

EPIDEMIOLOGIC EMERGENCY COVID-19 – COMPANY LAW

On 8 April 2020, the Law Decree No. 23 of 8 April 2020 (so-called “Liquidity Decree”, hereinafter referred to as the “**Liquidity Decree**” or “**LD**”) was published in the Official Gazette No. 94 and entered into force on 9 April 2020. The LD sets forth “*Urgent measures concerning access to credit and tax compliance for companies, special powers in strategic sectors, as well as measures in the field of health and work, and extension of administrative and procedural deadlines*”.

Certain provisions of the LD introduce, *inter alia*, amendments, interpretation criteria and/or temporary derogations from certain provisions of the Italian Civil Code and Legislative Decree no. 58 of 24 February 1998 (“**TUF**”).

1. Temporary provisions on the principles for the drafting of financial statements

Article 7 of the Liquidity Decree provides that, in the preparation of the financial statements for the year 2020, companies are entitled to evaluate items under a going concern assumption⁽¹⁾ provided that such assumption was ascertained in the last financial statements for the year ended before 23 February 2020⁽²⁾. This provision also applies to financial statements closed prior to 23 February 2020 and not yet approved at the date thereof. The valuation criterion will have to be specifically explained in the information note also through reference to the results of the previous financial statements.

As clarified in the explanatory report to the LD, this provision arises out of from the awareness of the disruptive and unprecedented effects of the COVID-19 epidemic and, in particular, of the profound but temporary fallout it may have on the prospects for business continuity. In fact, the report points out that the anomalous situation that has arisen from COVID-19 emergency would entail (if rules drawn up with reference to a physiological and non-pathological scenario were applied) the obligation for a very large number of companies to draft the financial statements for the current year according to deformed criteria, and in particular without the possibility of adopting a going concern approach, with serious repercussions on the valuation of all items in the financial statements.

⁽¹⁾ Set forth by article 2423-*bis*, paragraph 1, no. 1) of the Italian Civil Code.

⁽²⁾ Without prejudice to the provisions of Article 106 of Law Decree No. 18 of 17 March 2020. For a more detailed description of the provisions of the aforementioned Article 106, please refer to the guidelines published by Pavia e Ansaldo on 20 March 2020 and available at www.pavia-ansaldo.it.



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This provision of the LD therefore aims at neutralizing the deviating effects of the current economic crisis by: (a) preserving the purpose of the financial statements to provide actual and correct information, also to third parties; and (b) allowing companies that before the epidemic had a regular prospect of continuity, to maintain this prospect in the drafting of the financial statements of the current financial year (vice versa excluding companies that, independently of the COVID-19 crisis, were in a state of loss of continuity).

2. Shareholders' loans

Article 8 of the Liquidity Decree, entitled “Temporary provisions on loans to companies”, in order to encourage the refinancing of companies, provides for the temporary disapplication of the mechanisms for the subordination of loans made (i) by shareholders (Article 2467 of the Italian Civil Code⁽³⁾) or (ii) by those who exercise management and coordination activities (Article 2497-*quinquies* of the Italian Civil Code⁴).

The purpose underlying Articles 2467 and 2497-*quinquies* of the Italian Civil Code is to indirectly sanction the phenomena of “nominal undercapitalization”, i.e. the cases in which the company has the means to carry on the business, but these are minimally charged to capital, since they are mostly granted in the form of financing by its shareholders. In particular, Article 2467 of the Civil Code provides that the repayment of shareholders' loans (granted when the indebtedness of the company is excessive compared to its equity, or when it would have been reasonable to make a capital contribution) is subordinate to the satisfaction of other creditors⁽⁵⁾; hence the directors cannot repay the shareholders' loans when repayment would jeopardise the satisfaction of other creditors.

Articles 2467 and 2497-*quinquies* will not be applied with reference to loans made in favour of companies from the date of entry into force of LD (i.e. 9 April 2020) to 31 December 2020, as its application, as we read in the explanatory report to the LD, would constitute a disincentive to the involvement of shareholders in raising financial resources. However, the report also points out the temporary nature of the provision and “*the need to limit the derogation [from the ordinary regime of Articles 2467 and 2497-quinquies] chronologically, restricting its scope to funding granted by 31 December 2020 only*”.

3. Disclosure obligations pursuant to Article 120 TUF

Article 17 of the Liquidity Decree, entitled “*Amendments to Article 120 of Legislative Decree no. 58 of 24 February 1998*”, has amended paragraph 4-*bis* of Article 120 TUF introducing the power of CONSOB⁽⁶⁾, when the authority deems it necessary to protect investors or to make the corporate control and capital market efficient and transparent, to provide, for a limited period of time, in

⁽³⁾ This provision is dictated with regard to limited liability companies but is nevertheless considered by extensive case law and doctrine applicable to joint-stock companies, at least to those with a narrow social base.

⁴ Article 2497-*quinquies* of the Italian Civil Code provides that “*Article 2467 applies to loans made in favour of the company by those who exercise management and coordination activities towards it or by other subjects subject to it*”.

⁽⁵⁾ Please note that pursuant to Article 2467, paragraph 1, of the Italian Civil Code, shareholders' loans must be rendered if they were reimbursed in the year preceding the declaration of bankruptcy.

⁽⁶⁾ This power was exercised by resolution no. 21327 of 9 April 2020. The Authority has in fact provided, for a period of time of three months from the entry into force of the above-mentioned resolution and unless earlier revoked, the introduction of an additional threshold of 5%. When this threshold is reached or exceeded, the disclosure obligations set forth in Article 120, paragraph 4-*bis*, TUF arise for the companies listed in the list attached to the resolution.

addition to the thresholds indicated in the same paragraph, an additional threshold of 5% for companies with a particularly widespread shareholding structure⁽⁷⁾.

As highlighted in the explanatory report to the LD, in the current context, as outlined as a result of the COVID-19 outbreak, it has become appropriate, also in view of the extreme market volatility that occurred during the period of the epidemic, to ensure efficiency and transparency in the market for corporate control, further strengthening the regulation to protect transparency on acquisitions of significant shareholdings by identifying, therefore, a threshold lower than 10%, the first threshold at or above which the acquirer of the shareholding is required to publish the declaration of intentions.

It should be noted that pursuant to the above mentioned paragraph 4-*bis*⁽⁸⁾ of Article 120 TUF, when purchasing a shareholding in listed issuers equal to or greater than the thresholds of 10%, 20% and 25% of the related capital, except as provided for in Article 106, paragraph 1-*bis*⁽⁹⁾, the party making the communications referred to in paragraphs 2⁽¹⁰⁾ and following of the same Article 120 must declare the objectives it intends to pursue during the following six months. The declaration shall state under the responsibility of the declarant:

- (a) the means of financing the acquisition;
- (b) whether acting alone or in concert;
- (c) whether it intends to stop or continue its purchases, and whether it intends to acquire control of the issuer or anyway have an influence on the management of the company and, in such cases, the strategy it intends to adopt and the transactions to be carried out;
- (d) its intentions as to any agreements and shareholders' agreements to which it is party;
- (e) whether it intends to propose the integration or revocation of the issuer's administrative or control bodies.

The voting rights relating to listed shares or financial instruments for which the declaration provided for in paragraph 4-*bis* of the same article has been omitted may not be exercised and the related resolutions, if passed with a vote or the decisive contribution of those whose vote has been "frozen", may be challenged in accordance with the Italian Civil Code. The challenge may also be initiated by

⁽⁷⁾ The article in question also provides for the deletion, in paragraph 2-*bis* of Article 120 TUF, of the words "*high current market value*". Below is the text of paragraph 2-*bis* of article 120 TUF as amended by article 17 of the Liquidity Decree. "*Consob may, by means of a measure justified by the need to protect investors as well as the efficiency and transparency of the corporate control and capital market, provide, for a limited period of time, for thresholds lower than those indicated in paragraph 2 for companies with a particularly widespread shareholder base*". Pursuant to Article 120, paragraph 2-*bis*, TUF, CONSOB, by resolution no. 21326 of 9 April 2020, provided, for a period of three months from the entry into force of the above mentioned resolution and unless revoked earlier, for (i) the additional threshold of 1% upon exceeding which the disclosure obligations provided for under Article 120, paragraph 2, TUF arise for the companies listed in Section A of the list attached to the resolution and (ii) the additional threshold of 3% for companies qualifying as SMEs pursuant to Article 1 *w-quarter.1* TUF, referred to in Section B of the same list.

⁽⁸⁾ Paragraph 4-*bis* in comment was introduced by article 13 of Law Decree 148/2017 converted into law by Law no. 172 of 4 December 2017 (containing "*Urgent provisions on financial matters and for unavoidable needs. Amendment to the rules governing the extinction of the offence for reparative conduct*", so-called "Tax Decree"), with the aim of improving the degree of transparency and safeguarding the proper functioning of the market, increasing the level of information to stakeholders in corporate acquisition transactions.

⁽⁹⁾ Article 106, paragraph 1-*bis*, TUF provides that: "*In companies other than SMEs, the offer referred to in paragraph 1 shall also be promoted by anyone who, as a result of purchases, comes to hold an interest above the 25% threshold in the absence of another shareholder holding a higher interest*".

⁽¹⁰⁾ Paragraph 2 of Article 120 TUF provides that "*Those who participate in an issuer of listed shares with Italy as the Member State of origin in excess of three per cent of the capital shall notify the investee company and Consob. If the issuer is an SME, this threshold is five per cent*".

CONSOB⁽¹⁾. Failure to provide the information required by paragraph 4-*bis* of Article 120 is subject to the sanctions set forth in Article 193 TUF.

4. Temporary measures to support corporate liquidity - prohibition of dividend distribution and buyback

Article 1 of the LD, entitled “Temporary measures to support the liquidity of companies”, provides that SACE S.p.A. shall grant, until 31 December 2020, guarantees, in accordance with European legislation on State aid and in compliance with the criteria and conditions set out in the article in question, in favour of banks, national and international financial institutions and other entities authorised to exercise credit in Italy, for loans in any form granted to Italian companies.

As we read in the explanatory report to the LD, regulatory intervention is based on the current guidelines adopted by the European Union, which give Member States a broad power of intervention through the adoption of instruments to safeguard companies from a potential and serious liquidity crisis. In particular, Article 1 of the LD is based on the European regulatory framework introduced by the Commission with Communication C(2020) 1863 of 19 March 2020 and entitled “Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak”, which, recalling Article 107(3)(b) TFEU, allows Member States to intervene with various measures deemed compatible with the State aid scheme “to remedy a serious disturbance in the economy”.

Article 1 of the LD provides specific conditions to which access to the guarantee issued by SACE S.p.A. is subject, among which we deem appropriate to point out the provisions of Article 1(1)(i) of the Decree-Law, *i.e.* the commitment, by the company benefiting from the guarantee as well as by any other company based in Italy that is part of the same group to which the former belongs, not to approve the distribution of dividends or the repurchase of shares during 2020.

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⁽¹⁾ Or the Bank of Italy.