

COVID-19 SUPPORT MEASURES – ITALY

By courtesy of Cottyn partner office Mondini Rusconi

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1. CORPORATE LAW MEASURES

1.1. EXTENSION OF THE CONVOCAZIONE OF THE SHAREHOLDERS' MEETING FOR THE APPROVAL OF THE FINANCIAL STATEMENTS (ART. 106 OF DECREE NO. 18/2020)

Joint stock, limited liability, and cooperative companies may call the shareholders' meeting to approve the financial statements within 180 days of the end of the financial year (i.e. by 30 June 2020), as an exception to the provisions of Art. 2364, par. 2, and Art. 2478 bis of the Italian Civil Code and the respective provisions of the by-laws.

The board of directors does not have to justify the reasons for convening the meeting at the end of June.

1.2. MEASURES TO ALLOW VOTING OR PARTICIPATION IN SHAREHOLDERS' MEETING REMOTELY (ART. 106 OF DECREE NO. 18/2020)

These measures may be adopted with reference to the (ordinary and extraordinary) Shareholders' Meetings convened (also in second call) by 31 July 2020 (or at a later date provided that the state of emergency on the national territory related to the health risk caused by the COVID-19 epidemic is still in force). These measures can be adopted by means of a specific provision in the notice of call of both ordinary and extraordinary shareholders' meetings.

1.2.1. Measures valid for all types of companies (joint stock, limited liability, and cooperative companies)

The vote may be cast electronically or by correspondence, also in derogation of the by-laws, if the latter does not provide for or does not allow such a method (Art. 106, par. 2, of Decree No. 18/2020). If this method were chosen, the notice of call must contain the proposed resolution in full;

Attendance at the shareholders' meeting may take place by means of telecommunications, even if not provided for or prohibited by the by-laws. In this regard, it is also possible that the entire meeting may be held exclusively by telecommunication means, provided that the identification of the participants, their participation and the exercise of voting rights are guaranteed. Moreover, it is not necessary for the Chairman, secretary or notary public to be in the same place (Art. 106, par. 2, of Decree No. 18/2020).

1.2.2. Measures applicable to limited liability companies only (so-called “s.r.l.”)

In limited liability companies, as an exception to the provisions of the by-laws, shareholders may exercise their vote by means of written consultation or written consent without attending a specific meeting (Art. 106, par. 3, of Decree No. 18/2020). This also applies with regard to matters that the ordinary rules of the Italian Civil Code reserve for the exclusive competence of the shareholders' meeting (Art. 2479, par. 4, of the Italian Civil Code), namely:

- amendments to the by-laws;
- decision to carry out operations that entail a substantial modification of the corporate purpose determined in the by-laws or a significant modification of shareholders' rights;
- compulsory reduction of the capital for losses pursuant to Art. 2482 bis, par. 4, of the Italian Civil Code;
- when requested by one or more directors or a number of shareholders representing at least one third of the corporate capital.

1.2.3. Measures applicable to listed companies, companies admitted to trading on an MTF and companies with shares widely distributed to the public

These companies are admitted to:

- designate for ordinary or extraordinary shareholders' meetings the representative to whom shareholders may confer proxies with voting instructions pursuant to Art. 135 undecies of the Consolidated Act on Finance (so-called "designated representative"), also in derogation of the provisions of the by-laws;
- provide in the notice of call that attendance at the shareholders' meeting shall take place exclusively through the designated representative, thus excluding the participation of shareholders.
- In addition, the designated representative may also be granted proxies or sub-delegations, as an exception to the provisions of Article 135 undecies, paragraph 4 of the Consolidated Act on Finance.

1.3. TEMPORARY PROVISIONS ON THE REDUCTION OF CORPORATE CAPITAL DUE TO LOSSES (ART. 6 OF DECREE NO. 23/2020)

From 9 April 2020 to 31 December 2020, the ordinary rules of the Italian Civil Code on the reduction of share capital due to losses do not apply.

For the same period, there is no cause for dissolution for reduction of the share capital below the legal minimum.

1.4. TEMPORARY PROVISIONS ON THE PRINCIPLES FOR THE DRAFTING OF FINANCIAL STATEMENTS (ART. 7 OF DECREE NO. 23/2020)

In the preparation of the financial statements for the current financial year, the related items may in any case - even if on the basis of ordinary regulations they should not have been - be valued on a going concern basis as per Art. 2423 bis, par. 1, No. 1) of the Italian Civil Code if such a prospect exists in the last financial statements for the financial year closed before 23 February 2020. This valuation criterion must be specifically illustrated in the notes to the financial statements, also by referring to the results of the previous financial statements.

1.5. TEMPORARY PROVISIONS ON SHAREHOLDER LOANS (ART. 8 OF DECREE NO. 23/2020)

Art. 2467 and Art. 2497 quinquies of the Italian Civil Code do not apply to loans made by shareholders in favour of the company from 9 April 2020 to 31 December 2020. The repayment of these loans is therefore not subordinated to the satisfaction of the other corporate creditors.

2. BANKRUPTCY LAW MEASURES

2.1. POSTPONEMENT OF THE ENTRY INTO FORCE OF THE BUSINESS CRISIS AND INSOLVENCY CODE (ART. 5 OF THE DECREE NO. 23/2020)

Joint stock, limited liability, and cooperative companies may call the shareholders' meeting to approve the financial statements within 180 days of the end of the financial year (i.e. by 30 June 2020), as an exception to the provisions of Art. 2364, par. 2, and Art. 2478 bis of the Italian Civil Code and the respective provisions of the Articles of Association.

The Legislative Decree No. 14 of 12 January 2019 ("Business Crisis and Insolvency Code") will enter into force on 1 September 2021, instead of 15 August 2020. Such postponement is without prejudice to the provisions of the Business Crisis and Insolvency Code already in force on 16 March 2019, with specific regard to the jurisdiction for Extraordinary Administration proceedings, new guarantees in favour of purchasers of real estate to be built, as well as the amendments made to the Italian Civil Code on the organisational structure of the company and corporate groups, the liability of directors, and the appointment of auditors.

2.2. AGREEMENTS WITH CREDITORS AND RESTRUCTURING AGREEMENTS FACILITATIONS (ART. 9 OF THE DECREE NO. 23/2020)

In case of agreements with creditors and restructuring agreements already validated by the court, all the deadlines falling due between 23 February 2020 and 31 December 2021 are extended by six months.

For proceedings in progress, in which a validation hearing has not yet been held, the debtor company may request the granting of a period of up to ninety days (not further extendable) to file a new plan and a new proposal for an agreement with creditors or a different restructuring agreement, even pending bankruptcy proceedings. Nevertheless, in the case of agreement

with creditor, such petition may not be filed with where the creditors' meeting has already been held and the required majorities for approval of the debtor's proposal have not been met.

If the debtor company intends to amend only the deadlines for the performance of the arrangement with creditors or the restructuring agreement, it shall file a brief at the validation hearing, which shall contain an indication of the new deadlines and shall also file documentation proving the need for the amendment of the deadlines. The postponement of the deadlines may not be more than six months longer than the original deadlines.

2.3. TEMPORARY SUSPENSION OF BANKRUPTCY APPLICATIONS (ART. 10 OF THE DECREE NO. 23/2020)

All applications for bankruptcy filed between 9 March and 30 June 2020 shall be inadmissible. The rule does not apply to applications filed by the Public Prosecutor, when they are accompanied by requests (precautionary or conservative) pursuant to Art. 15 of the Bankruptcy Law. For proceedings in progress, in which a validation hearing has not yet been held, the debtor company may request the granting of a period of up to ninety days (not further extendable) to file a new plan and a new proposal for an agreement with creditors or a different restructuring agreement, even pending bankruptcy proceedings.

For the same period of time, the terms set forth in Art. 69-bis of the Bankruptcy Law for the filing of bankruptcy clawback actions are suspended.

3. EMPLOYMENT LAW MEASURES

3.1. SUSPENSION OF PROCEEDINGS TO DISPUTE DISMISSAL (ART. 46 OF DECREE NO. 18/2020)

Starting from 17 March 2020, Collective dismissals and redundancy procedures after CIGS (provided by articles 4,5 and 24 of Law No. 223 of 23 July 1991) are blocked for 60 days and in the same pending proceedings started after 23 February 2020 are suspended.

Until the expiration of the abovementioned time limit, individual dismissals for objective business reasons re suspended. Employers cannot terminate employment contracts for objective business reasons under Art. 3 of Law No. 604/66.

3.2. SPECIAL PROVISIONS ON STANDARD SALARY SUBSIDY AND ORDINARY WAGE ALLOWANCE (ART. 19 OF DECREE NO. 18/2020)

3.2.1. Prerequisites

Employers that in 2020 suspended or reduce their working operations for events connected with the COVID-19 emergency.

This applies to employers that may implement the safeguards concerning suspension or reduction of operations while employment is in progress (CIGO-Ordinary Earnings supplement fund, and FIS – Salary subsidy fund, and Bilateral Funds).

3.2.2. Eligible employees

Employees working for employers that on 23 February 2020 submitted the application are eligible for standard salary subsidy and ordinary wage allowance, regardless of their seniority with the company.

3.2.3. Time limits

The application needs to be submitted by the end of the fourth month following the one in which the period of suspension or reduction of operation started.

This benefit may be used for periods started after 23 February 2020 and for a maximum period of 9 weeks and in any event by August 2020.

These periods are not computed in relation to specific time restrictions set out, in general, by the provisions of Leg. Dec. No. 148 of 14 September 2015, expressly referred to by the Decree and, in case of subsequent applications, they are neutralized.

3.2.4. Procedure

Employers are exempted from the following requirements:

- Disclosure and consultation with the trade unions, under art. 14, Leg. Dec. No. 148/2015 (in any case, disclosure and consultation and joint examination must be completed, including by IT means, in the 3 days following the date of the initial communication);
- Terms for the procedure for the administrative application under art. 15., Leg. Dec. No. 148/2015 (for the standard salary subsidy) and art. 30, Leg. Dec. No. 148/2015 (for the ordinary wage allowance);
- Additional contribution under art. 5 Leg. Dec. No. 148/2015
- Upon request of the company, the standard salary subsidy and the ordinary wage allowance may be paid to eligible employees directly by INPS.

3.3. STANDARD SALARY SUBSIDY FOR COMPANIES THAT ARE ALREADY APPLYING EXTRAORDINARY EARNINGS SUPPLEMENT FUND (ART. 20 OF DECREE NO. 18/2020)

3.3.1. Prerequisites

Employers that – on 23 February 2020 – were applying the extraordinary earnings supplement fund may submit an application to obtain the standard subsidy under art. 19 of the Decree (Pls. see paragraph above). The standard subsidy suspends and replaces any extraordinary earnings supplement fund already in progress.

The benefit can be requested for no more than 9 weeks.

Employees working for employers that on 23 February 2020 submitted the application are eligible for the benefit, regardless of their seniority with the company.

3.4. ORDINARY WAGE ALLOWANCE FOR EMPLOYERS THAT HAVE ALREADY IMPLEMENTED SOLIDARITY BENEFITS IN PROGRESS (ART. 21 OF THE DECREE NO. 18/2020)

Prerequisites.

Employers registered with FIS (Fondo di Integrazione Salariale) that on 23 February 2020 had solidarity benefits in progress may submit an application to activate the ordinary wage allowance under art. 19 of the Decree (pls. see paragraph above). The ordinary wage allowance suspends and replaces the solidarity benefit already in progress.

Such benefit can be obtained for 9 weeks.

Employees working for employers that on 23 February 2020 submitted the application are eligible for the benefit, regardless of their seniority with the company.

3.5. NEW PROVISIONS FOR EXCEPTIONAL EARNINGS SUPPLEMENT FUND(ART. 22 OF THE DECREE NO. 18/2020)

3.5.1. Prerequisites.

Employers excluded from CIGO and FIS and Bilateral Funds may apply for the activation of Exceptional earnings supplement fund, in case of events related to COVID-19 emergency .

If the debtor company intends to amend only the deadlines for the performance of the arrangement with creditors or the restructuring agreement, it shall file a brief at the validation hearing, which shall contain an indication of the new deadlines and shall also file documentation proving the need for the amendment of the deadlines. The postponement of the deadlines may not be more than six months longer than the original deadlines.

Such benefit can be obtained for 9 weeks.

Employees working for employers that on 23 February 2020 submitted the application are eligible for the benefit, regardless of their seniority with the company

3.6. LEAVE AND ALLOWANCE FOR EMPLOYEES OF THE PRIVATE SECTOR (ART. 23 OF THE DECREE NO. 18/2020)

Following the suspension of schools, the following measure apply to working parents of children of 12 years or youger:

- Parents working in the private sector are entitled to benefit from specific leave arrangements for a continuous or fractioned period not exceeding 15 days, with an allowance equal to 50% of their salary. Such leave arrangement may be taken alternatively by either parent, for a total of 15 days
- Alternatively to taking the above mentioned leave, they may opt for a bonus for the purchase of babysitting services with a cap of 600 €.

3.7. EXTENSION OF THE TERM OF PAID LEAVE UNDER ART. 33, LAW 104 OF FEBRUARY 1992 (ART. 24 OF THE DECREE NO. 18/2020)

The number of days of leave accruing monthly under art. 33, paragraph 2, of Law No. 104 of 5 February 1992, has been increased by additional 12 days.

3.8. URGENT MEASURES FOR THE PROTECTION OF THE ACTIVE SURVILLANCE PERIOD OF WORKERS OF THE PRIVATE SECTOR

The period spent in quarantine with active surveillance or fiduciary home isolation under Law Decree No. 6 of 23 February 2020:

- Is treated as sick leave;
- Is not included in the calculation of the protected maximum sick leave period.

4. MEDIA SECTOR SUPPORT MEASURES

4.1. TELCO AND CONSUMERS

The Cura Italia Decree places the emphasis on the intrinsic essentiality of the emergency faced by operators providing electronic communications networks and services, demanding, on the one hand, that infrastructures be upgraded and, on the other hand, that services be guaranteed, meeting the needs and requests of users.

With the **AGCOM Circular of 20 March 2020**, the Italian Authority for Communications Guarantees also ordered some urgent measures, addressed to all operators, providing in particular the following:

1. All operators authorized to provide electronic communications networks and services shall endeavor to identify technical solutions for an **immediate increase in the average bandwidth per customer, on a fixed-line network, of at least 30%**; where technically not possible, operators shall promptly provide the Authority with all elements useful for the relevant assessment;
2. Until 30 June 2020, in case of lack of coverage from fixed-line wideband and ultra-wideband network, operators, at the request of the condominium or the Authority or legal entity, shall evaluate any **available wideband or ultra-wideband radio access solution** (including FWA), to be made available through common PW (single shared access);
3. Operators shall recommend to end consumers, through the usual communication channels, to **use preferably, from home, fixed accesses (also wi-fi)** in order not to overload the mobile network;
4. Operators shall evaluate the possible technical adoption of measures to **share their users' wi-fi hotspots** also with third parties, appropriately identified, for the possible sharing of unused capacity;

5. Operators shall propose to the Authority any **reasonable and temporary traffic management measures**, verifiable by the Authority, aimed at avoiding congestion and saturation of fixed and mobile networks, especially at particular times of the day, in line with current regulations and the initiatives taken in the Berec area;
6. The operators shall propose measures aimed at **simplifying and facilitating the recharging of SIM cards** remotely, through on-line procedures;
7. The operators shall **monitor** the compliance by call centers and agencies with current regulations for the protection of customers, taking into account the provisions of Resolution no 420/19/CONS and the preliminary results of the technical panel on teleselling launched pursuant to the same;
8. The operators shall propose to the **Permanent Table** flexibility measures, until 30 June 30 2020, with respect to possible situations of delay in the payment of access services by its customers.

4.2. MEDIA SERVICES

With **AGCOM Resolution no. 129/20/CONS of 18 March 2020**, the Authority published an act of recall on compliance with the principles in force to protect the correctness of information with reference to the theme "covid-19 coronavirus". Specifically, the following providers are requested to:

- with reference to **audiovisual and radio media service providers**, to ensure adequate and complete information coverage on the subject of "covid19 coronavirus", making every effort to ensure the testimony of authoritative experts in the world of science and medicine in order to provide citizens with verified and well-founded information;
- with reference to **video sharing platform providers**, to take all appropriate measures to counter the dissemination on the web, and in particular on social media, of fake news and information about the coronavirus that is incorrect or otherwise disseminated from sources not scientifically accredited, including through effective systems for the detection and reporting of offences and their perpetrators.

On this last point, with a **Letter to video sharing and social media platforms**, dated 21 March 2020, AGCOM recalled the importance of the dissemination, particularly on social media, of medical and health information correct and scientifically based in relation to the epidemiological characteristics of the coronavirus, as well as the prevention of infection and treatment of the state of infection

4.3. POSTAL SERVICES

With regard to postal and parcel delivery services, the Legislator and AGCOM want to ensure continuity of supply and access in order to meet the needs of citizens and the community and safeguard social and territorial cohesion.

These are some of the main provisions on this sector:

- registered mail, service of judicial documents and fines shall be left in the mailbox once the addressee or other person authorized to collect them has been notified, without the need for a signature at the time of delivery (which will be replaced by that of the postal operator);
- the postal operator's signature shall verify that the judicial documents have also been delivered;
- the postal operator's certificate shall have full legal value;
- parcels may be left on the floor, in the hallways or other places at the address indicated by the recipient.

According to **AGCOM Communication of 20 March 2020**, operators are required to comply with health and anti-accounting regulations and measures in the exercise of their respective activities, minimising the impact of the state of emergency on the provision of services and ensuring, at the same time, that citizens, consumers and employees are safe and protected from risk.

4.4. DIGITAL PLATFORMS AND BIG DATA

AGCOM, in addition to promoting informed information and fact-checking of the news available online, created a platform (www.cartesio.news) and a mobile app (Cartesio Cogito Ergo News), in which the users can engage in an exercise of subjective reading and evaluation of the quality of the information received.

4.5. OTHER MEASURES

Due to the exceptional circumstances caused by the epidemiological emergency related to COVID-19, AGCOM has decided to postpone the deadline for the payment of the Contribution to 15 June 2020 for companies with a turnover of € 50,000,000.00 or less.

With the AGCOM Resolution no. 130/20/CONS, the Authority finally adopted measures to ensure the speedy conclusion of the pending proceedings.

5. ENTERTAINMENT SECTOR SUPPORT MEASURES

5.1. BENEFIT FOR ENTERTAINMENT SECTOR WORKERS

5.1.1. Amount of the benefit

Art. 38 of “Cura Italia” Decree, as converted by Law no. 27 of 24 April 2020, provides for the payment to entertainment sector workers of a benefit equal to Euro 600 for the month of March 2020.

The provision specifies that this benefit is not subject to IRPEF (personal income tax).

5.1.2. Eligibility requirements

The eligibility requirements for the above benefit are the following:

- to be a member of Fondo Pensioni Lavoratori dello Spettacolo (Entertainment Sector Workers Pension Fund);
- to have paid at least 30 daily contributions to this fund in the year 2019;
- to have produced in the year 2019 an income not exceeding 50,000 euros;
- not to receive a pension;
- not to be employed on 17 March 2020.

5.1.3. How to apply for the benefit

In order to apply for the benefit, workers have to submit the application electronically to INPS (Italian National Institute of Social Security) through INPS website, www.inps.it.

5.1.4. Limitations

With reference to the above benefit, the abovementioned Art. 38 set a budget limit of 48.6 million Euro for 2020. This means that if this budget limit is exceeded, INPS will have to stop paying benefits to eligible workers.

5.2. TICKET REFUND

5.2.1. Refund

Pursuant to Art. 88 of “Cura Italia” Decree, as converted by Law no. 27 of 24 April 2020, refunds can be requested in relation to tickets for “performances” of any kind (including cinema and theatre performances) and to entrance tickets to museums and other “places of culture”, that could not be used due to current health emergency.

As a matter of fact, events and performances of any kind, held in any place, both public and private, as well as the opening of museums and other cultural institutions and places have been suspended from 8 March 2020 until the end of the emergency.

In order to assess the possibility of requesting a refund, it should be noted that, while the notion of "performances" is not defined by the law and must therefore be interpreted as broadly as possible, the notion of "places of culture" should be understood as meaning "cultural institutions and venues", thus including:

- a) museums;
- b) libraries;
- c) archives;
- d) archaeological areas;
- e) archaeological parks;
- f) historical, artistic or anthropological sites.

5.2.2. How to request the refund

Buyers may request a ticket refund by submitting a specific request to the seller, within 30 days of the entry into force of "Cura Italia" Decree or legislative measures subsequently adopted, attaching the relevant purchase receipt,

The law does not specify how to submit an application, so it must be inferred that the application can be submitted in any way, as long as it is suitable to be received by the seller (and to prove that it has been received, in case of dispute).

It should be noted that most sellers have already set up specific channels for refund requests (special sections on their website, call-centers, etc.) and sent information emails to buyers eligible for the refund.

5.2.3. Obligation on ticket sellers

Sellers are required, within 30 days of submission of the application by the buyer, to issue a voucher for an amount equal to the value of the ticket for which the refund is requested.

The voucher can be used by the buyer within one year of the date of issue.

The law does not provide for an obligation on ticket sellers to refund any commissions relating to the payment method used and/or shipping costs.

5.3. EMERGENCY FUND FOR THE ENTERTAINMENT SECTOR

5.3.1. Emergency fund

Art. 89 of "Cura Italia" Decree, as converted by Law no. 27 of 24 April 2020, set up two emergency funds for the entertainment sector, one for the daily management of the emergency and the other one for long-term investments. The total amount of the above funds for 2020 is €130 million, of which €80 million for daily management of the emergency and €50 million for long-term investments.

5.3.2. How will resources be distributed and allocated

The specific arrangements for the distribution and allocation of resources to operators in the entertainment sectors, including artists, authors and performers, will be established by decree of the Minister for Cultural Heritage and Activities and Tourism, which must be adopted by the end of May.

5.4. BENEFIT FOR AUTHORS AND PERFORMERS

5.4.1. Other benefits provided for culture & entertainment sector workers

Pursuant to Art. 90 of “Cura Italia” Decree, as converted by Law no. 27 of 24 April 2020, 10% of the overall compensation for Private Copying will be allocated to support authors, artists and performers. Private Copying is the remuneration that applies, via a royalty on blank phonographic or audiovisual support systems in exchange for the possibility to make recordings of works protected by copyright. In this way everyone can make a copy with great savings over buying another original in addition to what you already have. Compensation for private copying is applied to all recording devices and all support systems suitable for recording sound and video.

5.4.2. Recipients of the benefit

The recipients of the above benefit are more specifically authors, performers, and self-employed persons which signed an agreement with a copyright collecting society (currently in Italy SIAE and Lea).

5.4.3. Eligibility requirements

The eligibility requirements will be established by a special decree of the Minister for Cultural Heritage and Activities and Tourism, in agreement with the Minister of Economy and Finance, which must be adopted by the end of May.

6. CONTRACTUAL MEASURES

The current emergency is affecting also the existing contracts, causing delays or making impossible the fulfilment of contractual performances. In this context, the question therefore is what remedies our legal system offer to deal with situations that undermine and risk jeopardising the contractual relationship.

6.1. FORCE MAJEURE

The first step is to look at the contract to see whether it includes clauses that exclude the debtor’s liability for non-performance or delays in performance, and what remedies, if any, it provides. In this regard, the so-called Force Majeure clauses generally provide that in the presence of extraordinary and unforeseeable events, not attributable to the debtor, the party may suspend, terminate, the contract, or offer to modify equitably the conditions.

The Italian Civil Code does not contain a specific definition of force majeure clauses. However, it is common ground that they include all those circumstances -such as strike, wars,

revolutions, epidemics, embargoes and so forth- that the obliged party could not have reasonably foreseen at the time of the conclusion of the contract. Moreover, the performance must have become impossible or excessively more onerous for the obliged party as a result of the unpredictable event.

The current health emergency situation may constitute a cause of force majeure in most contracts containing the aforementioned clause and, even if it is not explicitly provided for, its relevance may be inferred in terms of interpretation due to the willingness of the parties themselves to provide remedies in exceptional and extraordinary circumstances.

6.2. IMPOSSIBILITY OF THE PERFORMANCE

6.2.1. Definitive Impossibility

According to the first paragraph of Article 1256 of the Italian Civil Code, “An obligation is extinguished, when for some reason not imputable to the debtor, the performance becomes impossible.” Article 1218 further establishes that “The debtor who does not exactly perform the obligation due is liable for damages, unless he proves that the non-performance or delay was due to impossibility of performance for a cause not imputable to him.” Therefore, the impossibility, in order to exempt the obliged party from liability, must be occurred (i.e. subsequent to the termination of the contract), absolute and not attributable to him. In such cases, the obligation is automatically extinguished.

Even a legislative or administrative measure issued after the conclusion of the contract (the so-called *factum principis*) can make the performance impossible *de facto*. It is unquestionable that, the current situation of extraordinary emergency could not have been reasonably foreseen and preventable by the parties to contracts entered into before the declaration of the national state of emergency (i.e. 31st January, 2020).

6.2.2. Temporary Impossibility

The second paragraph of Article 1256 provides that “If the impossibility is only temporary, the debtor is not responsible for any delay in performance for so long as the impossibility lasts. However, the obligation is extinguished if the impossibility lasts until, with relation to the kind of obligation or the nature of its object, the debtor can no longer be considered obliged to perform the contract or the creditor no longer has an interest in its performance.”

Therefore, if the impossibility of the performance is of a transitory nature the obligation remains suspended as long as the temporary impossibility persists and the debtor is not responsible for late performance. Once the aforementioned impossibility ceases, if the creditor has still an interest in receiving the performance, the debtor remains obliged to perform it.

However, it may happen that the impossibility persists until the debtor, given the nature of the contract, can no longer be deemed bound or the creditor is no longer interested in the performance. In such circumstances, as is the case for the definitive impossibility, the obligation is extinguished.

6.3. EXCESSIVE ONEROUSNESS

Quid iuris when the performance does not become impossible, but only more onerous?

Article 1467 of Italian Civil Code provides that “In contracts for continuous or periodical performances, or for deferred performance, if extraordinary and unforeseeable events make the performance of one of the parties excessively onerous, the party who owes such performance can demand the termination of the contract, with the effects set forth in Article 1458. Termination cannot be demanded if the supervening onerousness is part of the normal risk of the contract. A party against whom termination is demanded can avoid it by offering to modify equitably the conditions of the contract.”

The article in question applies only to contracts providing continuous, periodic or deferred performances (so-called long-term contracts). Moreover, the excessively onerousness must be due to the supervening occurrence of extraordinary and unforeseeable events, that significantly exceed the expected risk of the contract.

If those conditions occur, the party who owes the performance may request the termination of the contract with retroactive effect, without prejudice to the services already performed. On the other hand, the other party may avoid such a consequence by offering to amend the terms of the contract in accordance with the principle of good faith, in order to restore the balance between the contractual parties.

It should be pointed out that, in the case of excessive onerousness, the obliged party is not automatically released from its performance merely because the extraordinary and unforeseeable event occurred (as in the case of definitive impossibility). However, it is necessary that the party who no longer has interest in the performance acts in court to request the dissolution the contract.

6.4. IMPOSSIBILITY TO USE THE SERVICE

What happens if the impossibility relates not so much to the debtor's performance, as to the creditor's ability to receive or use it?

Let's take, for example, the case of a couple of tourists who have booked an 'all inclusive' vacation package to an exotic destination, which is suddenly hit by an epidemic. The tourists do not want to risk infection and decide not to leave. In this specific case the service (i.e. the journey) is still abstractly possible, but creditors cannot and are no longer interested in benefiting from it due to the unforeseen event (epidemic). The essential purpose of the contract can therefore no longer be achieved.

According to the most recent case law, in order to be enforceable, the impossibility to use the service must not be attributable to the creditor and his interested in receiving the service must have ceased. If these requirements are met, the impossibility for the creditor to use the service, even if not specifically provided for by law, is to be considered as a cause for the extinction of the obligation, autonomous and distinct from the total (ex art. 1463 Civil Code) or partial (ex art. 1464 Civil Code) impossibility to perform it.

The question then arises as to whether this jurisprudential guideline on all inclusive holiday package can be interpreted extensively and applied in other areas of law.

6.5. OTHER REMEDIES

Finally, it is important to ask and understand whether, in the face of unforeseeable circumstances that have significantly altered the contractual balance, our legal system recognises a right and duty to renegotiate clauses that have become unfair. In this regard, in the absence of general provisions on the matter, our legal system generally applies the principle of good faith. The principle of good faith, even in the absence of an express renegotiation clause (so-called hardship clause), binds the parties to a contract to review and restore to fairness those provisions and clauses that have become excessively onerous.

The duty to act in good faith therefore requires the parties to renegotiate the terms of the contract and to re-balance the contractual relationship. Consequently, in the face of the invitation to renegotiate by one party, in the presence of the conditions which make it necessary, the other party is required to accept the proposed modifications or to propose solutions which complies with the economy and maintenance of the contract. In any case, the non-defaulting party may act for the termination of the contract and compensation for damages or appeal to the Judicial Authority to restore the contract to fairness.

This interpretation of the principles of good faith is the result of an increasing awareness, also at international level, of the importance of cooperating to maintain the contract. This is particularly important in the face of unforeseeable events that are potentially capable of significantly altering the contractual balance. Undoubtedly, the current emergency provides an opportunity to deepen these principles in all areas of law.

7. TAX-INCENTIVE MEASURES

The Italian Government has enacted two Law-Decrees (Law-Decree 17 March 2020, n. 18 and Law-Decree 8 April 2020, n. 23 that include several financial, corporate and tax-incentive measures in response to Covid-19. These provisions are aimed at supporting businesses and families during and after the pandemic emergency and related lockdown restrictions.

7.1. ART. 55 DL 18: TAX CREDIT ON DISPOSING OF OVERDUE RECEIVABLES

A tax credit is granted upon selling trade and financial receivables overdue by 90 days to an unrelated party.

The tax credit corresponds to the deferred tax assets calculated on a basis equal to the lower of the following amounts

A) The aggregate of:

- Tax loss carry forward available, and
- Deductible notional interest expense (ACE) exceeding total net taxable income;

B) 20% of the nominal value of receivables disposed of.

DTA can be converted into a tax credit even if they are not recognized in the financial statements.

Receivables must be disposed of no later than 31 December 2020 and an election must be made by the same date.

The tax credit can be recovered starting from 2021 as follows:

- Offset against other tax liabilities;
- Assigned to other group or independent entities;
- Claimed for refund.

7.2. ART. 56 DL 18: REPAYMENT OF LOANS DUE BY SMES POSTPONED TAX CREDIT ON DISPOSING OF OVERDUE RECEIVABLES

Small and Medium-sized Entities experiencing Covid-19-related cash flow constraints can defer repayments of loans and financial lease payments until 30 September 2020. The above measures apply to Italian-based SMEs as defined by the EU Commission Recommendation n. 2003/361/CE dated 6 May 2003.

7.3. ART. 63 DL 18: EMPLOYEE BONUS

A bonus of up to Eur 100 is granted to employees with an income not exceeding Eur 40,000 in the previous year, proportional to the number of days worked at their place of work in March 2020.

The bonus will be paid directly by the employer within the deadline for year-end adjustments and can be recovered by offsetting it against other taxes and social security payables.

7.4. ART. 64 DL 18: TAX CREDIT FOR SANITATION OF WORK PREMISES AND PPE PURCHASE

A tax credit is granted to businesses in connection with expenses incurred for protecting workers from exposure to, and infection with, SARS-CoV-2. The tax credit is equal to the lower of:

A) 50% of the aggregate expenses incurred for:

- Sanitation expenses, and
- Personal protective equipment cost;

B) Eur 20,000.

7.5. ART. 65 DL 18: TAX CREDIT FOR RETAILERS

A tax credit is granted equal to 60 percent of the rent/lease paid for March 2020 for shops and other similar premises falling within cadastral category C/1 (i.e. shops and similar buildings).

7.6. ART. 66 DL 18: DONATIONS

Donations made in cash or in kind by individuals and non-profit entities during 2020 to the state, regions, local public authorities, other public institutions or legally recognized non-profit organizations to finance investments or expenses aimed at coping with the Covid-19 emergency benefit from a 30 percent tax deduction up to a deduction amount of Eur 30,000.

Donation made by businesses are fully tax deductible for IRES corporate tax and IRAP regional income tax purposes.

7.7. ART. 1 DL 23: STATE-GUARANTEED LOANS

SACE, the Italian Export Agency, will guarantee bank loans not longer than 6 years made to large businesses, SMEs, contract workers and professionals, if they have used up their entitlement to access the SME Guarantee Fund.

Beneficiary businesses cannot distribute dividends for the next 12 months and must manage any layoffs in agreements with trade unions.

The guarantee cannot exceed the higher of:

- A) 25% of 2019 revenues;
- B) 200% of the labor cost for FY 2019.

7.8. ART. 5 DL 23: BUSINESS CONTINUITY

The effective date of the provisions of the new Bankruptcy Code not yet entered into force is postponed to 1st September 2021.

Until 31 December 2020 minimum capital requirement rules are lifted.

Businesses having properly used the going concern assumption in the latest financial statement approved before 23 February 2020 can prepare their next financial statements on the same basis until fiscal year in course as at 31 December 2020, notwithstanding any economic downturns due to the lockdown restrictions.

The mechanism by which shareholder and directing company loans are repaid only after the claims of other creditors have been settled will not operate until 31 December 2020.

Various deadlines regarding bankruptcy procedures are extended.

7.9. ART. 14 DL 23: SME CENTRAL GUARANTEE FUND

Up to 31 December 2020 the SME Guarantee Fund will issue guarantees free of charge and securing amounts of up to 5 million to businesses with 499 employees or less.

7.10. ART. 18 DL 23: DEFERRAL OF TAX AND SOCIAL SECURITY PAYMENTS

VAT, salary withholding tax and social security payment deadlines of 16 April and 16 May 2020 are extended to 30 June 2020 for:

- A) businesses with revenues of up to Eur 50 million, if their March 2020 turnover has fallen by at least 33% compared with March 2019;
- B) businesses with revenues of more than Eur 50 million, if their April 2020 turnover has fallen by at least 50% compared with April 2019.

7.11. ART. 19 DL 23: WHT EXEMPTION ON SELF-EMPLOYMENT INCOME AND COMMISSIONS

Self-employed professionals and commission agents with revenues up to Eur 400.000 in fiscal year 2019 may request their clients not to apply withholding taxes on payments made between 17 March 2020 and 31 May 2020.

The above only applies to small businesses not employing any personnel. The beneficiary must pay the withholding tax amount by 31 July 2020.

7.12. ART. 20 DL 23: INCOME TAX ADVANCE PAYMENTS

Underpayments by less of 20% of advance instalments of 1RPEF personal income tax, IRES corporate income tax and IRAP regional income tax for FY 2020 will not trigger any penalties or interest.

7.13. ART. 21 DL 23: DEADLINE EXTENSION FOR PAYMENTS TO PUBLIC ADMINISTRATION

Late payments to the public administration, falling due on 16 March 2020 and made no later than 16 April 2020, will be considered timely made.

7.14. ART. 22 DL 23: EXTENSION OF DEADLINE FOR CU CERTIFICATE OF INCOME PAID

Submission deadline for the CU certificate of income paid is extended to 30 April 2020.

7.15. ART. 23 DL 23: VALIDITY EXTENSION OF CERTIFICATIONS ISSUED BY THE REVENUE AGENCY TO CONTRACTORS OR SUBCONTRACTORS

Certifications issued by the Revenue Agency until 29 February 2020 confirming that contractors or subcontractors have regularly fulfilled their tax obligations (see Tax newsletter 14.2.2020, n. 5) are now valid until 30 June 2020.

7.16. ART. 26 DL 23: PAYMENT EXTENSION FOR STAMP DUTY ON E-INVOICES

Payment of stamp duty on e-invoices has been extended to:

- A) 20 July 2020, in the case of Q1 2020 stamp duty due for Eur 250 or less;
- B) 20 October 2020, in the case of Q1 and Q2 2020 stamp duty due for Eur 250 or less in total.

7.17. ART. 36, 37 DL 23: EXTENSION OF LEGAL AND ADMINISTRATIVE DEADLINES

Various deadlines have been extended in connection with certain administrative, legal and tax proceedings and disputes.