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Consultazione pubblica concernente lo schema di Decreto legislativo per l'attuazione della direttiva (UE) 2017/828 del Parlamento europeo e del Consiglio, del 17 maggio 2017

Email: dt.direzione4.ufficio7@mef.gov.it

Dear Madam/Sir,

We very much welcome the opportunity to participate in the public consultation in relation to the transposition of the SHRD II into Italian Law. We will not comment on all the proposed revisions included in this Consultation as we will focus on matters directly related to our area of academic expertise and our ongoing research in corporate governance that we hope will be useful for your purposes.

Short Biographies

Dr Andreas Kokkinis joined Warwick Law School as Assistant Professor in 2013. Before that he taught at various institutions including UCL Faculty of Laws and Kent Law School. He holds a PhD from University College London (2014), an LLM from the London School of Economics (2009) and an LLB from the National University of Athens (2008). His research interests and expertise include corporate governance, corporate theory, and financial regulation. He recently published a monograph titled 'Corporate Law and Financial Instability' with Routledge, and an article examining the effects of the EU bonus cap at the Journal of Corporate Law Studies. He is the editor of the GLOBE Centre Briefing Papers Series. He has been Director of the LLM in International Corporate Governance and Financial Regulation.

Dr Konstantinos Sergakis holds an LL.B. from the National and Kapodistrian University of Athens, an LL.M. in International Business Law from University College London and a Ph.D. from the University Paris 1 Panthéon-Sorbonne. He joined the University of Glasgow as Senior Lecturer (Associate Professor) in Law in 2015, where he has convened the LL.M in Corporate & Financial Law since 2016 and he has acted as School International Lead since 2017. In 2017, he was elected as a member of the Executive Board of the International Association of Economic Law (AIDE). He is the author of *The Transparency of Listed Companies in EU Law* (Sorbonne - IRJS Editions 2013) and of *The Law of Capital Markets in the EU* (Palgrave Macmillan 2018). His research interests are related to Corporate Law, EU Capital Markets Law and Corporate Governance.

Comments

I. Proxy advisors

According to the draft Decree (Art. 124-octies , 3) under consultation, proxy advisors will be subject to the powers that Consob can exercise in accordance with art. 114, commi 5 e 6, e 115 (TUF). These powers refer to CONSOB's right to require listed companies to 'publish, in the manner it shall establish, the information and documents needed to inform the public'. They also refer to the requirement to provide information and documents, 'gather information, including by means of hearings' and to 'carry out inspections at the offices' of listed companies. Undoubtedly, these measures are very important for listed companies' disclosure obligations given the potential threat to the investor community, market integrity and informational efficiency arising from their violations.

We believe that such threats are not present to the same extent in the area of proxy advisory statements. Therefore, we find that the extension of such powers to proxy advisory firms is disproportionate both with regard to their role and with regard to the impact of their activities on the rest of the market.

We also find these powers disproportionate since their exercise may jeopardise the objectives that the SRD II is trying to achieve at the EU level (engagement, better communication between various market actors within the investment chain, transparency of information and client informed decisions). Shifting the regulatory focus from engagement/interaction amongst market actors to CONSOB monitoring powers will impede the spirit of the SRD II.¹

¹ For an analysis of these objectives, see Konstantinos Sergakis, *The Law of Capital Markets in the EU* (Palgrave Macmillan Corporate and Financial Law series, 2018) chapters 2 and 14.

The decree should also provide an explanatory note in relation to the CONSOB powers, applicable exclusively to proxy advisors,² which goes beyond what is prescribed by SRD II (art. 3j).

Most importantly, given the remit of such provisions (art. 124-*quater*, 3), we argue that such a stringent regulatory environment will hamper further competition by discouraging new market actors providing similar services in Italy. Enhancing and actively promoting competition is needed so as to increase the quality of proxy advisory services in Italy and offer more choices to various clients.³

We would therefore propose the elimination of para 3 of the new art. 124-octies. CONSOB can determine, on its own, further initiatives in this area so as to create a homogeneous and workable institutional framework for proxy advisors. We would also like to invite you to follow further arguments that we develop in section II that analyse in detail, inter alia, how CONSOB could exercise its powers under our proposal.

II. Enforcement mechanisms applicable to disclosure obligations (asset managers, institutional investors and proxy advisors)

The draft decree provides in art. 193bis-1 the imposition of administrative penalties by CONSOB going from 2.500 to 250.000 euros applicable to asset managers, institutional investors and proxy advisors when they violate the proposed disclosure obligations provided by the Decree. We argue that the exclusive focus on such enforcement mechanisms may prove detrimental to the transposition of the SRD II and is not aligned with the spirit of EU efforts in this area.

There are four main concerns about public enforcement (i.e. administrative sanctions or measures, such as pecuniary sanctions) of the new stewardship (governance/engagement) duties provided by the SRD II.

First, we argue that public enforcement risks creating an operational environment that is overly regulated and dissuading shareholders and proxy advisors from conducting their activities in capital markets with flexibility. Creating unreasonably burdensome conditions for market actors may also impede the development of innovative engagement solutions, since shareholders and proxy advisors will be primarily concerned by the necessity to comply with a series of legal requirements and not by the effectiveness of their strategies.

Secondly, public enforcement does not fit harmoniously with the conceptual premise of engagement duties whose main benefit is to trigger further engagement in the market,

² And not to other market actors, such as asset managers and institutional investors.

³ For an analysis of the merits arising from a flexible approach in this area, see Konstantinos Sergakis, *The Law of Capital Markets in the EU* (Palgrave Macmillan Corporate and Financial Law series, 2018) chapter 14.

increase the educational benefits of disclosure in this area, and gradually fight against shareholder apathy. This is because concerned parties will inevitably focus on the liability factor of compliance, and might be deterred from disclosing further information. Public enforcement may therefore transform educational tools into liability risks and severely undermine the SRD II objectives.

Thirdly, in the presence of public enforcement, the recipients of disclosure will rely mechanistically upon CONSOB instead of engaging with shareholders. Indeed, they will probably perceive administrative measures and sanctions as an adequate safeguard from non-compliance risks; hence, they might not be as motivated to interact with shareholders and proxy advisors to challenge their strategies, or seek to obtain more information relevant to their priorities.

Lastly, public enforcement will risk legitimizing certain borderline shareholder and proxy advisors' practices in the absence of actions taken by national authorities. Indeed, if CONSOB fails to investigate non-compliance elements and, subsequently, to sanction them, the disclosure duties will be perceived by the market as complied with and not raising any further concerns. An inactive regulatory stance can therefore be seen as an ex post certification of dubious practices. The concerned shareholders and proxy advisors will also be enabled to stop engaging with other parties that may want to challenge their activities and further engage in dialogue with them. The overall risk will therefore be a mutually neutralising effect of engagement and further apathy, from the perspectives of both the concerned shareholders and proxy advisors and the recipients of information.

To avoid the abovementioned risk and counter-productive effects of the EU shareholder engagement agenda, administrative measures and sanctions could, where appropriate, be exclusively envisaged for the simple and straightforward lack of disclosure (namely statements without any associated explanation, as required in such cases according to the 'comply or explain' principle, or even complete absence of such statements). **CONSOB should be able simply to verify if such disclosure (or the explanation required) has been published, and should be in a position to impose sanctions or other measures if this is not the case.** The examination of statements should be based on the compliance with a disclosure obligation (or the publication of an explanation where applicable) **and any interpretation of their content for enforcement purposes should not be permissible.**⁴ The Decree should clarify this point so as to avoid creating a complicated and counter-productive enforcement framework.

⁴ Konstantinos Sergakis, 'The Perils of Public Enforcement of Shareholders' Duties', 12 September 2018, available at <https://www.law.ox.ac.uk/business-law-blog/blog/2018/09/perils-public-enforcement-shareholders-duties>. See also, Konstantinos Sergakis, 'Legal Versus Social Enforcement' in H. Birkmose and K. Sergakis (ed), *Enforcing Shareholder Duties* (Edward Elgar, 2018) forthcoming. On the limitations of public enforcement by regulatory authorities, see also Andreas Kokkinis, *Corporate Law and Financial Instability* (Routledge, 2017) 180 – 182.

Examining closely the proposed amounts of the administrative penalties provided for by the Decree, we find the amount of 250.000 euros disproportionate to the threat represented by violations in this area, and would therefore call for the reduction of the maximum fine potentially imposed. A useful example can be found in the art. 19-*quater* of the Decree 5 dicembre 2005, n. 252 *Disciplina delle forme pensionistiche complementari* that provides for sanctions ranging from 500 to 25.000 euros. These minimum and maximum thresholds can be of course revisited in the future if the level of compliance with the new disclosure obligations proves to be very problematic. Nevertheless, it is our belief that, at the current stage where ensuring the spirit of the SRD II and allowing market actors to engage further between themselves, the focus should not be on stringent and administrative sanctions but on providing incentives to market actors to fulfil these obligations.

This stance is justified in light of the lack of clarity of the engagement and governance duties themselves, the difficulty in deciphering the expected outcome of such duties, and the embryonic stage of their understanding by national authorities. Indeed, authorities will face serious obstacles in defining engagement and assessing its quality on each and every case (given the inevitable differences and distinctive features of each corporation, institutional investor and intermediary), in deciding whether the duty to disclose has been effectively complied with, in clarifying borderline cases where engagement evolves into different directions or inevitably changes during or after the disclosure period (triggering automatically non-compliance suspicions) and in analyzing the quality of explanations provided in case of deviation.

Conclusion

As a consequence, for the time being, social enforcement mechanisms should be maintained, while resources and time should be invested to increase the familiarity of national authorities with these disclosure duties, so as to gradually prepare them for the implementation of enforcement tools in the future. Enforcement tools will only achieve desirable levels of efficiency when used meticulously and wisely by the legal order.

We truly believe that the transposition of the Shareholder Rights Directive into Italian law will enable the enrichment and maintenance of a more meaningful disclosure framework. That is why we argue for a measured approach so as to enable the various market actors to interact with clients and service providers. We hope that the comments provided in this letter are of interest for the Consultation's purposes.

Should you require any further information on the points raised above, please do not hesitate to contact us at Konstantinos.Sergakis@glasgow.ac.uk.

Yours faithfully,

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