TELECOM ITALIA S.P.A.
c.c. Mr Agostino Nuzzolo

Re: Supplementation by the Board of Statutory Auditors of the agenda for the shareholders' meeting of 24 April 2018 - Note.

Milan, 5 April 2018

EXECUTIVE SUMMARY

This note reviews the recent events regarding the supplementation of the agenda for the TIM shareholders' meeting called for 24 April 2018. The Board of Statutory Auditors ordered the supplementation, at the request of the shareholders linked to the Elliott fund. The opinion expressed here is that the decision made by the Board of Statutory Auditors does not comply with the law and the company bylaws for the following reasons:
(i) the resignations tendered by the majority of the members of the Board of Directors triggered the simul stabunt simul cadent *clause contained in the TIM bylaws;*
(ii) this clause requires the whole Board of Directors to be renewed: the items added to the agenda imply a breach of this obligation;
(iii) the clause also lawfully requires that, if a majority of the members of the Board of Directors should resign, only those members who have not voluntarily resigned shall remain in office until the whole Board has been renewed. The items added to the agenda therefore imply a resolution that is legally impossible, namely, the revocation of directors who will not be directors at the moment of the proposed resolution.

La presente nota esamina le recenti vicende relative alla integrazione dell'ordine del giorno dell'assemblea di TIM convocata per il 24 aprile 2018. L'integrazione è stata disposta dal

Collegio sindacale su richiesta di soci riconducibili al fondo Elliott. L'opinione che viene espressa è che la decisione assunta dal Collegio sindacale non è conforme alla legge e allo statuto per le seguenti principali ragioni:

(i) le dimissioni rassegnate dalla maggioranza dei componenti del Consiglio di Amministrazioni hanno attivato la clausola simul stabunt simul cadent prevista dallo statuto sociale di TIM;

(ii) la clausola statutaria impone l'obbligo di rinnovare il Consiglio di Amministrazione nella sua interezza: i punti aggiunti dell'ordine del giorno implicano la violazione di tale obbligo;

(iii) la clausola statutaria, inoltre, legittimamente dispone che, nel caso di dimissioni della maggioranza dei componenti del Consiglio di Amministrazione, rimangano in carica, fino all'integrale rinnovo del Consiglio stesso, solamente i componenti che non hanno volontariamente rassegnato le proprie dimissioni. I punti aggiunti dell'ordine del giorno, pertanto, implicano una delibera giuridicamente impossibile, e cioè la revoca di consiglieri che non saranno tali al momento della ipotizzata delibera.

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1. The facts and the wording of TIM's *simul stabunt simul cadent* clause

On 14 March 2018, shareholders' Elliot International LP, Elliott Associates LP and The Liverpool Limited Partnership asked for the agenda for the ordinary shareholders' meeting of the Company, already called for 24 April 2018, to be supplemented, by insertion of the following two items:

1. Revocation of the mandates of 6 Directors, in the persons of Arnaud Roy de Puyfontaine, Hervé Philippe, Frédéric Crépin, Giuseppe Recchi, Félicité Herzog and Anna Jones;

2. Appointment of 6 Directors, in the persons of Fulvio Conti, Massimo Ferrari, Paola Giannotti De Ponti, Luigi Gubitosi, Dante Roscini and Rocco Sabelli, to replace the directors whose mandates have been revoked pursuant to the preceding agenda item.

The Board of Directors of TIM on 22 March 2018 took note of the resignation of the Executive Deputy Chairman (and Chairman of the Strategy Committee) Giuseppe Recchi, with immediate effect.

During the same Board Meeting, seven other directors resigned with effect from 24 April 2018, *before* the start of the ordinary shareholders' meeting of the Company called to - inter alia - approve the financial statements for 2017, bringing the total number of resignations to eight of the fifteen directors.

On 24 April 2018 (the date resignations of the seven directors who joined Mr Recchi in resigning come into effect) the conditions specified in article 9.10 of the Bylaws of TIM will be fulfilled. This article states:

Should a majority of the seats on the Board of Directors become vacant for any cause or reason, the remaining Directors shall be deemed to have resigned and they shall cease to hold office from the time the Board of Directors has been reconstituted by persons appointed by the Shareholders' Meeting.

The Board of Directors of TIM has therefore decided, by majority, pursuant to the aforementioned art. 9.10 of the Bylaws, to call a further shareholders' meeting for 4 May 2018, to proceed with the reappointment of the entire board, without therefore proceeding to supplement the agenda of the shareholders' meeting of 24 April 2018 (to revoke and replace Mr de Puyfontaine, Mr Crépin, Ms Herzog, Ms Jones, Mr Philippe and Mr Recchi, who at the date will all have resigned and ceased to hold office). On this point, it should be recalled that the directors are unquestionably entitled to not comply with the obligation to call a shareholders' meeting at the request of minority shareholders, when the proposed topics are impossible or unlawful; this is an established principle in textbooks (CAMPOBASSO, *Diritto delle società*, Milan, 2009, note 7, page 310) and in the specialist literature (since SERRA, *L'assemblea: procedimento*, in *Trattato delle S.p.A.*, edited by Colombo Portale, vol. III, Turin, 1994, p. 75 et seq..; LIBERTINI-MIRONE-SANFILIPPO, *L'assemblea di società per azioni*, Milan, 2016, p. 135)

The requesting shareholders at this point in a letter to the Board of Statutory Auditors dated 23 March 2018, asking it to proceed with the supplementation itself. In their letter, the shareholders also asked for supplementation with an agenda that was *not the same*, in terms of content, as the agenda contained in the original request for supplementation.

The Board of Statutory Auditors, granting the request, unanimously decided to proceed, pursuant to art. 126-*bis*, subsection 5 of Legislative Decree 58/98, to supplement the agenda in the terms (which, as stated: were not the same as those requested earlier) indicated by Elliott on 23 March. These terms are as follows:

(i) Revocation of directors (to the extent necessary due to the chronology of the resignations that have in the meantime occurred during the board meeting on 22 March 2018 pursuant to article 2385, subsection one of the Italian Civil Code.);

(ii) *Appointment of six directors in the persons of Mr Fulvio Conti, Mr Massimo Ferrari, Ms Paola Giannotti De Ponti, Mr Luigi Gubitosi, Mr Dante Roscini and Mr Rocco Sabelli, to replace the outgoing directors Mr Arnaud Roy de Puyfontaine, Mr Hervè Philippe, Mr Frédéric Crépin, Mr Giuseppe Recchi, Ms Félicité Herzog and Ms Anna Jones.*

The Board of Statutory Auditors also formulated its own short explanatory note, in which it motivates its resolution, having found "*the existence of positions expressed both in case law (Milan Court) and in authoritative scientific doctrine and notarial maxims, suitable to support, in light of the coordinated reading of articles 2385 and 2386 of the Italian Civil Code, as well as clause 9.10 of TIM's Bylaws, the remaining in office even after the date of 24 April 2018 (the date their respective resignations come into effect)*" of the seven directors who had resigned, and of Recchi. Hence the argument about the lawfulness and the possibility of a resolution to revoke the same people, and about the lawfulness (although this was not particularly argued by the control body) of the possible appointment of new directors (six in number, and thus fewer than the number of outgoing directors) according to a vote to be passed by an ordinary legal majority, without slate voting.

I have been asked if in this context the supplementation of the agenda as ordered by the Board of Statutory Auditors in response to the requests made by Elliott International and others is lawful. The response requires careful reconstruction of the relationships between art. 2385, subsection one and Article 2386, the subsections four and five, of the Italian Civil Code, and an analysis of the content of the TIM *simul stabunt simul cadent* clause in light of the

provisions (contained in the system of art. 2386, subsections four and five) that legitimise it.

2. Article 2385, subsection one, of the Italian Civil Code.

As stated above, Elliott International and others asked for the agenda of the shareholders' meeting to consider TIM's financial statements to be supplemented *before* the new fact of the resignations of not only Mr. Recchi but also another seven directors, and thus of the majority of the Board, had occurred.

In my view, the resignations (with the consequent triggering of the TIM *simul stabunt* clause) make the request for supplementation pursuant to art. 126 of Consolidated Text 58/98 inadmissible. Elliott International and the Board of Statutory Auditors, however, consider that they are "saving" the request to supplement the agenda (although, as stated above, they have modified its wording), invoking the rule contained in article 2385, subsection one. This way forward is not practicable, however, firstly on account of the literal formulation of the discipline set out in article 2385, subsection one and in article 2386, subsection two, and even more so because the circumstance with which article 2385, subsection one is concerned differs radically from the legal foundation on which *simul stabunt* clauses are based.

So, let us first consider the literal plan, and recall, first of all, that article 2385 lays down that the resignations of directors ("renouncing") have immediate effect only if the majority of the Board remains in office. If instead it is the majority that resigns, then the resignations are postponed to the moment in which the majority has been reconstituted. This means that when the majority of directors resign, a shareholders' meeting must be called to replace them - as prescribed in art. 2386, subsection 2: this meeting must be called by the outgoing Board, including the directors who have resigned in *prorogatio*.

But the "system" of art. 2385, subsection one, does not seem to concede the possibility of "using" a shareholders' meeting (or a specific item on its agenda) planned for something radically different to be used to achieve the de facto result of reconstituting the majority that has resigned: and therefore, in the case

at issue, the replacement of directors for the wholly potential case of their prior cessation to hold office for a cause other than resignation (revocation).

Article 2385, subsection one should in fact be read, as stated above, with article 2386, subsection two. The former talks about the effects of cessation by resignation and tells us that if a majority resign then these resignations have effect from the reconstitution of the majority itself by the shareholders' meeting. The latter provision, art. 2386, subsection two, completes the first (art. 2385, subsection one) because it regulates the way in which the replacement must take place. Now, to achieve this replacement, article 2386, subsection two warns, the directors in office must call an *ad hoc* shareholders' meeting.

It therefore seems to be that, according to the clear literal wording of the provisions discussed here, a shareholders' meeting called *before* the resignations that *does not have* on its agenda the appointment of directors to replace directors who have ceased to hold office because they *renounced* said office cannot be used solely because there exists a shareholder's request to supplement the agenda of a shareholders' meeting that has already been called in order to consider the possible appointment of directors to replace a possible cessation consequent not on renouncing, but on a proposal for their revocation.

Therefore, based on art. 2385, subsection one, which as will be seen does not apply in this case - the call ordered by the Board of Statutory Auditors to replace the directors who have resigned: (i) would be in breach of article 2386, subsection two, since it in no way originates, as the article requires, from the directors who remain in office, namely, from the whole Board; (ii) prescribed a replacement of directors not in response to a cessation due to renunciation that had already occurred, albeit with deferred effect (as is the sense the combined reading of art. 2385 subsection one and article 2386, subsection two), but a replacement, if some directors had been revoked, insofar as they had, and, moreover, they do not exactly coincide with the directors who have resigned.

I stated that the agenda that was the object of the original request for supplementation made by Elliott and others "prescribed", because in effect the latest version of the agenda that is the object of the latest version of the

supplementation requested by Elliott seeks to correct the reference to "replacement by revocation" by removing it. But in doing so, the Board of Statutory Auditors is making an attempt to put the train back on track, but outside the maximum term (since the new and definitive version of the agenda was launched after the expiry of the term within which supplementation of said agenda may be requested). And in any event, the fact remains that the shareholders' meeting called to make the appointments *is not* the shareholders' meeting called by the subjects and in the ways prescribed by law for the reconstitution of a Board from which a majority of the directors have resigned.

3. In the case at issue, the provisions in article 2386 subsection four, of the Italian Civil Code, and of the *simul stabunt simul cadent* clause in TIM's bylaws apply in any event.

Also independently of the above reading of article 2385, it must in any case be stated that the logic followed by the Board of Statutory Auditors, and the choice it made, sensationally conflicts, contradicts and ignores the provisions of the law and the *simul stabunt simul cadent* clause in the bylaws.

Let's start with the law.

The lawfulness of clauses whereby the resignation of some directors entails the cessation of the whole Board was a matter of debate until 2003. With the 2003 reform, the Italian Civil Code categorised clauses that prescribe that the resignation of "certain" directors meant that the whole Board ceases to whole office in art. 2386. The law, and that is, art. 2386, subsection four, links the lawfulness of *simul stabunt* clauses with the "cessation" of certain directors. Without doubt, the term encompasses any reason for cessation, and therefore includes "renunciation", i.e. resignation, which is dealt with in article 2385, subsection one.

And then consider the bylaws. The TIM clause reproduced above aligns with the faculty granted by the law, because it connects to the premise that "a majority of the Directors cease to hold office for any cause or reason" - including therefore renunciation, resignation - the cessation of the whole Board ("the remaining directors shall be deemed to have resigned").

Article 2386, subsection four thus legitimises the derogation of the case presupposed by Article 2385, subsection one. In fact, the provisions of article *2385 do not in any way impose* the renewal of the *entire* Board, but impose only a "selective" intervention of the shareholders' meeting at the request of the Board of which the resigning directors are part, to add a sufficient number of directors to ensure that the majority of the Board has been appointed by the shareholders' meeting. The case authorised by article 2386, subsection four and adopted by the TIM bylaws is instead characterised by the circumstance that the loss of a majority cancels (it will be seen that, even if with effects that are wholly or partly deferred, it is always cancellation) the whole Board, in such a way that the shareholders' meeting is in that case called on to renew the whole board, and not just replace those directors who with their cessation have (legitimately) caused the cessation of the whole Board.

For our purposes, it must therefore be emphasised that based on what the Supreme Court had already confirmed (Cass. 5 September 1997), it became absolutely indisputable, with the 2003 reform (which introduced the fourth and amended the fifth subsection of art. 2386), that the *prorogatio* of the majority of the directors who had resigned in view of their "selective" replacement meaning the rule in article 2385, subsection one, is in no way a non-derogable principle of public law, but a principle that is wholly derogable. A derogability that, after 2003, was indeed expressly enshrined in the law itself in an unequivocal way, in art. 2386, subsection four (SANFILIPPO, *Commento agli artt. 2385 e 2386 c.c.,* in *Le società per azioni,* edited by P. Abbadessa and G.B. Portale, Milan, 2016, p. 1268*).*

A further conclusion imposes itself as the inevitable corollary of this statement about the specifically derogating nature of art. 2386, subsection four (and thus of clauses in bylaws that apply it) with regard to the case set out in article 2385, subsection one, insofar as it applies to a listed company like TIM.

In other words: reconstitution (not only of part, as required by article 2385, but) of the whole Board that has ceased to hold office must occur in a single context so as to make fully applicable the rule (and this really cannot be derogated) on slate voting, and thus permit the establishment of those relations

- majority - minority components, gender balance, the presence of independent directors etc., that are an essential feature of the law that applies to the administrative bodies of listed companies. If it were possible to recompose the whole Board of Directors with successive partial "top ups" the imperative law on the arrangements for the appointment of the boards of directors of listed companies would therefore be contravened. In yet other terms: if in response to the triggering of a *simul stabunt* clause (the company) attempts to recompose only the majority of the Board (attempting a legally impossible application of art. 2385, section one, also in an area in which it is derogated), this would contravene not only the scope and logic of the *simul stabunt* clause itself, but also the legally required checks and balances or, to put it another way, using modern terminology, would flout the diversity that must characterise the Board of a listed company.

Looked at in this way, all the ramifications of the supplementation of the agenda the Board of Statutory Auditors ordered, considered together, reveal the most radical reason for its unlawfulness: it introduces a mechanism for the replacement of directors that flagrantly contravenes the provisions in the bylaws and in the law on listed companies for the appointment of directors.

4. Corollary of the specific nature of article 2386, subsection four, compared to article 2385, subsection one.

Article 2385, subsection one, as stated above, not only presupposes that the resignation of a majority of the directors does not entail the cessation of all the directors (unlike a *simul stabunt* clause), and hence does not impose the reconstitution of the Board in its entirety, but dictates another principle, and that is, that the resignations of the majority must have an effect that is deferred until the majority itself is reconstituted (because the administrative body of the company must continuously reflect the will of the shareholders' meeting that appoints it).

And yet, from this perspective too, art. 2386, subsection four, and above all art. 2386, subsection five, instead leave full autonomy to bylaws that have recourse to a *simul stabunt* clause to modulate the effect of said clause, and merely dictate

a default rule for situations in which bylaws are silent on when the effects come into effect.

If the bylaws are silent, the default rule is that "the shareholders' meeting to appoint new directors" (which, I repeat, means the whole Board, because the express premise of the law is that, with the *simul stabunt* clause "the whole Board ceases to hold office") is to be called urgently by the directors remaining in office. Given this default approach, the bylaws may then freely formulate the choice deemed most appropriate on the "timing" point, and may even go so far as to attribute immediate efficacy both to the renunciation of those who take the initiative to resign, and to the cessation of all the other directors.

As accurately noted, the *simul stabunt* clause can therefore adopt various approaches and thus contemplate:

"*a) a* prorogatio *of the powers of the board as a whole until the acceptance of office by the new directors, elected by the shareholders' meeting called by the prorogued board;*

b) that only those directors who have not resigned remain in office until the whole board of directors is replaced by the shareholders' meeting, which those same directors remaining in office are required to call;

c) the entire board of directors is immediately and concurrently divested of its authority, with powers of ordinary management attributed to the board of statutory auditors, which must urgently call a shareholders' meeting to appoint a board of directors;

d) that the entire board is divested of its authority, without any specific indication of the moment of its cessation (in this case when the clause also applies in the case of resignation of directors, it must be specified that the resignations are to be with immediate effect, in derogation of art. 2385 of the Italian Civil Code. This derogation, moreover, must certainly be considered possible, given that this rule of the prorogation of the majority that have resigned does not serve any public interest and cannot be considered inderogable)" (PAGANO, *Commento all'art. 2386 c.c.*, in *Codice commentato delle S.p.A.*, edited by G. Fauceglia and G. Schiano di Pepe, Milan, 2007, p. 678).

The latter consideration of the Author cited above are emphasised because it would seem, from the explanatory note of the Board of Statutory Auditors, that the freedom of the bylaws in the matter of modulating *simul stabunt* clauses must be considered to be curtailed to make way for the *prorogatio* principle (in

the case of resignation of the majority of the directors) adopted by art. 2385. However, this argument leads to a paradoxical, and hence unacceptable, result, which is that of a limitation of the freedom of the bylaws that is exercised in a self-regulatory context that .....by law wishes to derogate from the very provision that the Board of Statutory wants to preserve! And, indeed, as we have just seen and with the clarifications that will not be set out, it must be reiterated that it is by now undisputed in the literature that, given also the possibility, provided in art. 2386, subsection four, of attributing even interim management to an organ that structurally has no administrative powers, as is the case for the Board of Statutory Auditors, then the provision on *prorogatio* contained to in article 2385, subsection one, cannot in any way be considered to be an expression of any type of inderogable principle (see, for example, GHEZZI, *Commento all'art. 2386 c.c.*, in *Commentario alla riforma delle società*, edited by P. Marchetti-L.A. Bianchi- F. Ghezzi- M. Notari, Milan, 2005, p. 271).

Continuing along this line, it must then be pointed out that:

(i) if it is lawful that, in the presence of a *simul stabunt* clause, the by-laws can determine the moment of cessation of directors who, by offering their resignations trigger the cessation of the whole Board of Directors in the two extremes of the immediate efficacy of the cessation for all, or the deferral of said efficacy for all;

(ii) if it is reasonable that the bylaws choose the intermediate route of the immediate cessation of those who present their resignations determining that the whole Board is divested of its authority, and the prorogation of the other directors, namely, those who have been "dragged" into said divestiture;

(iii) then it is also certainly lawful to defer the effects of the resignations of those who with their resignation determine the cessation of the whole Board of Directors to a date later than that on which the resignations were tendered but before the reconstitution of the Board.

In other terms: if article 2386, subsections four and five permit both the deferral of the cessation of those who resign and those who remain in office, and the alignment of the cessation, then it also permits the graduation over time of the effective date of the cessation of those who resign, triggering the

simul stabunt clause and the cessation of those who are divested of office by effect of said clause.

In this latter case, the situation of those who decide to cease to hold office does not differ from that of the immediate effect of their resignations: from the moment the resignations come into effect, even if is after the day on which they were announced, only the "remaining directors" remain in office. Until the resignations come into effect, both the directors who have decided to cease to hold office, albeit after a period of time, and the remaining directors, remain in office. When the resignations come into effect after a specific period of time after they have been tendered, only the other directors remain in office, although they represent (only) a minority of the members of the Board, because art. 2386, subsection four permits derogation from art. 2385, subsection one.

An undisputed general corollary of *simul stabunt* clauses with graduated effect is that, since art. 2385 subsection one does not apply, the directors who cease to hold office because they have renounced it are no longer in office from the moment their renunciation comes into effect: then clearly they cannot be revoked because, by definition, only a serving director may be revoked from office. But nor can these directors who have ceased to hold office be the only ones replaced because, by effect of the *simul stabunt* clause, the whole Board now has to be renewed, according to the inderogable procedures prescribed for listed companies.

Which, again, leads to consider not lawful the initiative to supplement the agenda taken by the Board of Statutory Auditors.

5. TIM's *simul stabunt simul cadent* clause.

Given the broad spectrum of solutions that the law permits, the articulated types of which is set out above, it is essential to look at the actual (wording of the) clause of the bylaws to be applied. It should be noted that the legal literature interprets the law as offering a broad range of solutions "*the determination of the moment of cessation of the entire Board, after one or more directors cease*

to hold office cannot do other than support an interpretation of the literal text that the clause may…from time to time assume" (PAGANO, *op. cit.*, p. 678).

And so it is clear that the TIM clause adopts a system of deferred efficacy, in the sense that the cessation of the directors "from the moment in which the Board of Directors is reconstituted by appointment by the shareholders' meeting" regards only those directors who have not already ceased to hold office, as it is also possible that this is the majority, but only those that, because the majority of their colleagues have ceased to hold office "for any cause or reason" are understood to have resigned. In fact, according to the TIM clause, their cessation has effect from the reconstitution of the whole Board.

Therefore, is the literal and unequivocal interpretation that endorses the possibility of the differentiated cessation of the majority of the directors with respect to the others. On the other hand, where the cessation is an act of will, the majority ceases when those who express their will to cease decide their cessation should come into effect. The remaining directors, it is reiterated, will cease when the whole Board is reconstituted.

Given that a start date may be applied to cessation by will - in this instance, in the case in point, from the start of the shareholders' meeting of 24 April - it is from this moment that the majority ceases by effect of the derogation from art. 2385, subsection one that art. 2386, subsections four and five, permits, and from that moment the members who have not resigned remain in office, and may if anything be revocable, until the whole Board is reconstituted.

6. The position expressed in the Milan Court on 10 June 2008 and in the Triveneto notarial maxims.

The brief report of the Board of Statutory Auditors cites a ruling by the Milan Court, and a notarial maxim, Triveneto H.C.9 (Terms of efficacy of the cessation of directors after the renunciation of one or more of their number in the presence of a *simul stabunt simul cadent* clause) to support their position, which here is deemed unlawful.

The ruling of the Milan Court on 10 June 2008 (Rel. Ciampi, Est. Fiecconi) would seem to support the contention that where a *simul stabunt* clause does

not contain a provision regarding the immediate forfeiture of office of all the directors, then the cessation of the majority should be subject to the *prorogatio* specified in article 2385 subsection one.

A careful reading of the ruling in question, however, drastically redimensions its scope, for our purposes, at least. As the Milan judge repeatedly emphasises, in fact, the force in that decision was not so much as to understand whether the *prorogatio* in art. 2385, subsection one, had to be considered an organisational rule that was an expression of a principle of public law (a position which, as has been stated, no legal expert any longer believes). The purpose of this judgement is instead to interpret a *simul stabunt* clause in which the moment of cessation of the directors who had resigned, and those that had been "dragged out" with them, had evidently *not been sufficiently clarified.* And in fact, based on the information obtainable from the (Milan) Business Register, the working of the clause was as follows: "*if due to resignation or any other cause there should no longer be a majority of Directors appointed by the Shareholders' Meeting, the whole Board shall be understood to be divested of its authority and a shareholders meeting must be called without delay for the appointment the whole Board*" (art. 14).

The judgement, in the context of this specific line of interpretation of the bylaws, accepts the argument that, in the silence of the bylaws, the organisational structure to be applied the moment the *simul stabunt* clause is triggered by the resignation of a majority of the directors would indeed by the *prorogatio* of the majority itself. But such an interpretation does not in any way prevent a specific clause in the bylaws providing differently, and that is precisely what happens in TIM, as we have seen.

If, instead, we wish to read support for the more radical (and objectively unsustainable) argument of the *non-derogability* of the prorogatio mechanism set forth in art. 2385, subsection one, in the aforementioned ruling, then if this really were the case, the judgement would, as stated above, flagrantly conflict with the combined provisions of the law on *prorogatio* itself and with art. 2386, subsection four, from which it follows that the *prorogatio* of art. 2385, subsection one only applies for cessation that does not produce the cessation of the whole Board, due to the operation of the *simul stabunt* clause.

And furthermore, even if we wish to accede to unsustainable imperative readings of article 2385, subsection one, it still remains the case, here, that the whole of supplementation of the agenda leads to the selective appointment of part of the Board in clear disregard of the clause in the bylaws and the applicable laws on the appointment of the administrative body. And this, I would repeat, is independent of how the Milan judgement cited here is read.

Similar considerations must in my view apply to the Triveneto notarial maxim H.C.9. Indeed, once again, in fact, it is not so much an unsustainable *petitio principii* regarding the inderogability of the *prorogatio* of art. 2385, subsection one, but simply a reading of what should (in the view of the editors of maxim) be considered the standard legal approach in the presence of a *simul stabunt* clause that does not expressly address the issue.

In the opposite sense to the positions that are being sustained here, the contention that the rule in the article 2386 subsection four only applies in case of cessation for causes other than resignation could then be advanced; but this, again, would lead to considering clauses in bylaws (such as TIM's) that do not adopt this wording to be unlawful. This argument, however, would conflict first and foremost with a systematic reading of the regulations on the cessation of the directors. Indeed, it has already been stated that when the law intends to refer solely to the cause of cessation derived from resignation it uses the word "renunciation" (art. 2385, subsection one), while when it is referring to cessation in general, it refers to "any cause of cessation" (art. 2385, subsection three). But, above all, where the article 2386, subsection four, envisages the possibility that a clause in the bylaws in case of the "cessation of certain directors" causes the whole Board to be divested of office, assigning the management to the control body, then it clearly cannot fail to refer also to the hypothesis of cessation by resignation. It is obvious that a cessation due to the death of a director, or their forfeiture because they no longer fulfil the requirements, would not tolerate a solution other than that of interim management by the statutory auditors, since no *prorogatio* could be hypothesised for those who are no longer there or who have been expelled from the board due to inderogable provisions of public law.

And it must in any event be pointed out that if, ironically, it should be accepted that cessation pursuant to art. 2386, subsection four, which requires the remaining directors to remain in office, only applies to cessation for objective reasons (death, forfeiture due to loss of the requirements, etc.), and not to cessation due to resignation (in that case *prorogatio* would apply, as a favour to the management attributable to the will of the shareholders' meeting), even, I would repeat, if this wholly unsustainable contention should be adopted, then certainly replacement of the board in "stages" would certainly not be admissible, and even less the replacement of only some of the members of the Board that has ceased to hold office, in its entirety, by virtue of a *simul stabunt* clause.

If this were not the case, it would open the way, I would again repeat, to a very serious breach of the regulations for the protection of minority shareholders in listed companies.

If in fact a minority, believing during the term of office of the Board of Directors that it has become a majority, proceeded to revoke the mandates of the serving "majority" directors, replacing them with its own nominees, and leaving in office those directors nominated by the original "minority", this would constitute the appropriation of the majority of the Directors outside of a shareholders' meeting to appoint the whole Board. And so, the original majority could certainly become a minority but could not even be represented as a minority on the Board any longer, and this would conflict with the inderogable prescriptions of the bylaws that the Board and the control body of a listed company must enforce.

7. Corollaries regarding the agenda for the shareholders' meeting of 24 April 2018

If with the start of the shareholders' meeting of 24 April 2018 some (the majority) of the directors of TIM have ceased to hold office, the same shareholders' meeting evidently cannot revoke these directors.

It cannot even replace them, as has already been stated, because the shareholders' meeting has not been called to appoint a new whole Board as

TIM's *simul stabunt* clause requires but, as even before then, article 2386 requires, whereby the outcome of the triggering of *simul stabunt* clauses is the cessation of "*whole Board*" and then the "one-shot" concurrent appointment of the "*new board*", i.e. of an entire new administrative body. And this, I repeat again, is in harmony with the requirements of the law on listed companies, which imposes slate voting for the appointment of the "members of the board of directors", and hence of the "new directors" referred to in art. 2386, subsection four.

A Shareholders' Meeting that had in this context, namely after the *simul stabunt* clause has been triggered and thus during the director renunciation phase - been called to renew the entire board, a meeting, as stated, that would interfere in this procedural sequence, purporting to replace directors who had already ceased to hold office, but not the entire Board, would have impossible and unlawful content. Hence the inadmissibility of a supplementation to the agenda, pursuant to art. 2367 or 126-*bis* of Consolidated Law 58/1998 which, the *simul stabunt* having been triggered, and with the cessation of the individual directors graduated over time, in this context, purports to selectively replace just some of the directors, and not to appoint the whole Board according procedure laid down for listed companies.

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