

COVID-19: SHAREHOLDER MEETINGS AND PAYMENT OF DIVIDENDS IN ITALIAN COMPANIES

Date: 25 March 2020

Italian Corporate M&A alert

By: Giampaolo Salsi, Paolo Rusconi, Bruno Vascellari, Carolina Sanna

As a result of the state of national emergency prompted by the COVID-19 crisis, urgent legislation -- namely, the Italian Prime Minister's decrees of 8, 9, 11 and 22 March 2020 (the "dPCMs") -- has imposed a number of limitations on local residents, including a general prohibition on moving within the Italian territory unless for "proven working reasons, state of need, or health reasons". Even more significantly, the latest dPCM of 22 March 2020 has imposed a general suspension on business activities, subject to specific exceptions listed in an attachment to the decree. Discussions among the country's central and regional governments, health authorities and civil protection are currently ongoing as to whether the lockdown should be tightened and extended even further.

These fairly drastic measures -- the enforcement of which raises fundamental issues as to the trade-off between civil rights, economic freedom and national wealth, on the one hand, and the constitutional imperative to protect public health and safety, on the other -- reflect the choice made to date by the Italian government in response to the COVID-19 pandemic. This approach follows the "lockdown path" as opposed to the "3Ts" (trace, test and treat) approach adopted in South Korea, or the "contain, delay, research and mitigate" strategy announced by the UK authorities.

Under the approach adopted by the Italian government, the mantra of "social distancing" becomes all the more compelling, and collective gatherings plainly impracticable. This clearly affects shareholder meetings of public and private companies, especially those in countries -- including Italy -- in which physical attendance is still generally required and alternative 'virtual' means of congregation, or of formation of consensus, are the exception.

The issue is extremely important as a large number of Italian companies (ordinarily, all those with financial year ending on 31 December) are required to approve their financial statements during the month of April. Specifically, Articles 2364, para. 2, and 2478-bis of the Italian Civil Code provide that joint stock companies and limited liability companies generally need to hold their annual general meetings for the approval of annual balance sheets within 120 days, or, when the by-laws so permit, 180 days after the end of the financial year.

In this note, we address some of the issues that Italian companies are faced with in connection with the holding of their AGMs during the ongoing COVID-19 crisis. Special attention will be given to certain provisions included in Law Decree no. 18 of 17 March 2020 (the freshly enacted "Cura Italia" decree, issuing measures to support families, workers and businesses, in the wake of the COVID-19 emergency) (the "Decree"), devised to address some of the issues at hand.

EXTENSION OF ORDINARY TERMS FOR THE HOLDING OF AGMS

Art. 106, paragraph 1, of the Decree, provides a new general exception to the ordinary 120-day requirement under Arts. 2364, para. 2, and 2478-bis of the Italian Civil Code, and to any similar restrictions set forth in a company's by-laws, and allows all AGMs to be held within 180 days after the end of the company's financial year.

Recourse to this exceptional extension will be discretionary, and will not require a showing of the "particular needs" referred to under Art. 2364, or any other justification. 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 period, even if the meeting is actually later held in second call.

ONLINE ATTENDANCE AND WRITTEN RESOLUTIONS. DESIGNATED REPRESENTATIVE

The Decree also contains (Art. 106, paras. 2 to 4) provisions that permit 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 designate proxies for shareholders.

In particular:

- Notices of call of ordinary and extraordinary meetings can permit shareholders attending the meeting by teleconference, and remote voting even if the bylaws are otherwise silent on the issue. Companies may also require that attendance take place only by teleconference, on the condition that attendees can be identified, actively participate in the discussion and vote, pursuant to Arts. 2370, para. 4, 2479-bis, para. 4, and 2358, para. 6, of the Italian Civil Code. Further, shareholder meetings will be deemed validly held even if all required participants have attended by teleconference, in particular without the need for the chairperson and the secretary (or the notary, in case of extraordinary meetings) to be physically present in the same location [1].
- Shareholder decisions in limited liability companies ("Società a responsabilità limitata") can be generally adopted by way of written consultation or written consent, notwithstanding the limits of Art. 2479, para. 4, of the Italian Civil Code and any restrictions in a limited liability company's by-laws. It remains to be seen how the general applicability of this option will 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 to a company's constituent documents to resort to shareholder meetings held by telecommunications means (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" quoted) are also permitted to nominate a "designated proxyholder" of the shareholders for the exercise of their voting rights at a shareholders meeting, notwithstanding any restrictions set out in the by-laws.

The designated proxyholder can be appointed in the notice of call of the meeting, which 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 when teleconferencing is impractical -- that attendance at a shareholder meeting can only take place through a designated proxyholder.

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

The exception to the ordinary 120-day deadline for the holding of AGMs (see section I 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 and to decide whether to declare dividends or distribute profits accrued in the previous financial year [2]. 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 changed circumstances.

However, once a dividend has been declared (by way of an *ad hoc* resolution of the AGM), the dividend becomes an individual right of the recipient shareholder, who will therefore acquire a monetary claim against 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 that Art. 91 of the Decree has introduced a "quasi-moratorium" for all debts, the payment of which is prevented or hindered as a consequence of the containment measures enacted in the wake of the COVID-19 crisis. Namely, Art. 91 of the Decree provides that "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".

Due to the novelty of this provision, it is not possible to assess its applicability to particular circumstances, or if the interpretation and construction of the expression "compliance with containment measures" will also extend to financial difficulties indirectly occasioned by the lockdown.

The above summary does not purport to constitute a comprehensive analysis of the recently enacted provisions of the Decree. Yet, it may give some immediate guidance as to some urgent measures adopted by the Italian government to facilitate business and governance continuity of companies in the face of current challenges.

NOTES

[1] 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 COVID-19 crisis. 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 remote connection modalities -- 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.

[2] It is worth noting that the extension of the period in which financial statements must be approved does not otherwise exempt directors and auditors from their duty to oversee a company's economic and financial condition and, if appropriate, take all necessary measures to safeguard their integrity.

KEY CONTACTS



GIAMPAOLO SALSI
PARTNER

MILAN
+39.02.3030.291
GIAMPAOLO.SALSI@KLGATES.COM



PAOLO RUSCONI
PARTNER

MILAN
+39.02.3030.2921
PAOLO.RUSCONI@KLGATES.COM



BRUNO VASCELLARI
COUNSEL

MILAN
+39.02.3030.2925
BRUNO.VASCELLARI@KLGATES.COM

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.