Dear Madam/Sir;

Thank you for the opportunity to participate in your consultation on the transposition of the Shareholder Rights Directive into Italian Law.

Summary

We make two recommendations:

1. Paragraph 3 from art. 124-octies (proxy advisors are subject to Consob’s powers as of articles 114 and 115 TUF) is eliminated.
2. Art. 193-bis.1, should also be eliminated as the financial penalties are disproportionate to the likely risks or harms and patently unfair and discriminatory.

Introduction

By way of background, since 1995 I have been the CEO of a UK-domiciled proxy voting agency. Until April 2018 we were known as “Manifest” but following a corporate re-organisation have become Minerva Analytics Ltd.

Unlike our US competitors, Minerva does not provide “voting recommendations”. Instead we offer in-depth analysis and data which enable institutional investors to inform their voting decisions. At the same time, we offer an internet-based voting platform which allows investors to manage the logistics of voting with utmost security and confidence.

Over the years we have also worked with our domestic regulators, registrars and supra-national bodies such as SWIFT, the OECD, and others to improve the hygiene of the vote plumbing. We have exposed abuses from banks and intermediaries in respect of the selling of confidential voting data and provided first hand support to various regulatory bodies which is designed to improve voting and governance for investors and corporations alike.
Improving the mechanics of voting is going to be a long and arduous process – and most likely will require an intervention from the competition authorities before shareholders are able to exercise their rights freely. My reason for writing is therefore to focus specifically on the proposals in the Decree (Art. 124-octies, 3).

In this regard Drs Konstantinos Sergakis and Andreas Kokkinis have shared their excellent and thoughtful response with me. From a technical perspective there is little that I can add except to say that I agree wholeheartedly with their analysis. From a practitioner’s perspective, the proposals are extraordinarily draconian and disproportionate to either the risks, harms or economics of proxy research service provision.

Minerva has been analysing Italian and other global companies for over 10 years and we never cease to wonder why giant global firms that routinely flout listing rules and best practice standards remain untouched by regulatory enforcement. Yet those few, and mostly small, organisations which seek to interpret and clarify disclosures for time-pressed investors are threatened with fines that would, if imposed, wipe them out at a stroke.

Drs Sergakis and Kokkinis are right in their claims that the proposals would damage healthy competition for governance research services in Italy – I can assure you that we would not wish to enter into a market with such a threat hanging over us. Which is, I believe, the opposite of what you wish to see- i.e. more variety. Throughout the debate over proxy advisors it was clear that, apart from a complete (dare I say deliberate) lack of understanding about our role, Europe is worried about the one-size-fits-all approach of the dominant US providers.

Minerva, together with our European partners, Frontis Governance (IT), Proxinvest (FR) and Corperance (ES), are working constructively to address the problems of US dominance and so ensure diversity. However, unless fund managers are encouraged to change their approach to fiduciary responsibility, they will continue to seek out low quality services at rock bottom prices. Healthy competition is a great spur to quality. A more fruitful approach perhaps might therefore have been to insist that asset managers must tender for proxy services with a minimum of three vendors every 5 years? A similar recommendation was made last week by the UK’s Competition and Markets Authority in respect of fiduciary management and the same approach is considered best practice for audit.

The proposals, as drafted, would shift responsibility from the proper fiduciaries to their external service providers. As we have seen in the North American market, regulations which give proxy advisors undue regulatory primacy through being “approved intermediaries” positively discourage fund managers from being active participants in the governance and stewardship role. This is not what SRD intended and not what either the companies or considerate shareholders wish to see.

The proposals would also be highly discriminatory towards one kind of service provider as against another. We do not see other providers of ESG research or ratings being threatened with such measures – despite many billions of Euros of capital being allocated on the basis of these services.
In addition to the operational concerns so well-articulated by Drs Sergakis and Kokkinis, there is then also a moral and ethical question relating to the ability of well-funded and resourced corporations being given the ability to suppress legitimate scrutiny by threatening the livelihood of those at the bottom of the value chain. Frivolous administrative investigations would be a wasted of time and effort when the reality is that most complaints between companies and investors or proxy advisors are matters of opinion, not inaccurate facts.

From a wider securities markets’ perspective, you may also recall that ESMA demonstrated, after a robust consultation and review process, that there was no market failure in the proxy research space which warranted regulation of the type you are considering. Furthermore, ESMA specifically stated that the Code of Conduct must be given an opportunity to have the desired intent of improving understanding and encouraging transparency. Despite the industry making sincere attempts to achieve those aims through the Best Practice Principles Group, issuers continue to make unfounded claims against the industry. Disappointingly, despite two public consultations, they decline to use the governance mechanisms that the Code offers. The Ministry would, we believe, likely face a barrage of trivial and vexatious complaints. Argumentum ad nauseam benefits no-one.

The Italian proposals, unlike other member states, not only go beyond SRD, but also beyond the expert advice of the European securities regulator and indeed other EU member states. Just as the debate surrounding the Development Decree of 2014 (Decreto sviluppo imprese) alarmed a significant number of academics, capital providers, and civil society, we believe that the proposals, as currently drafted, would not be well-received by many market stakeholders.

Public perception of and trust in business is at an all-time low on a global scale. Savers and citizens alike are concerned that many multi-national enterprises do not have their best interests at heart. As the European Commission and Parliament have shown, good governance and better ESG reporting are critical components of re-building that trust. Chilling dissenting voices with different views with threats of disproportionate fines would have all the hallmarks of intolerance that add to suspicion and distrust.

In conclusion, the proposals are disproportionate, will adversely impact competition, are against the letter of the SRD and the guidance of ESMA. But most important of all, they will not achieve the primary objective of the SRD which is to improve relations between companies and their investors.

Yours sincerely

Sarah Wilson
Chief Executive

2 https://bppgrp.info
4 https://www.manifest.co.uk/repeal-the-decree-ask-leading-italian-academics/
https://www.manifest.co.uk/a-poison-pill-by-any-other-name-would-taste-as-bitter/