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Managing Italian Companies with Listed Securities During The COVID-19 Outbreak – Part II (Public Guarantees and Lending Relief Measures)

This second 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 second 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 *Alert* addresses public guarantees and lending relief measures available to Italian companies with listed securities under the emergency provisions adopted by the Italian government. It follows Part I, published on 20 April, which focused on reporting obligations and corporate meetings. White Paper Part III, the last in the series, will cover the limits to market transactions.

Public Guarantees and Lending Relief Measures

Is there any special public guarantee for financings to Italian listed companies in light of the COVID-19 emergency?

YES. The Italian export credit agency SACE S.p.A. (an entity wholly owned by Cassa depositi e prestiti S.p.A. (CDP), which is in turn largely controlled by the Italian Ministry of Economy and Finance), together with the Italian government, will, subject to certain conditions, provide support for business continuity by means of up to €200 billion of loan guarantees (covering eligible companies' financings granted by banks and financing institutions after the entry into force of the Liquidity Decree on 9 April 2020). These loan guarantees will be reserved for companies (including listed companies) based in Italy, other than banks or other financing institutions, experiencing financial difficulties linked to the COVID-19 outbreak, not identified as "undertaking in difficulty" under the European Commission Regulation No. 651/2014 as of 31 December 2019 and whose debt exposures were not classified as impaired credit exposures ("*esposizioni deteriorate*") as of 29 February 2020.

The state will counter-guarantee without recourse (*senza diritto di regresso*) SACE's exposure to banks and other financing institutions granted the above facilities.

The SACE guarantee will cover up to 90%, 80%, or 70% (depending on the number of employees and turnover of the requesting company) facilities granted to finance employment costs, investments, or working capital relating to production plants or business activities located in Italy, as certified by the legal representative of the borrower. Refinancing transactions, facilities to finance share buybacks and acquisition financings are excluded.

Moreover, the SACE guarantees will apply only to facilities (i) having a term of a maximum of six years, provided that the companies will be entitled to a pre-amortization period of up to two years, and (ii) in an amount equal to the higher of either 25% of FY2019 group turnover or 200% of FY2019 group employee costs, both in Italy.

Details on the requirements and steps of the process to apply to the SACE are provided in the operational manual released by SACE on April 20, 2020 (the "**SACE Manual**").

The Central Guarantee Fund for small and medium enterprises and CDP will also provide guarantees to support the liquidity of companies experiencing financial difficulties linked to the COVID-19 outbreak, under the applicable conditions.

Key Provisions of Law: Art. 1 of the Liquidity Decree.

Are SACE guarantees subject to any requirement with respect to dividends and buybacks?

YES. The granting of a SACE guarantee is subject to certain requirements. In particular, the beneficiary company and any other Italian entity belonging to the same group may not approve any dividend distribution or share buyback in 2020.

However, as per the provision currently drafted under the Liquidity Decree, whether Italian companies that have already approved dividend distribution or a share buyback in 2020 will be eligible to benefit from the SACE guarantee scheme remains uncertain as the Italian Ministry of Economy and Finance can enact implementing regulations containing operational conditions and additional criteria to access the SACE guarantee.

According to the general principles of the law, it would be reasonable to assume that the dividend and buyback provisions should not affect resolutions approved prior to 9 April, and should therefore not prevent access to SACE guarantees. The SACE Manual confirms this interpretation: the applicant company must certify that both the same applicant and any other Italian entity belonging to the same group have not approved distribution of dividends or buyback of shares starting from 9 April 2020 and undertake not to approve such distribution or buyback in the course of 2020.

Considering the rationale of the requirement as detailed in the explanatory report of the Liquidity Decree (*i.e.*, avoiding that the beneficiary company commits financial resources to distribute dividends or cash to its shareholders) as regards the approval of:

- Distribution of dividends, it is advisable for the board not to approve or revoke the proposal of distribution of dividends if the company intends to benefit from the SACE guarantee taking into account the instructions provided in the SACE Manual (see also Part I: Reporting Obligations and Corporate Meetings);

- Buybacks, considering that the shareholders' resolution authorizing the purchase of treasury shares under article 2357 et ss. of the Italian Civil Code is typically included in the general shareholders' meeting agenda to renew the general authorization for the board to carry out buyback transactions but does not determine the obligation of the board to use such an authorization, it is reasonable to assume that the requirement at issue applies to subsequent board resolutions approving the launch of buyback transactions or programs enacting the general shareholders' authorization resolution. Only at the time of the board's resolution, the Company actually commits its financial resources to pay-out cash to its shareholders as a remuneration for the repurchase of the treasury shares. As a result, it is advisable for the board not to approve a resolution launching buy back transactions or programs at this time if it intends to benefit from the SACE guarantee taking into account the instructions provided in the SACE Manual.

Key Provisions of Law: Law Decree no. 23 of 8 April 2020 (Liquidity Decree).

What steps should be adopted (internally and externally) to benefit from the SACE guarantee?

Companies wishing to benefit from the new facilities guaranteed by SACE should:

- Accurately review their existing financings and related finance documents to determine whether the incurrence and drawdown of additional debt is allowed under the existing finance documents and whether there are any limitations, baskets, or conditions that should be potentially re-discussed with the existing lenders to obtain additional liquidity at potentially more favorable economic conditions

- Convene a meeting of the board of directors to discuss the possibility of obtaining new financings assisted by a SACE guarantee and the adoption of ad hoc resolutions and delegation of the necessary powers to one or more directors in case the company or any of its subsidiaries intends to avail itself of such guarantee, including:

  - Appointment of any financial or industrial advisor in charge of, in particular, elaborating and determining the financial information that can or must be provided to the financial creditors under the new SACE guarantee legal framework

  - Promptly start discussions with key contacts at banks or other financing institutions to evaluate the possibility of obtaining new financings assisted by a SACE guarantee

Key Provisions of Law: Art. 1 of the Liquidity Decree.

Recapitalization and Shareholders' Loans

Does the Liquidity Decree provide for the suspension of contingency provisions in case of relevant losses and reduction of share capital?

YES. The Liquidity Decree temporarily suspends the general corporate law provisions requiring shareholders to recapitalize, liquidate, or transform the company into a different kind of enterprise until 31 December 2020 in the event of losses exceeding one third of corporate capital or reductions of corporate capital below the minimum legal amount due to events occurred during the relevant fiscal year. In any case, the directors must inform the shareholders of the occurrence of such events.

Does the Liquidity Decree provide for any contingency measures supporting recapitalizations using shareholders' loans?

YES. The Liquidity Decree suspends the corporate law provisions on equity subordination for shareholders' loans and loans granted by entities exercising management and coordination activities between 9 April 2020 and 31 December 2020. The reimbursement of such loans will not be subordinated to the reimbursement of other debts and, starting from August 15, 2020, if occurred within one year from the date on which a company goes bankrupt, will not be returned. However, the suspension does not override the contractual subordination which might have been agreed with certain creditors.

Key provisions of Law: Art. 1, 6 and 8 of the Liquidity Decree and Art. 2446 (second and third paragraphs) 2447, 2467, 2482-*bis* (fourth, fifth and sixth paragraphs), 2482-*ter*, 2484 (first paragraph, no. 4), 2545-*duodecies* and 2497-*quinquies* of the Italian Civil Code.

Other Financing Matters

Do issuers need to inform bondholders if they draw down the revolving credit facility? Are there other disclosure obligations?

IT DEPENDS. The drawdown on a revolving facility would not typically trigger an independent disclosure to bondholders or to the public. However, borrowers/issuers may determine that public disclosure is required (*e.g.*, for the purposes of Regulation (EU) No 596/2014, as amended) or otherwise appropriate in connection with a drawdown based on the facts and circumstances of the specific situation.

Do companies need to review the finance documents in light of the COVID-19 outbreak?

YES. All companies with listed debt securities must conduct a full review of their finance documents. Such a review should focus on provisions that may have been impacted by the COVID-19 outbreak, including financial covenants, information covenants, events of default, and MAC. Also in light of the CONSOB warning of 9 April 2020, information on the impact of the COVID-19 outbreak should be included in the management report.

CONSOB invited listed issuers to also consider providing additional information or updates in the context of their shareholders' meeting called to approve the 2019 financial statements.

Is any specific financial reporting required under the bond documentation in connection with COVID-19?

IT DEPENDS. Issuers with outstanding debt securities should review the information undertakings and covenants within their bond documentation to confirm the provisions pursuant to which they are required to provide financial reporting and compliance certificates.

Such information is frequently due within a specified deadline from the end of the previous financial reporting period (*e.g.*, 120 days).

If issuers decide to make use of the option recently introduced by the "Cura Italia" Decree, which extends the ordinary term of 120 days provided for by the Italian Civil Code to 180 days to convene the annual general shareholders' meeting to approve the financial statements, they should assess if this option affects their ability to satisfy their financial reporting obligations under the bond documentation and if it might be appropriate to request a waiver from the bondholders from such information undertakings.

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

If you have questions about this *White Paper*, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

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