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COVID-19: New rules applicable to Shareholders' meetings

Article 106 of Decree Law. No. 18/2020 (the “Decree”) introduces new legal provisions regarding the regulation of companies’ shareholders’ meetings. These provisions are highlighted below, with particular reference to the regulation applicable to: (i) all joint-stock companies (*società per azioni*, “S.p.A.”) and limited liability companies (*società a responsabilità limitata*, “S.r.l.”); (ii) S.r.l. only; (iii) companies whose shares are listed on regulated markets, or admitted to trading on a multilateral trading facilities, or widely distributed among the public (*società ad azionariato diffuso*); (iv) cooperative banks (*banche popolari*), cooperative credit banks (*banche di credito cooperativo*), cooperatives (*società cooperative*) and mutual insurance companies (*mutue assicuratrici*).

According to Article 106, para. 7, of the Decree, the new regulation applies to shareholders’ meetings convened by **July 31, 2020** or by the date until which the state of emergency related to Covid-19 will remain in force.

Article 106, para. 8, of the Decree also applies to companies which are under public control (as defined pursuant to Article. 2, para. 1, lett. m), of the Legislative Decree No. 175/2016) within the financial and instrumental resources available under the current legislation and does not entail any new or greater expenditure.

PROVISIONS APPLICABLE TO JOINT STOCK COMPANIES (S.P.A.) AND LIMITED LIABILITY COMPANIES (S.R.L.)

(i) Period of notice for convening the shareholders' meeting

Article 106, para. 1, of the Decree, states that shareholders' meetings called to approve annual financial statements shall be convened within 180 days as of the end of the financial year. This provision represents an exception to the S.p.A. regulation set forth by Article 2364, para. 2, of the Italian Civil Code, according to which ordinary shareholders' meeting shall be called at least once in a year, no later than 120 days as of the end of the reporting period. Such provision of the Decree is an exception also to S.r.l. regulation pursuant to Article 2478-bis of the Italian Civil Code, according to which financial statements shall be approved by quotaholders no later than 120 days as of the end of the reporting period, except for the possibility of a longer term pursuant to Article 2364, para. 2, of the Italian Civil Code. Furthermore, the above mentioned provision applies to S.p.A. and S.r.l. regardless of different provisions of the By-laws, if any.

The derogation laid down in Article 106, para. 1, of the Decree refers, in particular, to the limits provided by the Italian Civil Code, according to which companies might delay the approval of financial statements by 180 days as of the end of the reporting period (i) if the company is required to prepare consolidated financial statements; or (ii) if special circumstances related to the company's structure and its purpose require to do so.

According to Article 106, para. 1, of the Decree, companies shall convene shareholders' meeting within 180 days as of the end of the reporting period without any limitation. Indeed, within the Directors' Management Report (*Relazione sulla Gestione*), directors could refer to the provisions set forth under Article 106, para. 1, of the Decree as a reason for the delay in the approval of financial statements.

(ii) Attendance to the shareholders' meeting and voting right¹

Pursuant to Article 106, para 2, of the Decree – regardless to any different provision contained in the By-laws – shareholders will be able to attend to the shareholders' meeting by means of telecommunication devices, and to vote by electronic means or by correspondence.

Furthermore, shareholders' meeting could be held – even exclusively – by means of telecommunication devices, that guarantee correct identification of participants, their participation and the relevant exercise of voting right. Moreover, the provision states that the Chairman, the Secretary or the Notary are not required to be in the same place.

¹ According to the Decree, this provision is also applicable to S.a.p.a., to cooperatives and to mutual insurance companies.

PROVISIONS APPLICABLE ONLY TO LIMITED LIABILITY COMPANIES (S.R.L.)

In addition to the regulation mentioned in Paragraph 1 above, the following provisions concerning the exercise of voting rights are specifically applicable to S.r.l.

(i) Expression of the voting right by means of a written consultation or by written consent

Expressly derogating to any provision of the By-laws and to Article 2479, para. 4, of the Italian Civil Code², Article 106, para. 3, of the Decree states that voting rights can be expressed by written consultation or by written consent. Therefore, the expression of voting rights by means of written consultation or by written consent can be used even in absence of a By-laws provision and also in relation to shareholders' decisions regarding (i) amendments to the Article of Association; (ii) decisions to carry out operations that might imply a modification of the corporate purpose or a material amendment to the rights of the quota holders; (iii) reduction of capital for losses; or when (iv) one or more directors or a number of quota holders which represent at least one third of corporate capital request that the decisions of the quotaholders shall be adopted through a quotaholders' resolution.

PROVISIONS APPLICABLE TO COMPANIES LISTED ON REGULATED MARKETS (AS WELL AS TO COMPANIES WHOSE SHARES ARE ADMITTED TO TRADING ON MULTILATERAL TRADING FACILITIES AND TO COMPANIES WITH SHARES WIDELY DISTRIBUTED AMONG THE PUBLIC)

(i) Designated Representative

Article 106, para. 4, of the Decree allows companies whose shares are listed on a regulated market to appoint the “designated representative” pursuant to Article 135-*undecies* of the Legislative Decree No. 58/1998 (“FSA”), for the purpose of the expression of voting rights at ordinary and extraordinary shareholders' meeting. The notice of call may provide that the attendance to the shareholders' meeting is exclusively possible through the designated representative.

The provision specifies that proxies or sub-proxies might be conferred to the designated representative by means of an ordinary proxy form, pursuant to Article 135-*novies* FSA, in derogation to Article 135-*undecies*, para. 4, FSA.

Pursuant to Article 106, para. 5, of the Decree, the aforementioned provisions regarding the designated representative shall also apply both to companies whose shares are admitted to trading on a multilateral trading facilities and to companies having shares widely distributed among the public.

Therefore, shareholders' meetings of such companies could take place according to the following procedures (if so indicated in the notice of call): (i) persons entitled to vote may attend to the meeting and express the vote, even exclusively, through the designated representative, to whom a proxy (or a sub-proxy, in case of persons that are themselves delegates) has been duly granted; (ii) the designated representative, the members of the corporate bodies and the secretary may attend to the shareholders' meeting, even exclusively, through telecommunication devices.

² Pursuant to art. 2479, par. 4, of the Italian Civil Code “If the By-laws does not provide the provision specified in par. 3 and in the cases regulated under par. 2, number 4) and 5), of this article, and in art. 2482-bis, par.4, of the Italian Civil Code or when one or more directors so request or a number of quotaholders that represent at least one third of the corporate capital, the decisions of the quotaholders must be adopted through a quotaholders resolution pursuant to art. 2479-bis.”.

PROVISIONS APPLICABLE TO COOPERATIVE BANKS, COOPERATIVE CREDIT BANKS, COOPERATIVES AND MUTUAL INSURANCE COMPANIES

Pursuant to Article 106, para. 6, of the Decree, cooperative banks (**banche popolari**), cooperative credit banks (*banche di credito cooperativo*), cooperatives (*società cooperative*) and mutual insurance companies (*mutue assicuratrici*) – also by way of exception to: (i) Article 150-bis, para. 2-bis of the Legislative Decree No. 385/1993 (according to which By-laws of cooperative banks provide the maximum number of proxies that may be conferred to a single shareholder, in any case not lower than 10 and not higher than 20); (ii) Article 135-*duodecies* FSA (which excludes the application to cooperatives of the provisions on proxy voting set forth in Articles 135-*novies* to 135-*undecies* FSA); and (iii) Article 2539, para. 1, of the Italian Civil Code (which provides that each shareholder may represent up to a maximum of 10 shareholders, and applies also to cooperative credit banks); as well as (iv) By-laws provisions providing for limitations to the number of proxies that shall be conferred to the same person – may appoint the designated representative pursuant to art. 135-*undecies* FSA in the case of both ordinary and extraordinary shareholders' meetings, with the option to grant to such designated representative a proxy within the second day prior to the date of the first call of the shareholders' meeting.

The convening notice may provide that the attendance to the shareholders' meeting shall be exclusively feasible through the designated representative.

In such cases, Article 135-*undecies*, para. 5, FSA (regulating the expression by the designated representative of a vote that differs from the one indicated in the voting instructions) does not apply; therefore, the designated representative may not, in any case, express a vote other than the one indicated in the voting instructions given by the delegating party.

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We provide assistance to clients, both national and international, on the structuring and implementation of corporate governance structures for industrial and financial entities, in the context of extraordinary and ordinary transactions, as well as the drafting of the most complex corporate agreements. We offer to our clients continuous tailor-made assistance in a broad range of civil and commercial law matters, including the creation of new corporate and commercial partnerships, assistance in the negotiation and drafting of shareholders' agreements and other types of arrangements among shareholders.

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