IMPARTIAL OPINION

IN TERMS OF SUPPLEMENTING THE AGENDA OF THE SHAREHOLDERS' MEETING OF A LISTED COMPANY BY THE BOARD OF STATUTORY AUDITORS

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1. *Fact.*– On 14 March, 2018 Elliot International LP, Elliot Associates LP and The Liverpool Limited Partnership, which at the time held a total stake of 2.53% of the shares in TIM S.p.A. (hereinafter, also "TIM" or the "Company"), pursuant to art. 126-*bis* of the C.L.F., submitted a request to supplement the agenda of the Shareholders' Meeting, convened by notice sent on 10 March, 2018 for the following 24 April, 2018. Specifically, the request called for the addition of the following items to be submitted for the approval of the shareholders: *(i) "the 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"; and *(ii)* "*the 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Paola Giannotti De Ponti, Luigi Gubitosi, Dante Roscini and Rocco Sabelli, to replace the directors whose mandates have been revoked pursuant to the preceding agenda item*".

On 22 March 2018, through a specific press release, the Company informed the market that, during the Board meeting held on the same day, the Executive Vice President Recchi together with directors Arnaud Roy de Puyfontaine, Hervé Philippe, Frédéric Crépin, Félicité Herzog, Camilla Antonini and Marella Moretti, have tendered their resignations with effect from 24 April 2018 prior to the start of the meeting. Furthermore, notice was given that on the same date a similar communication arrived at the Company by Ms Anna Jones.

Also according to what was announced in the press-release, given that eight directors out of a total of fifteen had resigned, the Board of Directors, in consideration of the wording of clause 9.10 of the TIM Bylaws - which states that "*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.*" - resolved to convene the Shareholders' Meeting of 4 May 2018 in order to proceed with the full renewal of the administrative body. At the same time, the Board decided to not supplement the agenda of the Shareholders' Meeting of 24 April 2018 as requested by the petitioning shareholders, relating to the revocation and replacement of Mr de Puyfontaine, Mr Crépin, Ms Herzog, Ms Jones, Philippe and Mr Recchi, by virtue of the fact that "*on that date* [of the Shareholders' Meeting of 24 April] *they would all have resigned and ceased to hold office*".

The following day, 23 March 2018, the shareholders themselves Elliot International LP, Elliot Associates LP and The Liverpool Limited Partnership, by means of a letter addressed to the Company's Board of Statutory Auditors, submitted a second request pursuant to art.*126-bis* of the CLF to supplement the agenda of the Shareholders' Meeting

of 24 April 2018, as follows: "*(i) the revocation of the directors (in the measure necessary, according to the timing of the resignations offered and accepted during the board meeting of 22 March last pursuant to article 2385, subsection one, of the Italian Civil Code) and (ii) the appointment of six Directors, in the persons of Fulvio Conti, Massimo Ferrari, Paola Giannotti De Ponti, Luigi Gubitosi, Dante Roscini and Rocco Sabelli, to replace Arnaud Roy de Puyfontaine, Hervé Philippe, Frédéric Crépin, Giuseppe Recchi, Félicité Herzog and Anna Jones, who have ceased to hold office.*"

Following the latter request, on 27 March 2018 the Board of Statutory Auditors unanimously decided, pursuant to art. 126-*bis*, subsection 5 of the C.L.F., to supplement the agenda of the Shareholders' Meeting of 24 April 2018 in the terms indicated in the request made by the requesting shareholders.

2. *Question*. - In relation to what is stated above, TIM S.p.A. asked for an *impartial opinion* to be offered regarding the following question: *"whether the supplementing of the agenda for the shareholders' meeting of TIM S.p.A. convened for 24 April 2018 and ordered by this Company's Board of Statutory Auditors at the request of the shareholders Elliot International LP, Elliot Associates LP and The Liverpool Limited Partnership, is compliant with the law and with the TIM Bylaws"*.

3. *The need to proceed with the complete renewal of the Board of Directors and the consequent inadmissibility of the supplementation of the agenda prepared by the Board of Statutory Auditors.* - according to what we have been able to understand at the time of the exposure of the facts, of the members of the TIM Board of Directors, one of them has resigned on 22 March, 2018 with immediate effect (Mr Giuseppe Recchi), while another seven (the directors de Puyfontaine, Philippe, Crépin, Herzog, Antonini, Moretti, Jones) resigned on 22 March with effect from before the start of the Shareholders' Meeting of 24 April, 2018.

The resignation of eight of the fifteen directors of TIM without a doubt triggers the application of the *simul stabunt simul cadent* clause provided for in art. 9.10 of the Company's Bylaws.

This clause, in fact, links to the loss of a majority of the directors "*for any cause or reason*" the virtual resignations "*of the remaining Directors*". The breadth of the phrase "*for any cause or reason*" erases all questions regarding the fact that the "majority resignation" hypothesis falls within the scope of the statutory provision: a hypothesis that is certainly included in it, since it is moreover - from an *ex ante* perspective (that specific to the drafter of any bylaws) - the most frequent case of termination of office before the natural expiration of the mandate, whose expunging would even exhaust the meaning and actual scope of the same clause (which would be destined to operate, against its own *rationale*, in rare hypotheses).

It follows that, due to the resignation of the majority of TIM's directors, the other directors are also to be considered, based on art. 9.10 of the Bylaws, to have "resigning", with the consequent need to proceed with the renewal of the administrative body. Moreover, this is the specific purpose pursued by the *simul stabunt simul cadent* clauses, which, by way of derogation from the legal provisions governing the replacement of directors, where the termination of a certain number of directors precludes the possibility making a partial substitution and requires the election of the entire board of directors from scratch.[1]. In this way, it intends to ensure full application of the regulations envisaged for the appointment and, in particular, in the presence of special rules for the election of the administrative body (such as, for example, in the case where a slate vote is envisaged), to ensure that the relative composition is not distorted due to circumstances occurring during the mandate and is at all times aligned with the structure that the bylaws wished to implement[2].

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[1] On the *rationale* of the *simul stabunt simul cadent* clause and on the full revocation of the administrative body, as its natural consequence, see, L. DELLA TOMMASINA, sub *art. 2385* of the Italian Civil Code, in *Delle società - Dell'azienda - Della concorrenza, Arts. 2379 - 2451*, ed. D.U. Santosuosso, in *Commentario del codice civile*, edited by E. Gabrielli, UTET, 2015, p. 219 et seq.; B. Libonati , *Corso di diritto commerciale*, Giuffrè, 2009, p. 430.

[2] For the highlighting of the connection between the provision of special rules for the election of the administrative body aimed at ensuring the representation of minority shareholders and the presence in the bylaws of a *simul stabunt simul cadent* clause, as an instrument to avoid the circumvention of such

In this regard, it is hardly necessary to observe that in the case of listed companies, the rules governing the composition of the board of directors must comply with specific legal provisions which require, *inter alia*, the provision of slate voting and in electing the administrative body to guarantee at least one shareholder taken from a slate other than the one that obtained the majority of votes (article 147-*ter* of the C.L.F.).[3] Therefore, based on the idea that the participation of members drawn from minority slates, rather than being aimed at granting board representation to a specific shareholder, tends to ensure - like the forecast that requires the presence of a certain number of independent directors and the one that requires compliance with gender quotas - the correct and effective functioning of the board dynamics of listed companies, favouring the alignment of the business interest with the interest of investing shareholders and, further upstream, the general interest that the market is functioning properly[4]. In the case of TIM, however, this request is

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rules, see: G. CASELLI, *Vicende del rapporto di amministrazione*, in *Amministratori - Direttore generale*, in *Trattato delle società per azioni*, edited by E. Colombo and G.B. Portale, UTET, 1999, p. 42, note 157; F. BONELLI, *Gli amministratori di società per azioni*, Giuffrè, 1985, p. 58, as well as more recently, *ex multis*, F. GHEZZI, sub *art. 2386 c.c.*, in *Amministratori*, edited by F. Ghezzi, in *Commentario alla riforma delle società*, edited by P. Marchetti - L.A. Bianchi - F. Ghezzi - M. Notari, Egea, 2005, p. 266.

[3] M. STELLA RICHTER *JR.* EMPHASIZED THE IMPORTANCE OF THE RULE IN QUESTION, *Voto di lista per la elezione delle cariche sociali e legittimazione dell'organo amministrativo alla presentazione di candidati*, in *Studi per Franco Di Sabato*, IV, t. II, ESI, 2009, p. 533, p. 535, which highlights how the provision of the slate vote necessarily implies that the resolution is on the appointment of the entire company body, not on the individual components, thus paving the way for the provision of non-majority electoral systems "that only through the simultaneous election of the whole board is it possible to guarantee one or more places for candidates drawn from "minority" slates". On this topic see also, finally, M. CERA, *Le società con azioni quotate nei mercati*, Giuffrè, 2018, p. 99 et seq.,

[4] In these exact terms see A. MAZZONI, *Gli azionisti di minoranza nella riforma delle società quotate*, in *Giur. comm.*, 1998, I, page 488, who, despite writing at a moment in history when it was not yet obligatory to provide for the participation of at least one minority director via the slate voting method, had already realized that it would have the effect of facilitating the entrance of "persons basically holders of interests in the company, as perceived and targeted by the minority shareholders in the sense specified above" [*i.e.* as shareholder investors, to safeguard the correct functioning of the market] (on page 491). For similar considerations, R.Costi, *Il governo delle società quotate: tra ordinamento dei mercati e diritto delle società*, in *Dir. comm. int.*, 1998, page 65 ff., in particular page 76; M.Cossu , *"Minority shareholdings" in legislative evolution: from the origins to the Consolidated Law on Finance*, in *Riv. dir. priv.*, 2001, page 119, who emphasized how the objective of safeguarding the integrity and the transparency of markets and protecting the minority shareholders of listed companies is part of a "*single* consideration" by the legislator, placing them in a context of complementarity.

particularly penetrating, given that on the one hand, the Bylaws seeks to reserve a third of the total board members to the slates other than the one that obtained the majority of votes (see Article 9.7, letter a, TIM's Bylaws) and, on the other hand, provides that, in the presence of several minority slates, representation on the board is divided proportionally among them (see Article 9.7, letter *b*, TIM Bylaws).

The provision of the rule *simul stabunt simul cadent* contained in article 9.10 of the TIM Bylaws is therefore functional not only to preventing the composition of the board of directors from assuming in practice, due to circumstances occurring during their term of office, a structure other than that which the Bylaws had intended, but also aims to ensure full application of the binding rules provided to protect general interests, governing the procedures for electing the administrative body of listed companies[5].

Based on these assumptions it seems evident that the addition to the agenda that the Board of Statutory Auditors decided to make, leaving room for a hypothetical resolution concerning the replacement (after removal) of only some of the directors, demonstrates a clear misalignment (and contrast) to the dictates of the TIM Bylaws to ensure full application of the imperative legislation regulating listed companies: namely, precisely, the appointment of a new administrative body in its entirety and without any sort of division.

While the conclusion reached would be difficult to argue against, it would in any case also apply assuming a different scenario, which supports the line - in the writer's opinion not attainable - which appears to have been taken by the Board of Statutory Auditors. It is worth recalling again that in the case in point:

- a director of TIM resigned with immediate effect on 22 March;

[5] In the sense that the provision of a *simul stabunt simul cadent* clause within the scope of listed companies aims at "making the purposes of the provisions of Art. 147-*ter* subsections 1 and 3 more coherent", see, specifically, M. STELLA RICHTER *jr.*, sub *art. 147-*ter *CLF*, in *Le società per azioni*, edited by P. Abbadessa, G.B. Portale, II, Giuffrè, 2016, page 4204; in the same sense, see M. Notari and M. STELLA RICHTER *jr.*, *Adeguamenti statutari e voto a scrutinio segreto nella legge sul risparmio*,in *Società*, 2006, page 535; A. NEGRI - CLEMENTI and F.M. FEDERICI, *La "sostituzione" degli amministratori di società quotate cessati in corso di mandato: voto di lista, principio maggioritario*, in *Società*, 2011, page 197.

- five directors of TIM resigned on 22 March with resignation not yet effective, with regard to whom a resolution as regards their removal was requested;
- another two TIM directors resigned on 22 March again with resignation not yet effective and for whom no removal was sought.

This would lead, at the outcome of any vote on the agenda supplemented as requested by the Board of Statutory Auditors (and in particular: the outcome of the vote on the removal of the directors for whom this was requested), to:

- three TIM directors in any case resigning;
- another five directors of TIM also resigning or being removed.

It is therefore clear, that, either as a result of resignation, or of removal (it too constituting, undoubtedly, the hypothesis ascribable to the cessation of office "*for any cause or reason*" referred to in article 9.10 of the Bylaws: *simul stabunt simul cadent* clause), *in any case* the majority of the Board would cease and in any event, the clause referred to would apply. With the consequent need, also following this approach, to proceed without exception to complete renewal of said administrative body, without any room for forms of partial replacement, as anticipated by the addition to the agenda which the Board of Statutory Auditors decided to implement.

The result of which would be, in substance, the same, it naturally being unthinkable - it being specified merely so as to be scrupulous - that, to prevent the much quoted *simul stabunt simul cadent* clause from being applied, the mere replacement simultaneous to their removal, of the directors who were specifically removed would be sufficient. Apart from the lack of logic that such reasoning evidently reveals - and here one must necessarily recognize that, insofar as simultaneous, the removal would by definition be destined to apply before the appointment - excluding from the outset the possibility of following such line of thought is the fact that it would result in a substantial, and even declared, evasion of a clause aimed at ensuring the full application of the bylaws concerning the composition of the administrative body, in turn complying with the special regulations

applying to listed companies, and for this reason, made so as to safeguard interests of a general nature.

The Board of Directors of TIM was therefore right to examine the request to supplement the agenda formulated by the applicant shareholders, deciding however - given the resignation of the majority of its members -, not to humour it, and to summon a special shareholders' meeting, in the short term, for the full renewal of the Board of Directors. On closer inspection, this is simply a *due* and *not deferrable* act, enabling the full replacement of the management body with the full and total application of the legal provisions and the bylaws ensuring the correct structure, operation, and balance of said body: beyond the interests and intentions of the individual shareholders. The recomposition of the entire Board of Directors may thus take place - as required - in a single occasion, according to the rules of slate voting and in compliance with the applicable regulations - particularly suitable, as seen, in the case of TIM given the specific provisions of its Bylaws - for creating a balance between the majority and minority shareholders, genders, participation in the corporate bodies and independent subjects. These are elements which characterize and qualify, all in the essential and specific terms, the composition of the administrative body of a listed company and which would be simply trampled on by - in any case, in the case in point, inadmissible - partial and divided replacements of the Board of Directors.

4. *The simul* stabunt simul cadent *clause contained in the TIM Bylaws and the impossibility of a resolution for removal of the directors already ceased.* - While the above is, in itself, exhaustive, it should be added - for completeness - that the addition to the agenda that the Board of Statutory Auditors decided to make is subject to dispute both as regards compliance with the law and the Bylaws, and from another perspective. It is evident, in fact, that the agenda of the Shareholders' Meeting of 24 April, as amended due to said addition, postulates the removal of directors who have already declared their resignation with effect from the date of 24 April 2018, before the Shareholders' Meeting: the removal

therefore to be possible, presupposes - in the view of the Board of Statutory Auditors - that these directors would still be in office during the Shareholders' Meeting of 24 April. A different view has been taken by the Board of Directors of TIM, which decided that at the time of opening the Shareholders' Meeting of 24 April, the resigning directors whom the applicant shareholders would like removed will already have ceased to hold office by virtue of the resignation formulated: the removal would be "impossible" (since purposeless) and, for the same reason, the request to supplement the agenda could not be accepted.

The position taken by the Board of Directors is in fact confirmed, already in the first instance, in the wording of the clause of Article 9.10 of the TIM Bylaws: clause, which specifically links the postponement of the cessation of office to the time of reconstituting the Board of Directors solely to the directors who have not resigned (: the directors who have not ceased "*for any cause or reason*"), thus clarifying that the other directors (those in relation to whom the *simul stabunt simul cadent* mechanism applies) cease immediately.

It is well known to the writers of this *Opinion*, that - in abstract - there is no unanimity of views, among those concerned, with regard to the relationship between Article 2385, subsection 1, of the Italian Civil Code, in the part in which it orders the *prorogation* of the directors stepping down from office should the majority of the board not remain in office, and art. 2386, subsection 4, of the Italian Civil Code, in the part in which it states that in any event only the directors "*remaining in office*" are responsible for calling an urgent Shareholders' Meeting for the renewal of the entire board. In particular, it is worth recalling that fundamentally there are two opposing lines of thought in this regard.

On the basis of a first line of thought, any clause involving the operation of the *simul stabunt simul cadent* mechanism recalled in article 2386, subsection 4, of the Italian civil code, would entail - precisely by virtue of the text of said provision (and the reference that it can be implemented at the power/duty only of the directors "remaining in office" to call the Shareholders' Meeting) - the total disapplication of article 2385, subsection 1 of the

Italian Civil Code, and therefore the *prorogation* rule sanctioned by it for the case of stepping down where the majority of the directors do not remain in office[6]. It is evident that following said interpretation - undoubtedly clear-cut in its conclusions - one would have a situation, in the case in question and with absolute certainty, in which at the time of the Shareholders' Meeting of 24 April 2018 the directors for whom the applicant shareholders have postulated a resolution for their removal would no longer be in office: the removal would, therefore, be "impossible".

According to another interpretative approach, however, the explanation just proposed errs by excess, overrating the literal meaning of the provision of Art. 2386, subsection 4, of the Italian Civil Code, which should instead be considered neutral as regards the application of the general rules on the effectiveness of the causes of termination of office and in particular the rules established by Article 2385, subsection 1 of the Italian civil code in relation to the moment of effect of stepping down from office[7]. The provision of a *simul stabunt simul cadent* clause suitable to evoke the mechanism underlying the formulation of Article 2386, subsection 4, of the civil code does not entail from this perspective - in itself - an exception to the suspension of the effects of stepping down of the majority of the directors, but rather an investigation, on each occasion, of the content of the individual clause and the way in which it is expressed, and testifies with reference to the effects of the cause of cessation, there being, moreover, no particular doubts as regards the enacting

[6] F. FERRARA *jr*., F. CORSI, *Gli imprenditori e le società*[15], Giuffrè, 2011, page 552; B. LIBONATI, *Corso di diritto commerciale*, loc. ult. cit.; F. GALGANO – R. GENGHINI, *Il nuovo diritto societario*, in *Trattato di diritto commerciale e di diritto pubblico dell'economia*, edited by F. Galgano, I, Cedam, 2006, page 436; F. GHEZZI, sub *art. 2386 c.c.*, cit., page 274; Circolare Assonime n. 18/2005, in *Riv. Soc.*, 2005, page 899; G. TROISE, sub *art. 2386 c.c.*, in *La riforma delle società, Società per azioni - società in accomandita per azioni, Artt. 2325 – 2422 cod. civ.*, ed. M. Sandulli e V. Santoro, I, Giappichelli, 2003, page 434.

[7] See, in this sense, P.M. SANFILIPPO, *Gli amministratori*, in *Diritto commerciale*, ed. M. Cian, II, Giappichelli, 2017, page 482, note 114; ID., sub *art. 2386 c.c.*, in *Le società per azioni*, edited by P. Abbadessa, G.B. Portale, I, *cit*., page 1276. In case law, see Court of Lucca, 4 December 2012, in *www.iusexplorer.it*.

nature of the regulation as per Article 2385, subsection 1 of the Italian Civil Code[8]. It should be specified, in this latter respect, that the *prorogation* of the directors who have resigned, wherever the majority of the board does not remain in office, undoubtedly does not represent an "irrevocable principle", being instead fully open to independent regulation through the bylaws. Said derogation is today confirmed, where necessary, first and foremost, in Article 2386, subsections 4 and 5, of the Italian Civil Code, which sanctions, in the context of the reform of company law in 2003, the total legitimacy of the *simul stabunt simul cadent* mechanism, leaving it up to the bylaws to modulate the content and terms of clauses that introduce, structurally significant changes to the mechanisms for removal and (re)appointment of the management body[9]. Back in not such recent times (well before the reform of company law) it was, moreover, authoritatively stated that "*it could well be that the bylaws containing the* simul stabunt simul cadent clause [adopt]*, in relation thereto, different rules as regards the date of effect of the resignation of the directors (of all; of those of the majority, persons effectively resigning; of the minority brought down by the*

[8] Without in itself expressing a principle of non-derogation to the rule of *prorogation* referred to in Article 2385, subsection 1 of the Italian Civil Code, read also in this sense - the judgement of the Milan Court 10 June 2008 (available in *Foro Pad.*, 2010, 150, with a note by V. SANTARSIERE), which bases its conclusions, in substance, on the specific content of the *simul stabunt simul cadent* clause in the case into consideration: clause which, as far as can be seen from the judgement, did not separate the moment of stepping down of the directors who resigned from that of the other directors. The same can be said - without thereby coming to any conclusions as regards the principles of "non-derogation" who have no raison d'être - with regard to the Maximum of the Notaries of Triveneto "H.C.9", which, far from adopting a position on the imperative nature of the *prorogation* referred to in Article 2385, subsection 1, of the Italian civil code, instead, provides indications on what could be the moment of stepping down of individual directors, in the presence of *simul stabunt simul cadent* clauses, disregarding (as is natural, given the context) the varied content which they may freely and in practice take.

[9] The specific legislative recognition of the power of the bylaws to assign the convening of the shareholders' meeting to the board of statutory auditors, with consequent immediate termination of the directors, constitutes, in effect, an unequivocal sign of the derogability of the provisions of Art. 2385 of the Italian Civil Code: in this sense see M. LANDINI, sub *artt. 2385 – 2386*, in *Il nuovo diritto delle società*, ed. A. Maffei Alberti, Cedam, 2005, I, page 713, as well as P.M. SANFILIPPO, sub *art. 2385 c.c.*, in *Le società per azioni*, edited by P. Abbadessa, G.B. Portale, I, *cit.*, page 1276.

resignation of the former)"[10]. There is no reason - if anything, the opposite applies - to diverge from such teaching.

Looking therefore at the specific literal content of the clause set out in article 9.10 of the TIM Bylaws ("*Any time a majority of the members of the Board of Directors should cease to hold office, for any cause or reason, the remaining Directors shall also be understood to have resigned, and will cease to hold office from the moment the Board of Directors is reconstituted by appointment by the shareholders' meeting*") one can see clearly how it distinguishes: *on the one hand*, the majority of the directors who have ceased for whatever cause or reason; *on the other*, the remaining directors understood as having resigned. Only for the latter does the clause provides that termination shall take effect from the moment in which the board of directors is reconstituted by appointment by the shareholders' meeting. The others, from the perspective of the clause and with an evidently intentional effect, instead cease.

It follows then clearly from said provision of the bylaws, that only the members of the Board to whom the cause of cessation does not refer would remain in office, even after the resignation of the majority of the directors. The efficacy of the "real" resignation (of the majority) of directors who resigned is immediate, while that of the "virtual" resignation of the other directors is deferred until the reconstitution of the body.

In conclusion, following the theory last mentioned, and considering - as is right and reasonable - the textual content of the clause contained in Article 9.10 of the TIM Bylaws, one reaches the result of deeming the directors who tendered their resignation as already having stepped down from office at the time of the Shareholders' Meeting of 24 April 2018. And a director who has already stepped down from office cannot, by definition, be removed, constituting a possible resolution, in this regard a resolution - as has been said earlier - with an "impossible" content representing an addition to the agenda, the

[10] Thus, A. DALMARTELLO, *Validità o invalidità della clausola «simul stabunt, simul cadent» nella nomina degli amministratori di società per azioni*, in *Dir. fall.*, 1956, II, page 155. In this sense see also G. MINERVINI, *Gli amministratori di società per azioni*, Giuffrè, 1956, page 480 ss.; more recently P.M. SANFILIPPO, sub *art. 2385 c.c.*, cit., page 1268; L. DELLA TOMMASINA, sub *art. 2385 c.c.*, cit., page 221; F. GHEZZI, sub *art. 2386 c.c.*, cit., page 270.

assumption of such a resolution constituting an "impossible" deed and therefore to be simply rejected as such.

It cannot be said moreover, that the applicant shareholders themselves seem to be aware of the "impossibility" of removing a director who has already stepped down: if true, as is true, that they deemed it necessary to amend the first formulation of the request for addition once they found it to be impossible to proceed with the removal of Mr Recchi, since he had already stepped down from office following his resignation.

5. *The non-existence of a power/duty of the Board of Statutory Auditors to supplement the agenda of the shareholders' meeting of 24 April 2018* pursuant to *article 126*-bis *of the CLF* - After the foregoing considerations, it remains to be asked, for completeness and to the senior management, if in the presence of factual circumstances account of which was given previously, the Board of Statutory Auditors was actually entitled to proceed, as it did, with a forced addition to the agenda, accepting the request formulated by the applicant shareholders.

This is an aspect which we mean to analyse here, irrespective of the assessments made above concerning the merits regarding the legitimacy and legal possibility for the Shareholders' Meeting to decide on "matters" which the Board of Statutory Auditors decided to add to the agenda of the Shareholders' Meeting of 24 April 2018.

In this regard, overlooking the circumstance - in truth relevant and not to be forgotten - that the applicant shareholders presented two separate and not coinciding requests to supplement the agenda and that the second of these - that approved by the Board of Statutory Auditors - was submitted beyond the maximum time limit, there is yet more to note.

It should be pointed out that art. 126-*bis*, subsection 5, of the Clf, specifically associates the substitute intervention of the board of statutory auditors to a situation of "*inertia*" or, at worst, "*unjustified refusal*" (of the application for integration presented by shareholders holding the capital quotas required for such) by the board of directors (it is worth copying

here the text of said provision: "*if the board of directors, or, in the case of inertia of such, the board of statutory auditors, or the supervisory board or the management control committee, do not supplement the agenda with the new items or proposals presented pursuant to subsection 1, the court, having consulted the members of the management and control bodies, where the refusal to make such provision appears unjustified, shall order the addition by decree. The decree shall be published in the manner set out in article 125-*ter*, subsection 1"*).

In the case in point the Board of Directors of TIM does certainly not appear to have remained "inert": the request formulated by the applicant shareholders was subjected to review and assessment within a board meeting, the outcome of which was promptly made public. Even less, then, did the TIM Board of Directors offer an unjustified refusal: the request of the applicant shareholders, suitably examined, was not upheld on the basis of clear and specific grounds, the reasonableness and justification of which is confirmed by the considerations put forward in this *Opinion*.

It is not clear therefore, on what basis the substitute intervention of the Board of Statutory Auditors may be founded, in the hypothesis in question.

It is clear, moreover, that a board of directors undoubtedly has a margin of discretion in examining the requests it receives pursuant to article 126-*bis* of the CLF (not otherwise than for requests pursuant to article 2367 of the Italian Civil Code)[11], connected to the fact that the very Judicial Authority may rule on applications of the applicant shareholders, putting itself before and substituting the assessment of the corporate bodies, *solely* in the

[11] On the power (and the duty) of the directors to take a stand, and consequently also to make a justified refusal where necessary, of a request pursuant to art. 126-*bis* CLF, see: R. SACCHI, *L'informazione nella e per la assemblea delle società quotate*, in *AGE*, 2013, p. 113; R. GUIDOTTI, sub *art. 126*-bis *T.u.f.*, in *Commentario T.u.f.*, a cura di F. Vella, Giappichelli, 2012, p. 1367; P. MONTALENTI, *La Direttiva azionisti e l'informazione preassembleare*, in *Giur. comm.*, 2011, I, p. 688. In the same sense, with reference to the application pursuant to art. 2367 of the Italian Civil Code, see *F. Magliulo*, sub *art. 2367 c.c.*, in *Commentario romano al nuovo diritto delle società*, edited by F. D'Alessandro, I, Piccin, 2010, p. 589 s.; P. MARCHETTI, sub *art. 2367*, in *Assemblea*, a cura di A. Picciau, in *Commentario alla riforma delle società*, edited by P. Marchetti - L.A. Bianchi - F. Ghezzi - M. Notari, Egea, 2008, p. 76 s., which reached the same conclusions regarding art. 126-*bis* CLF at p. 78; P. FIORIO, sub *art. 2367 c.c.*, in *Il nuovo diritto societario*, edited by G. Cottino, I, Zanichelli, 2004, p. 514.

case of omission or unjustified refusal of the competent company bodies (in the order specified by said article 126-*bis*, subsection 5, CLF), with the obligation to first consult the directors (and the members of the control body).

Certainly, within the scope of the checks that a board of directors not only can, but must perform before accepting a request (pursuant to art. 126-*bis* CLF, or pursuant to art. 2367 of the Italian Civil Code) is the assessment of the fact that the topic proposed - in addition to not being one of those for which proposals directly formulated by shareholders are directly excluded by law from being accepted in the shareholders' meeting - does not raise a potentially unlawful resolution: either since extraneous to the sphere of jurisdiction of the shareholders' meeting, or as having- as in the case in point - an impossible (or unlawful) object[12].

So much did the TIM Board of Directors do in the case in question; by which, the substitute intervention which the Board of Statutory Auditors deemed it fit to implement can be seen, in reality, to be without justification and without foundation.

And it should be added that the conclusion just reached would remain unchanged even if one wished to accept the idea that the board of statutory auditors - in order to exercise its substitutive powers - would be justified in an extreme hypothesis to enter into the merits of the considerations put forward by the board of directors underlying the decision to "reject" the applications advanced by the shareholders. The possibility of considering this prerogative cannot but remain confined, in fact, to a hypothesis of

[12] In literature, even the authors who have expressed a stricter approach as regards the breadth of the margin of discretionality of the directors (before a request pursuant to art. 126-*bis* of the CLF or pursuant to art. 2367 of the Italian Civil Code), have no doubts about the power of the latter to reject requests having an impossible (or unlawful) object ; see in this regard: N. DE LUCA, sub *art. 2367 c.c.*, in *Le società per azioni*, edited by P. Abbadessa, G.B. Portale, I, *cit*., p. 904; A. TUCCI, sub *art. 126*-bis *T.u.f.*, in *Le società per azioni*, diretto da P. Abbadessa, G.B. Portale, II, *cit*., p. 3909; M. LIBERTINI-A. MIRONE-P.M. SANFILIPPO, *L'assemblea di società per azioni*, Giuffrè, 2016, p. 135; A. TUCCI, sub *art. 2367 c.c.*, in *Delle società - Dell'azienda - Della concorrenza, Artt. 2247-2378*, edited by D.U. Santosuosso, in *Commentario del codice civile*, edited by E. Gabrielli, *cit*., p. 1553; M. CAMPOBASSO, *Diritto commerciale. 2. Diritto delle società*, UTET, 2012, p. 317; A. SERRA, *Il procedimento assembleare*, in Liber amicorum *Gian Franco Campobasso*, edited by P. Abbadessa e G.B. Portale, II, 2006, p. 46. In the same sense, in case law, Court. Milan, 2 April 2016, in *Giur. comm.*, 2016, II, p. 1038.

manifest abuse or of the reasons put forward by the board of directors being unfounded (circumstances which, in the case in point do not apply, whatever the scenario and whatever legal arguments accepted). Going beyond such, recognizing the board of statutory auditors the power to intervene on a general basis and substitute its own assessment for that of the administrative body merely on the basis of disagreeing with the reasoning put forward by the board of directors, would, in essence, mean assigning the control body a *primacy*, in relations between the company bodies, without any positive foundation.

After all- and to hush immediately any unfounded fear of the implications deriving from a circumscription of the "area of power" due to each body - it is worth remembering that the control body of a company (even more so if listed) boasts weightier privileges enabling it to suitably react to anything it "does not agree with " (without thereby invading spheres outside its jurisdiction). It is sufficient to recall that the board of statutory auditors can and must, really *ex multis*, challenge the board resolutions which it deems (including as a result of its own convictions) as not complying with the law or bylaws (art. 2388 of the Italian Civil Code), independently call the Shareholders' Meeting, at the least when it perceives serious misconduct and there is urgency to act (art. 151 of the CLF and Article 2406, of the Italian Civil Code), communicate without delay to Consob any irregularities which it finds in its supervisory activities (art. 149 CLF), and even submit to Court the accusation of serious irregularities in the management when it has justified suspicions that these exist (art. 2409 of the civil code and article 152 CLF).

6. *Conclusions.* - Summing up, one can respond to the question asked concluding in the sense that the supplementation of the agenda of the Shareholders' Meeting of TIM S.p.A. called for 24 April 2018 and ordered by the Board of Statutory Auditors of the same Company, at the request of the shareholders Elliot International LP, Elliot Associates LP and The Liverpool Limited Partnership, for all the reasons given *does not comply* with the law or with the TIM Bylaws.

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We express our appreciation for your confidence in our Law Firm, and we remain at your disposal for any further clarification which may be needed, yours sincerely.

Milan, 9 April 2018

Mr Giuseppe Portale Mr Luca Purpura

Mr Claudio Frigeni