



# Gatti Pavesi Bianchi

9 April 2020

## COVID-19 Update: Corporate Law

### URGENT MEASURES TO ENSURE THE GOING CONCERN OF COMPANIES AFFECTED BY COVID-19 EMERGENCY.

The Law-Decree 8 April 2020, no. 23, entered into force on 9 April 2020 (the “Decree”), introduced a number of measures to ensure, among others, the going concern of companies, taking into account the disruptive and abnormal effects and consequences of the Coronavirus emergency. Such provisions are not easy to be literally interpreted.

Namely, Chapter II of the Decree set forth certain temporary provisions on (i) share capital reduction, (ii) principles for the drafting of financial statements, and (iii) corporate financing.

#### I. Temporary provisions on share capital reduction

With reference to the share capital reduction due to capital losses<sup>1</sup>, the package of measures aims to prevent that losses occurred during the financial years ended by 31 December 2020 due to the Coronavirus outbreak, may force directors to put companies into liquidation rather than facing potential liabilities for non-conservative management pursuant to Article 2486 of the Italian Civil Code.

Indeed, Article 6 of the Decree provides for “*from the entry into force of this Decree and until 31 December 2020 for the cases occurred during the financial years ending by the aforementioned date, Articles 2446 para. 2 and 3, 2447 and 2482-bis para. 4, 5 and 6 and 2482-ter of the Italian Civil Code shall not apply. For the same period, a company may not be dissolved due to reduction or loss of share capital as per articles 2484 para 1, no. 4) and 2545-duodecies of the Italian Civil Code*”.

<sup>1</sup> See Articles 2446 and 2447 of the Italian Civil Code in relation to joint-stock companies - *società per azioni* “S.p.A.” - and Articles 2482-bis and 2482-ter of the Italian Civil Code in relation to limited liability companies - *società a responsabilità limitata*, “S.r.l.”.

Therefore, starting from 9 April 2020 and until 31 December 2020, in relation to the financial years ended by 31 December 2020 (i) there will be no obligation to reduce the share capital<sup>2</sup> in the event that the economic result does not bring the share capital back to more than two-thirds from the more than one-third of share capital previous year loss of share capital, (ii) there will be no obligation to resolve upon the reduction and a simultaneous increase of the share capital to a figure not less than the minimum required by law, or to transform the company<sup>3</sup>, in cases there is a loss of more than one-third of share capital and the latter is reduced below the minimum required by law, and (iii) the reduction or loss of share capital below the minimum required by law<sup>4</sup>, may not be invoked as grounds for the dissolution of a company. In any case, information obligations towards the shareholders in case there is a loss of more than one third of the share capital set forth under applicable law<sup>5</sup>, remains effective.

## II. Temporary provisions on principles for the drafting of financial statements

The negative implications of the Coronavirus emergency would entail for a potentially significant number of companies to draw their financial statements still elapsing on 31 December 2020 on the basis of deformed criteria (as they assume a physiological and non-pathological context as we are experiencing) and, in particular, without going concern, with a serious impact on the evaluation of all financial statements items.

In order to stem these deviating effects arising from the current economic physiological downturn and to protect the disclosure feature of the financial statements, Article 7 of the Decree provides for that, in the drafting of financial statements still elapsing on 31 December 2020, going concern is assumed as of the latest financial statements closed by 23 February 2020 (namely the date of the entry into force of the first measures related to the emergency); the aforesaid measures apply to the financial statements closed by 23 February 2020 and yet to be approved. Such measures will not prejudice the provisions of Article 106 of Law Decree no. 18 of 17 March 2020 (the so-called “*Cura Italia*” Law Decree), which extended by sixty days the deadline for the approval of the financial statements for 2019, ordinarily set at 30 April 2020.

Namely, Article 7 of the Decree provides that: “1. *In drafting the financial statements still elapsing on 31 December 2020, the going concern evaluation of the items provided under Article 2423-bis, para. 1, no. 1), of the Italian Civil Code may in any case be adopted if such evaluation already exists in the last financial statements closed prior to 23 February 2020, without prejudice to the provisions of Article 106 of Law Decree No. 18 of 17 March 2020. The evaluation criterion is specifically indicated in the notes to the financial statement, also by referring to the previous financial statement. 2. The provisions of the previous paragraph also apply to financial statements as at 23 February 2020 and not yet approved*”.

<sup>2</sup> Pursuant to Article 2446, para. 2, of the Italian Civil Code in relation to joint-stock companies and Article 2482-bis, para. 4, 5 and 6, of the Italian Civil Code in relation to limited liability companies, and Article 2446, third paragraph, for companies with shares without nominal value;

<sup>3</sup> Pursuant to Articles 2447 and 2482-ter of the Italian Civil Code;

<sup>4</sup> Pursuant to Articles 2484, para. 1, no. 4) and 2545-duodecies of the Italian Civil Code,

<sup>5</sup> Namely, Article 2446 para. 1, of the Italian Civil Code in relation to joint-stock companies, and Article 2482-bis, para 2 and 3, of the Italian Civil Code in relation to limited liability companies);

<sup>6</sup> Law Decree no. 6 of 23 February 2020, converted, with amendments, by Law no. 13 of 5 March 2020;

### III. Temporary provisions on corporate financing

The Decree also intends to encourage the funding of companies by their shareholders or by their holding companies. Namely, under Article 8 of the Decree, the mechanism for deferral of funding (*meccanismo di postergazione dei finanziamenti*) set forth under the Italian Civil Code, which provides that repayment of shareholders' loans shall be subordinated to other creditors<sup>7</sup>, shall not apply to loans made by shareholders or by holding companies between 9 April 2020 and 31 December 2020.

Indeed, Article 8 of the Decree provides that: "*Articles 2467 and 2497-quinquies of the Civil Code shall not apply to loans made in favour of the company from the date of entry into force of this Decree until 31 December 2020*".

<sup>7</sup> Article 2467 (Shareholders' loans) and Article 2497-*quinquies* (Financing by holding companies) of the Italian Civil Code;

## TEAM



*Equity Partner*

**Franco Barucci**

[franco.barucci@gplex.it](mailto:franco.barucci@gplex.it)



*Equity Partner*

**Andrea Giardino**

[andrea.giardino@gplex.it](mailto:andrea.giardino@gplex.it)

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.

The firm has consistently been involved in the most significant mergers and acquisitions transactions in Italy; our team brings vast experience to the public or private companies, private equity firms, financial advisors, financial institutions and investors.

### **Milan**

Piazza Borromeo, 8  
20123 Milano (MI)  
Tel. +39 02 8597 51  
Fax +39 02 8094 47  
[studio@gplex.it](mailto:studio@gplex.it)

### **Rome**

Piazza dei Caprettari, 70  
00186 Roma (RM)  
Tel. +39 06 6813 4961  
Fax +39 06 6813 4701  
[studioroma@gplex.it](mailto:studioroma@gplex.it)

**Disclaimer** This publication is provided by Gatti Pavesi Bianchi Studio Legale Associato and has been duly and professionally drafted. However, the information contained therein is not a legal advice and cannot be considered as such. Gatti Pavesi Bianchi Studio Legale Associato cannot accept any liability for the consequences of making use of this issue without a further cooperation and advice is taken.