



Client Alert | Capital Markets

Italy

COVID-19: Consob issues operational guidelines to the market on how to conduct shareholders' meetings

April 2020

On 10 April 2020, by communication No. 3/2020 ("**Communication**"), **Consob** provided the market with some operational guidelines on how to conduct ordinary and extraordinary shareholders' meetings.

The Communication calls on listed companies to ensure that all shareholders be afforded the conditions for participation and remote voting, using at least one among the various instruments set out in Article 106 of Decree-Law No. 18 of 17 March 2020 ("**Cura Italia Decree**") such as **electronic or postal voting, remote participation by telecommunication means and recourse to the designated representative** under Article 135-*undecies* of Legislative Decree 58/1998 ("**Consolidated Law on Finance**"- "**TUF**")¹.

The Communication has proved necessary in the light of the recent provisions introduced by law-makers by Article 106 of the *Cura Italia Decree*, setting out a specific discipline aimed at regulating the terms and conditions of the current shareholders' meeting season, reconciling the right of shareholders to participate and vote at meetings with the security measures imposed in relation to the COVID-19 epidemic².

¹ In this regard, reference is made to the provisions of Article 127 of the TUF ("*Postal or electronic voting*"), Article 135-*undecies* of the TUF and the relevant implementing provisions contained in the Issuers' Regulation concerning: (i) voting by correspondence (Articles 140 *et seq.* of the Issuers' Regulation); (ii) recourse to one or more forms of participation in shareholders' meetings through electronic means (Article 143-*bis* of the Issuers' Regulation); (iii) exercise of the right to vote before the shareholders' meeting using electronic means (Article 143-*ter* of the Issuers' Regulation); (iv) recourse to the designated representative under Article 135-*undecies* of the TUF (Article 134 of the Issuers' Regulation).

² See our alert published on 18 March 2020 "*Extension of deadlines to 180 days, remote voting and designated representative for listed issuers*".

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Concerning the aforementioned **participation and remote voting instruments**, Consob drew the attention of issuers to the provisions requiring the **confidentiality of voting until the start of the ballot count at the meeting**, both with regard to voting by correspondence and exercise of the vote before the shareholders' meeting pursuant to Article 143-*ter* of Consob Regulation 11971/1999 ("**Issuers' Regulation**") and with regard to proxies with voting instructions given by shareholders to the designated representative³.

Concerning the **identification of the persons entitled to participate and vote at the shareholders' meeting**, Consob specified that, pursuant to Article 106, paragraph 2, of the *Cura Italia* Decree, companies may exclusively use telecommunication means provided that the identification of the persons participating in the shareholders' meeting by such means is guaranteed.

In respect of the cases where companies provide for participation in shareholders' meetings **only through the designated representative** pursuant to Article 135-*undecies* of the TUF, Consob highlighted the necessity that all proposed resolutions on each item on the agenda be published before the meeting, in time to allow shareholders to exercise their voting rights by a proxy given to the designated representative (in time for any adjustment to the relevant proxy form). Therefore, according to the Authority, the agenda must be worded analytically so as to allow shareholders to vote by proxies given to the designated representative in respect of each item on which a shareholders' meeting resolution is required. In this regard, Consob pointed out that, if the explanatory reports under Article 125-*ter* of the TUF do not contain any proposals as to any item on the agenda with regard to certain choices attributed to the shareholders' meeting under the law or the bylaws, thus excluding direct participation of the shareholders in the meeting, in order to allow the collection of voting proxies on each item on the agenda, the following will be required:

- the resolution proposals of the majority shareholders must be sent to the company well in advance of the date of the shareholders' meeting or in accordance with the provisions of Article 126-*bis* of the TUF for shareholders with qualified shareholdings or at the time of submission of the lists, for matters related to the renewal of corporate bodies, or within any deadline set out by the company in the notice of call for submission of individual resolution proposals;
- with specific reference to shareholders' meetings for renewal of corporate bodies, those submitting lists of candidates to be appointed as directors and/or statutory auditors

³ More specifically, reference is made to the provisions whereby the chairman of the supervisory body and any employees and assistants of the same are responsible, up to when counting starts at the meeting, for the safekeeping and secrecy of ballot cards and revocation declarations, in case of voting by correspondence, and for the safekeeping and confidentiality of the information regarding the votes exercised (and any revocations made) by electronic means before the shareholders' meeting is held; reference is also made to the provisions concerning the issue of proxies to the designated representative, whereby the latter is responsible for ensuring the confidentiality of voting instructions until the start of the ballot count at the meeting, without prejudice to the possibility to notify such information to any employees and assistants that may be subject to the same confidentiality obligation.



must specify the candidate they intend to propose to the shareholders' meeting as chairman of the management body, if such choice is up to the shareholders' meeting under the bylaws, **and/or as chairman of the board of statutory auditors**, if the list is a "minority list".

Concerning the submission of **individual proposals for resolutions on the agenda items** at the shareholders' meeting, pursuant to Article 126-*bis*, paragraph 1, third period, of the TUF, in cases where participation is provided for to take place exclusively through the designated representative under the *Cura Italia* Decree, Consob announced that:

- it is not possible to directly submit individual proposals at the shareholders' meeting through the designated representative;
- at this stage, where, due to health reasons, the physical participation of shareholders in shareholders' meetings can be precluded, companies may provide for an adequate deadline in the notice of call for the submission of individual proposals for resolutions on the agenda items by those having the right to vote, to be published on the company's website; such deadline shall be identified in such a way as to allow shareholders to vote by proxy through the designated representative on each published proposal for resolution.

As is known, in derogation from Article 135-*undecies*, paragraph 4 of the TUF - pursuant to which the designated representative may be granted powers exclusively to the extent and for the purposes of the same article - the *Cura Italia* Decree has provided that **the designated representative can also be granted proxies and/or sub-delegations** under Article 135-*novies* of the TUF, **as the sole representative of an individual shareholder**. However, Consob pointed out that the representative designated by the company may only be granted **proxies with voting instructions** on the individual agenda items to be voted on and that the proxies or sub-delegations under Article 135-*novies* of the TUF to the designated representative must include voting instructions to be deemed effective.

With specific reference to the **right to pose questions before the shareholders' meeting** pursuant to Article 127-*ter* of the TUF, it should be noted that the aforementioned provision, as recently amended by Legislative Decree No. 49/2019⁴, provides for two different and alternative deadlines for submission of questions by those entitled to vote (i.e., the shareholders who are such also on the date of the "record date" under Article 83-*sexies*, paragraph 2, of the TUF). The choice between the two deadlines is left to the issuers and must be specified in the notice of call of the shareholders' meeting, pursuant to the aforementioned Article 127-*ter* of the TUF, to allow the shareholders to be aware of the same. That being said, Consob specified that, should a company opt for the exercise of voting rights exclusively through the designated

⁴ Reference is made to Legislative Decree No. 49 of 10 May 2019 ("*Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement*").



representative or by correspondence, i.e. without the physical participation of the shareholders in the meeting, one of the possible options to balance the company's interest in having sufficient time to reply to the questions and the shareholders' interest in knowing the replies prior to the expiry of the deadline for granting or revoking proxies to the designated representative, is the option - already chosen by several companies - of providing for the time limit of seven open market days before the shareholders' meeting under Article 127-ter, paragraph 1-bis, of the TUF for the submission of questions, assessing the **possibility of reducing, even if only slightly, the time available to the company for replying** (at least two days before the shareholders' meeting pursuant to Article 127-ter, paragraph 1-bis, of the TUF), so as to provide replies prior to the expiry of the aforementioned deadline for conferring or revoking proxies.

With regard to proxies, Consob pointed out that the **rules governing solicitation of voting proxies** under Articles 136 *et seq.* of the TUF, as implemented by Articles 135 *et seq.* of the Issuers' Regulations, **remain unchanged also in the event that companies were to decide to allow participation in the shareholders' meeting exclusively through the designated representative**. Consequently:

- pursuant to Article 138, paragraph 1, of the Issuers' Regulations, solicitation may not be carried out by sending a proxy form relating to the solicitation directly to the designated representative;
- for the voting at the shareholders' meeting, the proxies collected as part of the solicitation shall be conferred by the promoter to the representative designated by the company by way of sub-delegation pursuant to Article 135-*novies* of the TUF;
- in the event that sub-delegation to the designated representative is envisaged, the provisions that allow the promoter - in the cases under Articles 137, paragraph 3 and 138, paragraph 4, of the Issuers' Regulations - to exercise voting rights in a manner different from that proposed, if expressly authorised by the solicited party, if significant events occur that were not known when the proxy was being issued, and cannot be communicated to the solicited party, and it may be reasonably inferred that if this party had known of these significant events, it would have given its approval, shall not apply.

Finally, according to Consob, due to the restrictive measures adopted by the Government in connection with the COVID-19 epidemic, which might involve delay on the part of intermediaries in transmitting the communications to issuers that are required for participation in shareholders' meeting and the exercise of voting rights, the provision of Article 83-*sexies*, paragraph 4, of the TUF, **"... the right to attend shareholders' meetings and the exercise of voting rights if communication has reached the issuer beyond the terms specified in this paragraph, providing it has been received before the start of the works of the meeting works held pursuant to single convocation"** remains unchanged.

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