ALLEN & OVERY

Holding shareholders' meetings during Covid-19 coronavirus: the Italian response

Table of contents

1. OVERVIEW

1.1 How shareholders' meetings of joint stock companies (*società per azioni* or s.p.a.) and limited liability companies (*società a responsabilità limitata* or s.r.l.)[1] would normally be convened and held.

On when the shareholders' meeting should be convened

According to the Italian Civil Code (**ICC**), in companies without a supervisory board, the ordinary shareholders' meeting is the corporate body in charge of approving the yearly financial statements. For this purpose, the ordinary shareholders' meeting must be convened within the term established by the by-laws and in any case not exceeding one hundred and twenty days from the end of the reference fiscal year. The by-laws may provide for a longer term, in any case not exceeding one hundred and eighty days, in the case of companies required to draw up consolidated financial statements, and when special requirements relating to the structure and purpose of the company require it (see articles 2364 and 2478-*bis*, ICC). For listed companies, the possibility to call a shareholders' meeting within the longer term (if

[1] Although the extraordinary provisions commented under this note are addressed, as better explained herein, to many forms of companies incorporated under Italian law, this "Overview" section is exclusively summarizing ordinary rules applicable to two form of companies only, as s.p.a. and s.r.l. are by far the most common types of companies registered in Italy out of the category of partnerships (*società di persone*). For some figures as to the number of s.p.a., s.a.p.a. and s.r.l. type of company registered in Italy, see www.dati.istat.it.

provided for in the by-laws) is set under article 154-*ter*, par. 1, of the Italian Legislative Decree no. 58/1998 (known to practitioners as "TUF").

On how the shareholders' meeting should be held

By-laws of joint stock companies may allow the shareholders to attend the meeting by telecommunication means or by expressing their vote by correspondence or electronically (see article 2370, ICC). According to interpretation, the same rule applies also to meetings of quotaholders of limited liability companies even if no express provision of law so allows (see Milan Notarial Council – rule no. 14/2004).

All shareholders' meetings of joint stock companies are chaired by a chairman appointed by the shareholders, to be assisted by a secretary, also appointed by the shareholders, whenever the functions of the secretary are not to be performed, according to the law, by a notary public (see articles 2371 and 2375, ICC). The Italian law also does not require the appointment of a secretary for quotaholders' meetings of limited liability companies; however, the by-laws of such companies often so provide. In any event, for both s.p.a. and s.r.l. types of companies, it has been debated in the past whether, for the meeting to be validly held, the chairman and secretary must both be physically present at the same venue, as by-laws often expressly require (see the Interregional Committee of Notaries' Councils of the Triveneto – rule H.B.1/2004, whereby the venue where the meeting will be deemed to have been held is the one where "*the chairman and the person drawing the minutes will be present*"; similarly, see Milan Notarial Council – rule no. 1/2001. See also a Study approved on 16 March 2011 by the National Council of Notaries, available at this web address: https://www.notariato.it/sites/default/files/70-09-i.pdf; in particular, see pages 75-77).

It is not always the case that decisions to be taken by quotaholders of a limited liability company must be taken by calling and holding a proper quotaholders' meeting. The by-laws may provide that – with the exception of some decisions which are reserved by law to the competence of the general meeting of quotaholders – decisions may be taken through written consultation or on the basis of written consent (see article 2479, ICC).

1.2 Provisions concerning proxies for shareholders' meetings of listed companies

As a direct implementation in Italy of Shareholders' Rights Directive 2007/36/CE, Legislative Decree no. 58/1998 ("TUF") was amended in 2011 to provide the chance for listed companies to designate – unless this chance is expressly excluded by the by-laws – a subject (either a physical or a juridical person) to whom the shareholders can grant, by the end of the second open market day preceding the date established for the meeting, a proxy with voting instructions on all or some of the items on the agenda (see article 135-*undecies*, TUF). The use of said "Designated Representative" is not exclusive of other ways of being represented by proxy at any given shareholders' meeting, as TUF generally allows that any shareholder may appoint one representative to attend and vote on his/her behalf (see article 135-*novies*, TUF).

2. THE EXCEPTIONAL MEASURES ADOPTED BY THE ITALIAN GOVERNMENT

2.1 With Law Decree 17 March 2020, no. 18 (so called "*Cura Italia* Decree", **DL18**), the Italian Government adopted "*measures to strengthen the national health service and to provide economic assistance to*

families, employees and companies in relation to the epidemiological emergency of Covid-19". In particular, given the containment duties imposed under a number of legislative and Regional measures in connection with the Covid-19 outbreak and the approaching of the shareholders' meeting season, article 106 of the DL18 ("*rules governing the conduct of shareholders' meetings of companies*") allows companies to postpone their ordinary shareholders' meetings, and introduces rules to ensure that these meetings are held in compliance with containment provisions.

2.2 Article 106 of DL18 applies to joint-stock companies (s.p.a.), limited liability companies (s.r.l.), companies listed on regulated markets and multilateral trading systems, companies with shares widely distributed among the public (so called "*diffused companies*")[2], partnerships partly limited by shares (*società in accomandita per azioni*), cooperatives (*società cooperative*), mutual insurance companies (*mutue assicuratrici*), cooperative banks (*banche popolari*) and cooperative credit banks (*banche di credito cooperativo*). Rules implemented under article 106 shall apply to shareholders' meetings called to be held by 31 July 2020 or until any later date when the state of emergency relating to the Covid-19 epidemic will still be subsisting. According to article 106, the following rules have been introduced:

On when the shareholders' meetings should be convened

Companies may call their shareholders' meetings within the extended period of 180 days from the end of the 2019 financial year, even if this is not provided for under the by-laws (article 106, 1st par.).

On how the shareholders' meeting should be held

(i) Companies may call their shareholders' meetings by providing that they are held by telecommunication means or by expressing the vote by correspondence or electronically, even if the by-laws do not provide for such opportunity, or even if the by-laws expressly exclude it. It is expressly allowed that the chairman and the secretary (or the notary) of the meeting may attend from different venues (see also Milan Notarial Council – rule no. 187/2020) (article 106, 2nd par.).

(ii) Quotaholders of limited liability companies may adopt any decision through written consultation or on the basis of written consent, even if this would not be allowed normally by the law or the by-laws (article 106, 3rd par.)

Provisions concerning proxies for shareholders' meetings of listed companies

Both listed and "diffused" companies may apply art. 135-*undecies* TUF even if this possibility is not provided for in the by-laws, thus appointing the "designated representative" for the incoming ordinary and/or extraordinary shareholders' meetings. In addition, these companies may provide in the notice of call that the right to intervene at the shareholders' meeting must be exercised exclusively through the designated representative, which will be entitled to also receive "ordinary" proxies pursuant to art. 135-*novies* TUF[3].

---

[2] See article 2325-*bis*, ICC, whereby the law makes a distinction between "*companies with shares listed on regulated markets*" and companies "*disseminated among the public to a significant extent*". For a definition of the latter category, i.e. the one of "diffused companies", see article 2-*bis* of Consob Issuers' Regulation no. 11971/1999, available at this web site: http://www.consob.it/web/consob-and-its-activities/laws-and-regulations/documenti/english/laws/reg11971e.htm?hkeywords=&docid=2&page=0&hits=21&nav=false.

[3] In addition: (i) cooperative banks (*banche popolari*), cooperative credit banks (*banche di credito cooperativo*), cooperatives (*società cooperative*) and mutual insurance companies (*mutue assicuratrici*) may appoint the "designated representative" pursuant to art. 135-*undecies* of the TUF, also by derogating from the limits

Based on a recent interpretation of article 106 provisions (see Milan Notarial Council – rule no. 188/2020), it has been made clear that listed and "diffused" companies may simultaneously avail of the provisions entitling: (i) to exclude the physical attendance of shareholders (because of them being directed by the company to appoint the "designated representative" as their exclusive way of participating to the meeting); and (ii) to held the meeting only through telecommunication means, in which case the attendees will be mainly limited to the directors, the statutory auditors, the "designated representative", and the secretary (or notary).

3. POSSIBLE INTERPRETATION ISSUES

3.1 Assonime, the association of Italian joint stock companies, has issued a Q&A list to address possible queries on the interpretation and practical implementation of article 106 of DL18 (the **Assonime Q&A**)[4]:

(a) As seen above, according to art. 106 of DL18 listed companies may decide to hold shareholders' meetings "behind closed doors", as they may be held via telecommunication means and/or by requiring that only the "designated representative" attends instead of all shareholders; *who, and why, might take such decision?*

(i) it is up to the board of directors to indicate – within the limits defined by the decree and in compliance with its purposes – the most suitable methods of participation in the meeting and expression of the right to vote. In exercising this choice, the board of directors will have to take into consideration the reference regulatory framework, with particular attention to the measures adopted by the government to limit the movement of natural persons throughout the national territory (Prime Ministerial Decree of 8 March 2020, Prime Ministerial Decree March 11, 2020, Prime Ministerial Decree of March 22, 2020);

(ii) the decree allows flexibility, as in fact "*companies can provide, with the notice of convocation, more than one method of remote participation in the meeting, also by accumulating all the instruments indicated in the decree – vote by correspondence, participation through telecommunication means and delegation to the designated representative*"; Assonime's recommendation is in any event that, in the current circumstances, companies shall adopt "*those methods of participation and voting that ensure the shareholders' meeting in the absence of physical participation of the members, is recommended*".

(b) *How is it possible for shareholders participating in the meeting by correspondence or voting by proxy by the designated representative, to put forward resolution proposals directly at the shareholders' meeting?*

(i) This possibility is "limited", and companies should "*evaluate the opportunity to allow the presentation of proposals before the shareholders' meeting, providing for procedures and timelines such as to ensure adequate information for all shareholders*".

ordinarily provided for by the applicable special rules and article. 2364, 2nd par., ICC; and (ii) for State-owned companies as per article 2, paragraph 1, letter m), of legislative decree no. 175/2016, provisions of article 106 can be implemented within the financial and instrumental coverage available under current legislation and do not entail new or increased costs for public finance.

4 Available at http://www.assonime.it/attivita-editoriale/news/Pagine/News-Faq-QeA-sulle-assemblee-a-porte-chiuse.aspx.

(c) *How is it possible to integrate the notice of call to adapt it to new rules under article 106, if it has already been published?*

(i) In the event that the notice of call was published before the entry into force of DL18, it may be necessary to integrate the content to indicate the methods of participation and voting chosen to allow the meeting to take place without physical presence of attendees.

(ii) In this regard, the Assonime Q&A responds to two questions:

(A) whether there is a deadline before the shareholders' meeting by which the board of directors must have completed this integration, in order to ensure adequate information for the shareholders; and

(B) whether it is possible to postpone the meeting date by a few days in the event of the integration of the notice of meeting.

(iii) The answer to question (A) above is given, in the absence of any expressed provision of law, by availing of article 126-*bis* of TUF, which allows shareholders to submit proposals within ten days of the publication of the notice of call and requires that the related proposals and explanatory reports are published no later than 15 days prior to the meeting.

(iv) The answer to question (B) above has to be given on a case-by-case basis, always ensuring that shareholders' rights (e.g. relating to complying with the record date for attending the meeting and the presentation of lists, and to cast an informed vote) are preserved.

(d) *If the company decides to adopt the instrument of the "designated representative" as the exclusive means to participate in the shareholders' meeting, what will happen to resolutions usually taken on the basis of proposals ancillary to resolutions included in the agenda and put forward by shareholders in the course of the meeting? What about the right of individual shareholders to put forward further proposals?*

(i) Typical examples of such resolutions are those arising in connection with the appointment of corporate bodies, as sometimes "ancillary" to the foregoing: the determination of the number of members of the board of directors (unless specifically provided for in the articles of association; see article 2380-*bis*, par. 4, ICC), the duration for the office of directors (see article 2383, par. 2, ICC), the appointment of the chairman of the board of directors (if reserved to the decision of the shareholders' meeting; see article 2380-*bis*, par. 5, ICC), and of the control body (see articles 2398, ICC, and 148, par. 2-*bis*, TUF), the determination of the remuneration of the directors (see article 2389, paragraphs 1 and 3, ICC) and of the members of the control body (see article 2402, ICC).

(ii) As the last chance for those shareholders attending through a proxy to express their indications of vote falls no later than the second open market day before the date of the meeting, Assonime suggests that: (A) the board itself formulates proposals along with its illustrative reports (see article 125-*ter* of TUF); or (B) shareholders' representing at least 1/40 of the voting capital may formulate proposals on items already included in the agenda of the meeting, no later than ten days after the day when the notice of call has been published; or (C) whenever the timing no longer allows either of the two preceding solutions, the board may formulate its proposals by "unbundling" the resolutions submitted to shareholders in as many detailed resolutions as possible, through publishing an update to the board illustrative reports, which however shall be

possible by, and no later than, the 15th day prior to the day of the meeting, consistent with article 126-*bis* of TUF (see also under question 3(c) above).

(iii) As for the option for shareholders to submit individual resolution proposals directly during the meeting, this is according to Assonime: "*basically impracticable*". If companies still wish to allow any individual shareholder, regardless of the size of its shareholding, to submit resolution proposals before the meeting, the notice of call should define relevant procedural steps by indicating the timing and methods of submission. For example, companies could extend – voluntarily – the number of subjects entitled to submit such resolution proposals before the meeting pursuant to article 126-*bis*, par. 1, TUF, currently limited to qualified minorities (1/40 of the share capital).

(e) *If the company decides to adopt the instrument of the "designated representative" as the exclusive means to participate in the shareholders' meeting, what will happen to the right of shareholders to submit questions according to article 127-ter of TUF?*

(i) Article 127-*ter* of TUF, as lastly amended by Legislative Decree 49/2019, establishes two alternative cut-off dates for the receipt of questions from shareholders: the cut-off set at five open market days before the meeting requires that the answer is given by the company at the meeting at the latest; the cut-off set at seven open market days before the meeting requires the company to respond at least two days before the meeting.

(ii) As cut-off dates are set in the interest of shareholders, companies could voluntarily bring forward the date on which they provide answers to the questions in order to allow shareholders to have all the information available before the deadline for exercising the proxy. According to Assonime, some companies have already adopted the earlier deadline for submitting questions (seven days) thus being bound to respond within the second open market day prior to the shareholders' meeting, while also postponing the deadline for giving voting instructions under the proxy (e.g. at 12 noon on the market day preceding the meeting). Another solution could be adopting in the notice of call the longer term required by law to submit questions (seven open market days before the shareholders' meeting) and undertaking to provide answers before the deadline for conferring the proxy (for example, by 12 noon on the second market day before the meeting). The statutory provisions that allow the company not to respond if the information is available on the website's Q&A or in another response already published on the site remain unaffected.

4. A PRELIMINARY SURVEY RUN BY ASSONIME ON ITALIAN-LISTED COMPANIES

4.1 Assonime has run a survey[5] to check the current implementation of article 106 of DL18 among Italian listed companies with latest fiscal year ended on 31 January 2019. The table below shows the relevant results.

[5] Last available update: 28 March 2020. See also at this website address for further details: http://www.assonime.it/attivita-editoriale/news/Pagine/News270320.aspx.

	No. of companies	Companies that availed of the "designated representative" option	Month when the meeting is scheduled to take place			
			March	April	May	June
Companies which have confirmed the original date of the meeting	60	46	2	49	8	1
Companies which have moved the meeting to another date	43	7	1	5	25	12
Companies which have communicated the intention to move the meeting to another date	19	-	n/a	n/a	n/a	n/a
Companies which have not released any communication so far	95	-	n/a	n/a	n/a	n/a
Total	**217**	**53**	**3**	**54**	**33**	**13**

Contatti

Paolo Ghiglione

Partner - Corporate

Tel +39 0668429695

paolo.ghiglione@allenovery.com

Allen & Overy Studio Legale Associato

Via Ansperto 5, 20123 Milan Italy | Tel +39 02 290 491 | Fax +39 02 290 49333

Corso Vittorio Emanuele II, 284, 00186 Rome Italy | Tel +39 06 684 271 | Fax +39 06 684 27333

allenovery.com