

Milan, 6 April 2018

TIM S.p.A.
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For the attention of Attorney Agostino Nuzzolo
General Counsel

INDEPENDENT LEGAL OPINION

1. The case in question.

The following case is presented to me.

On 14 March 2018, the shareholders of TIM S.P.A. ("**TIM**" or "**the Company**") Elliott International LP, Elliott Associates LP and The Liverpool Limited Partnership ("**Elliott**"), in possession of the minimum shareholding required by article 126-*bis* of Legislative Decree no. 58 of 24 February 1998, ("**CLF**"), requested that the agenda for the Company's ordinary Shareholders' Meeting, already called for 24 April 2018, be supplemented by insertion of the following two items:

“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;

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Paola Giannotti De Ponti, Luigi Gubitosi, Dante Roscini and Rocco Sabelli, to replace the directors whose mandates have been revoked pursuant to the preceding agenda item”.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 the BoD acknowledged the resignation of the Executive Deputy Chairman (as well as Chairman of the Strategy Committee) Giuseppe Recchi, with effect from that date.

During the Board of Directors meeting, each of the following members of the Board resigned with effect from 24 April 2018, prior to the ordinary Shareholders' Meeting called for that date: the

Executive Chairman (member of the Strategic Committee by right) Arnaud de Puyfontaine, Board members, Camilla Antonini, Frédéric Crépin, Felicité Herzog, Marella Moretti and Hervé Philippe. On the same date, a similar communication was sent to the Company by Anna Jones.

At its meeting on 22 March 2018 the BoD, acknowledging that from 24 April 2018 (the date of effect of the resignations) the conditions referred to in article 9.10 of TIM's Bylaws were met, decided, by a majority, to call a Shareholders' Meeting, in a single call, for 4 May 2018 to renew the entire board. The Board of Directors, in relation to the above, did not proceed with the supplementation of the agenda of the Shareholders' Meeting of 24 April 2018, requested by Elliott and concerning the removal and replacement of Directors de Puyfontaine, Crépin, Herzog, Jones, Philippe and Recchi, on the grounds that on that date they would all have resigned and ceased to hold office.

On 23 March 2018, with a communication via certified electronic mail sent to the Statutory Auditors of TIM and copied to Consob and to the Chairman of TIM's BoD, Elliott asked the Board of Statutory Auditors, in exercising the powers referred to in article 126-bis, subsection 4 (or, *more properly*, subsection 5), CLF, to proceed with the supplementation of the agenda for the Shareholders' Meeting "*with the aforementioned material and proposal for (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) to appoint 6 Directors, in the persons of Fulvio Conti, Massimo Ferrari, Paola Giannotti De Ponti, Luigi Gubitosi, Dante Roscini and Rocco Sabelli, to replace the resigning members, namely Arnaud Roy de Puyfontaine, Hervé Philippe, Frédéric Crépin, Giuseppe Recchi, Félicité Herzog and Anna Jones*".

On 27 March 2018, the Board of Statutory Auditors unanimously decided, pursuant to art. 126-bis, subsection 5 of the CLF, to supplement the agenda in the following terms: "*(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 2018, 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.*"

In a communication dated 30 March 2018, the Chairman of the Board of Statutory Auditors sent to the Chairman of TIM's BoD, among other things, an explanatory note on the resolution made by the Board of Statutory Auditors on 27 April 2018 ("**Explanatory Note**") and "*a short note*" from Elliott's lawyer.

2. The questions

With reference to the circumstances synthetically illustrated in the paragraph above, I am submitted the following questions:

(i) whether the decision taken by the TIM BoD on 22 March 2018, to (a) call an Ordinary Shareholders' Meeting for 4 May 2018 in a single call to proceed with the full renewal of the board and (b) not to proceed with the supplementation of the Agenda for the Shareholders' Meeting of 24 April 2018, requested by Elliott International LP, Elliott Associates LP and The Liverpool Limited Partnership and concerning the removal and replacement of Directors Arnaud Roy de Puyfontaine, Hervé Philippe, Frédéric Crépin, Giuseppe Recchi, Félicité Herzog and Anna Jones, is legal;

(ii) whether the possible partial renewal of the BoD carried out by TIM's Shareholders' Meeting of 24 April 2018, in accordance with the proposal made by Elliott International LP, Elliott Associates LP and The Liverpool Limited Partnership with its request pursuant to art. 126-*bis* CLF, prevents the application of art. 9.10 of the Company's Bylaws.

The second question only arises where the first question is answered in the sense that the decision made by TIM's BoD on 22 March 2018 was illegal.

3. The documentation

In formulating this opinion I consulted:

- TIM's Bylaws;
- communication dated 30 March 2018 by the Chairman of the Board of Statutory Auditors of TIM to the Chairman of TIM's BoD, with attachments from "A" to "E";
- press release by TIM dated 29 March 2018;
- communication dated 28 March 2018 by the Chairman of the Board of Statutory Auditors of TIM to the Chairman TIM's BoD;

- press release from the Board of Statutory Auditors of TIM dated 27 March 2018;
- communication dated 23 March 2018 by Elliott International LP, Elliott Associates LP and The Liverpool Limited Partnership to TIM's Board of Statutory Auditors and copied to Consob and to the Chairman of TIM's BoD;
- press release by TIM dated 22 March 2018;
- press release by TIM dated 15 March 2018;
- communication dated 14 March 2018 by Elliott International LP, Elliott Associates LP and The Liverpool Limited Partnership to TIM;
- the explanatory report pursuant to art. 126-*bis*, subsection 4, of the CLF, dated 14 March 2018, of the Elliott International LP, Elliott Associates LP and The Liverpool Limited Partnership;
- call notice of the ordinary shareholders' meeting of TIM for 24 April 2018 dated 10 March 2018.

4. The reasoning adopted by the Board of Statutory Auditors, to support the acceptance of the request for supplementation pursuant to art. 126-*bis* of the CLF of Elliott.

The reasoning on the basis of which the Board of Statutory Auditors deemed it necessary to supplement the agenda for the TIM shareholders' meeting called for 24 April 2018 is shown in the Explanatory Note of the Board of Statutory Auditors (Annex A to the communication sent on 30 March 2018 by Chairman of the Board of Statutory Auditors to the Chairman of the Board of Directors of TIM; the heading of the Explanatory Note refers to resolution of the Board of Statutory Auditors of 27 April 2018, but in reality it should be considered that reference is made to the resolution passed by the Board of Statutory Auditors on 27 March, 2018, according to the press release of the Board of Statutory Auditors on the same date).

In the Explanatory Note mentioned above (p.3), it states, inter alia, that:

“(iii) having ascertained the existence of a regulatory framework that attributes the (qualified) shareholder the right to supplement items on the agenda which the Company cannot (a) contest due to merit or opportunity, or (b) restrict, with the exception of very limited scenarios (such as a request to include unlawful, impossible or useless items);

(iv) [n.d.r. omissis];

(v) *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, Directors Arnaud Roy de Puyfontaine, Hervé Philippe, Frédéric Crépin, Félicité Herzog, Anna Jones, Camilla Antonini and Marella Moretti remaining in office even after the date of 24 April 2018 (the date their respective resignations come into effect);*

(vi) *decided that, in consideration of the above, (a) on 24 April 2018 the majority of the members of the Board of Directors (eight directors, including Mr Recchi, out of a total of fifteen) will resign and, therefore, the entire management body of TIM should be understood as having resigned; and (b), consequently, in that scenario all the directors (and thus also, as is relevant here, Arnaud Roy de Puyfontaine, Hervé Philippe, Frédéric Crépin, Félicité Herzog and Anna Jones, whose removal from office has been requested) will be deemed to have resigned, but will remain in office until the Board of Directors is reconstituted;*

(vii) *also considering the fact that, in line with substantially unanimous case law, members of the Board of Directors who have resigned shall maintain their full managing powers in the prorogatio period until the aforementioned Board of Directors is reconstituted;*

(viii) *it having been finally ascertained that the request to revoke the mandates of the serving directors (although they resigned together with the rest of the Board, with the sole exception of Mr Giuseppe Recchi) and to appoint their substitutes appears to be neither useless nor impossible (as well as obviously not unlawful) and that it lies beyond the remit of the Board of Statutory Auditors, given the nature of the right attributed to the shareholders and the powers of the control body, any different assessment on the merits or advisability of the supplementation request submitted by the Requesting Shareholders with a communication to the Board of Statutory pursuant to art. 126-bis of the CLF.”*

In the document now being examined (p. 4) the Board of Statutory Auditors also considers that “*the issue of the effects of clause 9.10 of TIM's Bylaws on a board reconstituted during the shareholders' meeting of 24 April 2018 is beyond the scope of this explanatory note. It is indeed a separate and autonomous matter with respect to the supplementation request addressed to the Board of Statutory Auditors of TIM*”.

As seen, the topic on which the Board of Statutory Auditors bases the decision to accept the request by Elliott to supplement the agenda consists of the acceptance of the argument according to which Directors Arnaud Roy de Puyfontaine, Hervé Philippe, Frédéric Crépin, Félicité Herzog and Anna Jones would still be in office at the date of the start of the shareholders' meeting of 24 April 2018, for which the request for their revocation "*appears to be neither useless, nor impossible (as well as obviously not unlawful)*"¹.

The motivational itinerary now described does not seem to be acceptable, as it is polluted by a basic defect. In fact, to establish whether the request for supplementation put forward by Elliott pursuant to art. 126-*bis* CLF should be accepted, the central issue is not, as deemed by the Board of Statutory Auditors (as well as by Elliott and its lawyers), whether at the time of the opening of the meeting of 24 April 2018 the resigning Directors are still in office, but whether - in the presence of the circumstance that triggers the application of art. 9.10 of the TIM Bylaws (the loss of a majority of the members of the Board of Directors for any cause or reason) - it is possible to call the Shareholders' Meeting to replace some Directors and not the entire BoD or to include in the agenda of a Shareholders' Meeting already called the replacement of some of the Directors and not the entire BoD.

It should from now be stated that this question - both for reasons of a legal nature and for system reasons - must be answered in the second sense, so that the convening of the Shareholders' Meeting/the supplementation of the agenda must concern the replacement of the entire Board of Directors and not just some Directors, even if there has been a request pursuant to art. 126-bis of the CLF concerning the replacement of only some Directors.

Before explaining the reasons that led to this conclusion it is necessary to examine the profile by which the view was reached by the Board of Statutory Auditors, namely the time at which the resignations of the *resigning* Directors become effective.

5. The time the resignation of the *resigning* Directors becomes effective.

Firstly, it was acknowledged that the Board of Statutory Auditors ordered the supplementation in the terms discussed in Elliott's request of 23 March 2018 ("**Second request by Elliott, pursuant to**

¹ The same reasoning is expressed by Elliott in its communication dated 23 March 2018 addressed to TIM's Statutory Auditors and copied to Consob and to the Chairman of TIM's BoD, and in the document called "*Short note*" drawn up by the Law Firm assisting Elliott and dated 24 March 2018, attachment E to the communication sent on 30 March, 2018 by the Chairman of the Board of Statutory Auditors to the Chairman of the Company's Board of Directors.

art. 126-bis of the CLF"), while the Elliott's request of 14 March 2018 ("**First request by Elliott, pursuant to art. 126-bis of the CLF**") indicates the items on the agenda with a different wording.

However, the second request by Elliott, pursuant to art. 126-*bis* of the CLF is not respectful of the period of ten days from the publication of the call notice for the Shareholders' Meeting (laid down in the provision mentioned above), if the call notice dated 10 March 2018 was published on the same date.

Naturally, the Board of Statutory Auditors in listed companies has the power to call the Shareholders' Meeting autonomously pursuant to art. 151, subsection 2, CLF and this power appears to include that of supplementing the agenda of a Shareholders' Meeting already called.

However, the Board of Statutory Auditors, neither in its Explanatory Note, nor in any other document known to me, has set out the reasoning behind the decision to supplement the agenda of the Meeting on 24 April 2018 with the power provided by the law now referred to, a power that is very different from that provided by art. 126-*bis*, comma 5 CLF².

Furthermore, the statement of the Board of Statutory Auditors in its Explanatory Note, according to which the qualified shareholder is granted a right to obtain the supplementation of the items on the agenda not susceptible to "*restriction, with the exception of very limited scenarios (such as a request to include unlawful, impossible or useless items)*" does not appear to be founded.

In fact, as is known, art. 126-*bis*, subsection 5, CLF provides the power of the Court to order by decree the supplementation of items on the agenda of the shareholders' meeting, in the case of a request by qualified shareholders pursuant to art. 126-*bis* CLF and of inertia by the BoD. and Board of Statutory Auditors (as is relevant here), only in the event that "*the refusal [editor's note of the corporate bodies] to act should be found to be unjustified*".

This expression - and the identical phrase contained in the current text of art. 2367, subsection 2, c.c. with regard to the request to convene the shareholders' meeting - is interpreted as meaning that

² At this point we would add that the second request by Elliott, pursuant to art. 126-*bis* of the CLF was dated 23 March 2018. Even if it were understood that this request was also addressed to the TIM BoD, given that - although addressed to the Statutory Auditors of the Company, it was copied (to Consob and) also to the Chairman of the BoD. - the fact remains that only 4 days elapsed between the date of the second request by Elliott pursuant to art. 126-*bis* CLF and the date of the decision of the Board of Statutory Auditors (27 March, 2018), so it seems difficult to talk about the inertia of the BoD with respect to the Second Elliott request pursuant to art. 126-*bis* CLF, that is, the request accepted by the Board of Statutory Auditors, while the first request by Elliott pursuant to art. 126-*bis* CLF referred to the points on the agenda with different wording.

the filtering power of Directors, already existing with regard to the codification text prior to the 2003 amendment of joint stock companies, has been expanded as a result of the adoption of the legislative formula in speech, even if we discuss the exact scope of the filtering power by the administrative body.³

In this document it is not necessary to take a position on the identification of the limits of the power of the Directors not to accept the request for (call or) supplementation of the agenda of the shareholders' meeting, since the conclusion that the Elliott's request pursuant to art. 126-*bis* of the CLF should not be accepted can also be achieved by sharing the approach of the Board of Statutory Auditors and considering that the "*right to supplement items on the agenda*" can be restricted only in the presence of a request concerning "*unlawful, impossible or useless issues*".

This is because in the Explanatory Note of the Board of Statutory Auditors (p. 3, points *v* and *vi*) the remaining in office "*of all the directors*"⁴ - and particularly the Directors Arnaud Roy de Puyfontaine, Hervé Philippe, Frédéric Crépin, Félicité Herzog and Anna Jones - is extrapolated from the "*coordinated reading of articles 2385 and 2386 of the Italian Civil Code*" (and art. 9.10 of TIM's Bylaws).

Consequently, presumably the Board of Statutory Auditors wishes to enforce Art. 2385, subsection 1 of the Italian civil code, according to which the resignation, where the majority of the BoD does not remain in office, is effective from the time at which the majority of the Board is reconstituted following the acceptance of the new Directors.

The Board of Statutory Auditors, in the Explanatory Note (*ibidem*), also refers to "*positions expressed both in case law (Milan Court) and in authoritative scientific doctrine and notarial maxims*". Although the Board of Statutory Auditors does not make explicit citations, it is presumable that it intends to refer to the Milan Court, 10 June 2008, in *Giur. it.*, 2009, p. 377 s. (as regards the case law of the Court of Milan) and to maxim H.C.9 of the Interregional Committee of the Notary Associations of Tre Venezie.

In reality neither the jurisprudential ruling nor the notarial law mentioned above address the question as to whether art. 2385, subsection 1 of the Italian Civil Code may be derogated from the

³ See, in various senses, Brescia Appeal Court, 29 February 2016, the Milan Court, 2 April 2016, the Court. Brescia, 23 October 2015, all published in *Giur. comm.*, 2016, II, 1037 et seq.

⁴ To be honest, at least Director Recchi certainly does not remain in office, given that his resignation came into force from 22 March 2018 and he, of course, does not alone constitute the majority of the BoD.

provisions of the statutory clause *simul stabunt simul cadent*: these are pronounced in general terms, for which the principles embodied therein apply to the hypothesis in which the clause, *simul stabunt simul cadent* does not contain specific provisions regarding the time that the resignation of the Directors becomes effective.

In this regard, a distinction must be made between two aspects that sit at separate logical levels:

(i) if article 2385, subsection 1 of the Italian Civil Code is compatible with a *simul stabunt simul cadent* clause and therefore if it applies where the clause does not say specific rules regarding the starting date of the termination of Directors;

(ii) where it is deemed that article 2385, subsection 1 of the Italian civil code, is theoretically compatible with the *simul stabunt simul cadent* clause (accepting the theory more favourable to the one adopted by the Board of Statutory Auditors of TIM) - if this clause could derogate art. 2385, subsection 1, of the Italian Civil Code, where it specifically prescribes the time when the termination of the Directors starts.

The validity of the *simul stabunt simul cadent* clause has already been interpreted by the normative code prior to the reform of company law in 2003 (today the admissibility of this clause is expressly recognized by Article 2386, subsection 4, of the Italian Civil Code), the most discussed point has been - and still remains - the one now indicated under (i), relevant to the time the Directors' resignation becomes effective, when the *simul stabunt simul cadent* does not contain specific provisions on this point. It is likely that this debate alludes to the generic doctrinal reference made by the Board of Statutory Auditors in the Explanatory Notes.

To be honest, in the context of the debate on the topic under discussion, authoritative doctrine has argued that "*the rule of the prorogatio of the resigning majority (Article 2385, subsection one, second part) that will continue to administer together with the surviving minority on the one hand and the rule of the immediate termination of the resigning minority on the other (Article 2385, first subsection, second part), are complementary and related to the rule of partial renewal of the board by the shareholders' meeting*"⁵. According to this doctrine, therefore, art. 2385, subsection one of the Italian Civil Code, only applies in the case of partial renewal of the BoD and not when the entire Board is to be renewed as a result of the *simul stabunt simul cadent* clause regardless of the

⁵ INZITARI, *L'estinzione del rapporto d'amministrazione per effetto della clausola "simul stabunt simul cadent"*, in *Contr. impr.*, 1990, p. 860, highlighting added.

existence of specific provisions in the Bylaws on the time at which cessation of the Directors caused by the clause in question comes into effect.

In our case, however, it is not necessary to take a stance on the matter, given that art. 9.10 of the TIM Bylaws contains express provision on the date the resignation takes effect. This statutory clause in fact establishes 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*”.

The precept that office shall cease to be held from the time the BOD has been reconstituted by persons appointed by the shareholders' meeting only applies to "*remaining Directors*", as confirmed by the fact that there is talk of "*their* cessation" (highlighting added), i.e., indeed, of cessation of the "*remaining Directors*".

It appears reasonable to consider that the "*remaining Directors*" were the Directors other than the majority of the members of the Board of Directors resigning "*for any cause or reason*", and therefore including resignations.

In support of this interpretation it is possible to initially put forward the fact that it is only by interpreting art. 9.10 of TIM's Bylaws in this way that this assumes an autonomous preceptive purview with respect to art. 2386, subsection 4, of the Italian Civil Code, if art. 2385, subsection 1, of the Italian Civil Code is considered applicable in the presence of a *simul stabunt simul cadent* clause which does not explicitly regulate the time the cessation occurs (if, instead, this legislative provision is deemed inapplicable to the above case, this completely undermines the position taken in the Explanatory Note of the Board of Statutory Auditors).

In other words, it must be one or the other:

- either art. 2385, subsection 1 of the Italian Civil Code is not applicable where *simul stabunt simul cadent* clauses are present, even if they do not put forward provisions regarding the time of termination, and therefore the *resigning* Directors are not in office at the beginning of the Shareholders' Meeting of 24 April 2018;

- or, if art. 2385, subsection 1, of the Italian Civil Code is applicable in the case referred to in the previous indent, the only way to not render useless (as being merely repetitive of the legislative

framework) art. 9.10 of the TIM Bylaws is to interpret it in the sense that only those Directors not directly involved in the cause of termination remain in office, even if it is constituted by the resignations, until the entire BoD is reconstituted by the Shareholders' Meeting from which it again follows that the *resigning* Directors are not in office at the date of the Shareholders' Meeting held on 24 April 2018.

To this it should be added that in support of the interpretation of art. 9.10 of the TIM Bylaws hereby accepted there is the fact that it considers the loss of a majority of the Directors "*for any cause or reason*". This expression appears to be all-encompassing and includes termination by resignation. From this it follows that in any case where - including by resignation - there is a loss of a majority of the Directors, only the "*remaining Directors*" (i.e. those other than the majority directly concerned in the cause of termination) - and not the majority of Directors directly invested by the cause of the termination, even when this regards resignations - cease from the moment the BoD is reconstituted by the shareholders.

It must therefore be considered that art. 9.10 of the TIM Bylaws derogates from art. 2385, subsection 1, of the Italian Civil Code, for the hypothesis in which this rule can be considered abstractly applicable in the presence of a *simul stabunt simul cadent* clause.

It should be added that the legal provision now mentioned can be derogated. What was authoritatively detected in an era dating back to Gustavo Minervini, remains convincing today⁶, according to which, in the presence of the rule in question, "*the production of the extinctive effect is extended to the afore-mentioned time* [editor's note.: i.e. at the time when the majority of the board is reconstituted following the acceptance of the new Directors], *in order to ensure continuity of the company's directors: rationale eminently of private interest, which does not allow the rules in question* [editor's note.: which include Art. 2385, subsection 1, of the Italian Civil Code] *to be considered as binding*" (highlighted as in the text)⁷.

In this sense, see the decision of the Court of Milan, 22 March 1982⁸, whose author (Renato Rordorf) is authoritative - equal to that of the doctrine now recalled, and in relation to which enduring relevance is as described above. Recent literature also identifies the rationale of article 2385, subsection 1, of the Italian Civil Code, in the protecting of available interests. See for

⁶ Article 2385, subsection 1 of the Italian civil code has not been changed.

⁷ See MINERVINI, *Gli amministratori di società per azioni*, Milan, 1956, p. 484.

⁸ In *Foro it.*, 1982, I, cc. 2636 et seq.

example Francesco Vassalli, who states that "*the distinction made by the lawmakers regarding the immediate or delayed effects of the renunciation fulfils the need to retain the numerical composition established by the autonomy of the parties*" (highlighting added)"⁹.

Besides, the lawfulness of the derogation made by Article 9.10 of the TIM Bylaws is confirmed by article 2386, subsection 4, final part, of the Italian Civil Code, which allows for statutory autonomy in making a wider derogation. In the hypothesis envisaged by the latter provision, the convening of the shareholders' meeting for the reconstitution of the administrative body and the management activity, limited to ordinary administration, is attributed to an organ (the Board of Statutory Auditors) that is totally free from managerial responsibilities and which has a radically different (control) function, while art. 9.10 of TIM's Bylaws retains the power to call the Shareholders' Meeting and to manage the Company during the interim period for the "*remaining Directors*", who are part of the body (the BoD) institutionally invested with the administrative function.

Therefore, at the time the Shareholders' Meeting was opened on 24 April 2018, the *resigning* Directors cannot be deemed to have been in office, so a resolution revoking them at this Shareholders' Meeting would have been "*impossible*" or, at the least, "*useless*" (to use the terminology used in the Explanatory Note by the Board of Statutory Auditors, p. 3, point (iii)).

6. The incompatibility of the application of Art. 9.10 of the TIM Bylaws with a partial renewal of the BoD

However, it should be reiterated that the argument set out in the previous paragraphs was only for the purpose of being thorough, given that - as anticipated, whatever the view taken regarding the point at which the effects of the resignation of TIM's *resigning* Directors was triggered - we must consider that, in the presence of the circumstance triggering the application of art. 9.10 of the TIM Bylaws (loss of a majority of the members of the Board of Directors for any cause or reason), the convening of the Shareholders' Meeting, or the supplementation of the agenda for a Meeting already called may, and indeed should, relate to the renewal of the entire Board of Directors and not just the replacement of some Directors.

In this sense, both reasons of a legal perspective and system arguments are given.

⁹ See F. VASSALLI, in *Commentario romano al nuovo diritto delle società*, edited by D'Alessandro, vol. II, t. 2, Padua, 2011, p. 73. In truth the Author continues, referring also to the need to prevent operational gaps, which, however, he refers to the "*hypothesis for waiver of the sole director or of simultaneous waivers of all the directors*", which in the case of article 9.10 of the TIM Bylaws do not exist.

Under the initial perspective it should be recalled that:

- Art. 9.10 of TIM's Bylaws which determines the effective date of cessation for the "*remaining Directors*" at the "*time the **Board of Directors** has been reconstituted by persons appointed by the Shareholders' Meeting*" (highlighting added);
- Art. 2386, subsection 4, of the Italian Civil Code that, where the clause *simul stabunt simul cadent* operates, makes it incumbent upon the Directors remaining in office (or the Board of Statutory Auditors, in the eventuality set out in the latter part of the provision) to convene the shareholders' meeting "*for the appointment of the **new board***" (highlighting added).

As we can see, neither the statutory clause nor the law rule take into consideration substitution limited to certain Directors.

System considerations are added to these clear legal indications: the clause *simul stabunt simul cadent* is clearly aimed at attributing recognition and protection to the requirement that the composition of the BoD reflects the make-up of the share ownership¹⁰.

It is hardly necessary to point out that an unavoidable premise for this requirement to be met is the fact that the replacement involves the entire administrative body, and not just some of its members.

In fact if the renewal is only partial, even if the slate voting system is used, it is clear that this could lead to a composition of the BoD, that, in terms of representativeness (in the non-technical sense, obviously the Directors cannot have an imperative mandate) of the various components of the share ownership, differs from the composition that the administrative body has if it were to be renewed in its entirety.

Consider, for example, the case where, following the application of the slate voting system (in which the clause *simul stabunt simul cadent* is functionally linked), in a BOD of nine Directors six represent shareholder A and three represent shareholder B. If a partial renewal were possible and this only affected Directors representing one of the two shareholders (e.g. three of the Directors representing A or the three Directors representing B), this would make the composition of the BoD asymmetrical, including when applying the slate voting system, which would allow the shareholder

¹⁰ See, for example: FRANZONI, *Della società per azioni*, t. III, *Dell'amministrazione e del controllo*, in *Commentario del cod. civ. Scialoja-Branca*, edited by Galgano, Bologna-Roma, 2008, under art. 2386, p. 268; TINA, *Le pattuizioni sulla governance*, in *Le acquisizioni societarie*, edited by Irrera, Bologna, 2011, p. 487 s.

who had appointed all three outgoing Directors to appoint only one to replace them and not all of them.

Partial renewal of the BOD is therefore in a logical head-on conflict with the clause *simul stabunt simul cadent*. We would add to this that TIM is a listed company, which is irrevocably bound by art. 147-ter CLF, to the slate voting system, to which the *simul stabunt simul cadent* is evidently applicable.

Consequently, a possible partial renewal of TIM's BoD by the Shareholders' Meeting of 24 April 2018 would not only render article 9.10 of the Bylaws as meaningless, but also - and primarily - Art. 147-ter of the CLF, which imposes, as a mandatory precondition, the adoption of the slate voting system. From the time the factual circumstance arises calling for the application of art. 9.10 of the TIM Bylaws (see also chapter 7 below on this subject), the call of the Shareholders' Meeting/the supplementation of the agenda of the Shareholders' Meeting already called, may only pertain to the renewal of the entire Board of Directors and not its partial renewal. A possible partial renewal resolved by the Shareholders' Meeting of 24 April 2018 would be characterized as illegitimate and would involve an "*unlawful matter*" (to use the terminology used in the Explanatory Note of the Board of Statutory Auditors, p. 3 point (iii)).

7. The possible (illegitimate) partial renewal of the BoD does not prevent the application of Art. 9.10 of TIM's Bylaws in the case subject to the opinion.

On the basis of what has been said so far in response to the first question, there is no reason for the second question that has been submitted to me.

However, I do deal with this question below for the sake of thoroughness.

The Board of Statutory Auditors, in its Explanatory Note, expressed the view that the "*issue of the effects of clause 9.10 of TIM's Bylaws on a board reconstituted during the shareholders' meeting of 24 April 2018*" is "*a separate and autonomous matter with respect to the supplementation request addressed to the Board of Statutory Auditors of TIM*". In turn, Elliott in its second request for supplementation pursuant to art. 126-bis of the CLF, considered that "*(h) once the Shareholders' Meeting has resolved on the proposal to appoint six directors to replace Messrs de Puyfontaine, Crepin, Hervé, Recchi, Ms Jones and Ms Herzog, the majority of the BoD would then have been appointed the shareholders' meeting; (i) moreover, reconstitution of the majority of the BoD by the*

shareholders' meeting would not require the cessation of the current directors who have not resigned, since the coordinated resignations en masse, which occurred yesterday during the meeting of the BoD, do not constitute a "cause or reason" sufficient to determine the application of the Board of Directors dissolution clause prescribed, in derogation of the law, by article 9.10 of the bylaws;"¹¹.

In reality, the date on which the majority of the members of the Board of Directors tendered their resignations (22 March 2018) gave rise to the circumstance (loss of a majority of the members of the Board of Directors "*for any cause or reason*"), which, pursuant to art. 9.10 of the Bylaws, produces the consequence that "*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*".

In truth, in its second request for supplementation pursuant to art. 126-bis of the CLF. of 23 March 2018, Elliott stated that the resignations of Directors Arnaud Roy de Puyfontaine, Hervé Philippe, Frédéric Crépin, Félicité Herzog, Anna Jones and Giuseppe Recchi are "*manifestly abusive since they were openly aimed at preventing the shareholders of Telecom exercising their voting right on the proposal that is the object of the Supplementation*", and therefore, "*insofar as they are abusive, said resignations are not sufficient to constitute a legitimate "cause or reason" to trigger the application of article 9.10 of the company Bylaws*".

In reality, the resignations in question are theoretically compatible with purposes other than those allocated to such actions by Elliott, in particular they are compatible with the aim of allowing the shareholders' meeting to express itself on the renewal of the entire BoD, commensurate with the rationale of article 9.10 of TIM's Bylaws and with that of the system of slate voting, irrevocably imposed Article 147-ter of the CLF.

However, for the purposes of this opinion, it is not necessary to take a view on whether the resignation of the TIM's *resigning* Directors was or was not abusive. In fact, even if they were abusive, anyone wishing to assert this circumstance should activate the legal instruments prescribed in the law, which has nothing to do with the path chosen by the Board of Statutory Auditors,

¹¹ A similar opinion is expressed in the "*short note*" by Elliott's lawyer, p. 10, supporting the theory, picked up by the Board of Statutory Auditors in its Explanatory Note that this is a "*separate and subsequent issue with respect to the obligation to order the supplementation and to allow all the shareholders to express their opinion on it*".

granting the second request for supplementation of the agenda advanced by Elliott, pursuant to art. 126-*bis* of the CLF.

8. Conclusions

Summarising, for the reasons previously illustrated, I respond independent *pro veritate* in the following way to the questions that have been put to me:

(i) the resolution of the TIM BoD, made on 22 March 2018 to (a) call a Shareholders' Meeting in a single call for 4 May 2018 to proceed with the renewal of the entire board and (b) not supplement the agenda of the Shareholders' Meeting of 24 April 2018, as requested by Elliott International LP, Elliott Associates LP and The Liverpool Limited Partnership and the relative removal and replacement of Directors Arnaud Roy de Puyfontaine, Hervé Philippe, Frédéric Crépin, Giuseppe Recchi, Félicité Herzog and Anna Jones is lawful;

(ii) the possible (illegitimate) partial renewal of the BoD by the Shareholders' Meeting of TIM to be held on 24 April 2018, in accordance with the proposal formulated by Elliott International LP, Elliott Associates LP and The Liverpool Limited partnership with their request pursuant to art. 126-*bis* CLF f., does not prevent the application of Art. 9.10 of the Company's Bylaws and the consequent need for the Company Shareholders' Meeting to renew the entire Board of Directors.

* * *

I trust that I have hereby provided a thorough answer to the questions that were submitted to my attention. Moreover I am in any case ready to provide any further clarifications and details which may be required.

Best regards,

(Roberto Sacchi)