

Alert | Corporate



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Italian Stock Exchange Authority (Consob) Issues Opinion on List Presented by Outgoing Board of Directors of Public Companies

An outgoing board of directors (BoD) must ensure that the creation of its own list for the appointment of a new board is transparent and documented, pursuant to the Italian Stock Exchange Authority (Consob) opinion dated Jan. 21, 2022.

Although not expressly governed by Italian Law¹ and despite a lack of guidance in case law, the articles of association of several Italian listed companies allow the outgoing BoD to present its own list for the appointment of the new board members provided that the right of minority shareholders to appoint board members is not impeded or altered.

The presentation of a list by the outgoing BoD seems consistent with a BoD's self-assessment process as set forth by Borsa Italiana's Corporate Governance Code, and it could be the solution to the problem related to the lack of representativeness of the lists submitted by shareholders in companies where a majority shareholder who can direct the decisions of the shareholders meeting is absent.

The debate surrounding the conditions for the legitimacy of a list submitted by an outgoing BoD has become, especially in recent months, quite lively and interesting.

¹ See Article 147-ter of Legislative Decree 58/1998 (the so-called "TUF"), on the election and composition of BoDs of listed companies.

In addition to the transparency and documentability that the outgoing BoD must ensure in the creation of the list, Consob also highlighted the following key aspects:

- i) the need for adequate BoD meeting minutes regarding discussions and presentation of the list;
- ii) the involvement of independent BoD members, the appointments committee, and, where possible, the BoD chair;
- iii) transparency throughout all shareholder interactions;
- iv) the obligation of transparency² of each director available for reappointment, to avoid potential conflicts of interest;
- v) the need for timely publication and “correct and complete information on the list submitted by the Board of Directors and the procedures for its formation”;
- vi) the need for a declaration on the absence of any connection with the list proposed by the BoD by the shareholders submitting another list;
- vii) the circumstances under which directors are elected based on a list of candidates submitted by the BoD does not preclude the qualification of a shareholder as a related party.³

A few days after Consob issued its opinion, the Committee of Market Operators and Investors (COMI) issued its own opinion fully endorsing the need for mechanisms to safeguard transparency in selection of candidates for the list.

Ultimately, both COMI and Consob agree with the legitimacy of the list submitted by a BoD and on the need to reinforce best practices related to the selection and presentation of such list until legislative action definitively clarifies certain aspects that remain controversial.

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² See Article 2391 c.c. of Italian Civil Code, on the interests of directors.

³ In fact, if a shareholder had representation on the BoD (directly or indirectly, for example, through corporate officers of companies belonging to his Group), this circumstance would have to be taken into account even if the said directors had been drawn from the list submitted by the BoD and not from the list submitted by the shareholders themselves.

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