(In)efficient Cost Allocation in Italian Proxy Contests

Giovanni Niccolò Antichi*

Abstract

The research aims to examine the regulatory model adopted in Italy relating to Proxy solicitation. It will be verified whether Proxy solicitation, as actually regulated, adapts to the high level of ownership concentration that characterizes the Italian stock exchange and therefore provides adequate solution for agency's problems to which these ownership structures give rise. Thus, it will be demonstrated that, in its current formulation, Proxy solicitation in Italy appears poorly suited to guaranteeing an appreciable standard of shareholder democracy, especially for reasons related to financial aspects.

I. Overview

When flipping through manuals, monographs, essays, and articles relating to proxy solicitation from all over Europe and the United States,[1] I came across few doctrinal texts that clearly explained the different ways in which proxy solicitation can be carried out and its related corporate governance risks.[2]

* PhD in Business Law, LUISS Guido Carli.

[1] Proxy solicitation is a process of obtaining shareholders' proxies for votes in favour of, or against proposals, and is often used by those who are dissatisfied with a public company's performance, want to change. There are various types of proxy solicitation depending on who the proxy solicitor is, how it is carried out, and whose finances are used to fund it. These are issues addressed later in this paper.

[2] Only a few authors concern themselves with proxy solicitation's expenses (most of them are from the US): see E.R. Aranow and H.H. Einhorn, *Proxy Contests for Corporate Control: A Treatise on the Legal and Practical Problems of Management and Insurgents in a Corporate Proxy Contest* (New York: Columbia University Press, 2nd ed, 1963); L.A. Bebchuk and M. Kahan, 'A Framework for Analyzing Legal Policy Towards Proxy Contests' 78 *California Law Review*, 1071, 1073 (1990); D.M. Friedman, 'Expenses of Corporate Proxy Contests' 51 *Columbia Law Review*, 951, 951-964 (1951); S.W. Mintz, 'Use of Corporate Funds for Proxies and Other Expenses in Fight Over Corporate Management' 8 *New York University Intramural Law Review*, 90, 92 (1953); L.S. Machtinger, 'Proxy Fight Expenditures of Insurgent Shareholders' 19 *Case Western Reserve Law Review*, 212, 212-229 (1968); F.C. Latcham and F.D. Emerson, 'Proxy Contest Expenses and Shareholder Democracy' 4 *Western Reserve Law Review*, 5, 5-18 (1952); L.D. Stifel, 'Shareholder Proxy Fight Expenses' 8 *Cleveland-Marshall Law Review*, 339, 339-350 (1959); Note, 'Corporations. Powers of Stockholders. Stockholders Can Reimburse Victorious Insurgents from Corporate Treasury for Proxy Solicitation Expenses' 69 *Harvard Law Review*, 1132, 1132-1135 (1956); Note, 'Corporations – Payment of Proxy Solicitation Expenses – an Aspect of Corporate Democracy' 31 *New York University Law Review*, 825, 825-831(1956); F.D. Emerson and F.C. Latcham, 'Proxy Contests: A Study in Shareholder Sovereignty' 41 *California Law Review*, 393, 393-438 (1953); B.G. Buchanan et al, 'Shareholder Proposal Rules and Practice: Evidence from a

I consider it appropriate to take the opportunity, at the beginning of the eleventh year after sweeping reforms to Italian proxy solicitation rules were enacted, to comment on how these rules are enforced in respect of companies listed on the Italian stock exchange (Borsa Italiana) and in light of the above doctrinal texts.

Firstly, I will deal with the practice of proxy solicitation in Italy. I will provide a brief introduction outlining the concept to it according to Arts 136–144 TUF (decreto legislativo 24 February 1998 no 58, known as the 'Testo Unico della Finanza') and 135–139 Reg Emitt of the *Commissione Nazionale per le Società e la Borsa* (CONSOB)[3] – ie the public authority responsible for regulating Italian financial markets including the Italian stock exchange. Then, I will introduce different types of proxy solicitation and their underlying rationale.

Proxy solicitation can be divided into two different categories according to who engages in it: ie either board members as legal representatives of a company (incumbents); or shareholders or third parties (insurgents). Sections III and IV are dedicated to discussion on this.

Finally, I will deal in depth with how proper cost allocation with respect to who bears the costs proxy solicitation can contribute to the revitalisation and increased use of it, especially when it is carried out by minority shareholders. I will also outline possible solutions to cost allocation issues to ensure substantially equal treatment of proxy solicitors. I suggest that CONSOB should integrate these changes into regulation of issuers.

1. Italian Proxy Solicitation Regulation

Regulation of the representation of shareholders at company meetings of Italian listed companies, and the solicitation of proxies for voting at such meetings, has been subject to many layers over time to the point where, today, it is regulated on four different levels one level of which is the by-laws' articles applicable to it.

The first basis of the regulation of proxy solicitation is in Art 2372 of the Italian Civil Code. This provision contains general principles of company law such as that those who have the right to vote at company meetings of listed companies can give a written proxy to another who will attend the meeting. The proxy records how the person who gave it would like the proxy holder to vote on their behalf (ie it cannot be a blanket proxy) and it must relate to a particular meeting and not company meetings in general.

The second layer regulating proxy solicitation is contained in special legislation justified by promoting the efficiency of financial markets and is contained in the following legislation: title III 'Issuers', chapter II 'Discipline of listed companies'; sections II-*ter* 'Proxies'; and III 'Solicitation of proxies', of the TUF. These provisions

Comparison of the United States and United Kingdom' 49 *American Business Law Journal*, 739, 739-803 (2012).

[3] Regulation implementing the decreto legislativo 24 February 1998 no 58 (TUF), concerning the regulation of issuers (last CONSOB Resolution no 21508 of 22 September 2020).

provide that those who have the right to vote can nominate only a single representative to hold their proxy vote for each meeting, except for some specific exceptions contained in Art 135-*novies* (2-3).

These provisions, in turn, refer to the third layer of regulation: title IV, chapters I 'Proxies' and II 'Solicitation of proxies' of the Reg Emitt CONSOB relating to specific procedures and the obligations of a proxy solicitor in Italy which are regulated in detail in Arts 135-139.

The last layer of regulation is contained in companies' by-laws and statutes as well as individual issuers' shareholders general meeting regulations. The regulation governing the Italian stock exchange does not contain anything concerning proxies.

Since the entry into force of decreto legislativo 27 January 2010 no 27 and decreto legislativo 18 June 2012 no 91 (the 'corrective decree') adopting the shareholders' rights directive (integrated in 2017 by the European Parliament and Council Directive 2017/828/UE of 17 May 2017 – so called SRD II) in which the legislator radically changed the provisions in section III (Arts 136–144) of the TUF, any request to confer proxies for specific voting proposals or accompanied by recommendations, statements or other suggestions influencing a vote at a company meeting, addressed to more than two hundred shareholders, is considered a proxy solicitation. The requirement of the person making the request to also own shares in the relevant company was removed from the legislation. Now, proxy solicitation can be made directly by the promoter of shares,[4] by them disseminating a proxy statement and a proxy form without using a broker.[5] A vote on measures is then exercised directly by the promoter or its substitutes.[6] Previously, a proxy solicitation could be promoted only by an intermediary who assumed management of the entire procedure, including the collection of the voting proxies. Today, however, the proxy solicitor can do it themself, also delegating others.

While there may be structural factors that make the USA environment different to that in Italy, proxy solicitation was, in any case, rarely used in Italy until few years ago.

The provisions of the TUF aims to encourage the exercise of voting rights by

[4] Today, this important innovation also allows directors, through an issuer, to conduct in proxy solicitation. Before 2012, it was uncertain, even whether Banco Popolare Soc. Coop. and Sopaf S.p.A. in 2011, as issuers, had promoted proxy solicitation concerning general bondholders' meeting.

[5] The fact that the Italian legislator has decided to remove the requirement for a broker represents a strong push towards a freer financial market, not burdened by the previous bureaucratic constraint.

[6] The notion of proxy solicitation in Italy is very restrictive. For example, in the USA a proxy solicitation also exists when a communication is directed to more than ten shareholders, while in Spain a proxy solicitation is considered to have occurred when one person represents more than three shareholders in respect of a vote. See L. Enriques, 'Quanto è armonizzato il diritto societario europeo?', in G. Carcano et al eds, *Regole del mercato e mercato delle regole. Il diritto societario e il ruolo del legislatore* (Milano: Giuffrè, 2016), 169; K.J. Hopt, 'Corporate Governance in Europe: A Critical Review of the European Commission Initiatives on Corporate Law and Corporate Governance' 12 *New York University Journal of Law & Business*, 139, 155 (2015).

individual shareholders. This is unlike American law, where the proxy solicitation regulation established in 1934 limited management who abused proxy solicitation in the absence of rules to self-elect and remain in office.[7]

2. How Italian Proxy Solicitation Regulation Is Deficient

The Italian legislation should provide for substantive equal participation in corporate decision making for the 'insurgent' (shareholders) and the 'incumbent' (directors).[8] Actually, there is a huge distance between formal and substantive positioning of the proxy solicitor in order to ensure effective equality of treatment of directors and shareholders. While from a formal point of view it may appear that directors and shareholders are treated in the same way with respect to proxy solicitation, in reality – as shareholders are not allowed to finance their proxy solicitation from the issuer's coffers – they are at a substantial disadvantage compared to directors. The Italian legislation should give the same access to corporate funds to both for the purposes of proxy solicitation.

The expenses incurred to carry out proxy solicitation should always be traceable and reasonable, and explicitly indicated in a proxy statement because the purpose of proxy solicitation goes towards greater transparency in corporate choices.

It should also be expected that a reimbursement mechanism be present for insurgent shareholders to recoup proxy solicitation expenses and an *ex post* authorisation for the use of corporate funds by management to carry out a proxy solicitation.

These topics will be explored further below.

3. Overview of Proxy Solicitation in Italy

The number of Italian proxy solicitations carried out has been growing since 2012. Until 2016, most proxy solicitation was carried out by jammers without a specific aim, with there being only a few instances performed by issuers.[9] Since 2017, there have been an increasing number of solicitations carried out but never comparable to the numbers carried out in non-Italian jurisdictions.

In 2020 at the time of writing – largely owing to the Covid-19 pandemic – the only known proxy solicitation carried out in Italy is one in which Banca

[7] On this see CONSOB, 'Nota tecnica in materia di sollecitazione e raccolta di deleghe di voto e voto per corrispondenza', available at https://tinyurl.com/y54g2hm2 (last visited 30 June 2021).

[8] These terms are elaborated on in sections III and IV below.

[9] These are the few cases known to date: Retelit S.p.A. (2015), Italmobiliare S.p.A. (2014), Tiscali S.p.A. (2014), Seat Pagine Gialle S.p.A. (2014), Italcementi S.p.A. (2014), Telecom S.p.A. (2014), Intesa Sanpaolo S.p.A. (2014), Juventus S.p.A. (2014), Milano Assicurazioni S.p.A. (2013), Cape Listed Investment Vehicle in Equity S.p.A. in concordato preventivo (2013), Impregilo S.p.A. (2012), Enel S.p.A. (2012), Parmalat S.p.A. (2012), Banca Carige S.p.A. (2012), Screen Service Broadcasting Technologies S.p.A. (2012), Sopaf S.p.A. (2011), A2A S.p.A. (2011), Meridiana S.p.A. (2011), Eades Group (2011), A.S. Roma S.p.A. (2011), Banco Popolare Soc. Coop. (2011), Mediobanca Banca di Credito Finanziario S.p.A. (2011).

Carige S.p.A. favoured a proxy solicitation for a resolution for a paid and inseparable share capital increase for € 700 million. In 2019, Mediaset S.p.A. promoted the support by proxy voting of a resolution at its own extraordinary general meeting, for the approval of a common cross-border merger plan relating to a merger by incorporation of Mediaset S.p.A. and Mediaset España Comunicación S.A. in Mediaset Investment N.V.

There have been many other cases of proxy solicitation by shareholders in Italy, such as by the issuer Italiaonline S.p.A. during a savings shareholders' meeting in 2019 by Sunrise Investments S.p.A.

That year, 2019, was also lively in this respect for Trevi-Finanziaria Industriale S.p.A. which, during a spring bondholders' meeting, instigated a proxy solicitation as an incumbent. Then it was involved in another proxy solicitation in a September shareholders' meeting which was performed jointly by FSI Investimenti S.p.A. and Polaris Capital Management LLC.

Another shareholders' meeting in which a proxy solicitation was instigated by a shareholder, is the case of Fiber 4.0 S.p.A. (promoter) in the meeting of Retelit S.p.A. in April 2018. During that same spring in 2018, A2A S.p.A. and Lario Reti Holding S.p.A. also carried out another one in respect of an ordinary shareholders' meeting of Acsm-Agam S.p.A.

Between 2017 and 2018, significant Italian banks such as Intesa Sanpaolo S.p.A. and UniCredit S.p.A. also promoted solicitation as issuers in connection with their own shareholders' meetings.

Most often, solicitations are used in connection with resolutions for the conversion of savings shares into ordinary shares, approval of cross-border merger proposals, or election of directors and the fees to be paid to them. The most frequent proponents of solicitations are issuers because they can tap into corporate finances to fund solicitation. However, the number of proxy fights involving insurgent shareholders using solicitation is also growing.

The number of management proxy solicitations promoted in Italy is currently less than ten per year (known cases) and very few proxy fights have been carried out. The most famous fight in Italy was in 2012 involving Impregilo S.p.A. in which a shareholder, Salini S.p.A., carried out a proxy solicitation in connection with a resolution at a shareholders' meeting for the modification of the company's constitution to guarantee minorities representation through election of a director sitting on the board of directors. Salini S.p.A. managed to harness votes to rival Gavio S.p.A. and take on the majority of the board.

From the cases just listed, there seems to be a correlation between the existence of a cost allocation regime and the proxy solicitor's size. In fact, the more it has the opportunity to finance itself, the greater is the range of action by the intermediary on the number of shareholders reachable by proxy.

II. The 'Law & Economics' of Proxy Solicitation

It is interesting to investigate the dynamics behind the reasons why some companies engage in proxy solicitation and to understand, from a purely economic point of view, what advantages they gain in doing so. On the other hand, it is also useful to investigate what limits decisions to engage in proxy solicitation.

A law & economics analysis will lead us on a logical-deductive path aimed at understanding the details of proxy solicitation and its financial implications for its promoter.

1. Proxy Solicitation by Management and Its Problems

The figure of the promoter of proxy solicitation has now been liberalised even in the Italian legal system.[10] In a few years, the promoter has undergone a Copernican-like paradigm revolution within shareholders' meetings.[11] This however, generates strong doubts relating to an obvious conflict of interest issue; indeed, if an issuer is mobilised by its own finances and uses the managers of a company to promote a proxy solicitation, this necessarily places majority shareholders' interests in conflict with those of minority shareholders. The perverse effect of this position leads to the belief that, regardless of the many precautions to protect a minority shareholder,[12] the systematic approach is against them, because they are not guaranteed financial support on which to base their own alternative proxy solicitation. This is support which, conversely, majority shareholders have through an issuer.[13]

On the premise that there is a clear gap between the position of an issuer and that of shareholders in relation to the financing capacity of a proxy solicitation,[14] the goal will be to analyse how, and to what extent, the costs of proxy solicitation initiated by an issuer, should be borne by the company.

I will not address the situation in which directors (as shareholders) are promoters of a solicitation, but when they, as the directors, undertake to promote a solicitation by an issuer. While in the US access to corporate funds is allowed to directors in both cases, in Italy the legislation has ensured greater equality of treatment among challengers to directors' positions because it prevents directors,

[10] In Italy, the neutral expression of 'promoter' is used to both refer to an incumbent or insurgent that engages in proxy solicitation. Previously the promoter was prevented from carrying out solicitations directly but had to rely on a broker to do so.

[11] To emphasize the delay with which Italy has regulated proxy solicitation, see M. Bianca, *La rappresentanza dell'azionista nelle società a capitale diffuso* (Padova: CEDAM, 2003), 208. In the USA, it has been functioning well since the 1930s: see R.C. Pozen, 'Democracy by Proxy' *Wall Street Journal*, available at https://tinyurl.com/y2cmxfhw (last visited 30 June 2021).

[12] Let us think about limits within which incumbents may state proxy voting: see below section II.2.

[13] S. Bruno, *Ruolo dell'assemblea di s.p.a. nella corporate governance* (Padova: CEDAM, 2012), 211-212; G. Sandrelli, 'Note sulla disciplina "anti-scorrerie" ' *Rivista delle società*, 186, 186-223 (2018).

[14] This will be demonstrated below section III.

as promoters on their own account, to draw on corporate funds. However, I consider that the problem persists even in the case of proxy solicitation by an issuer, as long as the latent interest of directors is personal or partisan and not that of the company.[15]

If this is the case, how to run both provisions of proxy solicitation directly from management (incumbent) and from insurgent shareholders should be understood, even when performed through intermediaries, within the balance of shareholders' guarantees.[16] In other words, if anyone can carry out proxy solicitation, including directors, it is necessary to understand its limits in order to guarantee the rights of all shareholders.

a) Suggested Changes to the Enforcement of Provisions to Provide for Substantial Equal Treatment Between Incumbent and Insurgent

Italian legislation provides that a promoter of a proxy solicitation, including where it is a company, must prepare a proxy statement and a proxy form to be sent to shareholders in order to obtain their proxy votes. The rules governing the form of the statement must be adhered to and cannot be modified.[17]

A proxy statement aims not only to provide information to shareholders in accordance with Arts 136–144 Reg Emitt,[18] but also to serve as an appeal to shareholders to complete voting proxies and take a position at a company meeting. Therefore, an incumbent can also include a cover letter with the proxy form when sending the proxy statement.[19] The incumbent may also send informal communications to shareholders designed to gauge support for an initiative. This can take place more easily in cases of proxy solicitation carried out by insurgent shareholders, who will outline criticisms and observations to the board of directors in order to induce a change in strategic policy or in views held by the directors.[20] This is different in cases where the promoter is the incumbent: if shareholders are already satisfied with the policies of a board, the distribution of extra information could be a double-edged sword and bring about situations in which shareholders do not support a board.

At this point, we are already faced with an important debate. If a prior informal communication is considered part of proxy solicitation, as defined in

[15] For this reason, I will use the term 'incumbent' to refer to both circumstances.

[16] An equal position between directors and shareholders with proxy solicitation can be achieved only by ensuring that both have the same access to corporate funds. This issue is analysed further in section V.

[17] M. Bianca, n 11 above, 208.

[18] The *Regolamento Emittenti Consob* is the implementing regulation of *Testo Unico della Finanza*, concerning the issuers' regulation in Italy.

[19] Arts 136-144 state the minimum materials that must be provided when carrying out a solicitation, but do not limit nor prevent other related materials also being provided that support the initiative.

[20] This point will be discussed more thoroughly in section V.

Art 136 TUF, it should then be subjected to strict legislation to protect the interests of the company. If, however, mere informal communication is considered not to come within solicitation practices, its form should of course not be subject to the specific requirements regarding proxy solicitation.

According to CONSOB's technical notes, informal communications are excluded from the scope of the issuers' regulation regarding proxy solicitation.[21] Therefore, all communications not directly aimed at proxy voting requests, such as calls by a broker, are exempted from the regulations. Regardless, the authenticity of information provided to shareholders must be guaranteed. Although determining the content of communications is at the discretion of the promoter, CONSOB will carefully double-check its compliance with the requirements of the issuers' regulation because the risks associated with providing false and misleading information, especially in relation to the election of directors, are very high and irreparable.

When two or more opposing management policies are caught in the crossfire of contested corporate control, then there is likely to be a proxy fight to resolve the matter, in which case the battle will not end by parties sending cover letters, but by them following through with further communications in the standard form prescribed by the issuers' regulation.

b) Limits to Proxy Solicitation Provided by Art 138 Reg Emitt

An incumbent's proxy solicitation involves consideration of many aspects of company meeting principles, and corporate governance. However, the only two limitations that an incumbent may incur within proxy solicitation are:

(a) It cannot vote differently from the instructions received from shareholders (Art 138(4) Reg Emitt); and

(b) It must also accept voting instructions that do not comply with its own proposals (Art 138(2) Reg Emitt).

As others have already observed,[22] these limitations have been put in place to protect shareholders. However instead they may also marginalize them.[23] Although the existence of a proxy solicitation by an issuer is inevitable and

[21] See n 18 above.

[22] See, for example R. Sacchi, 'Voto in base alla data di registrazione e voto per delega dopo l'attuazione della Direttiva azionisti' *Giurisprudenza commerciale*, I, 31, 55 (2012).

[23] Even P.G. Jaeger, 'Le deleghe di voto', in F. Bonelli et al eds, *La riforma delle società quotate* (Milano: Giuffrè, 1998), 101; G. Minervini, 'Art. 136', in G. Alpa and F. Capriglione eds, *Commentario al testo Unico delle disposizioni in materia di intermediazione finanziaria* (Padova: CEDAM, 1998), II, 1243; R. Sacchi, 'Sollecitazione e raccolta delle deleghe di voto', in F. Bonelli et al eds, *La riforma delle società quotate* (Milano: Giuffrè, 1998), 387; F. Ghezzi, 'Art. 136-140 e 144', in P. Marchetti and L.A. Bianchi eds, *La disciplina delle società quotate nel Testo Unico della Finanza d.lgs. 24.02.1998 n. 58* (Milano: Giuffrè, 1999), 1267, agree that the issuer must be inhibited from promoting a proxy solicitation. In spite of this, A. Gambino, 'Art. 139', in G. Alpa and F. Capriglione eds, *Commentario al testo Unico delle disposizione in materia di intermediazione finanziaria* (Padova: CEDAM, 1998), II, 1266, support the idea that an issuer can promote solicitations on its own.

sustainable, at the same time the protections provided by CONSOB in order to avoid risks to shareholders in connection with them do not seem adequate. It would be far more desirable to introduce an organic discipline of cost allocation, just to overcome the enormous inequality among incumbents (directors through an issuer) and insurgents (the shareholders or third parties wishing to be promoters).

While agreeing that the legitimacy of proxy solicitation by an issuer without adequate safeguards represents a setback in the prevention of abuse in the exercise of proxy voting compared to the earlier rules (previously the issuer was not allowed to promote solicitation),[24] the solution should not be to prevent an issuer from promoting a proxy solicitation,[25] nor to always impose a *two-way proxy* rule.[26]

Adequate regulation of cost allocation would achieve a balance between healthy competition in governance and shareholders' corporate guarantees.[27] Nor is the allocation of the costs of proxy solicitation to an issuer contrary to the principles that has inspired European and Italian legislators and regulators.[28] Indeed, differently from the views of others,[29] the solicitation of proxies regulated by Italian legislation, is apparently done in the interests of the promoter since the eventual success of a solicitation would benefit the entire corporate structure and not only those who have supported the promoter, especially when the solicitation comes from shareholders or third parties wanting to gain control of a company.[30] Therefore, if the ultimate goal of allowing proxy solicitation is

[24] R. Sacchi, n 22 above, 55.

[25] That obstacle is based on the extension of the ban on a company to exercise a vote in its name and to vote by proxy. According to R. Sacchi, n 22 above, 57, this view is also supported by the European Parliament and Council Directive 2007/36/EC of 11 July 2007 as called SHRD (Art 10.1, second period) as it would prevent the national legislature from prohibiting the company receiving unsolicited proxies, not even to prohibit the company to assume the role of promoter. The author would consider this rule of Reg. Emitt. illegal because it is contrary to Art 2357-*ter* Civil Code.

[26] This device, even if supported by R. Sacchi, n 22 above, 59; P.G. Jaeger, n 23 above, 108; G. Napoletano, 'Deleghe di voto (Artt. 136-144)', in L. Lacaita and V. Napoleoni eds, *Il testo unico dei mercati finanziari: società quotate, intermediari, mercati, opa, insider trading: commento al d.lgs. 24 febbraio 1998, n. 58* (Milano: Giuffrè, 1998), 130, represents a circumvention of the problem rather than a solution. Also, it would probably induce a significant reduction in the probability that proxy solicitation will be promoted in favor of all shareholders, rather than to a certain category of them. Also, P.G. Jaeger, 'Convenzioni di voto – rappresentanza azionaria', in M. Rotondi ed, *Inchieste di diritto comparato, I grandi problemi della società per azioni nelle legislazioni vigenti* (Padova: CEDAM, 1976), V, 699, states that 'it is clear that, by itself (the *two-way proxy* rule), it would not offer substantial chances to members who wish to organize opposition to the control shareholder'.

[27] The Italian regulation merely requires that all costs of proxy solicitation must be borne by the promoter (Art 136(9) Reg Emitt).

[28] See A. Blandini, 'L'intervento e la rappresentanza in assemblea e l'art. 10 della Direttiva 2007/36/CE: prime considerazioni e proposte' *Le Società*, 511, 515 (2009).

[29] Contrarily, R. Sacchi, n 22 above, 58, considers that the interest protected during proxy solicitation is always that of the shareholders. However, CONSOB regulated in the same way as in the US, in which the guaranteed interest is that of the promoter, who also bears all the costs of proxy solicitation.

[30] See G. Presti, 'La nuova disciplina delle deleghe di voto' *Banca Impresa Società*, 35, 56 (1999). The author, based on the assumption that the costs are borne by the promoter, argues that

good corporate governance, I do not understand why the cost of the solicitation should not fall on the issuer.[31]

2. Proxy Solicitation by Insurgent Shareholders

Proxy solicitation by insurgent shareholders in Italy takes place in the same way as that done by an incumbent and therefore, the applicable regulatory regime in both cases is the same.[32] Other jurisdictions prefer divergent approaches to regulating these two situations, especially given the weak position of the shareholder as a promoter. For example, the US Securities Exchange Commission has dedicated Rule X-14A-8 of the Regulations specifically to proposed proxy solicitation by shareholders.[33]

The ontological choice of the Italian legislator has been underpinned by a principle of substantial equality of treatment between directors and shareholders, to avoid inequalities for the benefit of management.[34] I consider that therefore proxy solicitation expenditures are largely not discussed in Italy.

To say that on a formal level positions of incumbent and insurgent are substantially equal, albeit within the limits of Art 138 Reg Emitt in the case of incumbent proxy solicitation, is untrue. Access to corporate funds, therefore, becomes a discriminating factor in promoting proxy solicitation.

III. Expenses of Proxy Solicitation – Efficient Allocation of Costs

A proxy solicitation's promoter incurs various costs in connection with the solicitation, depending on the size of the company, its number of shareholders,

the Italian legislator, through the solicitation of proxies, uses a private and selfish interest of the promoter to obtain a general improvement in corporate governance practices.

[31] See P.G. Jaeger, n 23 above, 701, where, while acknowledging that at the time (as now) a solution has not been reached, he proposed two ways to fund proxy solicitation: the company should bear the costs of proxy solicitation in both cases; or when directors, also through an issuer, are promoters of a solicitation, the costs should be borne by the directors.

[32] For a complete examination of the current Italian legislation, see E. Ricciardiello, 'La nuova disciplina in materia di sollecitazione delle deleghe di voto: inizia la stagione italiana dei *proxy fights*?' *Giurisprudenza commerciale*, I, 151, 151-176 (2012); M. Campobasso, 'La tutela delle minoranze nelle società quotate: dall'eterotutela alla società per azioni "orizzontale" ' *Banca borsa titoli di credito*, 139, 142 (2015); R. Sacchi, n 23 above; M. Bianca, n 11 above.

[33] The 'shareholder proposal', however, has very different aims to how proxy solicitation promoted by shareholders is regulated in Italy. In fact, when one or more shareholders are willing to submit a proxy solicitation in the US, they are required to request management to include their voting proposal in the proxy statement of the issuer. However, if the issuer, by means of the directors, opposes the shareholders' proposal, it must also include in its proxy statement that of the shareholders' supporting their proposal. The issuer must also include in the proxy form the specific choice through which shareholders can express their approval or disapproval of the proposal. Alternatively, in cases in which an issuer does not promote a solicitation, or with a directors' election, the issuer must provide to insurgents a shareholder list, so they can disseminate their proxy statement independently.

[34] This is particularly emphasised by P.G. Jaeger, n 26 above, 697.

and the nature and purpose of the solicitation.

Previous experience, especially that in the US,[35] has shown that the whole process of solicitation requires assistance and the costs are unpredictable. It should be possible, for example, for a group of shareholders to introduce proxy solicitation to counter proxy solicitation organised by incumbents, especially in the case of election of board members. In these circumstances, however, costs can soar dramatically and cannot be reduced, except by not progressing with such solicitation.

Before promoting a proxy solicitation, both insurgents and incumbents should be required to estimate their potential expenditures, as well as to prepare a strategic plan. Such costs include the fees of lawyers, accountants, and other professionals, such as public relations experts, as well as proxy advisors. Without these skills, rarely will a solicitation hit the mark. These are essential sums, and not everyone with an interest in the outcomes for corporate governance can afford them.

This is where one of the problems of the interpretation and enforcement of Italian proxy solicitation regulation arises. While other jurisdictions regulate who bears the costs of solicitation,[36] the Italian legislator completely fails to address such cost allocation, almost as if it is not concerned with the proper functioning of the proxy solicitation itself.

As appears to be clear from the preparatory work undertaken to integrate into issuers' regulation, CONSOB has addressed the question of the costs of proxy solicitation. However, its conclusions have so far been short-sighted. If the aim is for promoters to be able to reach all shareholders without adding excessive cost to the proxy solicitation's promoter who may also be a minority shareholder, to permit that a notice can be published in the press, instead of requiring the use of mechanisms with significant costs borne directly by the issuer, as CONSOB does, is not enough. I consider that giving a proper discipline to proxy solicitation costs will essentially contribute vitality to the existing provisions in Italy, which have not caught on as in other European equity markets.[37]

Regarding the dissemination of proxy material, CONSOB requires that a proxy form, accompanied by a proxy statement, must be delivered to the parties concerned, including through intermediaries or depositaries. Awareness of the high costs of distribution, albeit at the expense of proper corporate information (the final scope of the provision), has, however, provided shareholders with the option of turning to intermediaries or depositaries of the shares to indirectly acquire the documentation for the solicitation. However, such a procedure does not prevent an intermediary from conveying information to shareholders, either directly or through brokers. The preference is to waive this last procedure owing

[35] For details about leading cases in the State of New York and Delaware, see section IV.1.

[36] The US Federal legislation provides for complete disclosure of a proxy contest's expenditures in Item 4 of Schedule 14A to Rule X-14.

[37] Surely, there are also structural factors that make the US situation different to the Italian one.

to the high costs the developer would need to support it.

This solution is incomplete. If, indeed, the problem of proxy solicitation relates to its costs, then CONSOB should provide cost-sharing mechanisms. In this sense, it is important to analyse: firstly, the limits within which management can use corporate funds (as an incumbent), a matter completely ignored even by CONSOB;[38] and, second, if reimbursement of insurgents' expenditures can be made directly from corporate funds.

In Italy today, insurgents rarely instigate a proxy solicitation against management policies. Often, insurgents are firmly anchored to the granite majorities of shareholders that characterize the Italian financial market (which, however, are slowly crumbling).

Moreover, a similar mechanism, and not even a foreign teleological purpose of a forecast of such content,[39] can be seen in the Italian Civil Code. Art 2393-*bis*(5) is substantially about a similar case to corporate liability, although in the field of a minority's liability action against directors. In the case of acceptance of such a claim by a court, a company is required to refund the costs of the minority, if they cannot be recovered against directors. Leaving the discussion on this point to section V below, I wonder whether to extend this provision, even in the case of proxy solicitation, complies with constitutional principles (Art 3 of the Italian Constitution relating to freedom and equality) and the rationale for proxy solicitation rules.

1. The Transparency Requirement and Costs of Soliciting Proxies

Proxy solicitations are operations that take place within a regulated stock market, and so CONSOB always has the power to check whether operators are behaving in a way that does not harm the public interest.[40] As a result, the issuers' regulation requires that anyone who wishes to promote a proxy solicitation to send a notice to CONSOB, who – after having noted the information contained in it – might want the promoter to provide further information.[41]

Nothing is yet enshrined regarding the costs of a solicitation. In other words, CONSOB, unlike its international 'colleagues',[42] has decided not to deal with the

[38] Nothing is said in the Italian issuers' regulation about this topic.

[39] I support this idea so that it can be introduced into our legal system, either at regulator level or soft law.

[40] See M. Bianca, n 11 above, 274, where he argues that the fact that the regulator prepared special schedules on which promoters are required to draw up a proxy statement and a proxy form, is symptomatic of how CONSOB addresses accurately identifying the disclosure requirements aimed at comprehensive and transparent information addressed to the recipients of proxy solicitation.

[41] It happened, for example, in Banca Carige S.p.A.'s proxy solicitation concerning a general bondholder' meeting in 2012.

[42] The Securities Exchange Commission in Item 4 of Schedule 14A (in accordance with Section 14 (a) of the Securities Exchange Act of 1934) requires a promoter to make disclosures about the source, amount, and extent of the expenses related to the proxy solicitation. In the European legal systems I reviewed (ie those in Italy, France, Spain and Germany), mostly the promoter declares in a proxy statement that all expenses will be borne by them.

subject of solicitation accounting, even if it is a fundamental part of the reimbursement charged to corporate funds. If CONSOB does not demand transparency in spending, it is difficult to start discussing the limits directors face in the use of corporate funds for promoting proxy solicitations. Neither will we be able to provide reimbursement of expenses in cases of insurgents' solicitation.

For these reasons, we therefore cannot remain indifferent to this serious gap, which the Italian regulator does not seem to want to fill. I hope that CONSOB will take notice of this issue and add it in the attached no 5B and 5C of Reg Emitt.[43]

2. Use of the Internet for Proxy Solicitation

CONSOB has adopted rules permitting promoters to distribute proxy materials through Internet websites and to inform shareholders using just an availability notice.[44] Before a shareholder meeting, a promoter can send a written notice of Internet availability to shareholders, indicating that proxy materials are available and explaining how to access them.[45] Otherwise CONSOB should provide a database in which all promoters could make their proxy materials available.[46]

This could also be an opportunity for CONSOB to regulate the relationship between promoters and intermediaries/brokers[47] and the proxy solicitation's public communications (all kinds of information given to the market) that today are subject only to the general rules of Art 114 TUF. Distributing proxy materials via the Internet could reduce the cost of soliciting proxies to the benefit of insurgent shareholder.[48]

IV. Solicitation by an Issuer – Use of Corporate Funds

The most significant benefit that board members have in a proxy solicitation as an issuer, is certainly direct and unconditional access to corporate funds with

[43] These attached no 5B and 5C provide example models of proxy statements and proxy forms. The first model requires that only the promoter must indicate any funding received for the promotion of the solicitation.

[44] The SEC has done this too, see Rule 14a-16. It became mandatory from 1 January 2009 for all issuers with respect to proxy solicitation commencing on or after that date.

[45] See A.L. Goodman et al, *A Practical Guide to SEC Proxy and Compensation Rules* (New York: Wolters Kluwer, 6th ed, 2019), 9-23.

[46] See D.O. Garris and C.A. Duke, 'SEC Proposes the Use of the Internet for Proxy Solicitations' 20 *Corporate & Securities Law Advisor*, 11-12 (2006). The SEC, for example, has established an Edgar archive, but it does not allow promoters to use the Edgar system in lieu of a publicly accessible Internet website, because of technological limitations. Otherwise, giving this public interest function to CONSOB or another authorized private company will guarantee shareholders' adequate information.

[47] I am referring here to how, and under which limitations, intermediaries and brokers are asked to distribute proxy materials to beneficial shareholders. See in more detail E.R. Aranow and H.H. Einhorn, n 2 above, 212.

[48] See J.H. Trotter and J.G. David, 'Proxies Prepare to Go Digital: The SEC's E-Proxy Solicitation Proposal' 14(4) *Corporate Governance Advisor*, 5, (2006).

which to defray costs related to the solicitation. As this privilege allows management to preserve themselves in the top positions with only the support of the majority shareholders, it is necessary to limit the use of corporate funds in this way. To that end, I will summarise the relevant principles that American jurisprudence has been developing over recent decades. Then, I will examine the main relevant judgments of the courts of New York, Delaware and the UK.[49]

1. General Principles in Non-Italian Jurisdictions – The Concept of Reasonable Expenditure

Today, both in the Italian legal system and in international jurisdictions, how management of a company can use corporate funds is not generally regulated.[50] However, principles are contained in judicial decisions regarding this, and I refer to these principles to extrapolate on their ideas and to support their integration into the Italian legal framework, of course with due consideration being given to the structural differences in corporate governance between different legal systems.[51]

The case law that I will now elaborate on relates to the following assumption:[52] the principles according to which management must be monitored emanate from

[49] These principles have been developed in the US mainly with reference to cases in which proxy solicitation is promoted by directors. However, in the Italian national financial market in which there is identity between the controlling shareholder and directors, the interest that motivates directors to take charge of solicitation is the same personal or partisan one. Therefore, even in the case of proxy solicitation by an issuer in Italy, we can observe the same spending limits.

[50] The Securities Exchange Commission regulates the disclosure of expenditure by management but does not regulate management's access to corporate funds, see n 42 above.

[51] See G. Bachmann, 'Der "Europäische Corporate Governance-Rahmen" - Zum Grünbuch 2011 der Europäischen Kommission' *Wertpapier-Mitteilungen*, 1301, 1305 (2011); T. Baums, *Bericht der Regierungskomission Corporate Governance. Unternehmensführung, Unternehmenskontrolle, Modernisierung des Aktienrechts* (Köln: Verlag Dr. Otto Schmidt, 2001); C. Bellavite Pellegrini, '*Corporate governance* e assemblea delle società quotate in Italia: un'indagine empirica' *Rivista delle società*, 401, 434 (2006); L. Enriques, 'La *corporate governance* delle società quotate: sfide e opportunità' *Giurisprudenza commerciale*, I, 493, 493-509 (2012); A.M. Fleckner and K.J. Hopt, *Comparative Corporate Governance* (Cambridge: Cambridge University Press, 2013); H. Fleischer, 'Zukunftsfragen der Corporate Governance in Deutschland und Europa: Aufsichtsräte, institutionelle Investoren, Proxy Advisors und Whistleblowers' 40(2) *Zeitschrift für Unternehmens- und Gesellschaftsrecht*, 155, 165 (2011); P. Hommelhoff and K.J. Hopt, *Handbuch Corporate Governance* (Köln: Schäffer-Poeschel Verlag Stuttgart, 2nd ed, 2009); P. Mäntysaari, *Comparative Corporate Governance: Shareholders as a Rule-maker* (Heidelberg: Springer, 2005); P. Marchetti, 'Il ruolo dell'assemblea nel T.U. e nella corporate governance', in F. Alcaro et al, *Assemblea degli azionisti e nuove regole del governo societario* (Padova: CEDAM, 1999); R. Kraakman et al, *The Anatomy of Corporate Law. A Comparative and Functional Approch* (Oxford: Oxford University Press, 3rd ed, 2017); P. Davies, *Introduction to Issuer Law* (Oxford: Oxford University Press, 2nd ed, 2010); G. Estaban Velasco, *El gobierno de las sociedades cotizadas* (Madrid-Barcelona: Marcial Pons-Garrigues & Andersen, 1999), 678; A. Pomelli, 'Offerta pubblica d'acquisto o scambio prevalente ed altre questioni aperte in tema di offerte concorrenti' *Giurisprudenza commerciale*, II, 682, 687 (2017).

[52] Corporate property theory can be relevant in Italy in the light of directors' duties of care and loyalty.

'corporate property theory',[53] and state that the resources of an issuer (being owned by all shareholders) must be used solely for corporate purposes and therefore for the company.[54] The use of corporate funds by board members for proxy solicitation in their own interest, or even majority shareholders aiming just to keep control of the company, is improper and should not be tolerated.

Further, the application of these corporate governance principles to proxy solicitation poses serious questions that ought to be analysed.[55] Without a doubt, management can draw on corporate funds to prepare and organize general meetings, but an important and separate question is the extent to which board members can reasonably spend corporate resources to influence voting decisions.

One of the first judgments on this issue was handed down in 1906 in the UK, namely *Peel* v *London & Northwestern Railway Co.*[56] In this case, the Court of Appeal ruled that it was legitimate for management to use corporate funds as long as the aim was supporting their policies and not the interests of directors as individuals.[57]

On this issue, several rulings have been made in the State of Delaware,[58] all censuring management's conduct designed to defend their policies at company meetings. In other words, it was considered reasonable for management to have expended corporate funds when done with the purpose of disseminating information to shareholders on corporate policies aimed at increasing awareness and judgment in the exercise of voting rights, whether or not that information was persuasive. Any other costs, expended only with the aim of directors maintaining their roles within management, are to be considered improper.[59]

This stance, however, was not as well accepted then as it is now. Again, under the law of the State of Delaware, a decision was made a few years later in *Steinberg* v *Adams*[60] that criticised the approach to the concept of 'reasonableness', as it was understood at that time, in connection with on what management should

[53] As everyone knows, the debate began with A. Berle and G. Means, *The Modern Corporation and Private Property* (New York: Transaction Publishers, 1932).

[54] Any other interest pursued must be considered *ultra vires*. See E.R. Aranow and H.H. Einhorn, n 2 above, 491, fn 2.

[55] See ibid 492.

[56] [1907] 1 Ch. 5, a dispute had arisen between the management of a company and a group of its shareholders who challenged the unconditional use of corporate funds by directors to circulate information to shareholders in favour of strategic policies that had already been undertaken. The judge ruled in favour of the directors who had made use of corporate funds because of their duty to inform shareholders about the policies undertaken and the reasons in support of them, although the purpose of the information was to also persuade and influence shareholder voting.

[57] E.R. Aranow and H.H. Einhorn, n 2 above, 493.

[58] See Hall v Trans-Lux Daylight Picture Screen Corp., 20 Del. Ch. 78 (1934); Empire Southern Gas Co. v Gray, 29 Del. Ch. 95 (1946); Hand v Missouri-Kansas Pipe Line Co., 54 F. Supp. 649 (D.C. Del. 1944).

[59] E.R. Aranow and H.H. Einhorn, n 2 above, passim.

[60] *Steinberg* v *Adams*, 90 F. Supp. 604 (S.D.N.Y. 1950) (applying Delaware law). See also *Rosenfeld* v *Fairchild Engine & Airplane Corp.*, 309 N.Y. 168, 176 (1955).

be permitted to expend company money. The judges in this case decided that the matter of reasonable expenses in a proxy solicitation was covered by the 'business judgment rule'.

This issue was not so clear, even in case law in the State of New York. In a leading case in 1907, *Lawyers' Advertising Co.* v *Consolidated Ry. Lighting & Refrigerating Co.*,[61] the Court considered that unusual, superfluous, or unnecessary expenses, although incurred in good faith, should not be borne by the company.

Some rulings over the years have addressed reasonable expenditure limits incurred by directors during a proxy solicitation. The issue was discussed in at least two other cases in the US. In *Cullom* v *Simmonds*,[62] the Supreme Court of the State of New York declared, based on the minority shareholder's claim, that costs expended of just over a hundred thousand dollars on proxy solicitation were unreasonable. However, in *Levin* v *Metro Goldwyn Mayer Inc* 1967 (New York),[63] five shareholders complained that directors had improperly committed the issuer to pay for lawyers, public relations experts and consultants, as well as committing internal human resources for the purpose of proxy solicitation. The action challenging the costs was dismissed because they were held to have been expended for the greater interest of access to corporate information.

2. Identification of Costs that Management May Charge to the Company for Proxy Solicitation

From the above discussion of the principles that directors must follow with a proxy solicitation, two different legislative approaches appear possible.[64]

The first is that directors have the right to use corporate funds for expenses reasonably incurred to convince shareholders of the correctness of their policies, provided that these policies are pursued in good faith and in the interest of the company, and for proxy conferment.

The second, more restrictive approach, is that it is possible for a board of directors to use the resources of a company only to inform shareholders of management decisions taken and the reasons in support of them, and also with the help of proxy advisors, for the purpose of achieving a quorum at a company meeting, and nothing more. The difference lies in the contemplation of the proxy conferment.[65]

Regardless of the difficulty of discerning which expenses are incurred for a constitutive quorum and not to influence voters,[66] the real rock that is found in the

[61] 187 N.Y. 395 (1907).

[62] 285 App. Div. 1051 (N.Y. App. Div. 1955).

[63] 264 F. Supp. 797 (S.D.N.Y. 1967).

[64] See E.R. Aranow and H.H. Einhorn, n 2 above, 498-499.

[65] M. Bianca, n 11 above, 292.

[66] The difference it is whether the rules will allow the directors to keep operating despite the adversity of the shareholders, or simply allow them to give correct information on the work and then let the shareholders be free to decide them.

Italian stock market is determined by a massive presence of majority shareholders who make management and control hardly contestable. This, however, is slowly becoming less the case. Just think now there is a massive presence of institutional investors and hedge funds in Italy, especially in the banking sector.[67]

The first legislative approach outlined above – though more delicate and difficult to achieve – should be chosen, provided that, in the face of greater ease of use of corporate funds by directors in a proxy solicitation, there are strict limits provided ex post to evaluate directors' behaviour and the reasonableness of expenses, maybe even by a court.[68]

It remains now to review some practical circumstances so that the underlying reasoning for the preferred approach is clear. Directors must, of course, submit a notice of a company meeting to shareholders at the company's expense. Nevertheless, if directors intend also to attach a proxy statement and form to the notice, it is relevant to assess the legitimacy of their behaviour.[69] The legality of forwarding a proxy solicitation statement jointly with a notice of a meeting would not be legally questioned, as a proxy statement must specify the date of the meeting and must not also say whether the notice has already been sent or not.[70] Indeed, while lowering the cost of any distribution of the proxy statement, and the proxy form supports efficiency in the expenditure of corporate funds, as at the same time they can be used to persuade shareholders, rather than simply inform them. It becomes difficult to understand what kind of expenditure was incurred by directors in the interest of the company and what was incurred with

[67] The latest detailed data on this can be found in: Glass Lewis, 'Guidelines, 2017 Proxy Season Italy', available at www.glasslewis.com; ISS, '2016 Europe Summary Proxy Voting Guidelines', available at www.issgovernance.com; Frontis Governance, 'Principi di Corporate Governance e Politiche di Voto per il Mercato Italiano. Stagione assembleare 2018', available at www.frontisgovernance.com; F. Bianconi and S. Bruno, *Evoluzione degli assetti proprietari ed attivismo assembleare delle minoranze (proxy season 2013)* (Roma: Luiss Ceradi-Georgeson, 2013), 7, available at https://tinyurl.com/y6d6jfre (last visited 30 June 2021); and, with reference to banking industry, conference proceedings, *Assemblea e Corporate Governance: Proxy Season 2014*, Milan, 2 July 2014.

[68] Behind this scheme of proxy solicitation costs' reimbursement lies the same reasoning governing a minority's liability action against directors. As shareholders are acting on the behalf of a company, pursuing its institutional interest, shareholders should not incur costs when acting without any personal motive.

[69] In France, notice of a company meeting and proxy statement are systematically sent together. Regarding attempts by directors to abuse this process, see Y. Guyon, *Droit des affaires. Droit commercial general et Sociétés* (Paris: Economica, 12th ed, 2003), I, 301.

[70] From reading Art 136(2) Reg. Emitt. Discloses no textual data against this interpretation. An extract of the article states: 'The notice shall indicate: a) the identity of the promoter and the company issuing the shares for which the proxies are sought; b) the date of the shareholders' meeting and the list of items at the agenda; c) how the proxy statement and the proxy form are published as well as the Internet site that these documents are available on; d) the date beginning from which the party with the voting right may request the prospectus and the delegation form from the promoter or view it at the market operator; e) the proposals for which the solicitation is to be carried out'; all data that has to be contained in a proxy statement as provided by the model (attached no 5b of CONSOB issuers' regulation).

the intent of persuading shareholders as to their exclusive interest. This is because the actual costs of in notifying shareholders of the meeting, and those for the distribution of the proxy statement and the proxy form, may be the same.

The same can be said of expenditures related to the organisation of a general meeting. There are no reasons why proxy advisors' fees may not also be covered, as such advisors, for example, assist management in developing industrial and strategic policies, in counting proxies at the pre-meeting and in tabulating votes during the meeting.

The proxy advisor's role is broad, owing to the need for them to take into account a variety of corporate interests and matters. Board members may also use these advisors to ensure the presence of shareholders at a meeting for the proper functioning of the company.[71] However, board members could also instruct proxy advisors to plan a proxy solicitation, thus creating a link between the interests of the company and those of the directors.

To what extent, then, is it reasonable to limit the use of corporate funds to pay the fees of proxy advisors?[72] This question should be discussed on a case-by-case basis, returning first to the directors' duty of care, and possibly to later judicial review of such payments.

V. Solicitation by Insurgent Shareholders – Reimbursement of Expenses by Corporate Funds

In this section, I will discuss how the costs of solicitation should be allocated when shareholders, in any form or composition, are promoting a proxy solicitation.

In identifying the exact expenses related to a proxy solicitation that should be reimbursed by the company to shareholders who initiated it, it is inevitable to refer to the concept of reasonableness, already referred to in section IV.1, about the use of corporate funds by management.

All expenses to compensate professionals, such as financial advisers and lawyers, for printing the proxy materials, notifying shareholders and the cost for proxy advisors' services, should be chargeable to the company, even if judicial review regarding the reasonableness of total expenditure should also exist.

A particular issue can be envisaged relating to the amounts necessary, according to Art 136(7) Reg Emitt, for the transfer of identification data to intermediaries involving the number of registered shares of the issuing company and the relative amount of shares of different classes, those who have the right to vote, who have not expressly prohibited communication of their data, and those

[71] E.R. Aranow and H.H. Einhorn, n 2 above, 500; G. Balp, *I consulenti di voto* (Milano: Egea, 2017), 46.

[72] With the same yardstick, the expenses paid to public relations advisors should also be considered, as well as those for legal and financial advisors. Relevant is the extent to which directors can claim the use of expert advisors of the issuer for the organisation of a proxy solicitation.

who have opened accounts as intermediaries and the amount of the issuer's shares respectively recorded on these accounts, as well as those of members. The promoter should bear these costs, which are essential to begin a proxy solicitation, but they might not all need to be repaid by the company to the promoter.[73]

1. Reimbursement of Costs to a Proxy Solicitor Where There Is Successful Proxy Solicitation by Shareholders

Reimbursement of expenses is at the heart of this entire discussion: to give vitality to proxy solicitation in the Italian financial system, the regulator has to provide that the issuer should be accountable for part of the expenses incurred and anticipated by insurgent shareholders and downsize access to corporate funds by management. We should not forget that the concept of proxy solicitation was created in a different legal context and that adjustments to it will be needed because of the different distributions of power within Italian corporate structure.[74]

Considering the urgency of drafting legislation or regulation that provides suitable finance tools in the hands of proxy solicitor as different from directors, I suggest two different solutions based on the current legislation.[75]

Judgments handed down in the US in the 1950s are leading the way for opening a debate on these topics in Italy.[76] In the US, the question was whether reimbursement by a company to a promoter of proxy solicitation expenditure could be subject to approval at a general meeting. Making reimbursement subject to proper corporate governance oversight, ensures both the use of corporate funds to a reasonable extent by directors, and that the reimbursement of insurgents' expenses are instrumental in achieving consistency of information at the base of expressing an informed vote. Yet, if the reimbursement of expenses incurred by insurgents is subject to the balance of corporate powers, it becomes legitimate in itself. Therefore, referring any decision on the matter regarding the reimbursement of expenses to a general meeting is unnecessary,[77] since authorisation of any illicit payments, though unanimous, has no effect and the related expenses could not even be reimbursed. For the same reasons, if a payment is legitimate, the shareholders' approval is not required.[78]

The foregoing leads me to say that, beyond all the issues arising relating to authorisation of reimbursement of expenses incurred by insurgents,[79] it might

[73] Related costs could be high, but when using e-proxy solicitation they may be less.

[74] For more detail, see A.L. Goodman et al, n 45 above, 3-9, concerning practical aspects of proxy solicitation.

[75] The different legislative choice is in the fact of making (or not) by the general meeting authorization of the expenses' reimbursement incurred by the insurgent.

[76] As noted above, see *Steinberg* v *Adams*, 90 F. Supp. 604 (S.D.N.Y. 1950); *Rosenfeld* v *Fairchild Engine & Airplane Corp.*, 309 N.Y. 168, 176 (1955).

[77] I am talking about ordinary general shareholders meeting, not extraordinary.

[78] E.R. Aranow and H.H. Einhorn, n 2 above, 512.

[79] If a shareholder has made use of proxy solicitation, this means that they do not have the

be logically and legally argued that, where the costs of solicitation incurred by insurgents are reasonable, documented, and subject to a corporate purpose, (not merely the purpose of gaining personal control of the company), then management could, also without authorisation at a general meeting, order the reimbursement of such expenses via an automatic mechanism.[80]

Another circumstance, not so remote, can be seen when insurgents remain partially successful. In these cases, having a hypothetical automatic mechanism for reimbursement would certainly be more controversial, and requiring a decision of a general meeting would be preferred.

2. Reimbursement of Costs to Proxy Solicitor Where Proxy Solicitation Is Unsuccessful

There are authors who have argued with some difficulty that even in cases of the failure of proxy solicitation, a company should be required to reimburse the costs to the promoter.[81]

If the corporate purpose requirement is replaced by greater disclosure of information about corporate policies, then it would also be justified for expenses incurred by insurgents who are unsuccessful in a proxy solicitation, to be reimbursed, as their actions are teleologically related to the increase of the degree information provided to the shareholder.[82] In other words, even if the scope of the failure ensures a debate between two or more opposing views about management decisions, shareholders can simply benefit from the debate in terms of increased awareness.

Others have also supported the view that[83] if directors use corporate funds to disseminate corporate information that is intended to influence shareholders' judgments when voting on a resolution (which most of the time are proposed by management), the same should be allowed in cases where proposals concern issues other than those of the directors.

However, there are two issues related to such an approach. The first is the

majority of votes. In this sense, then, if the insurgent shareholder managed to get a substantial number of proxies in order to push through its proposal to vote once, it does not mean that they would fail again, especially when the general meeting will be called to vote authorising the reimbursement of expenses incurred by them.

[80] Art 2393-*bis*(5) of the Civil Code provides that shareholders can initiate action against directors for damages arising from wilful misconduct or negligent behaviour. And, if the claim is accepted, the company reimburses the plaintiff's judicial expenditures and those incurred for the ascertainment of the facts which the judge does not charge to the losing party or which may not be possible to recover upon enforcement against them. This is the only case in which the legislator foreseen an automatic reimbursement in case of winning suit without general meeting's approval. This mechanism could be also used in the context of proxy solicitation.

[81] See F.C. Latcham and F.D. Emerson, n 2 above, 13; S.W. Mintz, n 2 above, 96.

[82] See D.M. Friedman, n 2 above, 958.

[83] I am referring here to the US literature, the most attentive to these issues being: Note, 'Proxy Solicitation Costs and Corporate Control' 61 *Yale Law Journal*, 229, 229-237 (1952).

risk of encouraging proxy solicitations that are completely irresponsible and not adequately justified. The second links to formulas for calculating the percentages of reimbursable expenses:[84] for example, the issuer could supply reimbursement based on the percentage of votes obtained by proxy solicitor, or by affording full reimbursement of the expenses necessary for information's disclosure and partial for fees of lawyers, accountants, and other professionals.

VI. Conclusion – Actualisation of Italian Proxy Solicitation Rules

Hoping that this work will help to encourage debate on the issue of cost allocation for different types of proxy solicitation for companies listed on the Italian stock exchange a debate that has not yet begun in Italy, I conclude by offering my own view, which is similar to the laws now in force in the States of New York and Delaware, on how expenditure should be borne for proxy solicitations in Italy.

Returning to the distinction between formal and substantive positioning of the proxy solicitor, in order to ensure effective equality of treatment between directors and shareholders, the same access to corporate funds should be given to both of them. Also, access to such funds should be limited as follows funds:

(a) Expenses must always be traceable and reasonable (and indicated in the proxy statement);

(b) The purpose of proxy solicitation should further greater transparency in corporate choices; and

(c) The company meeting should approve reimbursement to insurgent shareholders or authorises ex post the use of corporate funds by management, following a judgment of fairness by an independent internal committee.

[84] See F.D. Emerson and F.C. Latcham, n 2 above, 436. These two American authors are of the opinion that the rate of reimbursement should be conditioned to the ability of the promoter to obtain proxies, the so-called 'proportional reimbursement formula'.