

MEMORANDUM

The Shareholders' Meeting using telecommunications

Recently, the governing body of the Milanese notaries (“*Consiglio Notarile di Milano*”), addressed an issue that, in times of “*social distancing*”, may be of great interest for meetings convened in times of the COVID – 19 emergency. In fact, the new Guidelines No. 187 of March 11, 2020 address the issue of participation in meetings using telecommunications.

In drawing up the principle of law in question, the Milan Notarial Board took into account the provisions of art. 1, paragraph 1, letter q) of the Decree of the President of the Council of Minister of March 8, 2020, concerning “*Further provisions for the implementation of Law Decree No. 6 of February 23, 2020 on urgent measures concerning the containment and management of the epidemiological emergency by COVID-19*”, which states that “**when holding meetings, remote connections shall be adopted** with particular reference to health and sociomedical facilities, public utility services and coordination activated in the context of the COVID-19 emergency, in any case ensuring compliance with the one meter safety distance [...] and avoiding gatherings”.

In this regard, it should be remembered that Article 2370 of the Italian Civil Code (“**ICC**”) provides that “[t]he articles of association **may allow for participation in the shareholders' meeting by means of telecommunications** or voting by correspondence or electronically. Those who cast their vote by correspondence or by electronic means are considered to have attended the shareholders' meeting”.

The new Guidelines which consist of two different parts: the first concerns the feasibility of the meeting through telecommunications, while the second concerns the way the minutes are drawn up, state as follows:

Participation in the shareholders' meeting through telecommunications - where permitted by the Articles of Association pursuant to Article 2370, paragraph 4 of the Italian Civil Code, or in any case permitted by law and the regulations in force - may concern all participants in the meeting, including the chairman, it being understood that, the secretary taking the minutes or the notary must be at the venue indicated in the notice of the Shareholders' Meeting, together with the person(s) appointed by the chairman to ascertain who is (are) attending in person (provided that this task is not entrusted to the secretary taking the minutes or the notary).

The clauses of the Articles of Association that provide for the presence of the chairman and the secretary in the place where the meeting is convened (or in any case in the same place) must be understood to be functional to the simultaneous formation of the minutes of the meeting, signed by both the chairman and the secretary. Therefore, such clauses do not prevent the meeting from being held with the participation of all the participants through telecommunications, in which case the minutes of the meeting may be drawn up subsequently and executed by the chairman and secretary, or with the sole signature of the notary public in the case of a public deed.

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According to the Guidelines, therefore:

- (i) A shareholders' meeting may be held using telecommunications if provided for in the by-laws or if "*permitted by law and the regulations in force*". Two remarks can be made in this regard: (a) the first is that, the aforementioned Decree of the President of the Council of Minister of March 8, 2020, as well as Law Decree No. 18/2020 open up the possibility of a shareholders' meeting through telecommunications even in the absence of an explicit provision in the by-laws, at least for the period of validity of the exceptional regulations against the spread of the Coronavirus and (b) the second is that, applying the Guidelines of the Notarial Board of the Triveneto (*Consiglio Notarile del Triveneto*) according to which "*in case of limited liability per shares company so-called "closed" (i.e. with limited number of shareholders, not listed on any stock exchange), even in the absence of a specific provision in the articles of association, it must be considered possible to participate in the shareholders' meeting using telecommunications, provided that the principles of the collegial method are effectively respected*" (Guidelines H. B. 39). It would seem that the meeting may be held through telecommunications, even if the by-laws do not mention it, in order to facilitate the functioning of the board and, obviously, in full compliance with the collegial method;
- (ii) **All participants may use a remote connection, including the Chairperson;**
- (iii) The person who draws up the minutes of the meeting, notary or secretary of the meeting, must be at the venue where the meeting is called. In this regard, it is important to check the content of the clause of the by-laws concerning the place where the meeting is called; in fact, unless the registered office is exclusively provided for, it is conceivable that the place of the meeting is the registered office of the person who drafts the minutes, especially if the latter is a notary;
- (iv) The Chairperson may delegate to the person who drafts the minutes or to third parties (who must be at the place where the meeting is called) the task of recognising those attending. As has already been stated several times in legal literature, the Chairperson may have additional collaborators and consultants with respect to the company secretary, with the provision, especially in companies with a large number of shareholders, of a permanent structure to help him/her perform the functions assigned to him/her, especially when **the meeting is held with participants located in different locations and connected by telecommunications systems such as videoconferencing.**

With regards to the minutes of the meeting, it should first be pointed out that no rule requires the secretary and the chairperson to be present in the same place. On this point, the *Consiglio Notarile di Milano* excludes that clauses requiring the presence of the secretary and the chairman in the same place set a requirement for the validity of the meeting and of the minutes, since it is not necessary for the minutes to be drawn up at the same time as the meeting.

Basically, the Guidelines limit the applicability of such provisions of the by-laws only to the extent where it is necessary by law or opportunity that the minutes are taken simultaneous to the meeting, while in any other case there is no need for the minutes to be taken at the same time of the meeting and the minutes are drawn up by public deed by the notary public or with the signature of the Chairperson and secretary after the meeting.

Further to the above, it must now be said that some initial comments seem to extend the possibility of an entirely telematic meeting also to meetings of the boards of directors.

It should also be remembered that, limited liability companies may always, if provided for by the Bylaws, avail themselves of the voting procedures in writing, i.e. by written consultation or express written consent pursuant to Article 2479, paragraph 3, of the Italian Civil Code.

Lastly, it should be noted that Article 106 of Decree Law no. 18 of March 17, 2020 on "*Measures to strengthen the National Health Service and economic support for families, workers and businesses related to the epidemiological emergency by COVID-19*" (also known as "*Cure Italy*"), in addition to deferring the deadline for convening the Shareholders' Meeting to approve the financial statements for the year ended as at December 31, 2019 to June 28, 2020 (which falls on a Sunday), also provided, exceptionally, that:



- (i) the notice of the Shareholders' Meeting for all corporations, also as an exception to differing provisions of the by-laws, shall provide for "*the casting of the vote by electronic means or by correspondence and the participation in the shareholders' meeting by telecommunications*" (art. 106, paragraph 2);
- (ii) the Shareholders' Meeting of corporations is to be held exclusively by telecommunications (art. 106, paragraph 2);
- (iii) it is not necessary that "*the chairperson, secretary or notary public be in the same place*" (art. 106, paragraph 2).
- (iv) limited liability companies by stocks (*società a responsabilità limitata*) may, in any case, use the written consultation method or express written consent process to resolve on corporate matters in place of the meeting, even if the company's by-laws do not provide or provide otherwise or, in the event of a request by one or more directors or a number of shareholders representing at least one third of the share capital, that the meeting be held in the form of a live meeting (art. 106, paragraph 3);
- (v) as for listed companies and companies with shares widely distributed among the public, the representative provided for by Article 135-undecies of Legislative Decree No. 58 of February 24, 1998 (TUF) may be appointed "*even if the Bylaws provide otherwise*" (Article 106, paragraphs 4 and 5);
- (vi) the notice of the Shareholders' Meetings of listed companies or companies with shares widely distributed among the public, shall provide that "*attendance at the shareholders' meeting shall be conducted exclusively through the designated representative [...]*". (Art. 106, paragraphs 4 and 5);
- (vii) as an exception to the limit of proxies provided for by-laws of cooperative banks, cooperative credit banks, cooperative societies and mutual insurance companies, the representative provided for by Article 135-undecies TUF may be designated and the shareholders' meeting may be held with the exclusive intervention of the designated representative (Article 106, paragraph 6)

It is important to note that, the provisions summarised above pursuant to art. 106, paragraph 7 apply exclusively to "[...] shareholders' meetings convened by 31 July 2020 or by the date, if later, until the state of emergency on national territory relating to the health risk associated with the outbreak of the COVID-19 epidemic is effective".

FINAL REMARKS

The deadline for convening the Shareholders' Meeting to approve the financial statements is postponed by 180 days (to 28 June 2020) by force of law, therefore it is not necessary to hold a specific meeting of the Board of Directors to justify the postponement.

Pursuant to Legislative Decree no. 18 of March 17, 2020, the Shareholders' Meetings for the approval of the financial statements as at December 31, 2019 and any other Shareholders' Meetings convened by July 31, 2020 in ordinary or extraordinary session of corporations may be held in derogation of the provisions of the law or the companies' by-laws using telecommunications or by using voting methods that do not require the physical presence at the Shareholders' Meeting.

With regards specifically to limited liability companies by shares (*società per azioni*), the possibility that a shareholders' meeting may be held entirely by electronic communications, in accordance with the Guidelines of the Milan Notarial Board is, in any case, always an option that can be exercised, even beyond the period referred to in Law Decree no. 18 of 17 March 2020, or in the presence of clauses in the companies' by-laws with different addresses.

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