

New rights for minority shareholders in listed companies

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Introduction

On January 27 2010 a legislative decree to implement the EU Shareholders' Rights Directive (2007/36/EC) amended certain provisions of the Civil Code and the Consolidated Finance Law (Legislative Decree 58/98). The revised rules have applied to shareholders' meetings called since October 31 2010.

The aim of the reform is to encourage investment in listed companies by allowing for greater participation in shareholders' meetings by minority shareholders and non-resident investors. It makes a minority shareholding a more attractive opportunity, especially for certain investors, such as investments funds, which generally prefer not to assume the risks of company management. This update summarises the main amendments that affect listed companies' bylaws and regulations on shareholders' meetings.

Compulsory, potentially necessary and optional amendments

Companies should be aware of the distinction between optional amendments and compulsory amendments, the latter including amendments that may be deemed necessary in order to comply with the new provisions.

The only strictly compulsory provision requires a company to nominate at least one means of electronic communication whereby a shareholder can nominate a proxy for a shareholders' meeting (pursuant to Article 135(9) of the law).

The amendments that may be deemed necessary in order to comply with certain new provisions relate to:

- the publication of notices to call shareholders' meetings;
- the right of minority shareholders to call a meeting and amend the agenda;
- the right of attendance and voting rights;
- the quorum needed to pass resolutions on agenda items;
- the use of proxies; and
- the time limit for proposing lists of directors for appointment.

The optional amendments affect:

- the right to issue a single call for a meeting;
- electronic voting;
- shareholder identification;
- the approval of financial statements within 180 days of the end of the fiscal year;
- the removal of the requirement to appoint a representative for voting proxies; and
- the right to increase the dividend for certain categories of share.

Main amendments

Timing and content of call notice

As provided for in Article 125(2) of the law, new time limits have been set for the call notice, depending on the agenda of the shareholders' meeting:

- If a meeting is called to pass resolutions for the appointment of directors and statutory auditors, the call notice must be issued at least 40 days before the meeting;
- If a meeting is called to reduce the corporate capital as a result of losses or to appoint liquidators, the call notice must be issued at least 21 days before the meeting; and
- If a meeting is called to adopt defensive measures against a hostile acquisition, the call notice must be issued at least 15 days before the meeting.

In addition to the date, time and place of the meeting and an indication of the items to be discussed, the call notice must include:

- a clear and detailed description of the procedures that shareholders must follow in order to take part and vote in the meeting, including provisions on:
 - the right to ask questions;
 - the right to add items to the agenda;
 - the procedures for proxy voting; and
 - the procedures for electronic and postal voting;
- the record date (ie, the date by which a participation in the company must be owned in order for the holder to take part and vote in the meeting);
- the procedure for accessing information on the matters on which resolutions are to be passed, as well as reports and other documents to be discussed;
- the company's website address; and
- other information as required by the National Commission for Listed Companies and the Stock Exchange (CONSOB).

In order to ensure faster access to relevant information without discrimination between shareholders, the call notice and any additional information and documents that may be useful (eg, a proxy form) must be published on the company's website.

New shareholder rights

According to the amended Article 2367 of the code, shareholders representing at least 5% of the company's corporate capital may require the directors to call a shareholders' meeting. Furthermore, shareholders can ask questions before the shareholders' meeting about items on the



agenda, unless the 'frequently asked questions' section of the company website already provides clarification on the issue.

The amended Article 126(2) of the law relates to the right of shareholders that represent at least 2.5% of the corporate capital to ask for an item to be added to the agenda. They must present a written request, supported by their own report, within 10 days of the meeting being called. This period is halved for matters relating to the reduction of capital due to losses, the reduction of capital below the legal minimum and the appointment or removal of liquidators.

Representation

The amendments to Article 2372 of the code have removed a number of prohibitions and limitations on listed companies. The changes mean that:

- a listed company's bylaws may not preclude representation at shareholders' meetings;
- the prohibition against granting rights of representation to members of administrative and managing bodies no longer applies; and
- limits on the maximum number of shareholders that one person can represent no longer apply.

Furthermore, in order to encourage shareholder involvement, listed companies must indicate in their bylaws at least one method whereby shareholders may submit details of proxy representation electronically.

Article 135(11) of the law states that unless the bylaws provide otherwise, a listed company's call notice must indicate a person appointed by the company who can act as a proxy. Instructions may be given on the exercise of the shareholder's voting rights, even if such instructions relate specifically to certain items on the agenda. The law also provides that proxy status must be conferred at least two trading days before the meeting by completing an online form (the required contents of which are set out in CONSOB regulations). Articles 134(2) and (3) of CONSOB Regulation 11971/1999 (as updated in January 2011) state that in certain circumstances the representative may vote against his or her instructions if important new information comes to light in the course of the meeting.

Record date

Article 83(6) of the law introduced the record date to identify shareholders that are entitled to attend a shareholders' meeting and vote on items on the agenda. The intermediary must indicate such shareholders by means of the required communication according to the data available at the end of the seventh trading day before the date of the meeting.

Therefore, if shares are transferred between the record date and the date of the meeting, this does not affect the assignor's right to vote in the meeting, whereas the assignee may seek to revoke the assembly resolution and exercise its right of withdrawal.

Appointing directors

Article 147(3)(1)(2) of the law requires that lists for appointments to the board of directors be deposited at the company's registered office at least 25 days before the shareholders' meeting. Such lists must be made available at the registered office and on the company's website at least 21 days before the meeting and must comply with the formalities set out in CONSOB regulations.



Shareholder identification

The company's bylaws may provide a mechanism for identifying its shareholders, as set forth by Article 83(12) of the law, as long as a certain proportion of shareholders (ie, shareholders representing at least one-half of the number of shares prescribed by CONSOB in order to nominate directors) may ask - at any time - for information about the identity of shareholders and the size of their holding.

Article 83(11) requires the company to update the shareholder ledger within 30 days of receipt of communications and reports from financial intermediaries.

Approval of financial statements

Article 154(3) of the law previously required listed companies to publish annual draft financial statements, approved by the management body, within 120 days of the end of the fiscal year. Listed companies have now been given 180 days to approve their financial statements, pursuant to Article 2364 of the code. Such statements must be made available at the registered office, on the company's website and by any other means stipulated by CONSOB in other regulations.

Electronic voting

The new Article 2370 of the code allows listed and unlisted companies to provide for electronic voting in compliance with CONSOB regulations.

Single call and relevant quorum

A new provision in Article 2369 allows listed joint stock companies with an appropriate provision in their bylaws to issue a single call for a shareholders' meeting and to prohibit further calls. In such cases the applicable quorum is as follows:

- For an ordinary shareholders' meeting, no convening quorum applies and resolutions may be passed by an absolute majority of the shareholders present, although company bylaws may stipulate a quorum.
- An extraordinary shareholders' meeting is duly convened when shareholders that collectively hold at least 20% of the corporate capital are present (unless the bylaws stipulate a greater quorum). Resolutions may be passed by shareholders that collectively hold at least two-thirds of the capital represented in the meeting.

Increased dividends for certain categories of share

In order to encourage shareholder involvement in a company's business and in the supervision of its management, incentives have been introduced in favour of minority shareholders.

Shareholders that own less than 0.5% of the corporate capital (or a lower percentage indicated in the company's bylaws) are entitled to receive a higher percentage of profits, to within 10% of the profit distributed to the other categories of shareholder. This incentive does not create a special category of shares for the purpose of Article 2348 of the Civil Code and the relevant shareholders are not required to attend a special meeting. Shares in this category may not be granted to shareholders that exercise a controlling influence over the company, whether directly or jointly with other shareholders pursuant to a specific shareholders' agreement.



However, some commentators argued that this provision may be unconstitutional. It arguably represents an exercise of power beyond governmental remit under Article 76 of the Constitution, as Parliament delegated the government to implement the directive, which does not include provisions that affect shareholders' financial rights, profits or dividends. Moreover, the provision may contradict Article 3, as the right to increase dividends in relation to certain shares is granted to listed companies only - it could be argued that it is unconstitutional to grant a right that does not also apply to other stock companies. Moreover, the incorporation of the controversial provision into a listed company's bylaws could raise questions in relation to the right of withdrawal of shareholders that object to such a provision.

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