

RESPONDING TO COVID-19

March 2020

Practice Group(s):
 Labor Employment
 and Workplace
 Safety, TAX,
 Litigation and Dispute
 Resolution (civil
 proceedings),
 Finance, Corporate

COVID-19 and the Cura Italia Decree

By *Salsi Giampaolo, Bardella Stefano, Podda Roberto, Rusconi Paolo, Salvadori di Wiesenhoff Vittorio, Dotti Fabrizio*

On March 17, 2020, the Italian Government enacted the so called “Cura Italia” law decree, with the aim of issuing urgent measures to address the economic and social impact of the COVID-19 emergency) (the “Decree”). The Decree was published in the Official Gazette on March 17, 2020 and became effective the same day.

The measures adopted by the Italian Government relates to the following areas:

Labor, Employment and Workplace Safety

Through the Decree, the Italian Government made available to Italian employers a number of tools to handle the current Covid-19 emergency.

1. PUBLIC SCHEMES

The Decree made available additional public schemes to employers operating in the whole of the Italian territory. Please, find below the most important schemes which may be used by Italian employers to face the current emergency.

A. General measures

Firstly, the general public schemes available to certain industrial and commercial companies (as specified below) are the following:

- **Cassa Integrazione Guadagni Ordinaria**: shall apply in case of temporary company’s crisis, mainly with respect to companies operating in the industrial sector. Depending on circumstances, access to the *Cassa Integrazione Guadagni Ordinaria* may enable the employer to have its employees’ salary (or at least a part of it) paid by the Italian National Social Security Institute (“INPS”) for a maximum of 13 weeks (which may be extended on a quarterly basis up to 52 weeks).
- **Cassa Integrazione Guadagni Straordinaria**: shall apply in case of company’s crisis or reorganization, mainly with respect to industrial companies employing more than 15 employees and commercial companies employing more than 50 employees. INPS may pay employees’ salary (or at least a part of it) for a maximum period of 24/36 months, depending on circumstances.
- **Wage Integration Fund (FIS)**: shall apply in case of reduction or suspension of business affecting companies employing more than no. 5 employees to which the above normal schemes of *Cassa Integrazione Guadagni Ordinaria* and of *Cassa Integrazione Guadagni Straordinaria* are not applicable (e.g. commercial companies employing less than 50 employees; public services; craft and arts related enterprises; etc.).
- **Cassa Integrazione in Deroga**: set forth by the Italian Government for companies to which none of the above schemes is applicable.

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The Decree basically granted to employers operating all over the Italian territory a quicker access to the above social measures and made available additional schemes to grant all entrepreneurs operating within the Italian territory with a certain level of support as long as the health emergency is ongoing.

B. Public schemes made available in the whole of the Italian territory

“Cassa Integrazione Guadagni Ordinaria”

Starting from 23 February 2020 and for a maximum period of 9 weeks (but in any event not later than August 2020), employers may apply for *Cassa Integrazione Guadagni Ordinaria* in case a suspension or reduction of business is determined by Covid-19 emergency.

No prior agreement with works council/trade unions is required. Nonetheless, the employer is supposed to carry-out an information and consultation procedure with works council/trade unions, which may even be conducted electronically or from remote.

Only employees hired by 23 February 2020 will be entitled to integration of their salary; executives are excluded. The employer is not required to pay any additional social contribution and the integration of the employees' salaries covered by such public scheme will cover up to 80% of the salary relating to unworked hours and, in any case, cannot exceed € 1,127.87 per month for monthly salaries lower than € 2,159.48; and € 1,355.58 per month for monthly salaries higher than € 2,159.48.

Furthermore, it is worth mentioning that employers for which a *Cassa Integrazione Guadagni Straordinaria* is in course as at 23 February 2020 are entitled to suspend and replace it with the *Cassa Integrazione Guadagni Ordinaria* at hand.

Wage Integration Fund (“Assegno Ordinario”)

Assegno Ordinario can be granted for a maximum of 9 weeks to employees belonging to companies members of the so-called *Fondo di Integrazione Salariale* (“FIS”) employing more than 5 employees and to which the *Cassa Integrazione Guadagni Ordinaria* and the *Cassa Integrazione Guadagni Straordinaria* are not applicable. Such public scheme will be granted to all the employees hired by 23 February 2020; executives are excluded.

No prior agreement with works council/trade unions is required. Nonetheless, the employer must conduct a prior information and consultation procedure with works council/trade unions, which may even take place electronically or from remote.

The employer is not requested to pay any additional social contribution and the integration of the employees' salaries covered by such public scheme will cover up to 80% of the salary relating to unworked hours and, in any case, cannot exceed € 1,127.87 per month for monthly salaries lower than € 2,159.48; and € 1,355.58 per month for monthly salaries higher than € 2,159.48.

Cassa integrazione in Deroga

Employers not entitled to the *Cassa Integrazione Guadagni Ordinaria* may apply for the “*Cassa Integrazione in Deroga* due to the Covid-19 emergency” for a maximum of 9 weeks. In such an event, companies employing more than 5 employees are supposed to execute a prior agreement with works council/trade unions.

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Cassa Integrazione in Deroga will be granted to all employees hired by 23 February 2020; executives are excluded. The integration of the employees' salaries covered by such public scheme will cover up to 80% of the salary related to unworked hours and, in any case, cannot exceed € 1,127.87 per month for monthly salaries lower than € 2,159.48; and € 1,355.58 per month for monthly salaries higher than € 2,159.48.

As a general remark, please be advised that it is a common use under the Italian labor law that employees enjoy all holidays accrued and still not spent before the public scheme becomes effective.

C. Further measures to support employers over the emergency

In addition to the public schemes mentioned above, the Decree has made available the following additional measures with a view to supporting employers:

- **Sanitization**: employers may benefit from a tax credit equal to the 50% of the expenses incurred to sanitize premises due to Covid-19.
- **Mandatory hiring**: any obligation regarding the mandatory hiring of disabled employees pursuant to Law no. 68/1999 is suspended.

2. SOCIAL MEASURES

Furthermore, the Decree has set forth special measures to protect employees, workers and self-employees. Namely:

- **Dismissals**: starting from 17 March 2020 and for a 60-day period, employers are prevented both from serving individual dismissals due to objectively justified reasons and to trigger collective dismissal procedures. Terms for challenging dismissals are also suspended until 15 April 2020.
- **Bonus**: employees with an annual gross salary lower than € 40,000 who worked during March 2020 are entitled to a bonus equal to € 100, to be anticipated by the employer and not to be considered as an income for tax and social security purposes.
- **Permits under Law no. 104/1992**: paid monthly leaves granted to assist disabled parents or relatives are increased by further 12 days in March and April 2020.
- **Self-employees**: self-employees owning a VAT number active on 23 February 2020, as well as any worker enrolled with the special section of the INPS are granted with an indemnity equal to € 600 in March 2020, not to be considered as an income for tax and social security purposes.
- **Parental leave**: employees or workers enrolled with the special section of the INPS having children up to 12 years old may be granted with a special parental leave which may reach 15 days all over the period of schools' suspension and implying the right to an indemnity equal to 50% of the employee/worker compensation. Moreover, employees with children between 12 and 16 years old may benefit from an unpaid leave all over the period of schools' suspension, during which they cannot be dismissed. Such parental leave shall be granted provided that the other parent is not unemployed or granted with other social measures for the integration of his/her income.

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- **Families:** as an alternative to the aforesaid parental leave, parents with children up to 12 years old can apply for a bonus of € 600 for babysitting services during schools' suspension (the above age limit does not apply to children with serious disabilities).
- **Smart Working:** until 30 April 2020, employees affected by serious disabilities and/or living along with a seriously disabled person are entitled to smart working. Furthermore, employees suffering from serious illnesses shall be granted with smart working with priority in respect of their colleagues.
- **Absent at work:** if an employee is prevented from working due to a mandatory/fiduciary quarantine, the relevant absence shall be considered as sick-leave and shall not be counted in the maximum period of absence due to sick leave. Moreover, until 30 April 2020, the absence of employees with serious disability or oncological diseases, or performing life-saving therapies or immunocompromised, shall be treated as hospitalization.
- **Statute of limitation:** From 23 February 2020 and until 1 June 2020, the running of the statute of limitation period with respect to social security, welfare and insurance benefits provided for by INPS and INAIL is suspended.

TAX

The Italian Government has enacted a package of temporary, timely and targeted measures to support people, businesses and professionals through this period of disruption caused by Covid-19.

These measures are set out in:

- The Decree.
- Ministerial Decree 24 February 2020, concerning taxpayers established in certain municipalities.
- Art. 8 of the Decree 9 of 2 March 2020 ("**Decree 9/2020**"), concerning hospitality businesses (*settore turistico-alberghiero*).

The package includes the following measures:

- Deferring tax fulfilments (other than tax payments).
- Deferring tax payments.
- Deferring withholding tax deductions for professionals and agents.
- Tax incentive for businesses and professionals that sanitize work premises and work tools.
- Tax incentives for individuals and businesses that make donations aimed at facing the Covid-19 emergency.
- Tax credit for advertising investments.
- Tax incentive for the transfer of defaulted receivables by companies.

The Decree also includes provisions dealing with tax procedural deadlines and statute of limitations for tax assessment purposes.

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1. MEASURES TO SUPPORT PEOPLE, BUSINESSES AND PROFESSIONALS

- **Deferral of tax fulfilments – Art. 62(1,6) of the Decree**

Tax fulfilments (other than tax payments and withholding tax and regional/municipal surcharge deductions) expiring between 8 March 2020 and 31 May 2020 are deferred. By way of exception, all formalities relating to the pre-filled income tax returns (*dichiarazione precompilata*) are not deferred and, accordingly, remain due by 31 March 2020. The deferral applies to all taxpayers having in Italy their tax domicile (domicilio fiscale) or registered office (*sede legale*) or a place of business (*sede operativa*). This is an automatic deferral, with no applications required. No penalties will be charged in the deferral period. Taxpayers will be given until the end of June 2020 to fulfil the tax obligations that have accumulated during the deferral period (such as the annual VAT return, which is due by 30 April 2020 and, hence, benefits from the deferral)¹.

- **Support for small-size businesses and professionals through deferral of tax payments – Art. 62(2,3,5) of the Decree**

For businesses and professionals that have in Italy their tax domicile or registered office or a place of business and have reported revenues not higher than Euro 2,000,000² in the previous tax year, the following payments falling due between 8 and 31 March 2020 are deferred:

- Withholding taxes relating to wages and assimilated employment income (*redditi di lavoro dipendente e assimilati*).
- Regional and municipal surcharge deductions.
- VAT.
- Social security contributions and mandatory insurance premiums.

This is an automatic deferral, with no applications required. No penalties or interest for late payment will be charged in the deferral period. Businesses and professionals will be given until the end of May to pay any liabilities that have accumulated during the deferral period. The payments can be made in one lump-sum by 31 May 2020 or in up to five equal monthly instalments, starting from 31 May 2020³.

- **Support for hospitality and other businesses through deferral of tax payments and certain fulfilments – Art. 61(1,2) of the Decree and art. 8 of the Decree 9/2020**

For hospitality businesses having in Italy their tax domicile or registered office or a place of business and for other businesses (listed in art. 61(2) of the Decree) that are critically hit by the Covid-19 emergency, the following payments falling due until 30 April 2020 are deferred:

- Withholding taxes relating to wages and assimilated employment income.

¹ Companies whose tax year ended on 30 June 2020, are in principle required to file their annual tax return by the end of May 2020 and, hence, benefit from a deferral until the end of June.

² Businesses and professionals having their registered office or place of business in the Bergamo, Cremona, Lodi and Piacenza provinces can defer the VAT payments due on 16 March 2020 irrespective of the amount of their revenues.

³ The deadline is postponed to 1 June, since 31 May is a Sunday.

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- Social security contributions and mandatory insurance premiums (including fulfilments relating thereto).

VAT payments due in March 2020 by the same businesses are also deferred. The Italian tax authorities have listed the ATECO⁴ codes of the businesses that can benefit from this deferral⁵. The list is indicative and non-exhaustive. This is an automatic deferral, with no applications required. No penalties or interest for late payment will be charged in the deferral period. Businesses will be given until the end of May to pay any liabilities that have accumulated during the deferral period. The payments can be made in one lump-sum by 31 May 2020 or in up to five equal monthly instalments, starting from 31 May 2020⁶.

- **Support for taxpayers established in certain municipalities through deferral of tax payments and fulfilments – Art. 62(5) of the Decree and Decree 24 February 2000**

For individuals having, as of 21 February 2020, their residence or place of business in the first Covid-19 red zone⁷, tax payments and fulfilments due between 21 February 2020 and 31 March 2020, including enforceable payment requests (*cartelle di pagamento*) and payments due on the basis of tax assessments, are deferred. The deferral also applies to taxpayers, other than individuals, having their registered office or place of business in the red zone. Withholding tax agents having their registered office or place of business in the red zone shall defer withholding tax deductions due in the suspension period. The deferral applies to withholding taxes relating to (i) wages and assimilated employment income and (ii) payments made by the public administration.

This is an automatic deferral, with no applications required. No penalties or interest for late payment will be charged in the deferral period. Tax obligations that were due between 21 February 2020 and 31 March 2020 shall be fulfilled within the end of the month following the termination of the deferral period (which is not established yet). Tax payments that were due between 21 February 2020 and 31 March 2020 shall be made in one lump-sum by 31 May 2020 or in up to five equal monthly instalments, starting from 31 May 2020⁸. The statute of limitations expiring at the end of 2020 are postponed by two years. The extension should be limited to the taxes that have been deferred.

- **Support for small-sized professionals and agents through deferral of withholding tax deductions – Art. 62(7) of the Decree**

Professionals and agents (*commissionari, agenti, mediatori, rappresentanti di commercio e procacciatori d'affari*) that have in Italy their tax domicile or registered office or a place of business and have reported revenues not higher than Euro 400,000 in the previous tax year, can collect fees and commissions between 17 and 31 March 2020 without any withholding tax deduction, provided that they have not incurred any labour costs (*spese per prestazioni di lavoro dipendente o assimilato*) in February 2020 and that a written request is addressed to their clients.

⁴ Classification of economic activities.

⁵ See Ruling 12/E of 18 March 2020 and Ruling 14/E of 21 March 2020.

⁶ The deadline is postponed to 1 June, since 31 May is a Sunday.

⁷ The red zone included the following municipalities: Bertinico, Casalpusterlengo, Castelgerundo, Castiglione D'Adda, Codogno, Fombio, Maleo, San Fiorano, Somaglia, Terranova dei Passerini, Vo'.

⁸ The deadline is postponed to 1 June, since 31 May is a Sunday.

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Professionals and agents that opt for the deferral are given until the end of May to pay the withholding taxes that have accumulated during the deferral period. The payments can be made in one lump-sum by 31 May 2020 or in up to five equal monthly instalments, starting from 31 May 2020⁹. No penalties or interest for late payment will be charged in the deferral period.

- **Tax incentive for businesses and professionals that sanitize work premises and work tools – Art. 64 of the Decree**

Businesses and professionals that sanitize work premises and work tools are granted a tax credit, equal to 50% of the amount spent in 2020 (with a Euro 20,000 cap). The tax credit is accessible until the funds made available (Euro 50,000,000 in aggregate) are exhausted. The authorities are required to enact a ministerial decree, detailing the tax credit implementing measures, within 30 days from the entry into force of the Decree (i.e., within 16 April 2020).

- **Tax credit for shops and stores – Art. 65 of the Decree**

Businesses are granted a tax credit amounting to 60% of the fees relating to March 2020 for the lease of real estate assets in cadastral category C/1, i.e. shops and stores (*negozi e botteghe*). The tax credit is not available to businesses whose activity is deemed to be essential and, therefore, is not suspended, as listed in the measures adopted by the Italian Prime Minister. The tax credit can only be used to offset other tax/social security liabilities (*in compensazione*), according to art. 17 of Legislative Decree n. 241 of 9 July 1997.

- **Tax incentives for individuals and business that make donations aimed at facing the Covid-19 emergency – Art. 66 of the Decree**

Individuals and non-commercial entities that in 2020 make donations (in cash or in kind) in favour of the State, regions, local territorial bodies, other public bodies or institutions legally recognized non-profit organizations to finance the actions for coping with the Covid-19 emergency, can benefit from a 30% tax deduction (subject to a Euro 30,000 cap).

Business can deduct from their taxable profits all eligible donations (in cash or in kind) made in 2020 to finance the actions for coping with the Covid-19 emergency. Art. 66 of the Decree refers to art. 27 of the Law n. 133 of 13 May 1999. Accordingly, eligible beneficiaries of the donations should be the entities listed in Decree 20 June 2000:

- The State, regional and local public administrations, non-economic public entities.
- Recognized non-profit organizations (ONLUS)
- Foundations, associations, committees or institutions (set up by public deed or registered deed) whose statutory purpose is to assist population hit by calamities or extraordinary events.
- Labour unions or professional associations.

These eligible donations are also deductible (on a cash basis) for local tax (IRAP) purposes.

⁹ The deadline is postponed to 1 June, since 31 May is a Sunday.

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- **Support to taxpayers through deferral of enforceable tax and non-tax payments – Art. 68 of the Decree**

Enforceable tax and non-tax payments due between 8 March 2020¹⁰ and 31 May 2020 are deferred. The deferral applies to all enforceable tax and non-tax payments arising from formal payment notices (*cartelle di pagamento*), tax assessment notices (*accertamenti esecutivi*), social security bills, etc. All deferred payments shall be made in one lump-sum by 30 June 2020. Between 8 March 2020 and 31 May 2020, the authorities can neither notify new enforceable payment requests or acts nor enforce any payment requests or acts notified before 8 March.

The payments due by 28 February 2020 and 31 March 2020 under the recent tax amnesties (*Rottamazione-ter / saldo e stralcio*) are deferred to 31 May 2020.

- **Support to the gaming sector through deferral of gaming tax payments – Art. 69 of the Decree**

The payment of the gaming tax (*prelievo erariale unico* - PREU) and gaming concession fees is deferred from 30 April 2020 to 29 May 2020. The payments can be made in one lump-sum by 29 May 2020 or in equal monthly instalments (plus interest at the legal rate); in this latter case, payments are due on 29 May 2020 (first instalment), at the end of each subsequent month and on 18 December 2020 (last instalment).

- **Tax credit for advertising investments – Art. 98 of the Decree**

Businesses, professionals and non-commercial entities are granted a tax credit equal to 30% of any advertising investments made in 2020 through press, television and radio broadcast. The tax credit is capped at an amount that must be determined by the Italian Government and is subject to the relevant European Union limits.

- **Conversion of deferred tax assets into tax credits – Art. 55 of the Decree**

Companies that transfer, to unrelated parties, commercial or financial receivables owed by debtors in default of their payment obligations by more than 90 days, can elect to convert into tax credits a portion of their deferred tax assets (DTAs) relating to tax losses carried forward and to the notional interest deduction (ACE), subject to satisfaction of specific conditions. These eligible DTAs can be converted into tax credits even where they have not been recognized in the financial statements on the basis of applicable accounting principles.

The transfer of the defaulted receivables shall take place within 31 December 2020. The portion of eligible DTAs that can be converted into tax credits is limited to 20% of the nominal value of the defaulted receivables and such nominal values is capped at Euro 2 billion (on an aggregate group basis).

The tax credits resulting from the conversion of eligible DTAs can be (i) utilized to offset tax and social security liabilities without application of ordinary limitations, (ii) can be claimed in refund or (iii) transferred to other group companies or third parties.

A specific election must be exercised to convert eligible DTAs into tax credits. An annual fee may be due to the Italian Treasury.

¹⁰ For taxpayers established in the eleven municipalities included in the first “red zone”, the deferral runs from 21 February 2020.

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2. TAX PROCEDURAL DEADLINES AND STATUTE OF LIMITATIONS

- **Suspension of the tax authorities' assessment activities – Art. 67 of the Decree**

The tax authorities' assessment and collection activities are suspended between 8 and 31 March 2020. The suspension also applies to the deadlines for responding to ruling applications. As clarified by the *Agenzia delle Entrate* in Circular 6/E/2020, the suspension in art. 67 of the Decree is addressed to the tax authorities only and not to the taxpayers. The suspension is not meant to be a lock-down of the activity and the tax authorities shall continue to exercise their functions, to the extent possible and without requiring any physical movements of tax officers and taxpayers.

- **Extension of the statute of limitation – Art. 67(4) of the Decree:**

Art. 67(4) of the Decree refers to art. 12 of Legislative Decree n. 159 of 24 September 2015. As a consequence, the statute of limitations that would expire within 31 December 2020 are extended by two years. The extension should only apply to taxpayers that benefit from one of the tax deferrals considered above and should be limited to the deferred taxes. As a consequence, the statute of limitations for VAT assessments relating to 2015¹¹ are extended from 31 December 2020 to 31 December 2022 for businesses and professionals that can defer VAT payments.

- **Suspension of the terms for filing tax appeals – Art. 83 of the Decree**

The terms for appealing against tax assessment notices and for appealing against tax court decisions are suspended between 9 March and 15 April 2020.

Litigation and Dispute Resolution (civil proceedings)

Article 83 of the Decree addresses the issue of pending judicial proceedings and judicial terms and deadlines at the time of Covid-19.

The approach adopted by the Decree is based on two timelines: a first period, from 9 March 2020 to 15 April 2020, where all civil hearings and procedural terms are suspended, and a second period, from 16 April 2020 to 30 June 2020, where judicial offices are requested to organize their activities in compliance with any safety and health measures recommended by the competent authorities.

1. THE PROVISIONS APPLICABLE IN THE PERIOD 9 MARCH 2020 - 15 APRIL 2020

With respect to the first period of time indicated in the Decree, the following measures have been adopted:

- Hearings of all civil proceedings pending before any judicial offices have been postponed to a date after 15 April 2020; please note that the new date of the hearings is decided by each Judge.
- Procedural deadlines in civil proceedings are suspended. If a procedural term starts to run during the period of suspension, it is postponed to the end of the period of suspension; if a procedural term is calculated counting backwards from the date of a hearing, and the

¹¹ And 2014, if the filing of the VAT return was omitted.

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same falls within the period of suspension, the hearing is postponed in order to ensure compliance with the term.

- The terms for performance of any activity related to mandatory ADR proceedings already commenced before 9 March 2020 are suspended too.

The above measures do not apply to some proceedings indicated by the Decree, which, as far as civil proceedings are concerned, include the following:

- Proceedings concerning minor adoptions, unaccompanied foreign minors, minors removed from their families, and potentially dangerous situations.
- Proceedings concerning maintenance obligations arising from family relationships.
- Injunction proceedings for the protection of fundamental rights of individuals.
- Proceedings for the adoption of decisions on guardianship and interdiction if there is a motivated urgency.
- Proceedings relating to the endorsement, by the Judge, of the public administration's decision on mandatory sanitary treatments on individuals.
- Proceedings concerning the suspension of enforceability of first and second instance sentences.
- All other proceedings where the suspension would cause serious prejudice to the parties. In this case, the decision on the urgency of the matter is adopted by the head of the competent judicial office or, if the proceedings is already pending, by the competent judge, and in both cases the decision cannot be appealed. It appears that this provision shall also apply to precautionary proceedings (e.g. the urgent proceedings under article 700 of the Italian Code of Civil Procedure).

According to the Decree, all hearings that are not suspended can be held using alternative methods, e.g. using video-conference tools if no other parties apart from the parties themselves and their attorneys shall attend, or also in writings, by exchanging notes between attorneys, if only their presence is required.

2. THE PROVISIONS APPLICABLE TO THE PERIOD 16 APRIL 2020 - 30 JUNE 2020

As for the period 16 April 2020 - 30 June 2020, the Decree provides that judicial offices shall adopt organizational measures in compliance with the safety and health recommendations of the Ministry of Health, which are aimed, in particular, at avoiding gatherings and close contacts between people at Court.

In particular, the following measures may be adopted:

- Limitations to the public to access to judicial offices, also reducing the opening times.
- Access to services via appointment reservation;
- Adoption of binding guidelines for scheduling and conducting hearings.
- Adoption of alternative ways to hold hearings, by using the remote connections identified and regulated by the Italian Ministry of Health (e.g. Skype for Business), if no other parties

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apart from the parties themselves and their attorneys shall attend, or also holding hearings in writing, exchanging notes between attorneys, if only their presence is required.

- Postponement of non-urgent hearings after June 30, 2020.

Finance

Among the measures issued by the Italian Government, it is worth mentioning the following.

1. CENTRAL GUARANTEE FUND FOR SMALL AND MEDIUM ENTERPRISE - ARTICLE 49 OF THE DECREE:

Notwithstanding the provisions currently in force, for a period of 9 months from the entry into force of the Decree, guarantees under the central guarantee fund for small and medium-sized enterprises (the “**Fund**” and the “**Guarantee**”) are granted free of charge and the maximum guaranteed amount for each enterprise is equal to Euro 5,000,000.00. In case of direct Guarantee, the maximum guarantee amount is equal to 80% for the transaction submitted to the Fund for an amount up to Euro 1.5 million for each enterprise; in case of re-insurance or counter guarantee the maximum guaranteed amount is equal to 90%. In accordance with Recommendation no. 2003/361/CE, small and medium-sized enterprises (“**SMEs**”) include enterprises employing less than 250 persons and having either an annual turnover not exceeding €50 million, or an annual balance sheet total not exceeding €43 million.

The Guarantee may also be granted to secure new loans aimed at refinancing existing debts of the beneficiary, if an additional loan facility, for not less than 10% of the outstanding amount of the refinanced loan, is granted to the beneficiary. If, due to the COVID-19 emergency, a moratorium with respect to the loan secured by the Guarantee is granted by a bank or a financial intermediary, the duration of that Guarantee is extended accordingly. The Guarantee may be combined with other guarantees aimed at securing loans utilized to finance real estate investments in the tourism and/or hospitality sectors having a maturity of 10 years and a loan amount higher than Euro 500,000.

SMEs owing debts classified as “non performing” under the applicable banking regulation or SMEs classified as “undertaking in difficult” under EU Regulation n. 651/2014 are not allowed to apply for the Guarantee. Additional measures to reinforce the financial condition of enterprises, also by way of subsidized rates financings and guarantees up to 90% granted in favor of the enterprises, or the banks or financial intermediaries granting new loans to the enterprises, may be adopted by decree of the Italian Ministry of Economy and Finance in consultation with the Italian Ministry of Economic Development.

2. FINANCIAL SUPPORT MEASURES IN FAVOUR OF MICRO-ENTERPRISE AND SMALL MEDIUM SIZE ENTERPRISE – ARTICLE 56 OF THE DECREE

Italian based SMEs certifying that, as a direct consequence of the Covid-19, they suffered a shortfall of liquidity, are allowed to benefit from the following financial measures in connection with debts owed to banks, intermediaries under Article 106 of the Italian Banking Act and/or other licensed lenders in Italy, provided that such debts are not classified as non-performing at the date of publication of the Decree (i.e. 17 March 2020):

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- Lenders are not allowed to withdraw from uncommitted overdraft facilities (*apertura di credito a revoca*) and from certain working capital facilities (namely involving advance of account receivables, *prestiti accordati a fronte di anticipi su crediti esistenti*) as at 29 February 2020 or – if higher – as of the date on which the Decree was published (i.e. 17 March 2020), in whole or in part, until 30 September 2020.
- “Bullet” repayment loans maturing prior to 30 September 2020 are extended until 30 September 2020 and the relevant contracts and their ancillary elements are extended accordingly and without any formalities.
- Amortising loans and financial leaseings (including those obtained through the issue of agricultural bills of exchange (*cambiali agrarie*), are automatically put under a moratorium until 30 September 2020, also applying to all their ancillary elements and without any formalities, without incurrance of any additional or increased charges; enterprises are also allowed to request suspension only with respect of the principal component of the instalments. The relevant amortization plan is extended accordingly.

Banks and financial intermediaries may request the Guarantee up to an amount equal to 33% of the debt subject to the above mentioned measures on a free of charge basis and the Guarantee is issued without any assessment by the Fund. In case of default by the debtor, payment of the guaranteed amount is made by the Fund in two instalment: (i) a portion is paid after the commencement by the creditor of the enforcement procedures against the debtor and (ii) the outstanding balance is paid after the completion of the enforcement procedures.

Please consider that, irrespective of the Decree, the Italian Banking Association (“ABI”) has adopted a protocol on 6 March 2020, shared by a majority of Italian banks, in order to facilitate applications by SMEs to obtain extension of loans and moratorium on repayments, upon condition that the debtors do not owe debts classified as “non-performing”. Although the protocol does not bind the banks to accept such request, it provides for guidelines and recommendations to the banking sector.

3. OTHER MEASURES

The Decree provides for additional measures supporting enterprises and economic activities in general, including, *inter alia*:

- A State guarantee in favour of *Cassa Depositi e Prestiti* or “CDP” (the Italian State owned development lender) for any loans granted to lenders which provided financial support to enterprises suffering from decrease of turnover as a consequence of the epidemic emergency (art. 57 of the Decree); the State guarantee will support up to 80% of the overall exposure by CDP; this State facility will be implemented by a Ministerial Decree which has not been issued as of today.
- SACE (the Italian State owned export credit agency), is allowed to guarantee payments by the Italian Regions of supply of medical equipment and devices sold by foreign suppliers and needed to cope with the epidemic emergency; SACE is also allowed to provide guarantees in favour of Italian or international lenders providing financial support to the purchase of such equipment and devices.

In addition, some measures provide financial relief to individuals, in particular, allowing, *inter alia*:

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- individuals to obtain – subject to compliance with certain requirements aimed at providing evidence of the difficulties - a moratorium on mortgage loans granted for the purchase of the family house.
- shareholders and bondholders of banks subject to insolvency procedures in recent years, to obtain payment of their claims within a quicker timeframe.

Corporate

1. EXTENSION OF ORDINARY TERMS FOR THE HOLDING OF AGMS

Art. 106, paragraph 1, of the Decree, introduces a general proviso to the ordinary 120-day term under Arts. 2364, para. 2, and 2478-*bis* of the Italian Civil Code, and to any similar restrictions set out in the by-laws, in that it will be possible to hold AGMs within 180 days from the end of the company's financial year. Recourse to this exceptional extension will be discretionary, and will not require to be justified by any of the "particular needs" referred to under Art. 2364, or any other motivation. Given the provision's rationale, it is reasonable to argue that in order to benefit from the extended deadline it will be sufficient to set the meeting's first call within the 180-day term, even if the meeting is actually later held in second call.

2. ONLINE ATTENDANCE AND WRITTEN RESOLUTIONS. DESIGNATED REPRESENTATIVE

The Decree also contemplates (Art. 106, paras. 2 to 4) provisions aimed at promoting recourse to remote gathering and decision-making techniques, namely through the holding of shareholders meetings by way of teleconference, the use of written resolutions and the extended resort (for public companies) to designated shareholders' proxyholders. In particular:

- Notices of call of ordinary and extraordinary meetings, can contemplate (even in the by-laws' silence) the possibility of attending the meeting by way of teleconference, and to vote from remote (through correspondence or electronic voting systems). Companies may also elect to impose mandatorily that attendance takes place only by way of teleconference, on condition that attendees can be identified, actively partake in the discussion and vote, pursuant to Arts. 2370, para. 4, 2479-*bis*, para. 4, and 2358, para. 6, of the Italian Civil Code. Furthermore, shareholder meetings will be deemed validly held even if all required participants have attended through means of telecommunications, in particular without the need for the chairperson and the secretary (or the notary, in case of extraordinary meetings) to be physically attending in the same location¹².
- Shareholder decisions in limited liability companies ("Società a responsabilità limitata") can be generally adopted by way of written consultation or written consent,

¹² The solution set out in the Decree, appears to confirm the conclusions already reached by way of interpretation by the governing body of Milanese notaries ("*Consiglio Notarile di Milano*"), upon issuance of their latest guideline on corporate matters (*Massima* no. 187, of 11 March 2020), whereby the principle that shareholder meetings in Italian joint stock companies can be validly held even if all of the required participants are attending through means of telecommunications was upheld. The Milanese notaries' interpretation - which addresses a long-standing uncertainty in the construction of art. 2370, paragraph 4, of the Italian Civil Code - appears to be of general application, even beyond the current and ongoing sanitary emergency. Some early commentaries have also opined - on the basis of an extensive interpretation of those provisions of the dPCMs requiring adoption "wherever possible in the holding of meetings, of connection modalities from remote", that the principles expressed by the Milanese notaries with respect to shareholder meetings, would be generally applicable (during the state of emergency) to all other categories of corporate meetings, namely board of directors' meetings and board of statutory auditors' meetings.

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notwithstanding the limits of Art. 2479, para. 4, of the Italian Civil Code and any restrictions in their by-laws. It remains to be seen how the general applicability of this option can be reconciled with the requirement that certain decisions (namely, those involving amendments to the by-laws, Art. 2480 of the Italian Civil Code) be adopted with the assistance of a public notary. Until a clarification on this topic is given

- arguably, by the same notaries' governing bodies - it may be advisable, when dealing with amendments of a company's constituent documents, to resort to shareholder meetings held by telecommunications means (obviously, with the - remote - attendance of a notary, who will act as secretary of the meeting), as outlined in the preceding paragraph.
- Listed companies ("Società per Azioni quotate"), in addition to the modalities under paragraph 1 above, can nominate, for their shareholder meetings, a "designated proxyholder" of the shareholders for the exercise of the latter's voting rights, notwithstanding any restrictions set out in the by-laws.

The designated proxyholder can be appointed in the notice of call of the meeting, which, in that case, will need to include details as to the manner in which the relevant proxy can be granted. The notice of call can also stipulate - especially so when the recourse to teleconferencing means appears impractical, for the number of potential attendees or other reasons - that attendance to a shareholder meeting can only take place through a designated proxyholder.

3. CASH FLOW ISSUES AFFECTING A COMPANY'S ABILITY TO PAY DIVIDENDS

The derogation to the ordinary 120-days deadline for the holding of AGMs (see paragraph 1 above) is also meant to grant additional time to directors and auditors to evaluate the impact of lockdown on the company's financial prospects and cash flow, also with a view of giving directors and shareholders more elements to assume informed decisions, e.g. as to whether and to what extent they should propose or, as the case may be, resolve upon the distribution of any profits accrued in the previous financial year¹³. Indeed, it appears that some Italian companies are actually reconsidering their plans (even when already announced by their Boards) to declare dividends, in view of the supervened new circumstances.

However, once a dividend has been declared (by way of an *ad hoc* resolution of the AGM), the same becomes an individual right of the recipient shareholder, who will therefore acquire a monetary claim towards the company. To the extent the company is unable to pay on the due date, the creditor (shareholder) will be entitled to enforce ordinary legal remedies for collection of its debt.

It may be worth noting, in this perspective, that Art. 91 of the Decree, has introduced a "quasi-moratorium" for all debts, payment of which is prevented or hindered as a consequence of the containment measures enacted in the wake of the health and sanitary emergency. Namely, "compliance with the containment measures ... is always considered for purposes of excluding ... the debtor's liability, also in connection with the application of any forfeitures or liquidated damages stemming from late or omitted performance".

¹³ It is worth noting that the derogation of the term for approval of financial statements does not exempt directors and auditors from their duties to monitor and look after the economic and financial conditions of the company and, if appropriate, take all necessary measures to safeguard their integrity.

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Due to the novelty of the subject provision, it is not possible to safely assess to what extent it will be deemed applicable in the circumstances (the decision to declare dividends, adopted irrespective of the ongoing emergency, could indeed imply acceptance of the inherent risk by the company), or if the interpretation and construction of the expression “compliance with containment measures” will extend to include also financial difficulties indirectly occasioned by the lockdown.

Force Majeure

1. IMPOSSIBILITY OF PERFORMANCE

Pursuant to Art. 1256 of the ICC, “... an obligation is terminated when, for reasons beyond the debtor’s control, performance becomes impossible”. And “if impossibility is only temporary, the debtor, for as long as it is continuing, is not liable for late performance. However, the obligation is terminated if impossibility, having regard to the obligation’s title or the nature of its object, lasts until the debtor can no longer be deemed to be bound to perform, or the creditor is no longer interested in obtaining performance.”¹⁴

In the event a contractual obligation has been terminated for impossibility, the party which was entitled to receive performance under that obligation, will have the right to seek relief under Art. 1463 of the ICC, in that “the party released from due performance on grounds of supervened impossibility, cannot claim performance of the other party, and must return what it has already received ...”. If impossibility of one obligation is only partial, the other party will be entitled to a reduction of its obligation, or can withdraw from the contract, if he has no “appreciable interest” in partial performance.

Among the reasons that the judiciary in this country has deemed to constitute instances of impossibility, there are orders and prohibitions issued by Public Authorities (legislative, administrative and judicial), that specifically prevent one party from lawfully performing his obligations, i.e. the so-called “*factum principis*”. The containment measures recently issued by the Italian Government - and, in particular, the Prime Minister’s decrees (dPCMs) of 8, 9, 11 and 22 March 2020 - where they provide for mandatory closure of certain business activities, appear to meet the ‘impossibility test’ for obligations owed by businesses so affected, in that the “*factum principis*” constitutes an insurmountable impediment beyond the obligor’s control, at least insofar as the impeding circumstance was not foreseeable, as at the time in which the obligation was undertaken¹⁵.

Given the temporary nature of the emergency measures adopted by the Government (the subject decrees are meant to be applicable until the beginning of April, although their terms may be extended, depending on the epidemic’s evolution), a majority of the affected contractual relationships will likely fall within the scope of application of the second paragraph of Art. 1256 (temporary impossibility), therefore affording only temporary relief from non-performance, unless, of course, the nature or subject matter of the obligation (e.g. perishable

¹⁴ Similar principles apply to commercial transactions governed by the United Nations Convention on Contracts for the International Sales of Goods (the so called “Vienna Convention” of 11 April 1980), Art. 79 of which stipulates that “A party is not liable for a failure to perform any of his obligations if he proved that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.”

¹⁵ But see the comments on the recently enacted “quasi-moratorium” on obligations, under paragraph 3 below.

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goods), or the fading of the creditor's interest to performance (e.g. supplies with a prevalent seasonal element) command otherwise.

But what if the obligor does not belong to any of the business categories affected by closure orders, and yet the health and sanitary emergency constitutes an insuperable impediment, beyond his control? In principle, the same remedies available in case of "*factum principis*" should be accessible, on condition that the 'impossibility test' (absolute impediment, beyond the obligor's control and unforeseeable, applying normal diligence, as at the time in which the obligation was assumed) is met.

Notably, a recent orientation of the Italian Supreme Court¹⁶ has taken the view that a party entitled to receive performance of an obligation - performance of which is still entirely possible - may refuse it (and claim restitution of any consideration already paid), if, due to a change in circumstances, the contract's actual function ("*causa in concreto*") results frustrated. In other words, although performance of a contract's typical obligation remains technically possible, if supervening and unforeseeable circumstances (beyond the party's control) occur that make it impossible for one party to receive performance, that party will be entitled to refuse performance and consider the contract avoided, for subsequent lack of its "*causa in concreto*". The relevance of this doctrine in the current scenario is apparent, at least in those circumstances in which - even in the absence of a "*factum principis*" preventing performance - the effects of the pandemic frustrate irreparably the very reason of the transaction.

2. *HARDSHIP*

A separate remedy provided under Italian law - even if the contractual obligations are still possible, nor has the contract lost its "*causa in concreto*" - entitles a debtor to trigger a revision of terms, or, absent that, terminate the contract, in cases where due to "extraordinary and unforeseeable" new occurrences, performance of his obligations has become "excessively burdensome" (Art. 1467 of the ICC).

The judiciary has construed the notion of "extraordinary and unforeseeable" new occurrence, to specify that while the "extraordinary" character needs to be of an objective nature, having to take into account measurable elements such as frequency, magnitude, intensity, etc., which therefore can be appreciated also from a statistical perspective, the "unforeseeability" needs to be considered from a more subjective standpoint, as it pertains to the parties' typical prognostic ability, having regard to their professional status and industry¹⁷.

It is further specified that the remedy in question does not apply if the aggravation occasioned by the new occurrence remains within "the contract's normal risk" (Art. 1467 of the ICC, second paragraph). As a consequence, those contracts which by their nature (e.g. insurance, gaming, betting), or by the parties' express or implicit agreement are inherently resistant to change in circumstances, cannot be terminated on grounds of hardship. It is worth mentioning that some precedents have also taken the view that the remedies under Art. 1467 would not be available for those contracts that, for their particular legal regime or because of specific stipulations adopted by the parties, already contemplate *ad hoc* mechanisms for their rebalancing, in case of new occurrences affecting the original bargain. In the negotiating and drafting practice of share purchase agreements, for instance, the express qualification of the agreement as "*aleatorio*" (i.e. having an inherent 'risky' nature) is becoming increasingly common, thereby

¹⁶ Amongst others: Cass. no. 18047/2018.

¹⁷ Cass. nos. 2661/2001, 22396/2006.

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excluding at the outset relief under Art. 1467¹⁸. Even more significantly, the parties to several M&A transactions which were being negotiated in the weeks immediately following the first news of the outbreak, took the view to expressly specify in their agreements that the consequences of the epidemic should not be regarded as “material adverse changes” triggering renegotiation mechanisms or termination rights, unless their consequences “disproportionately” affected either party’s business¹⁹.

Due to the remedy’s exceptional nature and its limited application by courts (usually, in instances characterized by lasting, structural and severe adverse effects on a macroeconomic level), it is perhaps still too early in the pandemic’s evolution to predict the magnitude of the prejudice that it will bring to the country’s economic fabric or some of its sectors and industries. Yet, in perspective, particularly so if the emergency or its effects on the economy lasted for several months, increasing recourse to Art. 1467 of the ICC can be envisaged.

3. THE “QUASI-MORATORIUM” ON OBLIGATIONS UNDER THE “CURA ITALIA” DECREE

Finally, it is worth mentioning an extraordinary legislative measure, adopted by the Government within the package of urgent provisions aimed at supporting families, workers and businesses, in the wake of the Covid-19 emergency.

Art. 91 of the Decree has introduced a “quasi-moratorium” for all obligations, performance of which is prevented or hindered as a consequence of the containment measures enacted to limit the spreading of the contagion.

Namely, the newly enacted provision stipulates that “compliance with the containment measures ... will always be considered for purposes of excluding, pursuant to and under Arts. 1218 and 1223 of the ICC, the debtor’s liability, also in connection with the application of any forfeitures or liquidated damages stemming from late or omitted performance”.

Arts. 1218 and 1223 of the ICC regulate respectively the conditions under which a non-performing obligor is liable for damages (failure to prove that performance was impossible, for reasons beyond the obligor’s control), and the constituting elements of indemnifiable losses (costs and loss of profit, to the extent they are immediate and direct consequence of non-performance).

The above principles - the ordinary application of which imposes a particularly stringent test on obligors who seek to be exempted from liability - appear considerably mitigated as a result of the new emergency provisions. In particular, it is reasonable to opine that judges will be required to use a more liberal attitude in assessing the conduct and extension of liability of non-performing obligors, in all instances in which omitted (or late) performance was occasioned or affected by the need to comply with the extraordinary measures of containment enacted by the government. This appears to go way beyond the scope of impossibility for “*factum principis*” (see paragraph A, above), as the intensity of the containment measures

¹⁸ Possible changes in circumstances, especially so when occurring in the interim period between signing and closing, will need to be carefully addressed with specific ‘MAC’ (acronym for Material Adverse Change) clauses. Other solutions to be considered when negotiating M&A deals may include reconsidering formulas applicable to net working capital adjustments, use of buyer’s stock as a part of consideration, as well as working on earnouts and deferred consideration to take into account future effects of the emergency on the target’s profitability.

¹⁹ The reference to “disproportionate” effects, is meant to trigger an evaluation of the magnitude of the adverse effect relative to the business as compared to other participants in the industry in which the concerned business operates.

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ranges from closures of certain business activities (which, as outlined above, under certain conditions may qualify as ground of impossibility, under Art. 1256), to mere restrictions on people's ability to move, and yet all of these measures appear potentially relevant - insofar as an aggravation of the obligor's position originated thereby can be established - for purposes of mitigating the obligor's liability.

Even more explicitly, the new provision expressly refers to "... application of any forfeitures or liquidated damages connected to late or omitted performance" among the matters that would need to be submitted to the judge's appreciation in the light of these new exceptional parameters of liability, which leads us to believe that even enforceability of those typical expressions of the parties' autonomy in determining the sanctions (and the allocation of risk) applicable to their deals, would be suspended.

Due to the novelty of the subject provision, it is not possible to safely assess to what extent it will be applied in practice by courts, or how liberal and potentially extensive the interpretation and construction of the expression "compliance with containment measures" will be. Yet, this is undoubtedly an example of legislative policy, which, under the spur of an extraordinary situation of emergency, expresses a clear favour to obligors in state of hardship.

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Authors:

Giampaolo Salsi

Giampaolo.Salsi@klgates.com

+39.02.3030.2950

Paolo Rusconi

Paolo.Rusconi@klgates.com

+39.02.3030.2921

Vittorio Salvadori di Wiesenhoff

Vittorio.Salvadori@klgates.com

+39.02.3030.2948

Fabrizio Dotti

Fabrizio.Dotti@klgates.com

+39.02.3030.2972

Roberto Podda

Roberto.Podda@klgates.com

+39.02.3030.2923

Stefano Bardella

Stefano.Bardella@klgates.com

+39.02.3030.2927

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