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White Paper

COVID-19 Task Force — Milan

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Managing Italian Companies With Listed Securities During the COVID-19 Pandemic – Part I (Reporting Obligations and Corporate Meetings)

This first in a series provides practical guidance to help companies cope with the evolving regulatory scenario during the pandemic.

Due to the global spread of COVID-19, governments and regulators have adopted a variety of measures to support companies with equity and/or debt listed securities. As measures continue to be adopted to address the economic consequences of the epidemic,the regulatory framework applicable to Italian companies with listed securities has also been affected in many ways.

In particular:

- The European Securities and Markets Authority (ESMA) adopted special recommendations addressed to issuers about the disclosure of significant information concerning the impacts of COVID-19 on issuers' financial situation and business activities

- The Italian government issued three major extraordinary decrees, the so-called "Cura Italia" Decree (Law Decree of 17 March 2020), "Cura Italia 2" Decree (President of the Council of Ministers Decree of 22 March 2020) and "Liquidity" Decree (Law Decree no. 23 of 8 April 2020), which, among other points:

  - Introduced simplified formalities to hold shareholders' and board of directors meetings and to vote at such meetings
  - Strengthened the securities regulator's powers to impose stricter reporting requirements of relevant shareholdings in Italian listed issuers
  - Provided public guarantees for financings, provided that beneficiary companies do not, among other actions, distribute dividends and carry out buy-back transactions.

- The Italian Securities Commission (CONSOB) introduced a ban of short sales with respect to shares traded on the *Mercato Telematico Azionario* of Borsa Italiana S.p.A. and released its guidance on the shareholders' meetings of listed issuers as well as a warning on financial information (CONSOB Resolution n. 3/2020 of 10 April 2020 and CONSOB Warning of 9 April 2020).

This *Client Alert* is the first in a series, and will provide practical guidance by outlining the matters and questions that are most likely to arise in the management of an Italian company with listed equity and/or debt securities and provide some useful tips to address the most relevant corporate and securities law issues that may arise in the current evolving regulatory scenario. This series will cover the following topics:

- Part I: Reporting Obligations and Corporate Meetings
- Part II: Public Guarantees ad Lending Relief Measures
- Part III: Limits to Market Transactions

Reporting Obligations

Is any market disclosure due in connection with COVID-19?

YES. Equity and debt listed issuers should take into account their disclosure requirements under Regulation (EU) No 596/2014 as amended (Market Abuse Regulation). Issuers listed on regulated markets (*e.g. Mercato Telematico Azionario*) should also take into account requirements under Directive No 2004/109/EC as amended (Transparency Directive). In this respect, please note that on 11 March 2020, the ESMA advised issuers to:

- Disclose as soon as possible any relevant significant information concerning the impacts of COVID-19 on their fundamentals, prospects, or financial situation in accordance with their transparency obligations under the Market Abuse Regulation
- Provide transparency on the actual and potential impacts of COVID-19, to the extent possible, based on both a qualitative and quantitative assessment of their business activities, financial situation, and economic performance in their 2019 year-end financial report, or (if these have not yet been finalized) in their interim financial reporting disclosures

Therefore, companies should determine the extent of disruption to their business and operations as a result of the epidemic emergency and evaluate if they need to update their forward-looking statement language, if any, to address the COVID-19 pandemic. Further, companies should include risk factor disclosures in their 2019 year-end financial report discussing any risks related to the spread of COVID-19 on their business operations (due to quarantines of employees and suppliers, travel restrictions, etc.).

CONSOB, in its Warning dated 9 April 2020, reminded listed issuers to apply the ESMA recommendations above and warned issuers to consider providing any additional information or updates in shareholders' meetings called to approve 2019 financial statements.

In particular, CONSOB acknowledged that the COVID-19 pandemic constituted an event arising after the closing date of the financial year and, as such, advised issuers not to adjust their financial statements as of 31 December 2019 to reflect the effects of COVID-19. According to CONSOB, issuers should instead carefully evaluate whether the impact of the COVID-19 pandemic represents the outcome of pre-existing critical situations and, if it is the case, correctly apply the international accounting principles according to which events occurring after the end of the reporting period should be properly represented when having a material impact on the estimates of future forecasts, including those regarding business continuity.

Finally, CONSOB invited listed issuers to carefully assess if any disclosure related to the impact of the COVID-19 pandemic on the company's business prospects should be provided in the context of the Management Report on Operations (*Relazione sulla Gestione*), which accompany the financial statements. Such disclosures could include for example: updated information on the effect on the company's financial position and results of operations; measures adopted or planned to mitigate the outbreak; as well as a qualitative and/or quantitative indication of the potential impacts taken into account; while providing guidance on the company's future performance.

Key Provisions of Law: Regulation (EU) 2014/596, Directive 2004/109/EC, ESMA Recommendation of 11 March 2020 and CONSOB Warning of 9 April 2020.

What should a company do if it is no longer able to meet the publication deadlines for financial reports, including the extended deadline provided by the "Cura Italia" Decree (*i.e.* from 120 to 180 days)?

Significant constraints due to the epidemic emergency may substantially impair an issuer's ability to publish their financial reports within the deadlines. If issuers reasonably anticipate that publication of their financial reports will be delayed beyond the deadlines set out under Italian law, including as a result of the emergency decrees issued by the Italian government in recent weeks, companies are expected to inform CONSOB and the market of the delay, the reasons for such delay, and to the extent possible the estimated publication date.

On 27 March 2020 the ESMA issued a Public Statement on this issue addressed to the national authorities regarding issuers' obligations to publish periodic financial information during the spread of COVID-19.

Notably, the ESMA, considering that issuers may be prevented from fulfilling the requirements due to COVID-19, expects national authorities during this specific period not to prioritize supervisory actions against issuers in respect of the upcoming deadlines set out in the Transparency Directive regarding annual and half-yearly financial reports.

Key Provisions of Law: Article 17 of the Market Abuse Regulation and ESMA Public Statement of 27 March 2020.

Corporate Meetings

Do simplified formalities apply to shareholders', board of directors', and bondholders' meetings?

YES. The "Cura Italia" Decree provides for measures to help Italian public companies deal with the impact of COVID-19 during the 2020 annual general shareholders' meeting season in order to facilitate the attendance of shareholders using means other than in-person attendance — in compliance with the restrictive measures adopted by the Italian government to reduce the risk of infection.

In particular, all Italian joint-stock companies (including listed companies) and limited liability companies are entitled to convene ordinary or extraordinary shareholders' meetings (and shareholders' votes may be collected and exercised) using electronic means or by mail, and shareholders may attend such meetings

using audio or video calls (instead of attending in person). Companies may also hold shareholders' meetings exclusively by audio or video calls, while verifying participants' identities, attendance, and the exercise of their voting rights.

If meetings are held through audio/video calls, the chairman and the secretary of the meeting (*i.e.*, the notary in case of extraordinary shareholders' meetings) are no longer required to attend the meeting in person in the same place.

Moreover, companies with equity listed on Italian regulated markets may appoint (exclusively or not) the designated representative (*rappresentante designato*) to act as proxy of the shareholders at ordinary and extraordinary shareholders' meetings. Such companies can appoint the representative even if their bylaws provide for the opt-out from such an option. Listed companies may also provide in the notice calling the meeting that shareholders may attend such meeting exclusively by granting the proxy to the designated representative, thus reducing the number of attendees in person.

These provisions have also been extended to Italian companies with equity admitted to trading on a multilateral trading facility such as AIM Italia and to private companies with shares widely distributed among the general public.

The corporate provisions above shall apply to shareholders' meetings convened by 31 July 2020 or later (*i.e.*, as long as the national state of emergency due to the COVID-19 outbreak lasts).

According to Milan's Corporate Commission of Notaries, the shareholders' meetings can be held via phone/video call even if the chairman is not in the same place as the secretary. Bylaw provisions requiring that the chairman and the secretary (including a notary) attend the meeting in the same place only apply if the minutes of the meeting need to be finalized immediately after the meeting. Furthermore, if shareholders' attendance and participation is set to take place exclusively through the designated representative, listed companies may provide that the shareholders' meetings are to be held (even exclusively) via phone/video call (nevertheless companies shall be able to verify participants' identities, attendance, and their exercise of voting rights). In this case, all required participants, including the secretary, can attend the meeting via conference call.

Such provisions equally apply to the board of directors' meetings as well as to bondholders' meetings that are in any case required to comply with the Italian corporate provisions on extraordinary shareholders' meetings.

In light of the above, a listed issuer may hold its annual shareholders' meetings as follows:

- Shareholders attend the meetings using audio or video calls (instead of attending in person) and vote electronically or by mail.
    - Issuers shall consider the costs and technicality to permit the electronic vote and the attendance with audio/video calls.
- Designated representative (*rappresentante designato*) is now permitted, even if excluded by the bylaws.
    - At the option of the shareholders:

- In this case the shareholders could opt to attend in person and, therefore, the company shall prepare the location for the shareholders' meeting in compliance with the applicable rules in force at the time of the meeting taking into account the restrictions due to the epidemic emergency.

- On an exclusive basis with no shareholders attending in person.

  - The designated representative could also attend via audio/video call.

Key Provisions of Law: Art. 106 of the "Cura Italia" Decree and Art. 135-*undecies* of the Italian Legislative Decree no. 58/1998, *Massime* no. 187 and 188 of Milan's Corporate Commission of Notaries.

Is there any specific information in connection with COVID-19 emergency that a company should include in the notice of call to convene the shareholders' meeting?

YES. As reported, the "Cura Italia" Decree has introduced new formalities to hold shareholders' meetings and vote at the meetings (see question "*Do simplified formalities apply to shareholders, board of directors', and bondholders' meetings?*"). If a company decides to make use of such options, shareholders should be duly notified in advance. Therefore, the notice of call becomes the main instrument to define the procedures for the conduct of the shareholders' meetings and the rights of the shareholders and others entitled to vote to attend the meeting. The board of directors shall establish the contents of the notice, also derogating from the provisions provided by the bylaws (if needed).

In particular, as the Italian framework has been subject, and will probably continue to be subject before the end of the epidemic emergency, to many regulatory interventions introducing temporary measures aimed at supporting businesses through uncertain economic and market conditions, a company should inform its shareholders in the notice of call that in the event that the competent authorities issue further measures to address the COVID-19 emergency, the procedures to attend the shareholders' meeting and vote as set out in the notice may change.

Moreover, if a company's bylaws provide for the opt-out from the option to appoint the designated representative (*rappresentante designato*), and a company is considering using such an option, as provided for by the "Cura Italia" Decree, the company should specify this option in the notice of call and promptly inform its shareholders and the public, in order for its shareholders to confer a written proxy with voting instructions on all or some of the items on the agenda to a designated representative. The company's call should indicate the procedures to grant the proxy, including any option for any proxy-holder appointed by a shareholder to grant a proxy to the designated representative (so called sub-delegation). This option would especially help institutional investors, which typically intervene and vote in shareholders' meetings through proxy holders.

In the event that a company opts for a designated representative (*rappresentante designato*), CONSOB recommends that it set forth the relevant deadlines in a way that facilitates shareholders' voting rights. (See the following question "*Are there any specific aspects a company should consider in the event that participation in, and voting at, the shareholders' meeting is only allowed through the designated representative?*")

Key Provisions of Law: Art. 106 of the "Cura Italia" Decree, Article 135-*undecies* of the Italian Legislative Decree no. 58 of 24, February 1998 and CONSOB Resolution n. 3/2020 of 10 April 2020.

Are there any specific aspects a company should consider in the event that participation in, and voting at, the shareholders' meeting is only allowed through the designated representative?

***YES*.** Listed companies providing that participation in, and voting at, the shareholders' meeting shall only be allowed through the designated representative, should also consider that such decision would imply the implicit provision of a deadline (the second trading day before the date of the shareholders' meeting) for the exercise of their voting rights. Therefore, also considering CONSOB Resolution n. 3/2020 of 10 April 2020:

- The notice of call should describe in detail each item on the agenda (or should be duly integrated within a reasonable time), explaining those agenda items on which a shareholders' resolution is required. The proxy forms (both the designated representative's and the ordinary form) should be adequately structured in order to ensure that shareholders can express their voting instructions on each item.

- The explanatory reports prepared by the board of directors on the items in the agenda of the shareholders' meeting (article 125-ter of Italian Legislative Decree no. 58/1998) should include the board's proposals on each item, to the extent possible (*e.g.* the number of directors to be appointed when the bylaws provides for a minimum and a maximum number; the term of appointment of the directors; the fixed remuneration of the directors, etc.).

- Listed companies willing to preserve the right of individual shareholders to submit resolution proposals directly to the shareholders' meeting, should: (i) set out in the relevant notice of call the procedural formalities and indicate timing and manner for individual shareholders to do so; or (ii) extend to individual shareholders not meeting the quantitative criterion provided by article 126-bis, para. 1, of the Italian Legislative Decree no. 58/1998 (*i.e.* one fortieth of the share capital) the right to request the integration of the agenda and to present new proposals within 10 days from publication of the notice of call; or (iii) establish ad hoc procedures for submitting proposals on the agenda items by shareholders other than qualified minorities (*e.g.* providing that shareholders may submit their proposals within a 15-day deadline before the date of the shareholders' meeting), provided that the proposals are compliant with applicable law and adequately indicated in the notice of call (or its integration).

- Listed companies should bring forward the date on which they provide the market and their shareholders answers to the questions which have been submitted within the chosen cut-off date (*i.e.* seven or five trading days before the date of the shareholders' meeting), in order to allow shareholders to have all the information necessary to exercise their voting rights before the deadline for the exercise of the proxy (*i.e.* two trading days before the date of the shareholders' meeting). In this respect, CONSOB and Assonime suggested that in the circumstances a fair option would be setting the cut-off date to receive the questions at the new seven trading day term and bring forward the term to publish the responses before (*e.g.* two days before the shareholders' meeting) so that they are available to the shareholders before the deadline to grant or revoke the proxy. As an alternative, companies could postpone the deadline for the exercise of proxies (*e.g.* companies could postpone such deadline to 12 noon on the trading day before the date of the shareholders' meeting).

Key Provisions of Law: Articles 125-bis, 126-bis, 135-*undecies* of the Italian Legislative Decree no. 58 of 24 February 1998 and CONSOB Resolution n. 3/2020 of 10 April 2020. See also: Assonime Q&A on annual shareholders' meetings published on 3 April 2020.

Can the notice of call for the shareholders' meeting be supplemented if it has already been published?

***YES*.** In case the notice of call was published before the entry into force of the "Cura Italia" Decree, listed companies may need to supplement the content in order to notify the market and their shareholders of the chosen formalities for participating and voting at their annual meetings (*i.e.* without physical attendance).

In the absence of any deadline or particular indication by the competent authorities in such respect, listed companies may proceed at their discretion and supplement the relevant notice of call within a reasonable time, considering the shareholders' right to be informed and to express their vote. In the event that the supplement to the notice of call introduces the mandatory use of the designated representative (*rappresentante designato*), it is worth noting that any proxyholders that already received a proxy are required to sub-delegate the designated representative (and the sub-delegation is permitted even if not specifically included in the proxy).

Key Provisions of Law: Art. 106 of the "Cura Italia" Decree.

Can shareholders' meetings that have already been convened be postponed?

***YES*.** As specified below (see question "*Is there any new deadline for the approval of the 2019 financial statements?*"), as a result of the legislative measures issued to contain the effects of the COVID-19 emergency, the extension of the ordinary term of 120 days provided for by the Italian Civil Code, regardless of the existence of any provision in the bylaws providing for the longer 180-day term, will allow listed companies having already convened their annual shareholders' meetings to postpone the meetings within the above-mentioned timeframe.

Key Provisions of Law: Art. 106 of the "Cura Italia" Decree and Art. 2364(2) of the Italian Civil Code.

Annual general meeting during the COVID-19 outbreak: a tentative timetable

Based on the responses provided above, the below provides a tentative timetable for 2020 annual general meetings.

t-30	t-20	t-15	t-7 or t-5 TD	t-2 TD	t-1 TD	t0
Publish the notice of call	Cut-off date for qualitied minorities to submit proposals to supplement the agenda / new proposals	Suggested deadline to integrate the notice of call*	Cut-off date for shareholders to submit questions regarding matters on the agenda	Cut-off date for shareholders to grant the proxy to the designated representative	Alternative cut-off date for shareholders to grant the proxy to the designated representative	Date of the AGM
		Company to publish new proposals / integrations to the agenda, if any		Suggested deadline for a company to publish answers to the questions submitted by the shareholders (ideally by 12 pm) ***		
		Suggested cut-off date for single shareholders not representing a qualified minority to submit new proposals**				

TD means trading days

* In the absence of any deadline or particular indication by the competent authorities, listed companies may proceed at their discretion and supplement the relevant notice of call within a reasonable time, considering the shareholders' right to be informed and to express their vote.

** Listed companies may also provide that single shareholders not representing a qualified minority shall respect the cut-off date of 10 days from publication of the notice of call (*i.e.* by t-20).

*** Listed companies should anticipate their answers in order to allow shareholders to be informed and exercise their right to vote before the deadline to grant their proxy to the designated representative occurs. The t-2 TD,12 pm deadline allows companies not to postpone the proxy cut-off date.

Board of Directors

Should or must a company's board of directors convene to address the emergency?

YES. In general, it would be appropriate to convene a board of directors' meeting in order to have all the directors fully involved in the decision process in such a critical situation. In any event, the timing and the organization of the meeting should take into account the simplified formalities adopted under the "Cura

Italia" Decree (see question "*Do simplified formalities apply to shareholders', board of directors', and bondholders' meetings?*").

What should a typical agenda of a board meeting of an Italian company with listed securities during the emergency cover?

A typical agenda of a first board meeting during the emergency could cover the following matters:

- **Legal measures:** Acknowledgment of relevant laws and regulations implemented at European and national level to address the spread of COVID-19 and adoption of ad hoc resolutions in case the company or any of its subsidiaries intend to take advantage of any of such relief measures (*e.g.* layoffs for workers, state guaranteed financings, and other lending relief measures)

- **Financial and economic impact:** Assessment of the actual and potential impacts of the health emergency on the company's financial situation and economic performance and adoption of ad hoc resolutions in view of the approval of the 2019 year-end financial statements (CONSOB invited listed issuers to also consider providing any additional information or update in the context of their shareholders' meeting called to approve the 2019 financial statements)

- **Meetings:** Acknowledgment of the Italian government's adoption of simplified formalities to convene ordinary or extraordinary shareholders' meetings and encourage shareholders' remote attendance and adoption of ad hoc resolutions in view of the next shareholders' meeting, if convened by 31 July 2020

- **Assessment:** Assessment of the impact of those events on the company's business activities and results of operations and public disclosure of inside information related therewith (if any)

The board can be convened even if the chairman is not in the same place as the secretary and, therefore, can be held entirely via video or audio conference call without any person physically attending in the same place.

Key Provisions of Law: Art. 106 of the "Cura Italia" Decree, Art. 1 of the Liquidity Decree, CONSOB Resolution n. 3/2020 of 10 April 2020 and CONSOB Warning of 9 April 2020.

Financial Statements – Dividend Distribution

Is there any new deadline for the approval of the 2019 Financial Statements?

***YES*.** All Italian companies (including listed companies) are allowed to convene the annual general shareholders' meeting to approve the financial statements within 180 days after the end of their financial year (*i.e.*, 2019). This extends the ordinary term of 120 days provided for by the Italian Civil Code, regardless of the existence of any provisions of the bylaws providing for the longer 180-day term available to companies preparing consolidated financial statements or upon the occurrence of specific needs relating to the structure or business of the company to be described in the management report attached to the financial statements.

Companies should consider any reporting covenant that may be contained in the existing finance documents setting forth different terms for providing the lenders or bondholders with the annual financial statements.

Note that the 180-term refers to the first call of the meeting.

Key Provisions of Law: Art. 106 of the "Cura Italia" Decree and Art. 2364(2) of the Italian Civil Code

If a company's board of directors has convened the shareholders' meeting to resolve to determine the distribution of the 2019 dividends before the spread of the epidemic emergency, can the board suspend the dividend distribution?

***IT DEPENDS*.** Without prejudice to the recommendation on dividend distributions issued by the European Central Bank on 27 March 2020 (which requests that at least until 1 October 2020 no dividends are paid out and no irrevocable commitment to pay out dividends is undertaken for the financial years 2019 and 2020 by credit institutions which are considered significant supervised entities and/or significant supervised groups), if the dividend distribution has not yet been approved by the shareholders' meeting, the board of directors can be convened as soon as possible to resolve upon the revocation of the prior board resolution approving the 2019 dividend distribution and approve a new proposal for the allocation of 2019 earnings. Revocation of the dividend proposal would also be advisable in case a company intends to apply for the SACE guarantee for financings provided for by the Liquidity Decree. Granting such a guarantee is subject, to several requirements, including that the beneficiary company and any other Italian entity belonging to the same group do not approve any dividend distribution or share buyback in the course of 2020 (further details on this topic will be provided in a related *Client Alert* (Part II: Public Guarantees ad Lending Relief Measures).

In such case, a new board resolution should acknowledge the impact of the pandemic on the 2020 economic and financial outlook of the company, resolve upon the suspension of the prior board resolution authorizing the distribution of dividends based on the 2019 profit, and propose that the company's 2019 earnings be carried forward, net of the portion that should be allocated to reserves pursuant to Article 2430 of the Italian Civil Code. As an alternative, the board may propose to confirm the distribution of the 2019 dividend changing the payment dates (*e.g.* in instalments). The new proposals must be properly disclosed to the public and reflected in the annual financial report and the documents for the annual general meeting (also through addenda or amendments to documents already published).

Key Provisions of Law: Art. 2364 and 2430 of the Italian Civil Code and ESMA Recommendation of March 11, 2020

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