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The Shareholder Rights Directive II: Corporate Governance in the Context of Sustainability and Long-Term Orientation

Over the years, the EU institutions have taken a series of initiatives to modernise the corporate governance and strengthen the shareholder democracy. As reported in the Communication to the Council and the European Parliament of 21 May 2003 and in the Resolution of the European Parliament of 21 April 2004, these goals should be achieved by enhancing the shareholders rights and increasing the transparency duties among the companies and the institutional investors. As a first step in this direction, the Directive 2007/36/EC (SRD I) was adopted in order to facilitate the exercise of voting rights of the shareholders, by establishing the principle of equal treatment of investors and setting forth the requirements to take part to the shareholders meeting.

The weaknesses of the previous regulatory framework, however, have been revealed during the financial crisis. On these grounds, the Commission has undertaken a deep review of the corporate governance rules, pursuing the creation of value in the long-term period and the development of an inclusive and sustainable enterprise strategy, as addressed by the “Agenda 2020”. As reported in the 2010 Green Paper on Corporate Governance in financial institutions and remuneration policies and in the 2011 Green Paper on a EU corporate governance framework, the main issues affecting companies’ growth in the EU territory are represented by a lack of shareholders’ engagement, excessive short-term risk taking approach and the poor quality of the information exchanged among companies and investors.

The results of the consultations addressed with the Green Papers put the premises for the issue of the directive 2017/828/UE (or Shareholders Rights Directive II), amending the previous adopted in 2007. The SRD II represents a further step towards solving the market failures related to information asymmetries and agency problems underpinning the “shareholder apathy” and the conflict of interests with the management. In such a perspective, the SRD II has significantly reformed the corporate governance framework, by introducing the identification of the shareholders, the obligation to disclose the engagement policies and the transparency duties on proxy advisors. In addition, the directive provides shareholders the right to vote on the remuneration policies (*say on pay*), in order to align the compensation with the performance of the directors, as well as transparency rules to enhance the control rights during the related parties’ transactions.

The paper analyses the implementation of the SRD II in Italy, with special focus on the provisions related to the long-term engagement of the institutional investors and of the asset managers, also considering the ESG (*Environmental, Social and Governance*) factors, and on the issues, which may discourage the investors’ involvement in corporate governance. Furthermore, the say on pay system will be examined as potential voice right and feedback action on management activities, as well as the role of the proxy advisors in the promotion of the engagement.

The research proposes to find an answer to the following questions. How incisive should be the engagement without interfering with the competences of the directors? Could the engagement lessen the Business Judgement Rule, and how far should that go? According to the SRD II, institutional investors and asset managers are “qualified” investors in the dialogue with the management, but could the SRD II create a different treatment among the shareholders? Should the engagement be necessary long-term oriented? How about other ways of short-term oriented activism (like hedge funds activism) which may be effective on corporate governance but are perceived as disruptive by the Commission?

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