Virtual(-only) shareholders' meetings in Italian listed companies: *quo vadis*?

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Abstract

The article focuses on the legacy, if any, once the pandemic crisis is over, of the Italian emergency legislation re: the participation in the shareholders' meeting by means of telecommunications, with particular attention to the regulation of listed companies. Specifically, the topic of virtual(-only) meetings is addressed with a view both to investigating the reasons for their scarce use by Italian listed issuers, and to understanding whether the ability to intervene remotely can become a default rule in Italy. To this end, after analyzing the peculiarities of the Italian legal system – which, de facto, have limited the "virtualization" of the meetings, given that, *inter alia*, in the absence of a specific express provision in the by-laws, a virtual-only meeting appears not to be admissible under Italian law –, possible solutions *de lege ferenda* that may justify a "generalized" regime of virtual meetings in the Italian system will be illustrated.

Key words: shareholders' meeting, virtual-(-only), Italian listed companies, technology

Sommario

Il contributo si concentra sulla possibile eredità della legislazione emergenziale, in tema di intervento all'assemblea dei soci da parte degli aventi diritto mediante mezzi di telecomunicazione, a crisi pandemica conclusa, con particolare attenzione alla disciplina delle società quotate. In particolare, il tema della "remotizzazione" dell'assemblea viene affrontato nell'ottica sia di indagare le ragioni dello scarso utilizzo da parte degli emittenti quotati in Italia delle adunanze virtuali, sia di comprendere se la facoltà di intervenire da remoto possa elevarsi a regola di *default*. A

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tal fine, dopo aver analizzato le peculiarità dell'ordinamento italiano (che, di fatto, hanno limitato la "virtualizzazione" dell'assemblea), atteso che, *inter alia*, in assenza di un'apposita espressa opzione statutaria, non parrebbe ammissibile allo stato un'assemblea *virtual-only*, si proverà a vagliare eventuali soluzioni *de lege ferenda* che potrebbero giustificare nel nostro ordinamento un'assemblea virtuale "generalizzata".

Parole chiave: assemblea, azionisti, virtuale, società quotate, tecnologia

1. The Covid-19 emergency legislation as a boost for virtual(-only) shareholders' meetings in Italy

The Covid-19 emergency led, among other things, to the adoption of social distancing measures which have severely limited the possibility of interpersonal contacts. Beyond the numerous negative repercussions (*i.e.*, economic, social, psychological and anthropological, many of which probably still need to be fully analyzed, especially in view of the medium-long term effects on entire segments of the population), from a corporate governance perspective this brought a further implication, which deserves to be investigated, especially for its possible future evolutions: that is, a significant acceleration towards a more widespread use of remote(-only) meetings of shareholders and board members.

With respect to the former, on which we focus in this paper, from the point of view of the interaction between technology and (corporate) law, this phenomenon is not entirely new: starting from the corporate law reform of 2003, the concept of "*attending the shareholders' meeting by means of telecommunication*" was introduced into the Italian legal system for joint-stock companies. Therefore, the novelty of the post-pandemic scenario lies in the fact that, due to the need to arrange emergency solutions that would minimize the physical co-presence of numerous people in the same place (in order to avoid potentially dangerous gatherings for general health and safety) and the immediate and massive use of technologies capable of facilitating the achievement of this objective, a number of relevant legal institutions (and related legislative provisions), in terms of methods of participation of the shareholders in their meetings, previously mostly relegated to a marginal position (and therefore having largely theoretical relevance), were substantially revitalized.

With specific regard to remote meetings, thus, any query about their admissibility has become ultimately obsolete; the real questions now are the following: (i) is a virtual-only meeting valid? (ii) can this option be "imposed" on the shareholders?

Considering that what had been conceived as a temporary discipline has then converted into a steady regulation (for four and potentially more years)[1], it may be worth reflecting on the possible durable effects of the emergency provisions. Also, because it is now common opinion among Italian legal scholars, even those who traditionally opposed to virtual-only shareholders' meeting in joint-stock companies, due to the alleged existence of legislative hurdles to their implementation, that there appear not to be any real practical reason to prevent the (exclusive) use of information technology in that respect.

However, if we consider the specific context of Italian listed companies and test these preliminary reflections against the empirical data collected during the time period covered by the application of the aforesaid emergency provisions, we realize that, unlike closed companies, where use of telematic meetings (mainly in the form of two-way simultaneous videoconferencing) has been extensive, virtual-only shareholders' meetings for Italian listed companies has largely remained a theoretical option, mainly ignored by them.

In addition, if one looks beyond national borders, one notices a completely different panorama compared to the domestic one: indeed, not only the vast majority of listed companies in Europe have opted for – and held – virtual meetings during the Covid-19 emergency, but also, for example with specific reference to Germany, legislative amendment proposals have been presented (and later adopted) to make remote participation as the ordinary form of attending the meeting for the shareholders.

Hence, a further question that may be worth asking concerns the reasons for such a scarce use by Italian listed companies of remote meetings. Reasons that, considering the opposite trend that emerged in the rest of Europe, must be somehow related to circumstances endogenous to the Italian (legal?) system and which, in our opinion, can be grouped in the following three main categories: (i) legislative obstacles; (ii) "structural" obstacles; (iii) technical obstacles.

As to the first category, we refer to those barriers relating (a) specifically, to the emergency regulation concerning listed companies (that contemplat-

[1] We refer to the so-called "Cura Italia" decree (Legislative Decree no. 18, dated 17 March 2020, containing "*Measures to strengthen the National Health Service and economic support for families, workers and businesses connected to the epidemiological emergency from COVID-19*", converted, with amendments, into Law no. 27 dated 24 April 2020, the effects of which were most recently extended (i) until 31 July 2022 by virtue of Legislative Decree no. 228 dated 30 December 2021, converted, with modifications, into Law no. 15 dated 25 February 2022, and eventually (ii) until 31 July 2023 by virtue of Legislative Decree no. 198 dated 29 December 2022 (so-called "Milleproroghe" Decree), converted into Law no. 14 dated 24 February 2023.

ed the possibility to have recourse to the so-called "*rappresentante designato*" pursuant to art. 135-*undecies* of the Italian Consolidated Law on Finance), and (b) more generally, to corporate law applicable to all joint-stock companies (that leaves the choice of holding virtual meetings to a specific opt-in clause in the by-laws, in the absence of which the majority of Italian scholars interpret the remainder of relevant provisions as banning such possibility).

As to the second category, we refer to the combined effect of, on the one hand, the policy option (adopted by the Italian legislator) not to indicate specific criteria or guidelines to help drafting the relevant clauses of the by-laws, and, on the other hand, the morphology of the Italian ownership structure, in respect of which, being many Italian listed companies still mainly guided by (individual or blocks of) controlling shareholder(s), they probably have little incentive to amend their by-laws in that respect, absent any regulatory obligations.

As to the last category, we refer to the uncertainty surrounding the effects on the validity of the decisions adopted by a shareholders' meeting affected by possible disservices and malfunctions concerning the activation and stability of remote connections and identification of the participants.

2. The impacts of the "Cura Italia" decree on the pre-existing regulatory framework

Before 2020, Italian law concerning the remote attendance to the shareholders' meetings – mainly resulting from a couple of major interventions in 2003 and 2010 – was essentially based on the following principles.

First, teleconference meetings were merely an option for both companies and their shareholders, as this possibility existed only to the extent it was expressly provided for in the by-laws. Conversely, said by-laws could never impose electronic instead of physical attendance.

Secondly, the legislator, simply limiting to allowing the aforesaid opportunity but refraining from dictating a more precise discipline, omitted to regulate important aspects of the remote attendance (in terms, for example, of calculating the relevant quorums of shareholders who would be physically "absent", but remotely "present"; of the validity of the decisions adopted in such meeting in the event of failure of the signal and/or the connection, and liability arising therefrom, if any). Due to the intrinsic difficulty and the uncertainty in drafting the specific clauses concerning such item, coupled with the risk of possible litigation, which companies had to face, this has ultimately ended up in discouraging their opt-in.

A third significant aspect, though not strictly related to the technological dimension of the attendance to their meeting by the shareholders (but which will turn out to be decisive in the subsequent emergency legislation), concerned the possibility for Italian listed companies to designate a representative (that is, the "*rappresentante designato*" pursuant to Section 135-*undecies* of the Italian Consolidated Law on Finance) to whom those shareholder who would prefer not to attend the meeting in person could have empowered (and duly instructed as to voting) this individual to participate and vote on their behalf.

In 2020, the "Cura Italia" decree introduced some significant innovations. More specifically, Section 106, paragraph 2, not only allowed all companies (including listed ones) to provide, in the call notice of the shareholders' meetings, even by way of derogation from their by-laws, the possibility to attend said meeting by means of telecommunication but has also authorized the use of such means on an exclusive basis, preventing any physical participation whatsoever. On the other hand, Section 106, paragraph 4 (dedicated only to listed companies), prescribed that attendance at the shareholders' meeting could take place exclusively through the (duly empowered, by means of appropriately granted proxies) "*rappresentante designato*" (pursuant to Section 135-*undecies* of the Italian Consolidated Law on Finance).

The implications of this emergency legislation – which however, due to the continuation of contagion risks, eventually turned into the "normally" applicable law for the last three years – are, at least, two-fold.

First, the centrality of the by-laws has been reduced, as it is mandated that the (different) legislative provisions prevail. At the same time (and as a consequence of the above), the competent decision-making body in respect of the technologization of the shareholders' meeting shifted towards the board of directors, as any decision in relation thereto was left to the call notice of the shareholders' meeting, which is typically an act under the responsibility of the directors.

Secondly, with specific regard to listed companies, the feeling is that the "Cura Italia" decree has realistically taken into account the fact that the imposition (although seemingly disguised by mere option) of virtuality would have been at least premature for most Italian companies and would have placed them at a serious risk of non-compliance. Therefore, although it may have deprived them of a unique opportunity for rapid modernization, forcing them to make an immediate technological leap forward to set up remote meetings, the legislator preferred to preserve a bulwark of physical presence in the meeting, "exhuming" an institution already present in our legal system, but actually very little used by issuers, *i.e.*, the "*rappresentante*

designato": then, the real novelty of the "Cura Italia" decree consists of the option for issuers to mandate, in the call notice of the shareholders' meeting, that participation in said meeting could only take place through the "*rappresentante designato*".

Therefore, if the pragmatism of the legislator must obviously be recognized, probably ascribing to it the merit of having allowed many shareholders' meetings of listed companies to be held, at the same time it cannot be overlooked that this took place "at the expenses" of many prerogatives of the shareholders in the meeting, which, with the method of "forced" delegation to the "*rappresentante designato*", suffered the maximum reduction: in fact, the most recurring ritual consisted in the reading of the resolution proposals by the chairman of the meeting, followed by the vote expressed by the "*rappresentante designato*", in the absence of any discussion of the items on the agenda, with an evident deviation from the physiological functioning of the meeting.

From a corporate governance perspective, even though the specific health emergency might have played a pivotal role, it is worth emphasizing that the choices of the legislator might lead to the conclusion that the technologization of the shareholders' meetings may (necessarily?) imply a significant lessening of shareholders' participation rights, other than voting.

3. The way forward

Ultimately, the emergency legislation significantly changed the pre-existing regulatory landscape in two main respects: first, it rebutted the "presumption of physicality" of shareholders' meetings; secondly, it "forced" shareholders to take part remotely to their meetings.

However, with regard to listed companies, this simpler regime did not enjoy the wide implementation that one could have expected in hindsight.

In light of such a failure, the following four remarks deserve to be emphasized.

First, the virtualization of shareholders' meetings in joint-stock companies – albeit with a significant dichotomy between closed and listed companies – is already a fact, even *de lege lata*. Indeed, the current legislative framework allows the "hybrid" meeting – that is, in which some shareholders are present in person in the place where the meeting is physically convened, while others are connected remotely, according to the indications received in the call notice – to be considered admissible; yet it can be easily predicted that in the next future this may represent the main method of organizing shareholders' meetings. To the extent the option to connect remotely is "additional" in re-

spect of that to physically attend the meeting, no coercion can be said to be imposed on the shareholders (so as to require their express consent): at that point, this solution (up to the extreme of a total remote participation of those entitled to attend the meeting) may tend to prevail in the medium term especially in closed companies – for which most of the "obstacles" mentioned above either do not arise *tout court* or are, in any case, compensated by a number of logistical and organizational advantages.

On the other hand, virtual-only shareholders' meetings cannot be considered currently admissible, in light of numerous existing legal provisions mainly interpreted such as postulating (or at least assuming) a necessary (even only partial) "physicality" of the meeting. However, this does not automatically mean that they cannot have *tout court* any right of citizenship in our legal system, especially under a *de iure condendo* perspective. Indeed, given that there are no real reasons for such ban, but only regulatory obstacles, having ascertained that the last three years have demonstrated that remote meetings are in fact almost equivalent to physical meetings, and without prejudice to the required legislative coordination (and adjustments), the current opt-in regime may be converted into an opt-out one, making the virtual shareholders' meeting as the default legal option, although waivable by individual companies.

Secondly, a next technological step, further propelling remote meetings, could be the use, on a large scale, of the blockchain technology. Indeed, if some of the main problems associated with the shareholders' meeting process are attributable to transparency (of the procedure), identification (of the shareholders entitled to attend) and verifiability (of the votes), blockchain appears to be helpful: the issuer could have a better knowledge of the identity of its shareholders; undoubted advantages in terms of time, costs, transparency and accuracy of the vote may be achieved; shareholders' participation may be encouraged and, therefore, more effective decision-making power may be exercised. Conversely, however, if it is good to place adequate expectations in the evolution of technology, we must not fall into the "*Tech Nirvana Fallacy*", that is, in short, the fideistic, perhaps naive, belief that new technologies can *de plano* solve traditional corporate governance issues. And in this case, the risk exists: in fact, it is yet to be demonstrated that accuracy and certainty of the votes, immediacy of intervention and voting, direct dialogue and absence of intermediation, while desirable *per se*, are elements capable of motivating, at least in part, rationally apathetic shareholders to participate to the meeting, overcoming their typical reluctance.

Thirdly, it is therefore necessary to ask whether, from a policy perspective, a greater opening of the legal system to virtual shareholders' meetings, especially in listed companies, corresponds to interests worthy of protection.

On this point, the possibility of remote attendance could represent an incentive to participate in the meetings especially for minor institutional investors and retail shareholders. This, in turn, may help pursuing the goal of increasing the degree of accountability of the agents (*i.e.*, directors) towards the principals (*i.e.*, shareholders), as a result of greater monitoring of the latter on the former. Therefore, the legislator's objective to remove as many "obstacles" as possible to electronic participation (and voting) can still be considered viable: as such, a possible way to pursue it, without necessarily passing through a new emergency legislation – in the event of a future resurgence of the pandemic, if any – which, being an emergency (as a synonym of "hasty") measure, would probably replicate the "defects" of the previous one[2], could be to resort, perhaps for a limited period of time, to a sort of regulatory sandbox, under the initiative of the competent Supervisory Authority. In this way, the right environment could be created for issuers to experiment, in terms of technological innovation, the new frontiers of remote participation, while shielding them from those risks mentioned above, which have probably represented the main reason for the resistance of Italian listed companies to virtual shareholders' meetings.

Lastly, especially in the event the path of enhancing virtual meetings is pursued, it would be crucial to questioning about the role of the shareholders' meeting in Italian listed companies. Indeed, if we assume that shareholders no longer meet there to dialectically discuss their respective initial voting intentions and express their vote on the main decisions submitted to them (by the board of directors), then the virtual meeting can even amplify the drift towards a metamorphosis of the assembly into an organ in which choices taken elsewhere are ratified and formalized. The feeling is that the more recourse to remote participation is strengthened, the more the prerogatives of shareholders other than the right to vote are weakened or, at least, are reshaped to be protected mainly outside the shareholders' meeting.

On the other hand, the experience of the shareholders' meetings of listed companies reveals that rarely – in specific circumstances or in relation to particular issuers – the meeting is where an effective debate takes place. Hence, the issue is whether to enhance the function of the meeting as dialectically mediating between multifaceted interests, which appears unrealistic and anachronistic, or, more radically, to modify the physiognomy of the decision-making process, providing for methods for adopting resolutions outside the meeting. In this sense, a possibility may contemplate a by-laws opt-out by the issuers to allow them to transform the shareholders' meeting

[2] That is what happened in 2023: see *supra*, nt. 1.

into a referendum-type mechanism, where the will of the participants, crystallized in the vote (expressed elsewhere), is ascertained.

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