

Companies limited by shares

Italian and European Company Law – A.A. 2024/2025

Dott.ssa Giulia Serafin

One of the main characteristics of a s.p.a. is that of the necessary presence of three distinct internal bodies, each one is invested by the law with its own specific functions and powers:

- shareholders' meeting: body with deliberative functions, whose powers are limited to major decisions concerning the company, excluding the management of the company;
- administrative body: body with the power to manage and represent the company, it is also also responsible for implementing the resolutions of the shareholders' meeting;
- internal control body: body that has the function of controlling the administration of the company.

Administration and control systems:

- traditional system (administrative body and board of statutory auditors; default system)
- two-tier system (supervisory body and management board)
- one-tier system (board of directors and management control committee)

Shareholders' meeting

Is a collective body composed of the shareholders. Its function is to form the will of the company in the matters reserved to its competence by law or by the bylaws.

The shareholders' meeting decides according to the majority principle. The will expressed by the shareholders at the meeting is considered as the will of the company and binds all shareholders (even if absent, dissenting or abstaining), as long as the rules of the deliberative procedure have been followed.

Ordinary and extraordinary shareholders' meeting

Depending on the matters assigned, the shareholders' meeting can be distinguished into ordinary or extraordinary (2364, 2365 c.c.). Also, depending on the system of administration and control adopted, certain competences assigned to the ordinary shareholders' meeting change.

Competences of the ordinary shareholders' meeting (art. 2364 c.c.):

- 1) approves the financial statements;
- 2) appoints and removes directors; appoints the statutory auditors and the chairman of the board of statutory auditors and, where present, the person appointed to carry out the external audit of accounts;
- 3) determines the remuneration of directors and statutory auditors, unless it is not provided by the bylaws;
- 4) decides on the liability of directors and statutory auditors;
- 5) decides on other matters assigned by law to the competence of the shareholders' meeting, and on any authorizations required by the bylaws for the performance of acts of the directors, without prejudice to the liability of the latter for the acts performed;
- 6) approves any regulations for the proceedings of the shareholders' meeting.

Competences of the extraordinary shareholders' meeting (art. 2365 c.c.):

1. amendments to the bylaws;
2. appointment, replacement and powers of liquidators;
3. any other issue which the law explicitly states must fall under its responsibility.

→ some powers (which mainly relate to item 1) can be delegated to the administrative body (art. 2365, par. 2, c.c.)

Shareholders' general meeting and
special class shareholders' meetings

Depending on whether or not the company has issued special classes of shares we will have a single, general meeting of shareholders or also special class meetings.

The rules of the extraordinary shareholders' meeting will apply to the latter (if the special shares are listed, the rules of the savings shareholders' meeting will apply, art. 147-*bis* t.u.f.).

Shareholders' meeting procedure

1. Who calls the shareholders' meeting?

Usually, by the administrative body...

2. When?

(Cases in which the call it's mandatory: once a year, at the request of the shareholders)

The call of the shareholders' meeting by the internal control body:

1. if the call is mandatory and the directors have failed to do so (art. 2406, par. 1, c.c.)
2. if all the directors or the sole director fail (art. 2386 c.c.)
3. if, while carrying out its task, discovers facts of significant seriousness and there is an urgent need to take action (art. 2406, par. 2, c.c.)

→ In certain cases, the call of the shareholders' meeting can be ordered by the court.

→ Where? (municipality of the company headquarters)

→ How? Notice of call

→ The meeting agenda (disclosure function)

→ Plenary shareholders' meeting (assemblea totalitaria)

Who can attend the shareholders' meeting?

→ persons entitled to vote... shareholders with voting right, persons who are not shareholders but who can exercise the vote

→ members of the administrative body and of the internal control body

→ other persons entitled to attend the meeting

→ attendance by means of telecommunications and exercise of voting by mail or electronically (art. 2370, par. 4, c.c.) → *opt in* clause in the bylaws

Listed companies:

→ Right to request the integration of the agenda

→ Right to submit proposals on matters already on the agenda

Constitution of the shareholders' meeting and validity of resolutions

→ constitutive quorum (is the portion of the share capital which must be represented at the meeting to ensure the validity of its proceedings)

→ deliberative quorum (is the portion of the share capital necessary for the adoption of a resolution)

→ system of successive calls (first call, second call, etc.) to facilitate the adoption of resolutions, so by the second call the quorums are lowered.

ORDINARY SHAREHOLDERS' MEETING

| | | |
|-------------|---------------------|---|
| First call | Constitutive quorum | At least half of the share capital (50%). |
| | Deliberative quorum | Absolute majority (50%+1) unless the by-laws require an higher majority. |
| Second call | Constitutive quorum | Not required. |
| | Deliberative quorum | Majority of attending shareholders unless the by-laws require an higher majority (but not for the approval of the financial statements and the appointment and removal of the directors). |

ORDINARY SHAREHOLDERS' MEETING

| | | | |
|--|-------------|---------------------|--|
| Closed companies limited by shares | First call | Constitutive quorum | Positive vote of as many members representing more than half of the share capital. |
| | | Deliberative quorum | |
| | Second call | Constitutive quorum | More than one-third of the share capital. |
| | | Deliberative quorum | At least two-thirds of the capital represented at the meeting. |
| Open companies limited by shares (optional system) | First call | Constitutive quorum | At least half of the share capital (50%). |
| | | Deliberative quorum | At least two-thirds of the capital represented at the meeting. |
| | Second call | Constitutive quorum | More than one-third of the share capital. |
| | | Deliberative quorum | At least two-thirds of the capital represented at the meeting. |

SHAREHOLDERS' MEETING ONE-CALL SYSTEM

| | | | |
|----------------------------------|-------------------------------------|---------------------|---|
| Open companies limited by shares | Ordinary shareholders' meeting | Constitutive quorum | Not required. |
| | | Deliberative quorum | Majority of attending shareholders unless the by-laws require an higher majority (but not for the approval of the financial statements and the appointment and dismissal of the directors). |
| | Extraordinary shareholders' meeting | Constitutive quorum | 20% of the share capital. |
| | | Deliberative quorum | At least two-thirds of the capital represented at the meeting. |

Shareholders' meeting functioning

→ The chairman of the shareholders' meeting

→ The secretary

→ The right to request that the meeting is postponed

→ The minutes

Representation at shareholders' meeting (not listed companies, art. 2372 c.c.)

- closed companies: the by-law could exclude or restrict the representation
- proxies (delega)
- subjective limits
- quantitative limits

→ Abuse of the majority in the exercise of voting rights to the detriment of the interests of the company:
conflicts of interest between the shareholder and the company (art. 2373 c.c.)

→ Abusing majority power to the detriment of the minority

Voting syndicates (shareholders' agreements)

- Advantages and risks
- Effects
- Duration
- Rules for open s.p.a. and for listed companies (disclosure, consequences for the breach)

Invalidity of the shareholders' meeting resolutions

- annulability (voidable)
- nullity (more serious, void)

The main difference between voidable and void resolutions is that while the first can be annulled only upon request by the damaged party and within strict time limits, the latter are considered more serious and can therefore be voided ex officio by the court or on the request of any interested party. Moreover, time limit are longer (just in one case there are not time limit).

Annulability/Voidable resolutions (art. 2377 c.c.)

Art. 2377, par. 2, c.c.:

Resolution that are not passed in accordance with the law or the articles of association may be contested...

Resolutions which are not adopted in compliance with the law or the articles of association can be voided.

Persons entitled to contest a voidable resolution:

- absent, dissenting or abstaining shareholders (but is required a given percentage of the share capital, also jointly)
- directors
- internal control body
- supervisory authorities in the case of listed companies, banks, insurance companies or financial companies (Consob, Banca d'Italia, Ivass)

Shareholders (absent, dissenting or abstaining) are entitled to contest a voidable resolution only if they hold share with voting rights that represent the

- 0.1 % of the share capital in the open companies
- 5% of the share capital in closed companies

The articles of association may reduce or exclude this requirement.

If the shareholder does not own this percentage or doesn't have the right to vote, he/she can only claim compensation for the damage caused by the approval of the voidable resolution.

In certain cases, although the resolution would be invalid, the law states that it is voidable only if the violation reaches a certain severity (thus, favoring the stability of company resolutions):

1. Attendance at the meeting by persons who were not entitled to attend if this affected the constitutive quorum
2. Invalidity or miscounting of votes if they were decisive in the computation of the deliberative quorum
3. Incompleteness of the minutes, making it impossible to determine the content, effect and validity of the resolution

When the violation covers one of these three cases but does not reach this type of severity, the resolution will not be voidable.

→ Time limit:

The resolution may be contested within 90 days:

- a) from the date of resolution,
- b) from the date of the registration/filing in the Business register, whether the resolution must be recorded or filed.

→ Effects of the annulment:

- The annulment is valid for all the shareholders, the company and third parties, and obliges the directors to take any necessary actions.
- The annulment does not affect the rights acquired by third parties in good faith based on the decisions taken to implement the resolution.

→ Sanatoria:

the resolution may not be annulled if it is replaced by another resolution taken in accordance with the law or the statute or if it is revoked (also in this case without prejudice to the rights acquired by third parties).

Nullity (art. 2379 c.c.)

Art. 2379, par. 1, c.c.: **imperative list of cases**

Resolutions are void:

1. in the absence of the notice of call
2. in the absence of the minutes
3. where the object of the resolution is impossible or unlawful

Absence of the notice of call

shall not be considered a failure to call the shareholders' meeting if there are irregularities in the notice of call but this comes from a member of the company's administrative or internal control body, and it allows those who have the right to take part to be notified in advance of the call and of the date of the shareholders' meeting

In any case the resolution cannot be contested by those who consented that the shareholders' meeting be held.

→ Remember also the case of the plenary shareholders' meeting (here we don't have a notice of call, but the resolution will be valid)

Absence of the minutes

The minutes is not considered missing if:

- a) it contains the date and the object of the resolution,
- b) it is signed by the chairman of the meeting, or the chairman of the board of directors and the secretary or the notary

In any case, the nullity for the lack of the minutes can be avoided by drawing up the minutes before the next shareholders' meeting.

The object of the resolution is impossible or unlawful

The object of the resolution is not legally or materially achievable or is contrary to the law or the legal order or the morality.

Resolutions are also void if their object are lawful, but their content is unlawful (example: the resolution which pass a false financial statement).

→ Persons entitled to contest a void resolution: any interest party

→ Effects: The nullity does not affect the rights acquired by third parties in good faith based on the decisions taken to implement the resolution

→ Sanatoria: the resolution may not be declared null if it is replaced by another resolution taken in accordance with the law

→ Time limit for contesting a void resolution: 3 years, a) from the recording of the resolution in the book of shareholders' meeting or b) from the recording or the filing in the Business register (if it's provided)...

... but in case the resolution has an unlawful object and turns the corporate object of the company into an unlawful object, there is no time limit to contest the resolution.

→ Moreover, there are some specific rules that provide for shorter time limits with regard certain resolutions with particularly important subjects (share capital increase, reduction of the share capital, issuance of bonds, approval of the financial statement, transformation, merger, division).