the near-term prospects of the corporations in which they invest, making stock prices overly sensitive to

Commission set a sound regulatory framework for shareholders' protection as one of the primary objectives of the new European Company Law, which found in this element a real prerequisite to ensure confidence and trust in business relations and, thus, efficiency and competitiveness, especially through the Transparency Directive (Directive 2004/109/EC) and the principle of proportionality between capital and control. Moreover, this line of action has been implemented in Directive 2007/36/EC of the European Parliament and of the Council of July 11, 2007 (Shareholders' Rights Directive I, also, SHRD I),[7] claiming that shareholders must effectively exercise their rights and, to this end, dealing with the rules on transparency, the exercise of the right to vote by proxy, the possibility to participate in shareholders' general meetings by electronic means and the effectiveness of cross-border voting rights.[8] In addition, the mitigation of agency costs resulting from the separation of

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short-term information (generally quarterly financial results), but, at the same time, a recent study shows that firms with more short-term regulation speculators put stronger effort in adjusting their commerce to the modern competitive environment, make their product outstanding from those of the competitors, conduct more diversifying acquisitions, and have higher exec utive turnover in the immediate aftermath of the shocks. Our findings suggest that firms with more short-term institutional investors put stronger effort in adapting their business to the new competitive environment." *See* Mariassunta Giannetti & Xiaoyun Yu, *Adapting to Radical Change: The Benefits of Short-Horizon Investors* 2–3 (European Corp. Governance Inst. (ECGI) Finance Working Paper No. 467, 2016), ssrn.com/abstract=2723357; Mark J. Loewenstein, *Making America Competitive*, 18 DEL. J. CORP. L. 453–54 (1993) ("Because stock markets are too focused on the short-term, and corporate management is sensitive to stock market performance, management is highly motivated to maximize short-term results, even at the expense of a corporation's long-term interests. This, in turn, has led to the decline of America's ability to compete in the global economy, which has caused many of our current economic woes.").

[7] EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION, DIRECTIVE 2007/36/EC OF THE EUROPEAN PARLIAMENT AND THE COUNCIL OF 11 JULY 2007 ON THE EXERCISE OF CERTAIN RIGHTS OF SHAREHOLDERS IN LISTED COMPANIES, 2007/36/EC (2007) [hereinafter SHRD I].

[8] *See* Bruno Dondero, *Directive n° 2007/36/CE du Parlement européen et du Conseil concernant lìexercice de certains droits des actionnaires de sociétés cotées*, RTDF (2008), No. 4, at 90; Arthur R. Pinto, *The European Union's Shareholder Voting Rights Directive from an American Perspective: Some Comparisons and Observations*, 32 FORDHAM INT'L L.J. 587, 608–09 (2009) (highlighting six key provisions, namely: "1. Equal treatment of shareholders as to the participation and voting in the general meeting; 2. Required notice of general meeting of at least 30 days and certain required information; 3. The right to put items on the agenda of the general meeting and table draft resolutions; 4. Removal of requirements of any blocking mechanism such as share deposits that restricted shareholder participation in the general meeting; 5. The right of shareholders to ask questions on agenda items which must be answered; 6. Allowing and facilitating proxy voting individually and through securities accounts").

ownership and control has also been entrusted to mechanisms aimed to contain potential conflicts of interest between owners and controlling shareholders. Such mechanisms tend to be divided into three main sectors: *(i)* internal mechanisms (hierarchical structure and management incentives); *(ii)* external mechanisms (market for the reallocation of corporate control) and *(iii)* regulatory mechanisms. The EU "lawmakers" gained such perspective, in a coherent and straightforward way, even aimed and improved by the guiding principles of the Anglo-Saxon governance system, *i.e.* the value of shareholders as the sole objective of corporate governance, and independent directors in the Boardroom, ensuring that management does not deviate from the objective of shareholder value.[9]

"In looking at the Voting Rights Directive and comparing it to the United States, many of its provisions generally mirror U.S. law and practice but the overall approach exhibits some significant differences."[10] Concerning the abovementioned topics, it should be noted that while the U.S. legal system shows a clear pro-management attitude,[11] (as

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[9] Gaia Balp, *Regulating Proxy Advisor Through Transparency: Pros and Cons of the EU Approach*, 14 EUR. CO. FIN. L. REV. 1 (2017).

[10] Arthur R. Pinto, *The European Union's Shareholder Voting Rights Directive from an American Perspective: Some Comparisons and Observations)*, 32 FORDHAM INT'L L. J. 587, 615 (2009). The main difference is probably that the Directive reflects the concerns of European federalism by providing minimum standards without an inevitable regulatory system like the U.S. one, and still leaves a lot to Member States in terms of choice, implementation and enforcement. *See id.* at 623.

[11] The expressions *shareholder primacy* and *director primacy* are often used in mutual opposition, as two opposing conceptions of the shareholders-directors relations, in terms of prevalence of one over the other. Given the role of the topic, it seems appropriate to make a preliminary clarification: the two concepts lie (at least partially) on different levels. On the one hand, "director primacy" refers to the principle of the exclusive competence of the board (for example, *Section 141 (a)* of the *Delaware General Corporation Law* affirms that "the business and affairs of every corporation . . . shall be managed by or under the direction of a board of directors"); on the other hand, "shareholder primacy" refers to two distinct concepts: the wealth maximization norm, according to which managers are required to pursue the objective of obtaining a long-term return on the shareholders' investment, and the existence of a power of last resort control of the shareholders, albeit through the directors. The U.S. system can be described as a system where shareholder primacy (in its first above-described meaning) and that of directors are perfectly compatible and equally important, while (assuming that the second meaning of shareholder primacy is correct) the notion of shareholder primacy is incompatible with that of director primacy. "Sometimes the phrase is used to describe the goal of corporate governance (i.e., firms should serve the shareholder interest), but other times it is used to describe the means of corporate governance (i.e., shareholders should have a significant say in how firms are run)." David G. Yosifon, *Opting out of Shareholder Primacy: Is the Public Benefit*

management is entrusted with all the powers deemed necessary to guide the company, without the other components of the company structure interfering)[12] continental Europe's perspective does not ignore the shareholders' point of view. In other words, the U.S. system, in solving agency problems arising from the managers–shareholders conflict, uses a clearly unbalanced strategy. The decision-making powers vested in the board include those concerning the management of the company, including the day-to-day management, the performance of direct business operations and/or the conclusion of agreements committing the company to outsource its activities,[13] the resolution on dividends, proposals to amend the bylaws (including mergers and demergers) or the issuance of new shares up to the maximum limit set forth in the bylaws. Nevertheless, the growing demands to protect the position and interests of the shareholders in public companies have been met in the U.S. framework in two main areas: a series of legislative and regulatory initiatives—including the amendment of the Exchange Act, Rule 14a-11—aimed at making effective the exercise of the rights that the model already grants to Shareholders; and the proposal to revise the model in order to recognize new and additional powers to the category of investors.[14]

Coming to the "details": in 2009, both Sections 112 and 113 of the Delaware General Corporation Law, relating to access to Proxy Solicitation Material and Proxy Expense Reimbursement,[15] were amended to provide for the right to introduce into the bylaws both a clause requiring the company to include in the proxy form, also the names of candidates submitted by Shareholders, and a clause conferring the right to reimbursement of expenses derived from the proxy solicitation. The latter, suggested by the Delaware Supreme Court,[16] is only apparently less relevant than the former: in fact, the latter allows us to fully grasp the view

Corporation Trivial, 41 DEL. J. CORP. L. 461, 461 n.2 (2017). In accordance with the point of view expressed by the Author, we use the expression with this meaning, referring to the goal of corporate governance.

[12] *See generally* Sophie Cools, *The Real Difference In Corporate Law Between the United States and Continental Europe: Distribution of Powers*, 30 DELAWARE J. CORP. L. 697 (2005) (demonstrating social and economic phenomena when practicing comparative law).

[13] Alessandro De Nicola, *Commento sub art. 2380*-bis, *in* COMMENTARIO ALLA RIFORMA DELLE SOCIETÀ 91-92 (Piergaetano Marchetti et al. eds., 2005).

[14] *See generally* Lisa M. Fairfax, *Shareholders Democracy on Trial: International Perspective on the Effectiveness of Increase Shareholders Power*, 3 VA. L. & BUS. REV. 1 (2008).

[15] *See* James Morphy, Sullivan & Cromwell LLP, *Delaware Adopts DGCL Amendments,* HARV. L. SCH. F. CORP. GOVERNANCE & FIN. REG. (May 5, 2009), corpgov.law.harvard.edu/2009/05/05/delaware-adopts-dgcl-amendments/.

[16] *See* CA, Inc. v. AFSCME Emps. Pension Plan, 953 A.2d 227, 239–40 (Del. 2008).

of the managers' activities (identified above) as a distinguishing feature of the U.S. model.[17] Subsequently, a (stronger) consultation document published by the Securities and Exchange Commission amended the rules on the appointment of directors of listed companies.[18] Such modification is consistent with the model of equity democracy and with the assumptions adopted by the European legislator, also in the wake of the accurate indications coming from constant American jurisprudence on the point, which recognized that the purpose of the regulation of voting proxies is to give real vitality to the concept of corporate democracy.[19] It mainly permits shareholders (holding certain minimum percentages of shares) to propose their own candidates at the expense of the company, so that directors are required to consider the interests of shareholders and managers are required to pursue only their own objectives, to the detriment of the position of shareholders and the stability of the whole system.

Another step towards full shareholder democracy is taken by Professor Bebchuk, who states that increasing shareholders' power is not "as an end in and of itself. Rather, effective corporate governance, which enhances Shareholders and firm value, is the object underlying my analysis."[20] Thus, shareholders will be competent to initiate the procedures for the adoption of certain specific "managerial" choices and, specifically, the "*Rule-of-the-Game Decisions*", "*Game-Ending Decisions*" (mergers, demergers, contributions and wind-up) and "*Scaling-Down Decisions*" (distribution of dividends).[21]

Looking at the traditional governance debate, there are alternative and irreconcilable readings as far as the relationships that lie on the grounds of the U.S. public companies. In a traditional reading, shareholders' voting rights lead to the shape of the entire system being

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[17] Otherwise, if directors were not prevented from exercising their full managerial power in conditions where fiduciary duties apply, they would be required to refuse reimbursement to a dissident slate. *See* Steve Sauerwald et al., *Proxy Advisor and Shareholders Dissent: A Cross-Country Comparative Study*, J. MGMT. (Dec. 5, 2016), journals.sagepub.com/doi/pdf/10.1177/0149206316675928; Paul Rose, *On The Role and Regulation of Proxy Advisor*, 109 MICH. L. REV. FIRST IMPR. 62, 62–99 (2010).

[18] Facilitating Shareholder Director Nominations, Exchange Act Release Nos. 33-9046; 34-60089 (Dec. 14, 2009).

[19] Medical Comm. for Human Rights v. SEC, 432 F.2d 659, 674 (D.C. Cir. 1970), *vacated as moot*, 404 U.S. 403 (1972).

[20] Lucian A. Bebchuk, *The Case for Increasing Shareholders Power*, 118 HARV. L. REV. 833, 842 (2005).

[21] *Id.* at 844-47.

oriented towards the interests of shareholders.[22] In a more recent piece, public companies are controlled by their directors, not by their shareholders. So, while boards focus on share prices, directors deal with complaints they receive from employees, creditors, and the long-term survival of the company. In other words, "[(No firm, no board.)] Corporate law gives them room to take account of such concerns. This director-oriented governance system departs dramatically from the shareholders-primacy ideal, but it has served shareholders' themselves remarkably well. American public corporations, for all their flaws, have the best long-run performance record in the world."[23] Hence, shareholders' voting rights turn out to be almost "accidental" throughout the system, mainly to allow for the existence and functioning of a market for control and an immediate appreciation of the investment that would otherwise be impossible.

Of course, the debate will not end in the near future, but we believe that we are at a crucial point: the offensive of supporters of the role of shareholders and the SEC intention to complete its project had the effect of bringing out the advocates of the argument against a more significant intervention by investors in social life. If it is too early to understand what the outcome of the debate in North America will be, what is certain is that the reading we have defined as traditional is expected to have an impact on all European laws, through the transposition of the European Directives.

In view of this preliminary description of the U.S. debate on these issues, the time has come to dwell on the EU discipline.

III. THE EU DISCIPLINE: THE SHAREHOLDERS' RIGHTS DIRECTIVE IN A NUTSHELL

In order to gain a better understanding of the framework designed by the SHRD II, it is important to focus on the current discipline sketched by the SHRD I. This Directive consists of eleven articles dedicated to shareholders' general meetings, and requires companies to ensure equal treatment of all shareholders who are in the same position with regard to

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[22] Stephen M. Bainbridge, *The Globalization of Corporate and Securities Law in the Twenty-first Century: Director v. Shareholder Primacy in the Convergence Debate*, 16 TRANSNAT'L L. J. 45 (2002) (noting a traditional reading of the relationship gives an erroneous representation of the reality "[i]nsofar as shareholder primacy contemplates ultimate Shareholders control, U. S. corporate law is not characterized by shareholder primacy. Instead, the U. S. model is one of director primacy. Directors act and Shareholders, at most, react").

[23] Lynn A. Stout, *Shareholders Unplugged*, LEGAL AFF. (Mar./Apr. 2006), www.legalaffairs.org/issues/March-April-2006/argument_Stout_marapr06.msp.

participation and exercise of voting rights in a shareholders' meeting, without further detailed provisions. Clearly, this implies reaffirming a long-established principle in both individual internal rights and European company law,[24] namely that principle of equal treatment that is considerable as *(i)* it is a common and uniform principle of the whole discipline and, therefore, even *(ii)* it is a prerequisite and a guiding interpretative criterion for the matter.[25] The rules referred to herein are supplemented by the provisions concerning the procedures for the granting and revocation of the proxy, more specifically, Article 11, which states that: *(i)* the appointment of the proxy must be made in writing and the companies are required to offer at least the possibility of notification by electronic means as an alternative (but additional formal requirements may be imposed to ensure the identification of shareholders and proxy holders to verify the content of the voting instructions);[26] and *(ii)* the delegation of proxy may be revoked, and the revocation is subject to the same formal requirements as those laid down for the conferral of the proxy.[27]

Besides the application of the general principles, it must be underlined that the EU "Lawmakers" conferred a broad mandate for the revision of the rules on representation at shareholders' meetings in order to make it easier and more effective to exercise proxy voting, also adapting them to Article 10 of SHRD I; to limit, if necessary, the number of representatives appointed by shareholders; to require proxy holders to keep a record of the voting instructions received and to declare, if required, that they acted in accordance therewith.[28] SHRD I takes into account the activity of those who request or collect a significant number of proxies, in order to ensure an adequate level of reliability and transparency. Nevertheless, the spirit of the Directive should be interpreted in the sense that Article 10 is a general applicable rule, irrespective of whether the contribution initiative is attributable to the representative or to the representative himself.

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[24] In particular, this is already provided for in the Second Council Directive 77/91/EEC, 1976 O.J. (L 26) 1, which coordinates the laws of the different Member States relating to the protection of the interests of members and third parties in the formation of public limited liability companies and the maintenance and alteration of their capital.

[25] *See* SHRD I, *supra* note 7, Recital 5 (identifying the need to ensure that shareholders who do not reside in the Member State where the company has its registered office are treated equally (by providing for participation mechanisms that do not provide for a physical attendance at the shareholders' meeting) as a matter of priority, since it merely provides that companies may offer shareholders any form of participation in the shareholders' general meeting by electronic means in order to regulate proxy voting).

[26] *Id.* art. 11, para. 1-2.

[27] *Id.* art. 11, para 3.

[28] *See id.* art. 10.

IV. A NEW APPROACH: BASIC ELEMENTS FROM THE SHRD II

Within the above-depicted framework, the SHRD II intends to offer a completely new discipline. In our opinion, to understand the directive it is important to understand the answers to the following questions: *(i)* how to increase corporate transparency; *(ii)* how to identify shareholders; and *(iii)* how to deal with the renewed regime of voting at shareholders' meeting. Concerning the first point, a fundamental prerequisite for the achievement of the objectives set out in SHRD II is the identification of the company's shareholders. Such a step is, in fact, a "precondition" to ensure that exchange of information, which is often made more difficult by the "complex chains of intermediaries" behind company's stakes.[29] The SHRD II is clear on this topic, underlining that listed companies' shares are often held through complex chains of intermediaries making the exercise of shareholder rights and shareholder engagement more complex. "The identification of shareholders is a prerequisite to direct communication between the shareholders and the company and therefore essential to facilitating the exercise of shareholder rights and shareholder engagement. . . . Intermediaries should be required, upon the request of the company, to communicate to the company the information regarding shareholder identity."[30] In order to ensure the afore-presented results, European "Lawmakers" require listed companies to know their shareholders thanks to the help of intermediaries, that are required to communicate certain information.[31] The regime specified by the SHRD II is particularly careful, under a "privacy" point of view; a tailor-made discipline is provided by the Directive, and more specifically, by Recital 5, that allows companies and intermediaries to store personal data until they are aware that a person ceased to be a shareholder and for a maximum

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[29] SHRD II, *supra* note 1, Recital 4.

[30] *Id.*

[31] *See id.* Recital 5 ("[A] certain level of information on shareholder identity needs to be transmitted to the company. That information should include at least the name and contact details of the shareholder and, where the shareholder is a legal person, its registration number or, if no registration number is available, a unique identifier, such as the Legal Entity Identifier (LEI code), and the number of shares held by the shareholder as well as, if requested by the company, the categories or classes of shares held and the date of their acquisition. The transmission of less information would be insufficient to allow the company to identify its shareholders in order to communicate with them."); *Id.* art. 3b ("The Commission shall be empowered to adopt implementing acts to specify the minimum requirements to transmit information laid down in paragraphs 1 to 5 of [such an] Article as regards the types and format of information to be transmitted, including their security and interoperability, and the deadlines.").

period of twelve months after becoming aware of that fact. The profile is also very important, as stated by Art. 3a,

> [w]ithout prejudice to any longer storage period laid down by any sector-specific Union legislative act, Member States shall ensure that companies and intermediaries do not store the personal data of shareholders transmitted to them in accordance with this Article for the purpose specified in this Article for longer than 12 months after they have become aware that the person concerned has ceased to be a shareholder.[32]

Once identified, shareholders will have the right to receive from the intermediaries themselves (or from the company) all information aimed to enable them to exercise the rights conferred by the shares and, in any case, addressed to all shareholders holding shares of the same category. Such point is crucial too, because it brings about an appreciable exchange of information among corporate players. Nevertheless, it is fundamental—from a "systemic" point of view—since it seems capable to affirm a concrete distinction between shareholders—and, therefore, a *vulnus* in the principle of equality among them—where it affirms that "Member States may provide for companies having a registered office on their territory to be only allowed to request the identification of shareholders holding more than a certain percentage," 0,5% or less "of shares or voting rights."[33] Another fundamental profile related to corporate transparency and to the issue under examination is the exercise of voting rights by shareholders; which Article 3*c* will become a cornerstone of the new discipline, specifically with regard to the role of the intermediaries in the voting

[32] *Id.* art. 3a.

[33] *Id.*

process[34] and to the importance of the confirmation of receipt and counting of votes.[35]

V. INSTITUTIONAL INVESTORS AND CORPORATE GOVERNANCE IN LIGHT OF THE SHRD II

As mentioned earlier, the SHRD II raises the issue of the involvement of institutional investors in corporate dynamics. The topic—as already pointed out by eminent scholars and practitioners[36]—is one of the most important in the entire field of corporate law, as it is fundamental both in the EU model and in the U.S. system, where—especially after the financial crisis—it is progressively becoming one of the pillars of the entire discipline. As far as the SHRD II is concerned, the involvement of

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[34] *Id.* art. 3c ("Member States shall ensure that the intermediaries facilitate the exercise of the rights by the shareholder, including the right to participate and vote in general meetings, which shall comprise at least one of the following: *(i)* the intermediary makes the necessary arrangements for the shareholder or a third party nominated by the shareholder to be able to exercise themselves the rights; and *(ii)* the intermediary exercises the rights flowing from the shares upon the explicit authorization and instruction of the shareholder and for the shareholder's benefit."); *see also* Paolo Montalenti, *La Direttiva Azionisti e l'informazione preassembleare*, GIURISPRUDENZA COMMERCIALE 685/I (2011) (showing the information to be provided to shareholders before the meeting).

[35] *Id.* art. 3c (affirming that "Member States shall ensure that after the general meeting the shareholder or a third party nominated by the shareholder can obtain, at least upon request" and before a deadline to be defined, "confirmation that their votes have been validly recorded and counted by the company, unless that information is already available to them").

[36] *See* Lisa M. Fairfax, *Mandating Board-Shareholder Engagement?*, 3 U. ILL. L. REV. 821, 821-57 (2013); Craig Doidge et al., *Collective Action and Governance Activism* (2017), ssrn.com/abstract=2635662; PETRA NIX & JEAN JINGHAN CHEN, THE ROLE OF INSTITUTIONAL INVESTORS IN CORPORATE GOVERNANCE: AN EMPIRICAL STUDY (2013); OECD, *The Structure and Behavior of Institutional Investors*, THE ROLE OF INSTITUTIONAL INVESTORS IN PROMOTING GOOD CORPORATE GOVERNANCE (2011); Michael C. Schouten, *The Political Economy of Cross-Border Voting in Europe*, 16 COLUM. J. EUR. L. 1, 1–36 (2009); Edward Rock, *Institutional Investors in Corporate Governance*, *in* THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 363 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2017); Paolo Montalenti, *Investitori istituzionali e amministratori nelle società quotate: problemi e proposte,* RIVISTA ODC (2016), rivistaodc.eu/edizioni/2016/1/saggi/investitori-istituzionali-e-amministratori-nelle-societ%C3%A0-quotate-problemi-e-proposte/; GOVERNO DELLE SOCIETÀ QUOTATE E ATTIVISMO DEGLI INVESTITORI ISTITUZIONALI (MARCO MAUGERI ED.,2015); Matteo Erede & Giulio Sandrelli, *Attivismo dei soci e investimento "short term": note critiche sul ruolo degli investitori professionali a margine del dibattito europeo sulla "corporate governance",* 58 RIV. SOCIETÀ 931 (2013). *See also* George W. Jr. Dent, *The Essential Unity of Shareholders and the Myth of Investor Short-Termism*, 35 DEL. J. CORP. L. 97 (2010); *La finanza comportamentale e le scelte di investimento dei risparmiatori. Le implicazioni per gli intermediari e le Autorità*, Quaderni di finanza Consob, 68 (2011).

institutional investors is expressly considered able to guarantee *(i)* a real balance among all corporate interests; *(ii)* a correct implementation of corporate governance mechanisms in which an active participation of "heavy" shareholders, far from their current and traditional "apathy",[37] is necessary; and *(iii)* the adoption of a long-term (and therefore "safer" *or* "less risky," depending on the view) investment strategy.[38]

Firstly, the directive raised awareness in terms of the transparent policy to be implemented by institutional investors.

As pointed out by Recital 16, in fact, a public disclosure of some information on institutional investors' investment strategies could have "a positive impact on investor awareness, enable ultimate beneficiaries such as future pensioners optimize investment decisions, facilitate the dialogue between companies and their shareholders, encourage shareholder engagement and strengthen their accountability to stakeholders and to civil society."[39] For such reason, institutional investors (and asset managers) are required to develop and publicly disclose a shareholder engagement policy that describes *(i)* how institutional investors and asset managers integrate shareholders' engagement into investment strategy; *(ii)* the

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[37] The impact of proxy advisors on reducing the rational apathy of professional investors and on promoting the involvement of shareholders by encouraging the so-called collective action of institutional investors. GAIA BALP, I CONSULENTI DI VOTO (2017), 95-97. As the Author admits, it remains doubtful whether and how the voting advisors can actually bring about a positive collective action and an independent and pluralistic control of issuers, or on the contrary determine an effect of relieving professional investors of their voting responsibilities and herd management responsibilities, given the extreme concentration of the market and the criticism of the quality of the analytical tools used in formulating voting recommendations. On the one hand, the solution to this issue depends on the proportion of non-standardized proxy advisory mandates, normally prepared by the voting consultants by geographical area, based on uniform and supranational corporate governance guidelines. On the other hand, it depends on the degree of actual personalization and originality that this voting policy may present, as well as on the effective differentiation in the assessment of the voting proposal carried out by the proxy advisor. *Id.*

[38] As pointed out, "[i]nstitutional investors and asset managers are often important shareholders of listed companies in the Union and can therefore play an important role in the corporate governance of those companies, but also more generally with regard to their strategy and long-term performance. However, the experience of the last years has shown that institutional investors and asset managers often do not engage with companies in which they hold shares and evidence shows that capital markets often exert pressure on companies to perform in the short term, which may jeopardize the long-term financial and non-financial performance of companies and may, among other negative consequences, lead to a suboptimal level of investments, for example in research and development, to the detriment of the long-term performance of both the companies and the investors." SHRD II, *supra* note 1, Recital 15.

[39] *Id.* Recital 16.

different engagement activities and how to conduct disclosure; *(iii)* how to manage actual or potential conflicts of interests, particularly if institutional investors (or asset managers, or their affiliated undertakings) have significant business relationships with the investee company; and (iv) how voting rights have been exercised.

In our opinion, the last point—even dealt with too timidly by SHRD II—is crucial. Under the Directive, investors can decide not to publish every vote cast if the vote is considered to be insignificant due to the subject matter of the vote or to the size of the holding in the company, given that it is up to investors to set their own criteria regarding which votes are insignificant on the basis of the subject matter of the vote or the size of the holding in the company, and to apply them consistently.[40] In other words, the structure designed by SHRD II on this point could be weak when it allows investors to decide in a discretionarily way the type of information relating to the voting rights to be published or not. Also, the cost/efficiency argument adopted by the Directive on this issue[41] does not appear to be totally persuasive in comparison with a tailor-made provision that seems to realize, at a first glance, just an incentive for institutional investor, that will find in the EU regulatory framework the appropriate areas of actions and freedom.

Therefore, in light of the above, it can be observed that the transparency of the engagement policy of institutional investors and the information exchange among shareholders, companies, institutional investors and asset managers are the key elements of the SHRD II. On this issue, Member States are required to ensure such adequate information flows, without prejudice to the freedom of some players, that can decide not to disclose but must explain the reasons for this choice.[42] Another element to highlight is the adequacy of the disclosed content of the policies, that have taken into account a general description of voting behavior, an explanation of the most significant votes and the use of the proxy advisor services.[43]

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[40] *Id.* Recital 17-18.

[41] *Id.* Recital 18 ("With a view to reducing the possible administrative burden, investors should be able to decide not to publish every vote cast if the vote is considered to be insignificant due to the subject matter of the vote or to the size of the holding in the company. Such insignificant votes may include votes cast on purely procedural matters or votes cast in companies where the investor has a very minor stake compared to the investor's holdings in other investee companies. Investors should set their own criteria regarding which votes are insignificant on the basis of the subject matter of the vote or the size of the holding in the company, and apply them consistently.").

[42] *Id.* Recital 17.

[43] *Id.* art. 3g.

However, SHRD II also pays attention to the specific case in which an active manager invests on behalf of an institutional investor on a discretionary basis for each client or through a collective investment undertaking. In this case, it is expressly required to disclose some specific information on the agreement with the asset manager, such as how *(i)* the agreement with the asset manager provides the asset manager with incentives to align its investment strategy and decisions with the profile and duration of the institutional investor(s)' liabilities, in particular long-term ones; *(ii)* this agreement provides an incentive for the asset manager to make investment decisions based on assessments of the long-term and medium-term financial and non-financial performance of the investee company and to engage with the investee companies in order to improve their medium and long-term results; *(iii)* the method and time horizon for evaluating the asset managers' performance and the remuneration for their services are in line with the profile and duration of the institutional investors' liabilities, in particular with long-term results; *(iv)* the institutional investor controls the portfolio turnover costs incurred by the asset manager and the target relating to the level (or range) of portfolio turnover; and *(v)* the duration of the agreement with the asset manager.[44] Such approach definitively acknowledges the role played by institutional investors and confirms—if not goes beyond—the principles set out in some codes of corporate governance.

VI. PROXY ADVISORS: THE U.S. REGULATION AND THE EU DISCIPLINE(S?)

As "our modern corporate landscape is comprised of a complex web of inter-tangled agency relationships" among ISS, mutual funds, and corporations, thus widening the horizons of Berle and Means. We opted to deal with this topic in depth, perfectly sharing Professor Belinfanti's view, according that "investors' reliance on ISS presents a new flavor of the age-old agency cost problem, which merits thorough examination."[45]

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[44] *Id.* art. 3h.

[45] Tamara Belinfanti, *The Proxy Advisory & Corporate Governance Industry: The Case for Increased Oversight and Control,* 14 J.L. BUS. & FIN. 385, 388 (2009). A very recent and careful examination of proxy advisory firms, with an examination of their empirical evidence, was developed by the Manhattan Institute, which focused on: (i) Lack of transparency of consultancies, which do not disclose the way in which they develop their voting guidelines or the results of any tests to demonstrate that their recommendations are accurate; (ii) Elements influencing institutional investors, especially in the approval of remuneration plans; (v) Possible room for reform, with the intention of improving accuracy and transparency. James R. Copland,

As far as proxy advisors are concerned, the increased awareness of institutional investors shows how relevant and complex the topic is (not only)[46] in the European context,[47] where French and Italian regulations seem to be particularly relevant.[48] More specifically, although compared to the U.S.,[49] the (growing) European proxy advisor market has a smaller

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David F. Larcker & Brian Tayan, Proxy Advisory Firms: Empirical Evidence and the Case for Reform, (May 21, 2018), www.manhattan-institute.org/sites/default/files/R-JC-0518-v2.pdf).

[46] *See,* Sean McGinty & Konari Uchida*, What Roles Proxy Advisors Play: Evidence from International Comparison,* (2015), ssrn.com/abstract=2666078) (showing how "the approval rate in Japanese shareholder meeting, which are concentrated in the end of June, increases (decreases) as domestic institutional ownership increases when ISS recommends 'For (Against)'. Overall, the results support the view that proxy advisor recommendations affect voting behaviors of institutional investors with high benefits and costs of information collection"); *see also* Stephen J Choi, Jill E. Fisch & Marcel Kahan, *The Power of Proxy Advisors: Myth or Reality?,* 59 EMORY L.J. 869 (2010); Asaf Eckstein & Sharon Hannes, *A Long/Short Incentive Scheme for Proxy Advisory Firms,* (2018), ssrn.com/abstract=3098008 (discussing the measurement of ISS's power, and distinguishing institutional voting behavior from that of individual retail investors in the U.S.).

[47] EUROPEAN COMMISSION, COM (2014) 213 final-2014/0121 (COD), 5; EUROPEAN COMMISSION, COM (2011) 164 final (April 5, 2011), 14; EUR. SEC. & MKT. AUTH. ("ESMA"), *An Overview of the Proxy Advisory Industry. Considerations on Possible Policy Options*, www.esma.europa.eu/sites/default/files/library/2015/11/2012-212.pdf, 21-26. *See also* Albert Verdam, *An Exploration of the Role of Proxy Advisor in Proxy Voting* (2007), ssrn.com/abstract=978835; Uwe H. Schneider, *Abgestimmtes Verhalten durch institutionelle Anleger: Gute Corporate Governance oder rechtspolitische Herausforderung?*, 41 ZEITSCHRIFT FÜR UNTERNEHMENS- UND GESELLSCHAFTSRECHT 518, 520 (2012); Lars Klöhn & Philip Schwarz, *Die Regulierung institutioneller Stimmrechtsberater*, 149 ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 90 (2012); Dirk Kocher & Julia Heydel, *Kein abgestimmtes Verhalten und kein Stimmrechtsausschluss durch Stimmrechtsempfehlungen institutioneller Stimmrechtsberater*, 56 AG 534 (2011). For a comprehensive review of the literature, *see* BALP, *supra* note 37, at 129 n. 130.

[48] Pierre-Henri Conac, *La réglementation des conseillers en vote*, *in* RÉFLEXIONS COLLECTIVES SUR LA NOUVELLE DIRECTIVE DROITS DES ACTIONNAIRES DU 17 MAI 2017, 675, 690 (Benoit Lecourt et al. dirs., 2017). As the 2017 directive is a minimum harmonization directive, the French regulation will continue to apply, although the content the monetary and financial Code is likely to be adapted and the recommendation can be included in the general AMF's regulation to reinforce it. The Author has already addressed this issue in 2013, when, as part of the revision of the SHRD, the Commission improved the rules applicable to voting advisors in terms of transparency and the allocation of interests. Pierre-Henri Conac, *L'amélioration des règles applicables aux conseillers en vote* (proxy advisors), REV. SOCIÉTÈS 404 (2013).

[49] It is worth mentioning that a group of senators has recently expressed concern about inaccuracies in the analyses of voting advisors, noting that ISS offers only S&P 500 companies the opportunity to review and correct their reports. More generally, the Senators' letters (reflecting many of the concerns underpinning the bill passed by the House of Representatives on Dec. 7, 2017,

size, it is mainly fuelled by the demand of major investors,[50] and is on the "agenda" of several lawmakers throughout the European Continent. Even in the absence of empirical studies providing a reliable picture of the scale of the phenomenon[51] in terms comparable to those of studies in the North

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www.wlrk.com/docs/GorporateGoveranceReformandTransparencyActof2017.pdf) raised legitimate concerns about proxy consultancies and their substantial influence on proxy voting issues, which may lead to stricter regulation in the near future. *See* David A. Katz & Trevor Norwitz, *Congress Increases Pressure on Proxy Advisory Firms*, HARV. L. SCH. F. CORP. GOVERNANCE AND FIN. REG., (May 23, 2018), corpgov.law.harvard.edu/2018/05/23/congress-increases-pressure-on-proxy-advisory-firms/.

[50] ESMA, *supra* note 48, at 9, 16; Dutch Corporate Governance Code Monitoring Committee, Second Report on Compliance with the Dutch Corporate Governance Code 11 (2010).

[51] One of the few exceptions is represented by the following contribution:

> Information on the role that PAs assume in European markets is in demand in both the regulatory sphere and the academic sphere. . . . [the] findings show that there exists a substantial, yet varying, demand for PA services in European markets, suggesting that these information intermediaries play an economically meaningful role. We must note that our analyses are purely descriptive in nature; hence, we are unable to identify causal effects. However, overall, our findings that PA recommendations are associated with voting outcomes and that stock prices react to the publication of negative recommendations are in line with recent US evidence that unveils a causal relation between ISS 'vote against' recommendations and shareholders dissent.
>
> Our findings point out to European supra-national and national regulators that PAs may, indeed, assume an important role in shaping the way that Shareholders raise their 'voice' at AGMs and the way that governance mechanisms evolve at the firm and country levels. In addition, we contribute to the academic literature on the role and activities of PAs, which has not yet provided systematic evidence on European markets. By shedding light on the important roles of firm-level ownership and governance quality and of country-level Institutional designs in particular, our findings represent potential starting points for future research that aims to increase our understanding of how governance mechanisms and related information intermediation work and how they evolve in non-US jurisdictions.

Joerg-Markus Hitz & Nico Lehmann, *Empirical Evidence on the Role of Proxy Advisor in European Capital Markets*, EUR. ACCOUNT. REV. 1, 2, 33 (2017).

American area,[52] proxy advisors (*Ivox* in Germany,[53] *Manifest* and *IVIS* in the UK, *Proxinvest* in France, *Shareholders Support* in the Netherlands, *GES Investment Services* and *Nordic Investor Services* in Sweden)[54] seem to be present and active in the position papers relating to the regulatory initiatives undertaken by the European Authorities, by the European Supervisory Authorities, by standards setters, and the consequent role that opinion makers gained in the area of corporate governance law. The observation that proxy advisors take on the role of standard setter in governance matters without legitimacy or supervision unites the EU and the U.S. scholars' positions on the topic[55] and, in line with the significant weight of foreign investors in corporate meetings of a highly-diversified portfolio, it seems to be even stronger in the former than in the latter.[56] As the literature carefully points out,

> the lack of regulation of the Proxy Advisory industry contrasts with the power they in fact hold. This power is exercised both in determining the way in which votes will be cast at general meetings worldwide, and— even more importantly—in the draft resolutions of the general meeting drawn up by the board.[57]

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[52] Asaf Eckstein, *Great Expectations: The Peril of an Expectations Gap in Proxy Advisory Firm Regulation*, 40 DEL. J. CORP. L. 77, 83 (2015) (examining the powerful arguments of proxy advisor regulation and the potentially negative consequences of proxy advisory regulation, especially focusing on the Expectations Gap (which occurs when the parties interested in regulation—mass media, academics, politicians and the general public—tend to overestimate the efficiency and effectiveness of any regulatory regime) resulting from such regulation, its numerous and significant negative consequences and its possible solutions, with a view to making regulation more effective).

[53] Holger Fleischer, *Zukunftsfragen der Corporate Governance in Deutschland und Europa: Aufsichtsräte, institutionelle Investoren, Proxy Advisor und Whistleblowers*, 40 Z. FÜR UNTERNEHM.- GESELLSCHAFTSRECHT 155–81 (2011).

[54] Alessandro Morini, Proxy Advisor*: Attività e prospettive regolatorie*, 68 BANCA BORSA TIT. CRED. 759 (2015). For a comparative overview, see Steve Sauerwald et al., *Proxy Advisor and Shareholders Dissent: A Cross-Country Comparative Study*, 20 J. MGMT. 1, 1-31 (2016); Ascensiòn Gallego Còrcoles, *Proxy Advisor in the Voting Process: Some Considerations for Future Regulation in Europe* 13 EUR. CO. & FIN. L. REV. 107, 109-11 (2016).

[55] Balp, *supra* note 9, at 8.

[56] Massimo Belcredi, Stefano Bozzi, Angela Ciavarella & Valerio Novembre, *Proxy Advisor and Shareholders Engagement. Evidence from Italian Say-on-Pay* 26 (CONSOB, Working Paper no. 81, 2015), ssrn.com/abstract_id=2616258.

[57] Gallego Còrcoles, *supra* note 54, at 108.

One of the first (European) results of such awareness[58] led to the publication of best practice principles in March 2014, while an even earlier, embryonic form of voluntary proxy advisors' regulation is contained in the UK's 2010 Stewardship Code.[59] These principles—which aim to promote active supervision of institutional investors and a more explicit role for issuers in the governance—can also be extensively applied to voting advisors, in light of the recurring practice of stewardship functions. The subscribers to the Stewardship Code are required to disclose the voting rights exercised, thus, providing a description of the specific content of the services acquired, identifying the providers, and specifying to what extent they rely on the voting recommendations received.[60] Shortly after the (leading) UK experience, the French one was remarkable: the *Autorité des Marchés Financiers* intervened on the issue of voting advisors in a direct approach, issuing a recommendation which—taking into account the provisions of Article L.533-22 of the *Code monétaire et financier*—combines the approach adopted in the Stewardship Code with the position of the EU authorities. The topic became increasingly important and was rapidly discussed by the European Commission, which in April 2014, formulated the proposal for a Directive, specifically dedicating some provisions to voting advisors. As the doctrine correctly pointed out, the issue is much more complex than it seems, since voting advice is part of a much broader framework, characterized by dialectical conflicts among specific interests, difficult to merge in the only apparently quiet area of corporate interest, and mitigated by the numerous asymmetries that characterize widely-held companies. The presence of voting consultants, in fact, shifts the role of intermediary of the complex dialectic among shareholders and management, between majority and minority shareholders, only towards it. The European directive, as the aforementioned author has carefully observed, should be preceded by a reference to the duties of intermediaries, but does not offer detailed

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[58] Morini, *supra* note 54, at 780; Reena Aggarwal, Isil Erel & Laura T. Starks, *Influence of Public Opinion on Investor Voting and Proxy Advisor* 16-17 (Fisher Coll. of Bus. Working Paper No. WP 2014-03-12, 2015), ssrn.com/abstract_id=2447012.

[59] Gallego Còrcoles, *supra* note 54, at 132–33.

[60] *Id.* at 112 ("The usual combination of both activities (logistic and intellectual) implies that the recommendation on how to vote, as part of services described as "intellectual", appears automatically predisposed on the electronic platforms which are made available to the customer as part of the "logistic" activity undertaken by the Proxy Advisor. So, the institutional investor needs just a couple of easy steps to cast his votes, especially if he agrees with what has been recommended. If not, he is free to separate from the recommendations appearing as default on the voting platforms and to vote otherwise. Complementarily, proxy advisor offer the possibility to cast proxy statement votes on their client's behalf." (emphasis and footnotes omitted)).

provisions on institutional investors and managers, aspects in respect of which the author proposes improvements and reinforcements with respect to the organisational duty of monitoring of professional investors, overcoming the current critical issues of the doctrine on the transparency of conflicts of interests and quality of service.

In light of the above, the SHRD II confirms the belief that voting advisors are the ideal solution to ensure a reduction in the costs of analyses relating to corporate information, but it knows that they are able to influence the behavior of investors and, more precisely, of those investors who have highly diversified portfolios and hold numerous foreign shares. In order to secure the application of the corporate transparency principle, Member States are requested to ensure that voting advisors subject to a code of conduct: *(i)* report effectively on the application of corporate governance codes; *(ii)* disclose essential information related to the development of their research, opinions, advices, and voting recommendations; and *(iii)* inform Shareholders about any actual (or potential) conflicts of interest or business relationships which might influence this process.[61] Such information should be public for at least three years to allow institutional investors to take into account their past performance. So, while in the first phase, Europe only tended to move, at least temporarily, in favor of an option based solely on non-binding rules, then, a combination of direct and indirect forms of regulation seemed to work even better. In general terms, the direct regulation of Proxy Advisor in Article 3i of the Proposal tends to adopt the legislative instrument, reflecting those established in non-binding form in the Best Practice Principles (BPP)[62] and to provide inspiration for some of the solutions underlying the regulation of credit rating agencies (that pose similar problems to the ones of proxy voting), and in particular for those which have an obligation of transparency to the public. This choice implies that proxy advisory activity requires the protection of the market and its proper functioning. In regards to indirect regulation, the provisions of Articles 3f and 3g express a system that results in a European operational approach (based on the comply-or-explain rule)[63] slightly different from the American one. Looking at the procedure and at the adequacy of a (minimum) legislative regulation of the proxy adviser, it is essential to

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[61] SHRD II, *supra* note 1, Recital 26; Li, Tao, *Outsourcing Corporate Governance: Conflicts of Interest Within the Proxy Advisory Industry*, MGMT. SCI., (2016) ssrn.com/abstract=2828690 (noting conflicts of interest have sparked concern in the proxy advisory field, but, "increasing competition could help alleviate them").

[62] Gallego Còrcoles, *supra* note 54, at 134-37.

[63] Konstantinos Sergakis, *Deconstruction and Reconstruction of the "Comply or Explain" Principle in EU Capital Markets,* 5 ACCT. ECON. L. - CONVIV. 233, 256-65 (2015). *See also* Conac, *supra* note 48, at 691.

constantly reflect on possible (minor) amendments and, therefore, to understand whether the existing system guarantees the reliability and quality of voting advisory services, by providing that the proxy advisor operating in Europe has to fulfil certain obligations. According to Article 3i of the Proposal (as updated June 22, 2016 as a basis for further inter-institutional negotiations), voting advisers are required to clarify the compliance (if effective) with corporate governance codes and to annually report on their application, indicating which recommendations of the Code or parts thereof have not been applied, the reasons and the appropriateness. The minimum information to be provided under the second paragraph of Article 3i shall cover the circumstances deemed relevant for the assessment of the quality of the services provided by the investor. Disclosure concerns (i) the essential features of the methodologies and models applied in the analysis; (ii) the main sources of information used; (ii.a) the procedures adopted for the purpose of assuring the quality of research, advice and expression of voting recommendations, as well as the qualification of analysts; (iii) whether and how the national context (market, law and regulation) is taken into account, as well as the following factors. These rules follow a two-track approach: codes of corporate governance/stewardship, whose importance is worthwhile (and whose value is strengthened), establish a real disclosure obligation, but legal disclosure obligations in this area are necessary. In this framework, there seems to be a limited attitude of trust in both the Codes of Stewardship and the Codes of Corporate Governance and in the ability of the (legal) compliance rule to have an effective or at least sufficiently wide effect on the activity of Proxy Advisory.[64] The ambiguity of this approach is confirmed—however appropriate—by the last sentence of the second paragraph of Article 3i, according to which the publication of the information provided for by the norm may be omitted if that information is already included in that disclosed pursuant to the provisions of the first paragraph.[65] This part of the norm at least avoids dysfunctional duplication of information. Thereafter, the information referred to in the second paragraph of Article 3i significantly overlaps with the paragraph on quality of service and the guidelines for its application. As in any Code of Conduct, disclosure shows BPP's intention to rebalance the asymmetries that the Proxy Advisory contract establishes, so as to make the client/investors' position the less unfavorable position to the implementation of more effective control by voting advisors. The corresponding legal obligation in Article 3i appropriately reinforces this

[64] *See* Balp, *supra* note 9.

[65] Gallego Còrcoles, *supra* note 54, at 137–40.

intention by strengthening the scope of the principle; given that the typical function of a comply-or-explain rule is to oblige addressees to take a position vis-à-vis it, to create conditions of transparency with regard to this position, to exert indirect pressure on addressees to adhere to it, and to induce members to act in accordance with the rules referred to in the first paragraph of Art. 3i. The declaration concerns both the commitment in a future perspective and the compliance of corporate operations with the principles of adherence to which they have been declared (or with the reasons for potentially different behavior). Failure to communicate, or failure to behave ex post unjustifiably in line with the scope of the statement, would, at least theoretically, have consequences for the appointment of directors and their reputational level.[66] However, the first paragraph of Article 3i—which should be read in conjunction with the following—does not preclude the (legitimate) choice of noncompliance in order to determine the lack of information on the elements to be disclosed.

In addition, also in light of the recent MAR regulation, it is quite natural to wonder whether proxy advisors' dialogue with the issuers subject to voting advice is relevant as a form of selective disclosure of privileged information. Further considerations must be made with reference to the current practice of informal interviews held by voting advisors with major companies, whose shareholders' meetings are subject to analysis, especially when the economic results of the issuers are not satisfactory (or whose management deserves attention). Although companies often contact proxy advisors prior to the shareholders' general meetings to discuss items on the agenda, it is sometimes the case that this contact leads to a revision of the initial recommendation (stating that some circumstances have been assessed wrongly or misleadingly, without fully understanding the underlying factual circumstances).[67] The issuer's interest in dialoguing (also) with the voting advisors—as indirect representatives of the main investors—may also be generated by the intention to explore the potential consensus on some transactions or on certain strategic choices decided by the directors before their formalization and, therefore, before their communication to the market.[68] Outside the market-sounding context, discussion with proxy advisors can facilitate a clear and broader assessment of the company, as well as signal the willingness of the issuer to respond to or consider stakeholder requests.

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[66] *See* Yonca Ertimur, Fabrizio Ferri & David A. Maber, *Reputation Penalties for Poor Monitoring of Executive Pay: Evidence from Option Backdating*, 104 J. FIN. ECON. 118 (2012).

[67] *See* Bryce C. Tingle, *Bad Company! The Assumptions behind Proxy Advisor' Voting Recommendations*, 37 DALHOUS. L. J. 709 (2014).

[68] *See* Chiara Mosca, *Director-Shareholder Dialogues Behind the Scenes: Searching for a Balance Between Freedom of Expression and Market Fairness* (forthcoming 2018).

Even if the constructive dialogue with the issuer is mainly intended to concern well-known information (if not already communicated to the market) for the performance of the typical activity of consultants with voting advisors, it is strictly related to matters of corporate governance to a lesser extent than others that may be price sensitive. Therefore, in this case, information does not fall within the purpose of the ongoing disclosure obligation.[69] Although the scope of relevance of the discipline of privileged information and its abuse is probably limited, it cannot be excluded that private information may be transmitted (more or less implicitly) to the proxy advisors who are able to favor positive voting recommendations.

The opinion that selective disclosure of information to third parties is legitimate must therefore be shared, provided that it does not lead to an unacceptable restriction of the system, becoming a means of systematically overcoming the principles of equal access to inside information and of the protection of market integrity, which underlie the obligation of ongoing public disclosure. This attitude underlines the need to ensure that appropriate precautions are taken to prevent, or otherwise limit, the risk of breach of the public disclosure obligation and market abuse.

Proxy advisors would abuse inside information they had (legally) become aware of as a result of such duties, whether they passed it on to the clients (and the transactions in the issuer's financial instruments were carried out by them) or used in the course of their advisory duties on behalf of one or more of their clients. Indeed, the information would be used outside the normal exercise of employment, profession or office, thus taking over for MAR purposes.

VII. THE INVOLVEMENT OF SHAREHOLDERS IN THE DETERMINATION OF DIRECTORS' REMUNERATION: AN OVERVIEW OF SAY ON PAY

The SHRD II pays particular attention to the "problem" of adequate shareholder involvement in the determination of directors' remuneration. This issue—which became more important after the financial crisis[70]—

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[69] *See* Balp, *supra* note 9.

[70] As one author construed:

> Although American fury over executive compensation is not new, it has grown considerably amidst the financial crisis. And it has been fueled by stories of executives receiving significant pay packages while their companies performed poorly or received federal bailout funds. Some even insisted that excessive

plays a central role in the scholars' perspective[71] and it is dealt with both in Recitals 28-41 and in Article 9a of SHRD II, following an argumentative line that seems to read the control of managers' remuneration in terms of incentives and agency costs. As pointed out by the Directive itself, remuneration is one of the key instruments available to companies to align their interests with those of their directors and, in view of the crucial role of directors in companies, it is important that the remuneration policy of companies is determined appropriately by the competent bodies within the company and that shareholders are given the possibility to express their views on the remuneration policy of the company.

Briefly considering the content of the document, we deem appropriate to underline that the architecture envisaged by the SHRD II aims to solve the opposition between shareholders' primacy and directors' primacy[72] in the sense of giving the former a specific right of voice in the field of remuneration. In other words, it seems that the Directive pays specific attention most of all to the shareholders' position, confirming their role as Principal, and emphasizing the importance of their commitment to every aspect of society. In order to create a truly effective system, the new

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> executive pay played a role in fueling, or even precipitating, the financial crisis by incentivizing executives to pursue unjustifiably risky transactions. Such stories accelerated efforts to reform executive pay practices.

Lisa M. Fairfax, *Sue on Pay: Say on Pay's Impact on Directors' Fiduciary Duties,* 55 ARIZ. L. REV. 1, 3-4 (2013). The article is extremely relevant for all issues related to litigation and the relevance of fiduciary duty law in the field, arguing that lawsuits presented are "a welcome opportunity for courts to reshape fiduciary duty law and reconfirm[ ] that law's relevance to the executive compensation debate . . . [even if] courts historically have been reluctant to interfere in the executive pay decision." *Id.* at 51.

[71] *See generally* Steven A. Bank, Brian R. Cheffins & Harwell Wells, *Executive Pay: What Worked?*, 42 J. CORP. L. 59–107 (2016); Roberto Barontini, Stefano Bozzi, Guido Ferrarini & Maria Cristina Ungureanu, *Directors' Remuneration Before and After the Crisis: Measuring the Impact of Reforms in Europe*, *in* BOARDS AND SHAREHOLDERS IN EUROPEAN LISTED COMPANIES 251 (Massimo Belcredi & Guido Ferrarini eds., 2013) ; Massimo Belcredi, Stefano Bozzi, Angela Ciavarella & Valerio Novembre, *Say-on-Pay in a Context of Concentrated Ownership. Evidence from Italy* (CONSOB, Working Papers No. 76, 2014), ssrn.com/abstract=2403886; Steven Balsam, Jeff Boone, Harrison Liu & Jennifer Yin, *The Impact of Say-on-Pay on Executive Compensation*, 35 J. ACCT. PUB. POL'Y 162 (2016); Clara Torres-Spelliscy, *Corporate Democracy from Say on Pay to Say on Politics*, 30 CONST. COMMENT. 431 (2015); Natasha Burns & Kristina Minnick, *Does Say-on-Pay Matter? Evidence from Say-on-Pay Proposal in the United States*, 48 FIN. REV. 233 (2013).

[72] This aspect is further underlined in Federico Riganti, *La nuova* Shareholders' Rights Directive*: alcune riflessioni introduttive*, *in* NUOVI LEGGI CIVILI COMMENTATE, (forthcoming 2018).

Article 9a provides that the approval of the directors' remuneration policy shall be submitted at least every four years to the general meeting of shareholders, whose members—duly informed pursuant to Article 9c of SHRD II—will be called upon to express their opinions by (preferably) binding (or at least advisory) vote[73] (depending on the countries in which they have been transposed). We consider such freedom of choice as appreciable. However, without any doubt, it might *(i)* weaken the process of uniformity undertaken at a European level, as well as the above-described desired involvement of shareholders in relevant issues, and *(ii)* consequently confirm the somewhat irretrievably "subordinate" role of the "owners" at the Board of Directors in modern corporations, at least as far as the subject under discussion. Another possible weakness of the issue could be the explicit provision whereby Member States may allow companies, in exceptional circumstances, to temporarily derogate from the remuneration policy, provided that the policy includes the procedural conditions under which the derogation can be applied and specifies the elements of the policy from which a derogation is possible. Exceptional circumstances—as specified by the SHRD II—only concern situations where the exception to the remuneration policy is necessary to serve the long-term interests and sustainability of the company as a whole or to assure its viability.[74] Again, it might also represent an "open door" to a discretionary application of the provisions that could lead to the problems above.

In light of the content of the remuneration policy, as set out in the Directive, it explains—in a clear and comprehensible manner—some basic elements, namely, and, *inter alia*, how: *(i)* it can contribute to the company's business strategy and long-term interests and sustainability; and *(ii)* the remuneration and employment conditions of employees of the company were taken into account when establishing the remuneration policy; moreover it shall *(iii)* indicate the duration of the contracts or arrangements with directors and the applicable notice periods; *(iv)* the main characteristics of supplementary pension or early retirement pension schemes, and *(v)* the terms of the termination (and related payments).[75] In

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[73] *See* SHRD II, *supra* note 1, art. 9a ("Member States may provide for the vote at the general meeting on the remuneration policy to be advisory. In that case, companies shall pay remuneration to their directors only in accordance with a remuneration policy that has been submitted to such a vote at the general meeting. Where the general meeting rejects the proposed remuneration policy, the company shall submit a revised policy to a vote at the following general meeting.").

[74] *Id.* art. 9a (4).

[75] *Id.* art. 9b 1(a)-(c).

the end, it must be remembered that the remuneration policy shall also explain in detail the decision-making process followed for its determination, review and implementation. Specific attention must also be paid to the case of revision of the policy itself: in that circumstance, in fact, all significant changes must be described and explained to the Shareholders.[76]

Although briefly, pending the concrete application of the new regulation, a conclusion must be drawn: SHRD II seeks to offer an updated and appreciable discipline to market participants, and that should be able—also in light of the weaknesses highlighted above—to reform the current application of the principle, as described comparatively in the following paragraph.

A. Say on Pay in a European Perspective: A Comparative Overlook and the Italian Experience

In order to favor the alignment of the interests of both shareholders and managers, from 2000 to 2012 eleven developed countries introduced a specific regulation that allow shareholders to influence (albeit indirectly) executive directors' remuneration policies, *i.e.* the SoP regulation.[77] These rules allow shareholders to express their views on the remuneration policies adopted on a regular basis. In particular, shareholders are given the opportunity to express an opinion, which may be binding on the policies of executive directors and on the correlation between the remuneration and corporate performance.

Initially, in 1995, the SoP mechanism was introduced in the English Greenbury Report, in light of executives' over-remuneration after the privatization of public services.[78] After that, disclosure of equity-based

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[76] *Id.* art. 9a.

[77] Say on Pay laws give shareholders the opportunity to vote on executive remuneration policies on a periodic basis, in a binding or non-binding (advisory) way, or even with a comply-or-explain vote to be considered by the Board of directors as a starting point in the definition of such remuneration policies. In six of the eleven countries that planned to adopt such regulation at the time the authors wrote their piece, the vote was binding. *See* Randall S. Thomas & Christoph Van der Elst, *Say on Pay Around the World*, 92 WASH. U.L. REV. 653 (2015); Ricardo Correa & Ugur Lel, *Say on Pay Laws, Executive Compensation, Pay Slice, and Firm Valuation Around the World*, 122 J. FIN. ECON. 500–20 (2016). *See generally* Simone M. Sepe, *Making Sense of Executive Compensation*, 36 DEL. J. CORP. L. 189 (2011) (showing several relevant measures taken since the reform with the objective of introducing best practices on remuneration, namely compensation committee and risk committee rules, say-on-golden-parachutes provisions, and restrictions on compensation structures).

[78] The Greenbury Report, *Directors' Remuneration,* (July 7, 1995).

remuneration increased,[79] thereby easing monitoring by investors. Then, the Higgs Report[80] broadened the scope of the first report by requiring listed companies to provide adequate information on the remuneration of executive and non-executive directors. In 2002, the Directors' Remuneration Report Regulation required listed companies to draw up an annual report[81] on the remuneration received by executive directors and submit it to the (non-binding) approval of shareholders. While this vote is an important expression of shareholders' opinions, it does not directly affect the validity of the remuneration arrangements.

Given the positive impacts that the UK model had,[82] in 2011, section 951 of the U.S. Dodd-Frank Act[83] amended the Securities Exchange Act of 1934 by expressly requiring shareholders to cast a non-binding

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[79] Equity Based Remuneration is designed to build management loyalty and to focus its attention on the definition and implementation of strategies aimed to increase the corporate market value. They represent a form of protection of shareholders' interests. Among them, stock options entitle the holders to purchase treasury shares at a certain date (European Options) or by a certain date (American Options), at a certain price (Exercise Price). On expiry, the holder may decide to acquire the company shares or to transfer the option right.

[80] The Directors Remuneration Report, as established by the Directors Remuneration Report Regulation, consists of four parts—the second of which contains information on the composition and powers of the Remuneration Committee, on the remuneration related to corporate performance and liabilities assumed to fulfill the contractual obligations of directors' contracts, the third of which contains information on the remuneration policies of executive directors implemented by the company. The DRR must be approved by the Board of Directors and signed by the Chairman or Secretary of the Board of Directors. Directors' Remuneration Report Regulations 2002, No. 1986, Regulation 3, LEGISLATIVE.GOV.UK, www.legislation.gov.uk/uksi/2002/1986/regulation/3/made.

[81] *Id.* (setting out the minimum content required by the Remuneration Report, taking into account the remuneration paid to executive directors); 17 C.F.R. § 229.402 (2011) (stating requirements for annual salary).

[82] *Cf.* Jeffrey N. Gordon, *Say on Pay: Cautionary Notes on the UK Experience and Case for Shareholders Opt-in* (Colum. L. & Econ., Working Paper No. 336, 2009), ssrn.com/abstract=1262867. *See* Fabrizio Ferri & David A. Maber, *Say on Pay Votes and CEO Compensation: Evidence from the UK*, 17 REV. FIN. 527 (2013) (for an empirical evaluation of the phenomenon, according to which UK firms responded to negative say on pay voting outcomes by removing CEOs' controversial pay practices, which have been criticized "as rewards for failure (e.g. generous severance contracts)" and "increasing the sensitivity of pay to poor realizations of performance").

[83] *See generally* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 951, 124 Stat. 1376, 1899 (2010) (codified at 15 U.S.C. §78n-1); *see also* Sandra L. Suarez, *Reciprocal Policy Diffusion: The Regulation of Executive Compensation in the UK and the US*, 12 J. Pub. Aff. 303-14 (2012) (for an overview of the situation in the aforementioned English-speaking countries).

advisory[84] vote on the remuneration received by executive directors, based on a review of information on executive directors' remuneration.[85] In particular, the SEC stated that listed companies are required to provide detailed information on directors' remuneration and to explain in detail the remuneration of the Chief Financial Officer, the Chief Executive Officer and three other top directors.[86] According to a study by Towers Watson,[87] in 2017, following a downward trend, 1.4% of listed companies did not obtain shareholders' approval regarding executive directors' remuneration

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[84] Omari Scott Simmons, *Taking the Blue Pill: The Imponderable Impact of Executive Compensation Reform*, 62 SMU L. REV. 299, 345 (2009) (even if simply advisory directors on notice that shareholders can voice their dissatisfaction).

[85] *SEC Adopts Rules for Say-on-Pay and Golden Parachute Compensation as Required Under Dodd-Frank Act*, U.S. SEC. & EXCH. COMM'N (Jan. 25, 2011), www.sec.gov/news/press/2011/2011-25.htm; *Say on Pay Frequency Revisited for 2017*, DRINKER BIDDLE (Feb. 7, 2017), www.drinkerbiddle.com/insights/publications/2017/02/say-on-pay-frequency-revisited-for-2017; *Cf.* Jill E. Fisch, Darius Palia & Steven Davidoff Solomon, *Is Say on Pay All About Pay? The Impact of Firm Performance*, HARV. BUS. L. REV., (Nov. 2017), ssrn.com/abstract=3046597; Peter Iliev & Svetla Vitanova, *The Effect of the Say-on-Pay in the U.S.*, MGMT. SCI. (Feb. 2013), ssrn.com/abstract=2235064; James F. Cotter, Alan R. Palmiter & Randall S. Thomas, *The First Year of 'Say on Pay' Under Dodd-Frank: An Empirical Analysis and Look Forward*, 81 GEO. WASH. L. REV. 967 (2013); Randall S. Thomas, Alan R. Palmiter & James F. Cotter, *Dodd-Frank's Say-on-Pay. Will It Lead to a Greater Role for Shareholders in Corporate Governance?*, 97 CORNELL L. REV. 1213, 1224 (2012); Marisa Anne Pagnattaro & Stephanie M. Greene, *'Say on Pay': The Movement to Reform Executive Compensation in the United States and European Union*, 31 NW. J. INT'L L. & BUS. 593, 602 (2011); Minor Myers, *The Perils of Shareholder Voting on Executive Compensation*, 36 DEL. J. CORP. L. 417, 444, 446, 456, 459 (2011) (author focuses on all steps, from the UK experience to the voluntary adoption before the Dodd-Frank, from the costs and benefits of the system to the opt-out regime); Lisa M. Fairfax, *Shareholding Democracy on Trial: International Perspective on the Effectiveness of Increased Shareholder Power*, 3 VA. L. & BUS. REV. 1, 10-12, 17-18 (2008).

[86] Executive Compensation, SEC.GOV, www.sec.gov/fast-answers/answers-execomphtm.html; Caroline Pearce, *UK: An Overview of the Higgs Report on the Role and Effectiveness of Non-Executive Directors*, MONDAQ (Mar. 14, 2003), https://tinyurl.com/y7ah37w7 (noting that in 2002, the British Labour Government commissioned Sir Derek Alan Higgs to draw up a report focusing on an analysis of the role and effectiveness of non-executive directors).

[87] U.S. Executive Pay on Votes, TOWERS WATSON (Aug. 7, 2017), www.towerswatson.com/-/...pay.../2017/say-on-pay-summer-2017-wrap- up.pdf (explaining that the analysis was carried out on companies belonging to the Russel 3000 Index: shareholders' consensus stands at 90% in the 77% of the companies belonging to this index, while the consensus is between 50% and 90% in the remaining 20%).

policies (*i.e.* SoP failure).[88] Similarly, other countries such as Canada,[89] China,[90] New Zealand,[91] Australia,[92] Belgium, Denmark, France,[93] Germany, the Netherlands, Norway and Switzerland agreed to adopt the same position on these rules.[94] More precisely, as early as 1937, the German Stock Corporation Act required the supervisory board to control the remuneration paid to the management and that such compensation was reasonable, in line with the company's economic and financial conditions.[95] However, shareholders did not have voting rights on the remuneration received by executive directors. In 2009, the German Parliament approved a new regulation, the *VorstAG* (Regulation on the appropriateness of remuneration of executive directors on the Board of

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[88] *See* 2017 Say on Pay Results, SEMLER BROSSY (Sept. 13, 2017), www.semlerbrossy.com/wp-content/uploads/SBCG-2017- SOP-Report-09-13-2017.pdf (providing an annual report on the say-on- pay failures).

[89] Vanessa Serret, Sylvie Berthelot & Michel Coulmont, *Les facteurs déterminants de la mise en place du* Say on Pay *au Canada*, FINANCE CONTRÔLE STRATÉGIE (2016), journals.openedition.org/fcs/1783.

[90] 赵金龙 et al., *论股东对公司高管薪酬的投票权 - Shareholders' Say on Pay : International Experience and Lessons for China*, 比较法研究 30–46 (2016).

[91] Randall S. Thomas & Susan Watson, *Should New Zealand Adopt Say on Pay?* 19 N.Z. BUS. L. Q. 1, 13-19 (2013) (concluding that "the existing evidence shows that it is unlikely to have a big effect on current pay practices at most companies in New Zealand if it is adopted").

[92] Matthew Grosse, Stephen Kean & Tom Scott, *Shareholder Say on Pay and CEO Compensation: Three Strikes and the Board is Out*, 57 ACCOUNT. FIN. 701 (2017); Mahdi Faghani, Reza Monem & Chew Ng, *"Say on Pay" Regulation and Chief Executive Officer Pay Evidence from Australia*, 12 CORP. OWNERSHIP & CONTROL 28 (2015); Reza Monem & Chew Ng, *Australia's "Two-Strikes" Rule and the Pay-Performance Link: Are Shareholders Judicious?*, 9 J. CONTEMP. ACCOUNT. ECON. 237–54 (2013); Allan Fels, *Executive Remuneration in Australia*, 20 AUST. ACCOUNT. REV. 76 (2010).

[93] Anne-Sylvaine Chassany, *French Shareholders Win Say on Executive Pay,* FIN. TIMES (June 10, 2016), www.ft.com/content/240318b2-2ed9-11e6-bf8d-26294ad519fc) (permitting shareholders to have a say in the sum directors are paid, after the debate regarding the board of Renault against the carmaker's shareholders); *see French and European "Say on Pay" Regimes,* AMF (May 3, 2017), https://tinyurl.com/y7xjgoyg (noting the information to be provided to shareholders for their vote, the scope of the text, performance conditions and transparency of remuneration); Benoit Lecourt et al., *supra* note 2, at 692–96 (2017); Alain Pietrancosta, *Say on Pay: The New French Legal Regime in Light of the Shareholders' Rights Directive II*, at n. 3 (Nov. 5, 2017), ssrn.com/abstract_id=3065673 (explaining the combination of European provisions (informed voting, performance condition) and national provisions (two binding votes) will make French legislation one of the most stringent in the EU, hopefully leading to a good alignment of the remuneration of executives with company performance).

[94] Thomas & Elst, *supra* note 77, at 655, 658.

[95] *Id*. at 689.

Directors), which allows shareholders to express an opinion on remuneration policies adopted with a specific vote.[96] The supervisory board is responsible for determining the compensation received by managers.[97] Companies are also required to define remuneration policies that are closely linked to company performance. In Belgium, since 2012, shareholders of listed companies have been asked to cast a non-binding vote on the Remuneration Report on an annual basis.[98] This vote shall be considered binding if the company has departed from the recommended best practices on the subject of variable remuneration received by executive directors.[99] In the Netherlands, the shareholders' meeting approved the remuneration policies implemented and their amendments on an annual basis as from 2005.[100] Minutes of the meetings can be requested to verify that the remuneration policies and compensation received by executive directors have actually been discussed by the shareholders.[101] In Australia, the Two-Strike Rule applies. The First-Strike provides that, if shareholders express a negative opinion on the Remuneration Report, and if the percentage of disagreement is at least equal to 25% of the votes that can be cast at the shareholders' meeting, the Board of directors shall amend the remuneration policies implemented.[102] If shareholders again express their disagreement at the next general meeting, they will be asked to vote on the Spill Resolution, through which shareholders can decide whether or not to re-elect executive directors.[103] If shareholders approve such a resolution, with a percentage of votes equal to at least 50% of the exercisable votes, within ninety days from the date of the vote the executive directors are re-elected.[104] In Sweden, shareholders had the opportunity to vote in a binding manner on the guidelines proposed by the board at the shareholders' meeting since 2006.[105] In addition, the Swedish Companies Act requires the company's

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[96] *Id.* at 689-90.

[97] *Id.*

[98] *Id.* at 676–78.

[99] *Id.* at 668. In Belgium, in 2011, shareholders had to express a vote on remuneration policies (regarding share-based compensations only). The approval of remuneration policies by the shareholders' meeting was voluntary, but not only a few corporation implemented it.

[100] *Id.* at 703.

[101] *See* Grosse, Kean & Scott, *supra* note 92, at 701–25; Faghani, Monem & Ng, *supra* note 91, at 28–39; Monem & Ng, *supra* note 92, at 241-42; Fels, *supra* note 92, at 80.

[102] Monem & Ng, *supra* note 92, at 239.

[103] *Id.*

[104] *Id.*

[105] Thomas & Elst, *supra* note 77, at 695–96 (explaining how the Swedish Companies Act defines the minimum content required for drafting guidelines to be used for the definition and implementation of remuneration policies. The guidelines must cover salaries and any type

statutory auditors to certify three weeks before the shareholders' general meeting that the Remuneration Report was drawn up in accordance with the guidelines approved by the shareholders' general meeting the previous year.[106]

A recent study argues that SoP's performance in opposing management is higher when the firm has a significant presence of block holders, independent of ISS recommendations and has a dispersed shareholding structure.[107]

Voting On . . .	**Belgium**	**France**	**Germany**	**NL**
Board's Remuneration	B	B		Can be delegated
Executive Directors' Remuneration		NB		Can be delegated
Frequency	Annual	Annual	Not defined	Every time rules change
Remuneration Report's Approval	NB			
Management's Remuneration (Two-Tier Boards Only)			NB	
Supervisory Board's Remuneration (Two-Tier Boards Only)		B	B	B

of executive directors' remuneration, including the definition of the vesting period in the event of equity-based payment. When the total remuneration paid to certain executive directors cannot be determined, the guidelines must define the additional disclosures required and the methodologies for estimating it, as well as any applicable waiver).

[106] *Id.* at 696.

[107] Miriam Schwartz-Ziv & Russ Wermers, *Do Institutional Investors Monitor their Large vs. Small Investments Differently? Evidence from the Say-On-Pay Vote*, 4-5 (Mich. St. U. & U. Md. Working Paper Grp., No. 2510442, 2018), ssrn.com/abstract_id=2510442.

Voting On . . .	Sweden	UK	USA	Australia
Board's Remuneration	B			
Executive Directors' Remuneration	B		NB	
Frequency	Annual	Annual	Every Three Years (Max)	Annual
Remuneration Report's Approval		NB		NB
Management's Remuneration (Two-Tier Boards Only)				
Supervisory Board's Remuneration (Two-Tier Boards Only)				

Key: B = Binding; NB = Non-Binding

Most of the studies on the impact and determination of such a low consensus on remuneration policies were conducted in England and in the U.S. As regards to the former, a sample of listed companies belonging to the FTSE 350 Index was used, finding that the percentage of dissent tended to fluctuate between a peak of 7.9% in 2002 and a low of 3.4% in 2005.[108] This disagreement is related to s factors, including the quantitative level of remuneration received by executive directors; the correlation between compensation received and company performance, and the dilution of the shareholding resulting from incentive plans.[109] As far as the latter is concerned, since 2010 the remuneration of executive directors has shown

[108] Mary Ellen Carter & Valentina L. Zamora, S*hareholder Remuneration Votes and CEO Compensation Design* (AAA 2008 MAS Meeting Paper, Nov. 2007), ssrn.com/abstract=1004061.

[109] *Id.* at 4.

a downward trend.[110] Still, shareholders do not express this dissent on a random basis, but on the ground of specific parameters relating to remuneration policies.[111] In particular, they disagree if the remuneration received by the CEOs is extremely high (and increased independently of the economic performance of the company) and if shareholders' remuneration is composed of personal benefits.[112] Dissent is common in companies with disappointing results, where executive directors' remuneration is high.[113] In Italy, it is clear that the dissent expressed by shareholders tends to be significantly related to the size of the company.[114] The quality of disclosure is an additional factor influencing the shareholder's opinion on remuneration policies.[115] Disagreement is common where shareholders provide institutional investors with detailed information on the variable component of remuneration.[116] Disagreement also tends to be at higher levels where the fees paid are higher, thus showing a positive correlation between the disagreement expressed and the CEO's compensation.[117] Another factor that influences the shareholders' vote on remuneration policies is the presence of block

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110 Balsam, Boone, Liu & Yin, *supra* note 71.

111 *Id.* Moreover, as shown lately by the President of Shareholder Value Advisors, Stephen F. O'Byrne, *Say on Pay: Is It Needed? Does it Work?*, HARV. L. SCH. F. CORP. GOVERNANCE AND FIN. REG. (Jan. 25, 2018), corpgov.law.harvard.edu/2018/01/25/say-on-pay-is-it-needed-does-it-work/, there is also a necessity for control by institutional investors over the remuneration of managers and directors, as there was a lack of alignment between remuneration and performance. The SoP vote, focusing on the short term, is characterised by a much lower sensitivity to the alignment of salaries and ten-year costs with current salary premiums. The impact on investors is further weakened by the inability to provide portfolio companies with a specific and practical analysis of remuneration for performance analysis. That is why the authors invited institutional investors to tie their SoP votes to a ten-year analysis of CEO pay for performance that uses achievable pay for performance to quantify pay leverage, salary alignment and bonuses for the industry's average performance. Greater activism, also from this standpoint, would in fact increase competitiveness. Luca Enriques & Alessandro Romano, *Institutional Investor Voting Behavior: A Network Theory Perspective* (European Corporate Governance Institute (ECGI) - Law Working Paper No. 393/2018 Apr. 2018), ssrn.com/abstract=3157708.

112 *Id.* at 166, 188.

113 *See* Marinilka Barros Kimbro & Danielle Xu, *Shareholders Have a Say in Executive Compensation: Evidence from Say-on-Pay in the United States*, 35 J. ACCT. & PUB. POL'Y 19, 15–16 (2016).

114 *Id.* at 25.

115 Belcredi, Bozzi, Ciavarella & Novembre, *supra* note 71.

116 *Id.* at 26.

117 *Id.* at 8.

holders.[118] Thus, the level of dissent is lower where ownership is more concentrated.[119]

B. Effects

After the introduction of the SoP, there was an increase in the sensitivity of the CEOs' remuneration with respect to company performance[120]: the remuneration received in the event that the company—among the companies whose shareholders are required to express a (even non-binding) judgment, on the remuneration received—recorded negative economic and financial results.[121]

Examining the UK compensation reports, some authors who refer to a sample of listed companies, have shown a reduction in incentives labelled by investors as "rewards for failure" before and after the introduction of SoP in the country.[122] Afterwards, in the event of dismissal after the application of the SoP, a reduction of the notice period can be observed while, following the adoption of the rule, from 2000 to 2005, there is no evidence that the growth rates and executive directors' compensation are reduced. However, also in light of the increased time commitments for directors,[123] there has been a rise in the sensitivity of the remuneration received by CEOs with corporate performance, especially in cases where shareholders strongly disagree and excessive remuneration was paid in 2000–2002.[124] The effects of SoP on remuneration policies in the U.S. in 2011 highlight that about 55% of companies with high levels

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[118] *Id.* at 18.

[119] *Id.*

[120] Ferri & Maber, *supra* 82, at 527.

[121] Correa & Lel, *supra* note 77.

[122] Thomas & Watson, *supra* note 91.

[123] Dan Marcec, *Meaningful Limits on Director Pay*, HARV. L. SCH. F. CORP. GOVERNANCE AND FIN. REG., (Dec. 20, 2017), corpgov.law.harvard.edu/2017/12/20/meaningful-limits-on-director-pay/ ("[D]irectorships have become more of a full-time job given the rate of change and the 'always-on' nature of today's corporate environment, the ad hoc payments for meetings make less sense, since what can be constituted as a 'meeting'" is less clear. That said, in the cases where additional compensation is warranted, the limits allow some discretion. While they are a legal protection, they also have practical applications while explicitly assuring shareholders of a reasonable cap on director compensation.").

[124] Reggy Hooghiemstra, Yu Flora Kuang & Bo Qin, *Does obfuscating excessive CEO pay work? The influence of remuneration report readability on say-on-pay votes*, 47 ACCOUNT. BUS. RES. 695 (2017).

of disagreement make significant changes to remuneration policies,[125] and these changes tend to be implemented thanks to the intervention of institutional investors.[126] Additionally, proxy advisors' recommendations also tend to have a say in SoP votes.[127] After 2011, ISS expressly indicated that companies which did not comply with remuneration policies would receive negative recommendations on proposals and appointment of members of the Remuneration Committee.[128]

Some authors argue that the expression of a negative opinion by shareholders on the remuneration received by executive directors has a dual effect: executives are encouraged to take corrective measures, and the market penalizes management actions through negative publicity.[129]

Even though some authors argue that this regulation does not have any lasting effect for companies falling within its scope, the analysis aims to verify whether the regulation has any effect on the remuneration of executive directors, in keeping with what happens in the U.S. and in the UK widely-held corporations.[130] Then, it seems appropriate to focus exclusively on each of the aforesaid figures, since the CEO and the Chairman of the Board of Directors have greater power in defining the strategic guidelines that can be pursued by the company, and since their remuneration tends to be subject to in-depth evaluation.

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[125] Yonca Ertimur, Volkan Muslu & Fabrizio Ferri, *Shareholder Activism and CEO Pay*, 24 REV. FIN. STUD. 535 (2011).

[126] *See* Chris Mallin, *Institutional Investors: The Vote as a Tool of Governance*, 16 J. MANAG. GOV. 177 (2012).

[127] Ertimur, Muslu & Ferri, *supra* note 125.

[128] *See* Matthew Goforth, *Analysis of ISS' Proxy Voting Guidelines*, HARV. L. SCH. F. CORP. GOVERNANCE & FIN. REG. (Dec. 23, 2017), corpgov.law.harvard.edu/2017/12/23/analysis-of-iss-proxy-voting-guidelines/ ("[ISS will] generally [recommend a] vote against members of the board committee responsible for approving/setting non-employee director compensation if there is a pattern (i.e. two or more years) of awarding excessive non-employee director compensation without disclosing a compelling rationale or other mitigating factors."). The impact of proxy advisor activism on the issue is also clarified in American Council for Capital Formation, Timothy M. Doyle, *The Conflicted Role of Proxy Advisors* (May 2018), https://tinyurl.com/ybx5en9l.

[129] Ferri & Maber, *supra* note 82, at 26.

[130] Carter & Zamora, *supra* note 108; Ferri & Maber, *supra* note 82; Belcredi, Bozzi, Ciavarella & Valerio Novembre, *supra* note 71; Kimbro & Xu, *supra* note 113 at 2; Balsam, Boone, Liu & Yin, *supra* note 71.

Hypothesis 1: The disagreement expressed by shareholders on the remuneration of executive directors leads to a reduction in the remuneration received (1) by the Chief Executive Officer and (2) by the Chairman of the Board of Directors.

The assessment of say on pay's effectiveness is rather problematic. The serious financial scandals in the U.S. and Europe highlighted how top management can use information asymmetries to influence, even with the help of explicitly criminal activities, the results of their actions and the extent of their incentives. In these cases, a negative incentive was created, which led to an amplification of managerial opportunism. SoP results in an increase in pay for sensibility to performance as it leads to a reduction in the remuneration received (in the event that the company economically underperforms).[131] In a context such as that described above, it is easy to guess that the manager whose compensation has been reduced because of the dissent expressed by the shareholders has an incentive to maximize value for shareholders in order to rebuild trust and avoid reputational damages.[132]

Hypothesis 2: A reduction in remuneration, as a result of the expression of dissent by shareholders, leads to an increase (1) in revenues and (2) in the assets recorded in the financial statements.

Furthermore, the reduction in the executive directors' remuneration, as a result of the expression of dissent by the shareholders, leads to an increase of both the ROA and the ROE.[133] So, any reduction in executive directors' remuneration will contribute to meeting the interests of shareholders. If directors pursue revenues growth, profits will increase and cash flows will be available for self-financing, dividends will be distributed, and financial ratios such as ROE, ROA, EBIT, NOPLAT will be improved.

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[131] Jie Cai & Ralph A. Walkling, *Shareholders' Say on Pay: Does It Create Value?* 46 J. FIN. & QUANTITATIVE ANALYSIS 299, 300 (2011); Vicente Cuñat, Mireia Gine & Maria Guadalupe, *Say Pays! Shareholder Voice and Firm Performance*, (ECGI - Finance Working Paper No. 373, Feb. 2013), ssrn.com/abstract=2240410; Carter & Zamora, *supra* note 108.

[132] Kelly R. Brunarski, T. Colin Campbell & Yvette S. Harman, *Evidence on the Outcome of Say-On-Pay Votes: How Managers, Directors, and Shareholders Respond*, 30 J. CORP. FIN. 132 (2015).

[133] Ferri & Maber, *supra* note 82.

Hypothesis 3: The disagreement expressed by shareholders with regard to remuneration policies, if followed by a reduction in the remuneration received, leads to an increase (1) in the ROA and (2) in the ROE.

As some scholars have shown, the market reaction to SoP is positive,[134] the market value increases (as the market positively reflects the rise in management efficiency following the expression of disagreement by shareholders), as well as Tobin's Q,[135] probably due to a reduction in executive directors' remuneration and to a stronger correlation between remuneration levels and corporate performance. It is assumed that in case of an express misalignment of shareholders (and consequent reduction of the remuneration received by executive directors) there will be an increase of Tobin's Q coefficient, regardless of the dispersed or concentrated shareholding structure.[136] Finally, it is assumed that the market rewards companies in which, after expressing dissent, a greater alignment between remuneration received and corporate performance is achieved, and management efficiency, through a reduction in remuneration received. These companies are expected to increase their market capitalization in both the short and medium-term.

Hypothesis 4: The expression of dissent by shareholders, if followed by a reduction in executive directors' remuneration, leads to an increase (1) in the Tobin's Q Ratio and (2) in Market Capitalization.

In order to identify the effects of SoP on the performance of companies in Europe, we brought the Italian scenario into focus: the sample consists of 1053 observations, related to 211 listed companies, corresponding to all corporations listed on the Italian MTA (Mercato Telematico Azionario) over the *entire* period under analysis (2012-2016). Then, additional information was retrieved from the minutes of the shareholders' general meetings (in order to detect the dissent expressed by shareholders on remuneration policies, while the remuneration of executive directors was be manually derived from the reports published on the website of each company), from the Annual Remuneration Report (mainly as to the amount), from the AIDA database (the Italian provider of the Bureau Van Dijk European Database, which contains a historical

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[134] Cuñat, Gine & Guadalupe, *supra* note 131.

[135] *See generally* Correa & Lel, *supra* note 77. (Tobin's Q is an industry-adjusted natural logarithm used as a proxy for firm value).

[136] For a detailed and comprehensive overview of the Italian regulation on the topic, *see* BALP, *supra* note 37, 87-91.

archive on ownership structures) and from Bloomberg (as to the enterprise value). The first objective of the study is to identify the impact of shareholders' dissent on executives' remuneration policies (with particular reference to the remuneration of the CEO and the Chairman). The impact of the disagreement on the corporate and market variables is then considered, also identifying a single independent variable, *i.e.* the percentage of dissent expressed.[137] The second objective is to examine the reaction of the market after shareholders' dissent, whether it has led to a reduction in the remuneration received by the executive directors. Therefore, in the first section, the dependent variables considered are the following: Delta Remuneration CEO (2012-2014); Delta Remuneration CEO (2013-2014); Delta Remuneration Chairman (2012-2014); Delta Remuneration Chairman (2013-2014). Then, in the second section, the variables to be used to calculate the impact of the dissent expressed by the shareholders are the following: profits, total value of the assets, ROA, ROE, ROE, Tobin's Q Ratio,[138] Market Capitalization and Corporate Value.[139]

The dissent, calculated by determining the percentage of votes against and abstentions,[140] both expressing a negative vote on the proposals submitted to the shareholders' meeting, was equal to 4.7% in 2012, then, there was a growth trend of dissenters, which reached 6% in 2016.

In order to investigate the level of dissent, the composition of the sample was analyzed distinguishing four categories of dissent (< 5%, 5-10%, 10-20%; >20%). Empirical analyses show that the level of dissent is normally less than 5%—although it is not negligible to point out that this value is decreasing (from 77.6% in 2012 to 68.8% in 2015 and 2016). By contrast, there was a different trend of dissent in the 5-10% range (from 4.7% in 2012 to 10.6% in 2016) and in the upper 20% range (from 5.3% in 2012 to 8.2% in 2014 and 2016, although with a decrease in 2015, which a value of 7.1% was recorded) was different. In the 10-20% range, the

[137] When calculating the percentage of dissent, abstained votes are also taken into account, as it is the Italian regulation to include the effect of abstaining votes in the calculation of opposing opinions.

[138] Correa & Lel, *supra* note 77, at 514. (the Tobin's Q Ratio was calculated by comparing the total market capitalization value of the company under analysis with the total value of the assets on the financial statements).

[139] Corporate value is calculated by adding to the Market Capitalization, the corporate debt, minority interest and preference shares, from the value recalculated in this way the cash and cash equivalents are subtracted. The Value, thus, is a much more accurate indicator of corporate value than Market Capitalization.

[140] Looking at the internal structure of dissent, the votes against, compared to those abstained, are about 70-75% (therefore increasing from 69% in 2012).

trend of dissent is variable, only within a couple of percentage points (from 12.4% in 2012 and 2016, with a single peak of 15.9% in 2014). The analysis carried out therefore makes it possible to understand whether this increase in dissent was followed by major changes in the remuneration of the members of the Board of Directors and in other economic and financial variables linked to Italian listed companies.

Restricting the sample and focusing on the sole expression of dissent, it is clear that the proportion of dissenting parties exceeds the proportion of abstentions in the years examined (the value of abstaining parties was 69% in 2012, 73% in 2013 and around 75% in the three-year period 2014-2016).

In general, it is appropriate to begin with a couple of basic observations regarding *(i)* sales revenues: at the end of 2016, 18% of companies had not reached a million euro, while 22% of them had reached 1-10 million euros in sales revenues; *(ii)* market capitalization, which in 2016 showed an increase corresponding to the percentage of companies with capitalization over 1,000 million euros (from 18% in 2012 to 35% in 2016);[141] *(iii)* ROA: during that period, ROA above 5% decreased (from 58% in 2012 to 48% in 2016), while ROA between 0 and 5% moved up from 25 to 31%; (v) ROE: ROE generally increased, even if when ROE was between 0 and 5% it only moved up from 23 to 24%.

Finally, as a general remark, the analysis performed with respect to the minutes of shareholders' meetings reveals that the Reports on remuneration are structured in two different sections: the first one details the strategy adopted with regard to the composition of remuneration and the governance structure; the second one specifies information on the remuneration paid (in the previous fiscal year), including stock-based plans. In 2016, based on the different roles of CEO and Chairman, the fixed remuneration of the CEO was equal to 56% of the remuneration, while the variable remuneration was equal to 31% and that of the subsidiaries to 7%, while the fixed remuneration of the (executive) Chairmen reached 66%, while the variable remuneration was at 16% and that of the subsidiaries at 13%.

Before testing the hypotheses under examination, it is essential to also investigate the degree of correlation among all the variables involved in order to establish whether or not there are events of multicollinearity. The evaluation can be carried out using a normal correlation matrix, but it is even more appropriate to use the VIF (Variance Inflation Factor) test,

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[141] *See generally* Correa & Lel, *supra* note 77 (for explanations underlying this phenomenon and highlighting a positive increase in the market value of the companies that have adopted SoP, linked to the reduction in the remuneration received by the CEO and the increase in pay-performance sensitivity).

which verifies the relationship between the variance of a model with several variables and the variance of a model with a single time limit. This test provides an index measuring how much the variance of an estimated regression coefficient has increased due to the statistical phenomenon of collinearity. Values above ten tend to identify a strong multicollinearity, but statistics suggest taking five as the threshold value of the VIF.

Performing a first-stage regression, results are summarized as follows:

Table 1a

Variables	**VIF**
Board Members	1.53
Institutional Investors	1.27
Independent Directors (%)	1.26
CEO Duality	1.22
Family Controlled	1.19
Price Book Value	1.41
LN Total Assets	3.07
LN Sales	2.53
LN Net Financial Position	2.28
Debt Equity Ratio	1.12
Delta Earnings Ratio	2.40
Delta Mkt Capitalization	1.41
Delta EBITDA	1.38
Delta Remuneration CEO	1.23
Delta ROA	1.19
Delta Remuneration Chairman	1.29
Delta Earning	1.18
Delta ROE	1.08
Delta Tobin Q	1.07
Delta Total Assets	1.04
Mean VIF	1.51

As Table 1a illustrates, the values of all independent variables are lower than the critical threshold. Therefore, we can safely deduce that the model is not affected by multicollinearity, as corroborated by the correlation matrix below:

Table 1b

	dissenso	d~s_1216	d~o_1216	pfn_2016	ln_ric~i	ln_ta	delta~ne	delta~te	priceb~e	debteq~y	inv_isti
dissenso	1.0000										
delta_rem_~6	0.1240	1.0000									
delta_remc~6	0.0219	0.3268	1.0000								
pfn_2016	0.0400	-0.1850	-0.0372	1.0000							
ln_ricavi	0.0045	-0.1539	-0.1060	0.2641	1.0000						
ln_ta	-0.0095	-0.0536	0.0427	0.3561	0.7203	1.0000					
delta_marg~e	-0.0200	-0.0274	-0.0236	0.0110	0.1867	0.1192	1.0000				
delta_util~e	-0.0066	0.1714	0.0187	-0.6644	-0.1611	-0.2051	0.3279	1.0000			
pricebookv~e	0.0161	0.0461	-0.0038	-0.0589	0.1395	-0.0099	-0.0245	0.0502	1.0000		
debtequity	-0.0236	0.0323	0.0612	0.0742	0.1705	0.2571	-0.0094	-0.0181	-0.0603	1.0000	
inv_isti	0.0731	0.0147	0.1735	0.1071	0.2304	0.3087	0.0232	0.0175	0.0726	0.0856	1.0000
ind_dir	0.1229	-0.0513	-0.0392	0.2554	0.2220	0.3452	-0.1241	-0.2151	-0.0079	0.0963	0.0577
consi_cda	-0.0084	-0.0788	0.0160	0.2500	0.2487	0.4487	0.1566	-0.0354	-0.0621	0.2374	0.2365
duality	0.0374	-0.0463	-0.1044	-0.0626	0.0065	-0.1569	-0.0161	0.0295	0.0525	-0.0354	-0.2370
family	-0.0743	0.0883	-0.0736	-0.1535	-0.1026	-0.2557	-0.0787	0.0462	0.0893	-0.1324	-0.1144
delta_ricavi	-0.0691	0.2367	0.1381	-0.0352	0.0922	0.0822	-0.0164	0.0486	0.1587	-0.0178	0.1380
delta_roe	-0.0959	0.0339	-0.0011	-0.0325	-0.0012	-0.0109	-0.0016	0.0448	-0.0791	-0.0034	0.1031
delta_roa	-0.3423	-0.0580	-0.0198	-0.1096	0.0954	0.0817	0.1089	0.1777	0.0939	-0.0085	0.0747
delta_ta	-0.0154	-0.0369	-0.0515	-0.0102	-0.0731	-0.0742	-0.0109	0.0077	-0.0579	-0.0117	-0.0821
delta_cap_~o	-0.0592	0.0331	0.0847	-0.0616	0.0722	0.0136	0.0111	0.0750	0.4270	-0.0414	-0.0068
delta_tobi~q	-0.0057	0.0054	0.0808	0.0010	0.0051	0.0142	0.0202	0.0068	-0.1818	-0.0091	0.0008

	ind_dir	consi_~a	duality	family	delta_~i	delta~oe	delta~oa	delta_ta	delta_~o	delta_~q
ind_dir	1.0000									
consi_cda	0.1625	1.0000								
duality	-0.0618	-0.2725	1.0000							
family	-0.1671	-0.2281	0.1913	1.0000						
delta_ricavi	-0.0784	0.1181	-0.0833	0.0276	1.0000					
delta_roe	-0.0561	0.0249	-0.0325	0.1105	0.0307	1.0000				
delta_roa	-0.1067	0.1529	-0.1061	0.0616	0.1157	0.1055	1.0000			
delta_ta	-0.0588	-0.0660	0.1471	0.0652	-0.0108	-0.0011	0.0081	1.0000		
delta_cap_~o	-0.1236	-0.0784	-0.0261	0.1021	0.1893	0.1142	0.2507	-0.0245	1.0000	
delta_tobi~q	0.0338	-0.0190	-0.0840	0.0192	0.0320	-0.0030	0.0500	0.0540	-0.0213	1.0000

C. The Impact of Dissent on the CEO's and Chairman's Remuneration

The first part of this study aims to investigate the effects of the new SoP regulations on the remuneration of top managers in a short and medium-term time horizon. The first part relates to changes between 2012 and 2013, while the latter between 2012 and 2016.

These considerations are intended to verify there is a correlation between the expression of significant dissent by shareholders and the remuneration of executives.

Table 2 shows the results of the regressions relating to the remunerations of the CEOs and of the Chairmans of the Board for the period 2012-2013.

Table 2

Independent Variables	Delta CEO (12-16)	Delta President (12-16)
% Dissent	0.2237838	-0.738990***
Board Members	-0.0182747	-0.0321728**
Institutional Investors	0.3173336*	0.0168438**
Market Book Value	0.0181283**	0.0455425**
Ratio Independent Directors	-0.3481216	-0.1861202**
CEO Duality	-0.0942709	-0.1831588*
Family Controlled	-0.1846545*	0.2283943
Debt Equity Ratio	0.0066419	0.0090774
LN Total Assets	0.0282075***	0.0992822***
LN Sales	-0.0515177**	-0.1097175
LN Net Financial Position	0.0440741**	-0.1687162
Delta EBITDA	0.0000812*	-0.0000911*
Delta Earnings/Losses (Yearly)	-0.0000535	0.000126
Observations	3667	3667
R^2	0,15	0,56

Key: * = statistical significance 10%; ** = statistical significance 5%; *** = statistical significance 1%

In the long term (2012-16), the CEO and the Chairman appear to have different remuneration impacts. On one hand, the remuneration of CEOs seems not to be influenced by the expression of dissent, to the extent that they are not even negatively linked to it. Moreover, the p-value is high (0.22). Thus, it would appear that the impact of the SoP on Italian listed companies still has marginal implications on CEO compensation. But, the level of significance regarding the remuneration of the Chairman is very low (0,0064), so data sets that are significant at different levels, making the effective impact of shareholder voting explicit in terms of a reduction in the Chairman's compensation. Therefore, in the Italian scenario, shareholders' dissent provokes a drop in the compensation of the Chairman of the Board of Directors in the five years under consideration.

Table 3

Independent Variables	Delta Earnings (12-16)	Delta ROA (12-16)	Delta ROE (12-16)
Delta Remunerations Chairman 2012-18	0.3310241***	-0.1914463*	0.610892
Delta Remunerations CEO	0.1388536*	-0.0317488*	-1.02983
% Dissent	0.200854	0.0221860***	0.317060***
Board Members	-0.1895698	0.223827*	0.3447105
Institutional Investors	0.180684*	0.3193304	0.0154120**
Independent Directors	-0.1174775**	-0.131488	-0.6248136**
CEO Duality	-0.2502815	-0.9752264	-0.8142450
Family Controlled	-0.1895698	0.7284246	0.634235
Market Book Value	0.1220281*	0.2745745*	-0.8569782
Debt/Equity Ratio	-3.2289211**	-0.031828	-0.0568971
LN Total Assets	-0.086614	0.0735963	-0.4733477
LN Sales	3.6587412**	0.1410528	0.4394027*
LN Net Financial Position	-6.7433211	-0.0000102	-0.0000202
Delta EBITDA	-0.0007719	0.0001463	-0.0033774
Delta Earnings/Losses (Yearly)	0.000138	0.0008702*	0.0011460
Observations	5211	5211	5211
R^2	0,38	0,27	0,21

Key: * = statistical significance 10%; ** = statistical significance 5%; *** = statistical significance 1%

Looking at the first column in Table 3, the p-value is 0.08, so, in the long run, dissent has a positive effect on earnings. Considering the second column, the p-value is 0.0002, allowing the hypothesis to be accepted at any level of significance. Specifically, the dissent would appear to have a positive impact on the ROA, contributing to improving profitability in the medium term. Regarding the third column, the p-value is 0.44, so the same trend that occurred with regard to sales revenues is not applicable. The ROE is not influenced, in the five years considered, by the expression of dissent of the shareholders (such time distance may be the cause of this SoP ineffectiveness).

D. Dissent's Impact on Capital and Market Values

Table 4 presents the results of our analyses to assess the impact of dissent and some of the main economic variables.

Table 4

Independent Variables	Delta TA	Delta Cap Mkt	Delta Tobin's Q
Delta Remunerations CEO 2012-16	-0.7198068	0.083864*	-0.0240872
Delta Remunerations President 2012-16	-0.7506705	0.1678166**	0.0859089
% Dissent	1.682706	0.8780585*	0.2372348*
Delta EBITDA	-0.0004381*	-0.0000965	0.00006
Delta Earnings/Losses	0.0003225	0.0000873**	0.0000231
Delta Earnings	0.4843394	0.1303461*	0.0377446*
Delta ROE	-0.0042392	0.0079056***	-0.0009288
Delta ROA	0.1306796*	0.0591359***	0.0118664
Board Members	-0.1747262*	-0.0611277***	-0.0193936
Independent Directors	-0.839223*	0.9371144	0.3094264
CEO Duality	0.980232***	-0.2371072	-0.1907353
Family Controlled	1.404869	0.1185272*	0.0906587
Institutional Investors	-0.1821450	-0.345566*	-0.0333149

Market Book Value	-0.8037282	0.4028115***	-0.1157457***
Debt Equity Ratio	0.0379287**	0.0012933*	-0.0010621
Observations	7334	7334	7303
R^2	0,22	0,58	0,19

Key: * = statistical significance 10%; ** = statistical significance 5%; *** = statistical significance 1%

Considering the first column, the regression is not statistically significant (p-value: 0.29); in other words, SoP does not apparently impact this variable. Therefore, looking at the second column (p-value: 0), all invalid assumptions must be accepted at any level of significance: SoP is therefore relevant with respect to market capitalization: as dissent increases, stocks tend to perform better (as the dissent percentage variable confirms). The market therefore seems to recognize the effort made by companies to discuss and define remuneration policies. Finally, focusing on the third column (p-value: 0.64), it would seem that there is no direct link between this indicator and the SoP.

E. Conclusion of the Analysis

The results are perfectly consistent with the those recorded in countries with a widespread ownership structure,[142] influencing corporate remuneration policies. Moreover, the situation is also consistent with the U.S. scenario, where SoP rules lead to an increase in corporate value.[143] As a result of the dissent and a reduction in the CEOs' remuneration, the market reacts positively and there is an increase in market capitalization. The positive response of the U.S. market[144] can be traced back to a reduction in the unfairness of top managers' remuneration and to a greater correlation between CEOs' remuneration corporate performance. In addition, the board's decision to reduce executive directors' remuneration to inspire shareholders' trust fosters dialogue and matching of directors' and shareholders' interests. This realignment of interests generates a positive reaction from investors, which leads to an increase in the main market indicators.

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[142] Carter & Zamora, *supra* note 108; Kimbro & Xu, *supra* note 113 at 19.

[143] Lucian A. Bebchuk & Jesse M. Fried, *Executive Compensation as an Agency Problem*, 17 J. ECON. PERSP. 71 (2003).

[144] Cai & Walking, *supra* note 131.

In conclusion, dissent and redefinition of CEOs' remuneration policies brings about an improvement in market indicators, as it happens in countries characterized by widespread ownership.

VIII. RELATED-PARTY TRANSACTIONS

For the sake of completeness, it is essential to remenber that SHRD II also focuses on related-party transactions.[145] Even though the issue is not one of the key elements addressed in the present paper, we believe that a brief and descriptive analysis might assist the reader in understanding the genuine impact of the EU discipline on shareholders. The revised Article 9c sets strict rules based on maximum transparency and requires the preparation of adequate information flows and the approval of such transactions, in a manner that prevents some corporate players from taking undue advantage of them.[146] The awareness that transactions with related

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[145] *See*, *ex multis*, Luca Enriques, *Related-Party Transactions*, in JEFFREY N. GORDON & WOLF-GEORG RINGE, THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE (2018), 506-31; Luca Enriques, Gerard Hertig, Hideki Kanda & Mariana Pargendler, *Related-Party Transactions*, in REINIER KRAAKMAN ET AL, THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH (2017), 145-69; Isabelle Urbain-Parleani, *Les transactions entre parties liées*, in Benoit Lecourt et al., *Réflexions collectives sur la nouvelle directive «Droits des actionnaires» du 17 mai 2017*, REV. SOCIÉTÈS 675 (2017), at 696-99; Elizabeth A. Gordon, Elaine Henry & Darius Palia, *Related Party Transactions: Associations with Corporate Governance and Firm Value*, (Oct. 2005), ssrn.com/abstract_id=558983; Mark Kohlbeck & Brian Mayhew, *Agency Costs, Contracting, and Related Party Transactions* (Dec. 2004), ssrn.com/abstract_id=592582; Paolo Montalenti, *Le operazioni con parti correlate: questioni sistematiche e problemi applicativi*, RIVISTA DIRITTO COMMERCIALE 63 (2015); BALP, *supra* note 37, 81.

[146] The consideration is fully in keeping with the Recital 43, according to which "[w]here the related party transaction involves a director or a shareholder, that director or shareholder should not take part in the approval or vote. However, Member States should have the possibility to allow the shareholder who is a related party to take part in the vote provided that national law foresees appropriate safeguards in relation to the voting process to protect the interests of companies and of the shareholders who are not a related party, including minority shareholders, such as for example a higher majority threshold for the approval of transactions." SHRD II, *supra* note 1, Recital 43. Moreover, under Recital 44 "Companies should publicly announce material transactions no later than at the time of the conclusion of the transaction, identifying the related party, the date and the value of the transaction and any other information that is necessary to assess the fairness of the transaction. Public disclosure of such transaction, for example on a company's website or by other easily available means, is needed in order to allow shareholders, creditors, employees and other interested parties to be informed of potential impacts that such transactions may have on the value of the company. The precise identification of the related party is necessary to better assess the risks implied by the transaction and to enable

parties may cause prejudice to companies and their shareholders represents one of the major points of the discipline laid down by SHRD II, as it may give the related party the opportunity to appropriate value belonging to the company. Thus, adequate safeguards for the protection of companies' (and shareholders') interests are relevant. For this reason, Member States should ensure that material related party transactions are submitted to approval by the shareholders or by the board of directors or supervisory body, according to procedures that prevent related parties from taking advantage of their position and from adequately protecting the interests of the company and non-related shareholders, including minority shareholders.[147] So, the Directive intends to update the regulation, in particular by requiring Member States to define the material transactions taking into account *(i)* the influence that the information about the transaction may have on the economic decisions of corporate shareholders and *(ii)* the risk that the transaction creates for the abovementioned categories.[148] More specifically, as anticipated, SHRD II pays paramount attention to transparency, requiring Member States to ensure that companies disclose to the public a detailed announcement—containing information on the nature of the related party relationship, the name of the related party, the date and the value of the transaction and other information necessary to assess whether the transaction is fair and reasonable from the perspective of the company and of shareholders who are not related parties, including minority shareholders—on the material transactions with related parties at the latest at the time of the conclusion of the transaction.[149] The Directive focuses mainly on the involvement of shareholders and directors in the preparation/approval of transactions: following Art. 9*c* stated, in fact, that Member States shall: *(i)* ensure that material related party transactions are approved by the general meeting or by the Board or the supervisory body of the company, in accordance with procedures that prevent the related party from taking advantage of its

challenges to the transaction, including by means of legal action.". SHRD II, *supra* note 1, Recital 44. *See also* Enriques, Hertig, Kanda & Pargendler, *supra* note 156.

[147] *See* SHRD II, *supra* note 1, Recital 42.

[148] As specified by the SHRD II itself, in defining material transactions Member States shall set one or more quantitative ratios based on the impact of the transaction on the financial position, revenues, assets, capitalization, including equity, or turnover of the company or take into account the nature of transaction and the position of the related party.

[149] The public announcement shall be accompanied by a report assessing whether the transaction is fair and reasonable from the perspective of the company and of the shareholders who are not a related party, including minority shareholders, and explaining the assumptions it is based upon together with the methods used. The content of the report itself is specified by SHRD II as well.

position and which protect the interests of the company and of shareholders who are not a related parties, including minority shareholders; *(ii)* provide that shareholders in the general meeting have the right to vote on material related party transactions approved by the board of directors or the board of statutory auditors of the company; and create a mechanism by which (*iii)* if the related party transaction involves a director or shareholder, the director or shareholder shall not take part in the approval or vote.[150] In light of the above—and taking into account the exclusions provided by Art. 9*c*[151]—it could be affirmed that the framework established by SHRD II appears appreciable in its intentions, as well as comprehensible in its essential lines, even though perhaps too burdensome from the cost/effectiveness point of view. In other words, the regulation provided seems to pay specific attention to the problems above, and it offers a discipline accessible to companies, as well as a concrete line of defense in the interest of the company. Some doubts may remain on the capacity of the regulations to definitively find the right balance between the different interests of stakeholders, but the positive aspects still play a more relevant role if compared to the doubts expressed.

[150] "Member States may allow the shareholder who is a related party to take part in the vote provided that national law ensures appropriate safeguards which apply before or during the voting process to protect the interests of the company and of the shareholders who are not a related party, including minority shareholders, by preventing the related party from approving the transaction despite the opposing opinion of the majority of the shareholders who are not a related party or despite the opposing opinion of the majority of the independent directors." SHRD II, *supra* note 1, art. 9c.

[151] It must be remembered that, "Member States may in fact exclude, or may allow companies to exclude, from the requirements in paragraphs 2, 3 and 4 of art. 9c itself: *(i)* transactions entered into between the company and its subsidiaries provided that they are wholly owned or that no other related party of the company has an interest in the subsidiary undertaking or that national law provides for adequate protection of interests of the company, of the subsidiary and of their shareholders who are not a related party, including minority shareholders in such transactions; *(ii)* clearly defined types of transactions for which national law requires approval by the general meeting, provided that fair treatment of all shareholders and the interests of the company and of the shareholders who are not a related party, including minority shareholders, are specifically addressed and adequately protected in such provisions of law; *(iii)* transactions regarding remuneration of directors, or certain elements of remuneration of directors, awarded or due in accordance with Article 9a; *(iv)* transactions entered into by credit institutions on the basis of measures, aiming at safeguarding their stability, adopted by the competent authority in charge of the prudential supervision within the meaning of Union law; *(v)* transactions offered to all shareholders on the same terms where equal treatment of all shareholders and protection of the interests of the company is ensured." *Id.*

IX. FINAL REMARKS

In conclusion, we deem appropriate to underline the following points as the strengths of the EU shareholders' regulation. First of all, the effort of SHRD II to reassess the role of institutional investors plays a role of prime importance. The approach is commendable, as it can make the necessary distinction between shareholders who—while respecting a principle of equality—would seem to deserve a separate treatment, based on their involvement in the company. In other words, SHRD II takes a proactive approach to this profile, in line with the underlying socio-economic framework. Nevertheless, the topic of proxy advisors has also been explored in-depth and modernized: the above-mentioned elements demonstrate a constant tendency to strengthen the role of these voting intermediaries, even without implementing the substantial lessening of liability that a longer voting-chain could actually achieve. SHRD II also emended the remuneration issue, which is able to bring about a proper rebalancing of the agency conflicts between shareholders and directors, subjecting them to an increasingly constant *placet* of the former. Of course, the non-binding statutory nature of the shareholders' decision on managers' remuneration is a point of undisputed weakness, but the path taken so far certainly matters. From a practical point of view, it should also be stressed that dissent's results over say on pay are perfectly consistent with those recorded in countries with a dispersed ownership structure, which affects companies' remuneration policies. In particular, in Italy, there is a negative correlation between the expression of dissent and the change in CEOs' remuneration, as well as between the Chairman's remuneration and the dissent expressed. On the contrary, there is a positive correlation between the disagreement expressed by shareholders on remuneration policies and market values, such as market capitalization and Tobin's Q, which are negatively related to the reduction in the CEO remuneration received as a result of the dissent expressed. In other words, after dissent and the reduction of CEO remuneration, the market reacts positively and market capitalization increases. This attitude seems to be confirmed also from an economic perspective, given that the balance between costs and benefits seems, in this case, to be oriented towards achieving a concrete and optimal rebalancing. Finally, with regard to the elements examined, there is a clear rapprochement of the discipline to some structures usually linked to the U.S. context, whose distinctive features are then progressively attenuated according to a general convergence.

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