

EPIDEMIOLOGIC EMERGENCY COVID-19 – COMPANY LAW

1. Law Decree “Cura Italia”

On 17 March 2020, the Law Decree No. 18 of 17 March 2020 (so-called Law Decree “Cura Italia”, hereinafter “**Law Decree Cura Italia**” o “**LD**”) was published in the Italian Official Gazette No. 70 and entered into force. The LD sets forth “*Measures aimed at strengthening the National Health Service and providing economic support measures for families, workers, and businesses, related to the Covid-19 epidemiologic emergency*”.

Among the measures adopted by the Law Decree Cura Italia, it is worth mentioning Art. 106, entitled “*Rules for the management of shareholders’ meetings*”, which contains certain provisions applicable to companies in order to tackle the impact of Covid-19 on the shareholders’ meetings and on the decisions relevant to the companies’ life.

The said provisions: (i) allow the companies to extend the deadline for convening the annual shareholders’ meeting for the approval of the financial statements for the year ending on 31 December 2019; and (ii) facilitate the attendance of the shareholders, authorising remote meetings, in compliance with the Decree of the President of the Council of Ministers of 8 March 2020 (which provides for specific restrictions for business activities entailing the presence of people in the same place, in order to lower the risk of contagion – hereinafter “**DPCM 8.03.2020**”)⁽¹⁾.

The following paragraphs explain in detail the rules set forth in Art. 106 LD which are applicable, as per §7 of the said article, to the shareholders’ meetings convened within 31 July 2020 or, if later, within the end of the national state of emergency for health risk related to the Coronavirus outbreak.

Management of shareholders’ meetings for the approval of financial statements

⁽¹⁾ The Decree of President of the Council of Ministers 9 March 2020 extended the measures adopted by DPCM 8.03.2020 to the entire national territory.



Art 106, §1, LD sets forth an extended term to convene the shareholders' meeting for the approval of the financial statements for the year ending on 31 December 2019.

Namely, notwithstanding anything to the contrary provided for under Art. 2364, §2, and Art. 2478-*bis* of Italian Civil Code or under the by-laws, the ordinary shareholders' meeting having on the agenda the approval of the financial statements may be convened within 180 days after the end of the financial year. Therefore, the companies are allowed to extend the ordinarily applicable 120-day period⁽²⁾, regardless of whether or not the by-laws contains any specific provision enabling the company to opt-in for the longer 180-day period (before the entry into force of the LD, the 180-day option was available exclusively for companies drawing up the consolidated financial statements or in case special circumstances concerning the structure or the business purpose of the company require so).

Attendance and voting at the shareholders' meeting

With regard to the shareholders' meeting of joint-stock companies (*società per azioni*), companies limited by shares (*società in accomandita per azioni*), limited liability company (*società a responsabilità limitata*), cooperative enterprises and mutual insurance companies (*società cooperative e mutue assicuratrici*), Art. 106 §2 LD authorizes: (a) voting by correspondence or by electronic means; and (b) attendance to the shareholders' meeting via telecommunication means, also by way of derogation to the companies' by-laws. Such modalities shall be duly indicated in the notice calling the extraordinary and ordinary shareholders' meetings⁽³⁾.

The said companies may also establish that the shareholders' meetings are held, even exclusively, through telecommunication means, provided that it is ensured the identification of the participants, their attendance and the exercise of their voting right (under Art. 2370, §4, Art. 2479-*bis*, §4, and Art. 2538, §6, Italian Civil Code). In such case, the in-person presence of the chairman and the secretary, or (when required) the notary, in the same venue is not necessary⁽⁴⁾.

Art. 106, §3, §4, §5 and §6 LD set forth specific provisions for certain type of companies, namely:

⁽²⁾ The ordinary deadline to convene the shareholders' meeting is set forth in Art. 2364, §2, Italian Civil Code, which also applies to limited liability companies in accordance with Art. 2478-*bis* Italian Civil Code.

⁽³⁾ With regard to the companies listed on regulated markets, the exercise of the voting right through correspondence or by electronic means and the attendance to the shareholders' meeting via telecommunication means shall remain governed by Articles 140 – 143-*ter* of the regulation enacted by Consob Resolution No. 11971 of 14 May 1999, as subsequently amended and supplemented.

⁽⁴⁾ The provisions set forth in the LD aligns with the recommendations of the Corporate Committee of the Notary Council of Milan, upholding and confirming the position of the latter. Indeed, on 11 March 2020 the said Corporate Committee published the "Emergency" Recommendation No. 187 relating to the DPCM 8.03.2020, providing useful indications regarding the attendance to the shareholders' meeting via telecommunication means. Namely, in order to tackle the Covid-19 emergency, the said Recommendation states that "*where practicable, the shareholders' meeting shall be conducted by remote means*". The text of the Recommendation No. 187 is reported below: "*Where set forth in the by-laws in accordance with Art. 2370, §4, Italian Civil Code, or in any case allowed under the regulation in force, all the shareholders, including the chairman, may attend the shareholders' meeting through telecommunication means. However, the secretary drafting the minutes or the notary shall be present in the venue indicated in the notice of call, together with the person/s entrusted by the chairman with the identification of the shareholders attending the meeting in person (provided that the secretary drafting the minutes or the notary are not entrusted with such task). The provisions of the by-laws requiring the presence of the chairman or the secretary in the venue indicated in the notice of call (or in the same venue) shall be deemed as aimed at the simultaneous drafting of the minutes of the shareholders' meeting, which shall be signed both by the chairman and the secretary. Therefore, the said provisions do not prevent the shareholders from attending the meeting through telecommunication means, since in such case the minutes of the shareholders' meeting could be drafted later, either with the signature of the Chairman and the secretary, or with the signature of the notary in case of minutes drafted as a notary deed.*"

- Limited liability companies (Art. 106, §3, LD): by way of derogation to Art. 2479, §4, Italian Civil Code, the voting right may be exercised through written consultation or by consent given in writing. Therefore, the limited liability companies may opt in for the said voting modalities. Voting can take place through such modalities also in the following cases: (i) when the shareholders' meetings are convened to resolve upon amendments of the by-laws and decisions substantially modifying the company's purpose or significantly modifying the shareholders' rights; (ii) upon occurrence of any circumstances set forth under Art. 2482-bis, §4, Italian Civil Code⁽⁵⁾; (iii) if a qualified number of directors or shareholders request that the shareholders' decisions shall be made through a resolution to be passed by the shareholders' meeting.
- Listed companies, companies with shares traded on multilateral trading systems and companies with shares held to a considerable extent by the general public (Art. 106, §4 and §5, LD): for the purposes of the extraordinary and ordinary shareholders' meetings, the companies with listed shares may appoint a representative under Art. 135-undecies Legislative Decree 24 February 1998, No. 58 ("Consolidated Law on Finance", hereinafter referred as "TUF"), notwithstanding anything to the contrary provided for under the by-laws.
The said companies may also establish, in the notice of call, that the shareholders are allowed to attend the shareholders' meeting exclusively through the representative appointed under Art. 135-undecies TUF (by way of derogation to the generally applicable provision enabling the shareholder to grant a proxy to the representative appointed); in addition, proxies or sub-proxies may be granted to the said representative also pursuant to Art. 135-novies TUF, by way of derogation to Art. 135-undecies, §4, TUF⁽⁶⁾.
As explicitly set forth under Art. 106, §5, LD, such provisions shall apply also to the companies with shares admitted to trading on multilateral trading systems (e.g., AIM Italia) and to the companies with shares widely distributed among the public.
- Banks and cooperative credit institutions (banche popolari e banche di credito cooperative), cooperatives enterprises and mutual insurance companies (società cooperative e mutue assicuratrici) (Art. 106, §6, LD): by way of derogation to Art. 150-bis, §2-bis, Legislative Decree 1° September 1993 n. 385 ("Consolidated Bank Law" "TUB"), to Art. 135-duodecies TUF and to Art. 2539, §1, Italian Civil Code and to the provisions of the by-laws limiting the number of proxies which can be granted to the same person, shareholders of banks, cooperative credit institutions, cooperatives enterprises and mutual insurance companies may appoint the representative for the purposes of the extraordinary and ordinary shareholders' meetings in accordance with Art. 135-undecies TUF. The said companies may also provide, in the notice of call, that the shareholders are entitled to attend the shareholders' meeting exclusively through the representative appointed under Art. 135-undecies TUF. Besides, the LD provides that Art. 135-undecies, §5, TUF shall not apply.

⁽⁵⁾ Art. 2482-bis, § 4, Italian Civil Code provides that: "*If the loss has not decreased to less than one third within the following financial year, the shareholders' meeting shall be convened to approve the financial statement and the reduction of the corporate capital proportionally to the recorded losses. Failing that, the directors and the statutory auditors or the person in charge of the legal auditing appointed under Art. 2477 Italian Civil Code shall request the Court to order the reduction of the corporate capital for the amount of the losses recorded in the financial statement*".

⁽⁶⁾ Assonime has recently published a report analysing the provisions of the LD relating to the conduct of the shareholders' meetings. According to the said report, "*the provisions concerning listed companies shall apply also to the bondholders' meetings of companies with listed bonds by virtue of Art. 2415, §3, Italian Civil Code*".

Lastly, the LD provides that the shareholders may grant the proxy under Art. 135-*undecies*, §1, TUF, until the second day prior to the shareholders' meeting on first call.

2. Consob Resolution – Communication under Art. 120, TUF

On 17 March 2020, Consob published its Resolution No. 21304 providing that, with reference to the companies with high market value identified in the annex attached to the Resolution, for three months from the entry into force of the Resolution (unless revoked earlier), the notification obligations under Art. 120 TUF arise also when the following thresholds are exceeded: (i) 1% for the companies named in Section A⁽⁷⁾ of the list to the Resolution; and (ii) 3% for companies qualifying as SMEs under Art. 1 *w-quater*.1 TUF, defined in Section B⁽⁸⁾ of the list attached to the Resolution.

This is without prejudice to the exemptions from the notification requirements for significant shareholdings provided for under Article 119-*bis* of the regulation adopted by Consob with Resolution No. 11971 of 14 May 1999, as subsequently amended and supplemented (“Issuers' Regulations”).

Under Art. 114, §5, TUF, any person who, on the date of entry into force of the aforementioned Resolution No. 21304, “*holds a stake in the voting capital of listed companies named in the attached list that is above the thresholds set out in sub-sections (i) and (ii) above and below the thresholds set out in Art. 120, §2, TUF, is required to communicate this in the manner and within the terms specified in the aforementioned Art. 120, §2, TUF, within 10 working days after the aforementioned date*”.

3. ESMA Recommendation

On 11 March 2020, following the analysis of the market situation and of the contingency measures taken by supervised entities, ESMA provided the following recommendations to financial market participants:

- Business Continuity Planning – all financial market participants, including infrastructures should be ready to apply their contingency plans, including the deployment of business continuity measures, to ensure operational continuity in line with regulatory obligations;
- Market disclosure – issuers should disclose as soon as possible any significant information concerning the impacts of COVID-19 on their fundamentals, prospects or financial situation in accordance with their transparency obligations under the Market Abuse Regulation;

⁽⁷⁾ Namely: A2A S.p.A., Anima Holding S.p.A., Assicurazioni Generali S.p.A., ASTM S.p.A., Atlantia S.p.A., Azimut Holding S.p.A., Banca Mediolanum S.p.A., Banca Popolare di Sondrio s.c.p.a., Banco BPM S.p.A., BPER Banca S.p.A., Cerved Group S.p.A., Enel S.p.A., Eni S.p.A., Fincobank Banca Fineco S.p.A., Hera S.p.A., Interpump Group S.p.A., Intesa SanPaolo S.p.A., Iren S.p.A., Italgas S.p.A., Italmobiliare S.p.A., Leonardo S.p.A., Mediaset S.p.A., Mediobanca – Banca di Credito Finanziario S.p.A., Moncler S.p.A., Pirelli & C. S.p.A., Prysmian S.p.A., Reply S.p.A., Saipem S.p.A., Salini Impregilo S.p.A., Sanlorenzo S.p.A., Saras S.p.A., Raffinerie Sarde, Snam S.p.A., Società Cattolica di Assicurazione soc. coop., Telecom Italia S.p.A., Terna – Rete Elettrica Nazionale S.p.A., UniCredit S.p.A., Unione di Banche Italiane S.p.A., Unipol Gruppo S.p.A..

⁽⁸⁾ Namely: Banca Farmafactoring S.p.A., BF S.p.A., Carel Industries S.p.A., Dovalue S.p.A., EL.EN S.p.A., Gruppo Mutuonline S.p.A., IGD – Immobiliare Grande Distribuzione SIIQ S.p.A., Illimity Bank S.p.A., RCS Mediagroup S.p.A., Tamburi Investment Partners S.p.A..

- Financial Reporting – issuers should provide transparency on the actual and potential impacts of COVID-19, to the extent possible based on both a qualitative and quantitative assessment on their business activities, financial situation and economic performance in their 2019 year-end financial report (if these have not yet been finalised) or otherwise in their interim financial reporting disclosures.

4. STAR Issuers – Notice of Borsa Italiana

On 11 March 2020, Borsa Italiana published the Notice No. 5319 recalling that, in order to maintain the STAR status, issuers must, *inter alia*, “make additional periodic financial information available to the public within 45 days of the end of first, third and fourth quarter of the financial year”. Borsa Italiana also specifies that “the issuers are exempted from the obligation to publish the statement regarding the fourth quarter if they make available to the public the annual financial report together with the other documents referred to in Article 154-ter, §1, TUF within 90 days of the end of the relevant financial year” (Article 2.2.3, §3, letter a) of the Rules of the Markets organised and managed by Borsa Italiana).

Having received requests for clarifications from some STAR issuers in the context of the current situation linked to Covid-19, Borsa Italiana confirms the continuation of the obligations mentioned above, unless there are objective impediments.

In the latter case, Borsa Italiana recommends the issuers to promptly disclose to the market regarding the timeframe for the publication of the annual financial report, explaining the nature of the impediment.

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