



Shareholders' meetings and annual financial statements at the time of COVID-19

1. Introduction

In March and April of each year Italian companies tend to organize their board meetings for the approval of draft annual financial statements and to convene the general shareholders' meeting for the final approval of financial statements. Such timing is the result of Italian law requirements pursuant to which the shareholders' meeting for the approval of annual financial statements must be convened within 120 days from the last day of the year to which the statements refer (which, for most companies, is December 31). For Italian companies with listed shares the shareholders' meeting is also subject to a 30 day prior notice requirement (which is extended to 40 days if the appointment of a new board of directors or statutory auditors is in the agenda for the meeting).

Prior to the recent measures (discussed below), the 120 day period could be extended to 180 days subject to the occurrence of at least one of the following circumstances: (i) the company is required to prepare consolidated financial statements or (ii) particular situations relating to the structure or purpose of the company occur. Legal scholars argued that "force majeure" could justify such an extension and, along these lines, the current COVID-19 outbreak could probably be treated as a force majeure event.

The COVID-19 pandemic continues to escalate at a rapid pace and does not allow convening, organizing and holding meetings of shareholders in person and in physical places. The Italian Government recently introduced a series of measures to address such issues.

In addition, the ongoing pandemic also affects the preparation and disclosure of possible impact on the financial statements of companies in general and more profoundly of companies with listed shares. The emergency will also affect first quarter results and could require issuers to publish press releases to update the market of the possible impact.

2. Shareholders' meetings of companies with listed shares

Attendance in person to shareholders' meetings is currently restricted pursuant to the limitations set forth by the Decree of the Italian Prime Minister dated March 8, 2020, which prohibits personal movements anywhere in Italy "except for proven work-related reasons, in case of necessity or for health reasons". Attendance in person to shareholders' meetings does not appear to qualify for the work-related exemption, in particular with respect to retail investors that generally represent a significant part of potential participants to meetings of companies with listed shares.

General shareholders' meetings of companies with listed shares tend to result in gatherings of large number of attendees in relatively small spaces in clear contradiction with the restrictions put in place by the Italian Government to reduce the risk of contagion of the COVID-19 virus (in particular the 1 meter – 3 feet – safety distance). The Italian Prime Minister, on March 9, 2020, issued a decree prohibiting "*[...] all forms of gatherings of persons in public spaces or in places open to the public in the entire national territory*". Such a broad prohibition seems to exclude any possibility of holding a meeting in person even if in compliance with the other requirements such as the 1 meter safety zone.



2.1. Remote participation

A first solution to comply with the restrictions is through the use of technical devices and platforms that allow remote participation of shareholders to companies' meetings. Prior to the current crisis, however, remote participation was a discretionary option for companies with listed shares which required a specific provision in the company's by-laws. A limited number of Italian listed companies (approximately 30%) exercised such an option. In the absence of a specific provision in the by-laws in person meetings were the norm in Italy.

On March 11, 2020, to address the crisis, the Notarial Council of Milan issued a recommendation (No. 187/2020) indicating that "remote attendance to shareholders' meetings by means of remote telecommunication technology (where provided for in the by-laws or in any case permitted by law) is applicable to any participant to the meeting" (including the chairperson and secretary who, until then, were required to be in the same location).

The Notarial Council of Milan also added that any provision in the by-laws, which requires the presence of the chairperson and the secretary in the same place, is intended to preserve the minutes formation and do not prevent meetings where all participants join from different locations by using remote telecommunication technology, as the minutes formation requirement could be complied with at a later date. This approach recommended by the Notarial Council of Milan opened the gate for shareholders' meetings with all participants joining in remotely even when remote attendance constitutes a deviation from the company's by-laws.

Along the same lines the Decrees of the Italian Prime Minister dated March 8 and March 11, 2020, appear to legitimize the use of remote telecommunication technology in connection with any meeting (including shareholders' meetings), also in the absence of specific provisions in the company's by-laws. Such decrees promote the use of remote telecommunication technology in connection with any corporate activity as the new "ordinary method", regardless of specific provisions in the by-laws.

2.2. Designated representative and proxy voting

A second solution is by using the "designated representative" or resorting to proxy voting. The designated representative is a person, appointed by the company itself, to whom the shareholders may confer (and subsequently revoke), by the end of the second trading day prior to the date set for the shareholders' meeting, a proxy, signed by the delegating party, with voting instructions, on all or some of the proposals on the meeting agenda.

Such an approach, however, is hindered by several obstacles:

- 1) companies are allowed to: (i) exclude tout court, in their by-laws, the appointment of a designated representative; (ii) provide for the appointment of the designated representative only for either ordinary or extraordinary shareholders' meetings or for shareholders' meetings with a specific agenda (i.e., approval of the financial statements); (iii) grant the board of directors with the power to decide, for each shareholders' meeting, for the appointment (or not) of the designated representative. In addition, the use of a "designated representative" is not provided for in relation to Italian companies with shares listed on AIM Italia, which is a multilateral trading facility, where a large number of issuers have listed and traded;



- 2) companies are also allowed to limit (and in practice often limit) the maximum number of proxies that could be granted to any single proxy holder.

2.3 The new so-called "Cura-Italia" Law Decree

On March 16, 2020, the Italian Government approved the so-called "Cura-Italia" law decree (the "Cura-Italia Decree"). Such law decree introduces measures in several areas affected by the COVID-19 pandemic, including specific provisions relating to shareholders' meetings to be held by July 31, 2020, or by the later date on which the state of emergency ceases to be in force in the national territory.

Pursuant to the Cura-Italia Decree:

- (i) all companies, regardless of whether their shares are listed or not, are allowed to convene their annual shareholders' meeting to approve financial statements within the longer term of 180 days, without any need to justify such extension;
- (ii) all companies (as well as certain partnerships and cooperatives) are allowed to provide, in the notice of call for a shareholders' meeting, for attendance and voting by remote telecommunication technology, regardless of specific provisions for such purpose in the by-laws, provided that the identification of participants, their attendance and the exercise of voting rights are in compliance with certain specific requirements. The Cura-Italia Decree also trumps the previous requirement for the chairperson and secretary to be in the same location, even when expressly provided for in the company's by-laws;
- (iii) limited liability companies, are allowed to proceed with shareholders' voting by means of written consultation or by written consent, regardless of previous restrictions set forth by law or by-laws;
- (iv) all companies with listed shares are allowed to appoint a designated representative for the exercise of voting rights at ordinary and extraordinary shareholders' meetings, notwithstanding any clauses in their by-laws providing otherwise. Such companies are also entitled to provide, in the notice of call convening a shareholders' meeting, that participation is allowed exclusively through the designated representative. The use of a designated representative is extended to companies admitted to trading on a multilateral trading system (such as AIM Italia) and to companies with shares widely distributed among the public;
- (v) companies with listed shares that do not adopt remote voting systems are mandatorily required to appoint the designated representative. In the event that any of such companies has already convened its annual shareholders' meeting when the Cura-Italia Decree enters into force, without the appointment of the designated representative or in the absence of remote voting systems, the meeting could be postponed and reconvened.

The escalation of the COVID-19 outbreak at a rapid pace produces and will continue to produce, at least in the short term, repercussions on the financial disclosure of companies with listed shares for the first quarter of 2020 and will most likely trigger obligations to update financial projections and estimates through press releases in accordance with applicable laws and regulations.



The events and legislative interventions related to COVID-19 represent, for the prevailing majority of companies, significant events which occurred after the end of the financial year of reference, which require to be reviewed, for companies that are subject to IFRS (such as companies with listed shares on regulated markets), pursuant to IAS 10 and OIC 19, as well as certain provisions of the Italian Civil Code.

Events and situations occurring after the end of the financial year of reference do not require companies to go back and adjust financial data for the year already ended as the repercussions are limited to the forthcoming periods and do not affect the past.

Such events, however, may, in rare circumstances, affect business continuity (i.e., a company's ability to pursue its business purpose). To the extent that events occurring after the end of the financial year of reference could result in a company not being able to continue its regular business activity, then accounting standards (based on business continuity) and the corresponding amounts in the financial statements require to be changed or adjusted.

Companies with listed shares are required to report in the notes to their financial statements "*the nature and effect on the balance sheet, income statement and cash flow of significant events occurring after the end of the financial year*", pursuant to the Italian Civil Code.

The management report, which accompanies the financial statements and is prepared and approved by the board, is required to disclose, pursuant to the Italian Civil Code, "*a description of the main risks and uncertainties to which the company is exposed*". Along these lines, the management report would need to address the potential repercussions of the COVID-19 outbreak on financial data, especially in terms of projections and estimates.

Companies with listed shares whose board of directors already approved draft annual financial statements (to be submitted to the general shareholders' meeting) do not appear to be subject to a mandatory obligation to revoke the initial approval and resolve upon an updated draft reflecting the implications of COVID-19 on the company's business, but could address such impact in a press release in compliance with applicable laws and regulations.

In this context, ESMA issued a number of recommendations ("*ESMA recommends action by financial market participants for COVID-19*") for financial market participants including, *inter alia*: (i) planning and adopting business continuity plans; (ii) implementing adequate disclosure to the market, in accordance with the transparency requirements of the *Market Abuse Regulation*, with regard to the impacts of COVID-19 on the company's financial data; (iii) adopting a transparency regime with regard to the disclosure of actual and potential impacts of COVID-19 to be included in the financial reporting for the year 2019, if not yet finalized, or, alternatively, in the interim financial reporting during 2020.

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The Equity Capital Markets Department of Legance is available to provide any clarifications, also in respect of any specific situation which may be of interest to you.

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