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Università Cattolica del Sacro Cuore di Milano
(XXI Ciclo)

Subject of the Paper: "The two-tier system"

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The role of the General Meeting

(*Abstract*)

Within the two-tier system the role of the meeting is reduced by the effect of the presence of the supervisory board, which is given not only the function of controlling but also some duties which, within the legal management system, are instead committed to the shareholders' decisions.

In accordance with article 2364 *bis* c.c., in the companies provided with a supervisory board, the ordinary meeting:

1) appoints and removes the members of the supervisory board;
2) establishes the sum which is due to them as a fee, if it isn't laid down by the statute;
3) discusses and decides what is the liability of the members of the supervisory board;
4) discusses and decides on the distribution of the net profit;
5) appoints the auditor.

This is the specific set of regulating rules on the issue. To the interpreter the differences between this and the provision of article 2364 c.c. are quite clear. Not all these differences can be explained from the point of view of their typology. Anyway, only the appointment of the members of the board of directors appears to be an imperative function assigned by law to the supervisory board instead of being assigned to the general meeting. It is in fact, together with the adoption of the balance sheet, the most peculiar feature of the two-tier system. Nevertheless, while in the case of the latter function it is explicitly allowed a possible ouster of the competence of the supervisory board, nothing it's provided about the appointment of the members of the board of directors.

There are some other functions that must be considered as conferred to the meeting, apart from article 2364 *bis* c.c. and even though one follows the interpretation according to which the list expressed by law is tendentially closed. Among these functions there is, for the members of the board of directors, the legitimation to sue for damages. According to the first sub-paragraph of article 2409 *decies*, c.c., the company or the shareholders, pursuant to articles 2393 and 2393 *bis* c.c., file a lawsuit for damages against them. The same decision is also conferred to the supervisory board according to law (second sub-paragraph of article 2409 *decies* of the civil code), so it seems inopportune to suppose an oversight by the legislator, despite there have been opinions by contraries. The purpose of the law is to establish a parallel legitimation in order to stress the

independence of the different bodies and, first of all, the independence of the board of directors from the meeting. And it may be necessary to argue alike also about the lawsuit for damages against the liquidators: the second sub-paragraph of article 2489 c.c. refers the interpreter generically to the rules about the responsibility of the managing directors.

As regards the residual functions the issue is how to ascertain the company body having competence in case the civil code expects the shareholders' decision, being the company managed according to the two-tier system. These are for example: the purchase of assets or credits which belong to promoters, founders, shareholders and directors within two years from the company registration in the Register of Companies (article 2343 *bis* c.c.); the sale and the purchase approval of treasury shares (articles 2357 e 2357 *ter* c.c.); the confirmation of the operations performed while the company is not registered in the Register of Companies yet (third sub-paragraph of article 2331 c.c.); the authorization to the directors to perform competing activities (article 2390 c.c.); the appointment (and removal) of the general manager (article 2396 c.c.).

It is maybe to be hoped that the statute fills this gap. Nevertheless it is left the problem of the lack of provision for such issues in the statute. In this case there are two opposite trends in the interpretation of the law. One of them considers the provision as meant for the meeting anyway, whatever may be the elected managing system. In other words it considers as implicit the reference to the meeting, even within the two-tier system. Differently, the other trend asserts that the functions which are not expressly conferred on the ordinary general meeting have to be assigned to the supervisory board, on the basis of a residual competence of this body.

Consequently, the contractual clauses adopted by the shareholders can reduce the differences between the functions of the meeting, within the traditional system and the two-tier system, basically to the fact that the task of the appointment of the directors can be conferred to the supervisory board. In that case it is difficult to think to a real differentiation and independence of owners and supervisors, not only because the members of the supervisory board are anyway appointed by the shareholders' majority, but also and mainly because if the statute is aimed to concentrate in the meeting all the other functions that may be assigned to both the bodies, there isn't the real purpose to entrust the company management to professionals equal to the task and independent too.

Kommentar: ma per il bilancio lo statuto non può trasferire la competenza sic et simpliciter