



# Gatti Pavesi Bianchi

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## *COVID-19 Update: Public Interventions and other measures for Companies' Capital Strengthening*

### **LAW-DECREE NO. 34 OF 19 MAY 2020 (so-called “Decreto Rilancio”) - PUBLIC INTERVENTIONS AND OTHER MEASURES FOR COMPANIES' CAPITAL STRENGTHENING**

In order to back and boost the Italian economic-productive system affected by the “Covid-19” outbreak, the Law-Decree no. 34 of 19 May 2020 (the “Decree”) introduces, under Article 26 (*Capital strengthening of medium-sized enterprises*) and Article 27 (*Dedicated Assets*), public interventions and other measures to strengthen Italian companies' capitalization, but those operating in the banking, financial and insurance industries. Moreover, Article 43 of the Decree (*State Fund for the safeguarding of employment rates and going concern of business activities*) provides for public interventions, through equity investments, for rescuing and restructuring companies owning historical trademarks of national interest and joint-stock companies, with 250 or more employees, in distress.

You may find below a summary of the aforesaid provisions. We will provide further updates as the secondary legislation, to which the deployment of the aforementioned measures is mostly deferred, will be released.

## CAPITAL INCREASES OF SMEs: TAX BENEFITS AND STATE FUND (“FONDO PATRIMONIO PMI”) MANAGED BY INVITALIA

Article 26 of the Decree introduces measures aiming at strengthening the equity of medium-sized enterprises by providing tax benefits for both investors and companies in relation to capital increases to be approved and fully paid-in by 31 December 2020 as well as by allowing such companies to issue bonds or other debt instruments to be subscribed by a state fund for SMEs named “Fondo Patrimonio PMI” (the “Fund”), to be managed by *Agenzia nazionale per l’attrazione degli investimenti e lo sviluppo di impresa Spa - Invitalia*, or by companies wholly owned by it (“Invitalia”) <sup>(1)</sup>.

In particular, pursuant to Article 26, paragraph 1, of the Decree, such tax benefits and access to financing provided by the Fund are reserved to joint-stock companies (*società per azioni – S.p.A.*), limited liability companies (*società a responsabilità limitata – S.r.l.*), including simplified limited liability companies (*S.r.l. semplificate*), limited partnerships (*società in accomandita per azioni – S.a.p.A.*), cooperative companies, European companies under Regulation (EC) No 2157/2001 and European cooperative companies under Regulation (EC) No 1435/2003, with registered office in Italy and which meet the following requirements (the “Company”, the “Target” or the “Issuer”) <sup>(2)</sup>:

- revenues (the “Revenues”) <sup>(3)</sup> for 2019 fiscal year period in excess of Euro 5 million (or in excess of Euro 10 million for the access to the financing provided by the Fund) but lower than Euro 50 million;
- an overall reduction by no less than 33% of Revenues during March and April 2020 compared to the same period of the previous year due to the “Covid-19” outbreak; and
- capital increase approved and fully paid-in between 19 May 2020 and 31 December 2020; to be noted that, such capital increase shall be at least equal to Euro 250,000 in order to have access to the financing provided by the Fund (the “Capital Increase”).

For the tax benefit in favour of the Target and the access to the financing provided by the Fund, the Decree also requires, *inter alia*, that the Company complies with tax, labour, real estate and environmental law, and that it did not fall within the category of “firms in difficulty” as of 31 December 2019 <sup>(4)</sup>.

### *Tax benefits for investors and targets (overview)*

Article 26, paragraphs 4 to 7, of the Decree grants existing shareholders or third party investors subscribing the Capital Increase a tax credit equal to 20% of the contribution in cash capped at the first Euro 2 million of the investment. Companies that (i) directly or indirectly control the Target, (ii) are under common control with the Target, as well as (iii) controlled by the Target, cannot benefit of such tax credit.

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<sup>(1)</sup> Pursuant to Article 26, paragraph 3, of the Decree the measures set forth therein are subject to authorisation by the European Commission pursuant to Article 108, paragraph 3 of the Treaty on the Functioning of the European Union (the “Treaty”), concerning State aid.

<sup>(2)</sup> Financial intermediaries and holding companies as per Article 162-bis of the Italian Consolidated Income Tax Act (Presidential Decree no. 917/1986) as well as companies engaged in insurance activities cannot be beneficiaries of the above-mentioned measures.

<sup>(3)</sup> As defined under Article 85, paragraph 1, letters a) and b) of the Italian Consolidated Income Tax Act (Presidential Decree No. 917/1986).

<sup>(4)</sup> See Article 26, paragraph 2, of the Decree.

The shareholdings resulting from the investment must be held until 31 December 2023 and the distribution of reserves, of any kind, before such date by the Company results in the forfeiture of the tax benefit and the obligation to reimburse the amount of the tax savings, together with interests.

The aforementioned tax benefit also applies to investments made:

- in companies having permanent establishments in Italy with registered offices in Member States of the European Union or in countries belonging to the European Economic Area, which meet the requirements set forth under Article 26, paragraph 1, of the Decree; and
- through units or shares of undertakings for collective investment domiciled in Italy <sup>(5)</sup>, or in Member States of the European Union or States which are members to the Agreement on the European Economic Area, whose investment will lead to a participation higher than 50% of the share capital of companies that meet the conditions set forth under Article 26 of the Decree.

Article 26, paragraphs 8 and 9 of the Decree, on the other hand, provide that the Companies, following the approval of 2020 financial statements, are entitled to a tax credit equal to 50% of the losses exceeding 10% of the shareholders' equity, gross of the losses themselves, up to 30% of the amount of the Capital Increase. The distribution of any kind of reserves before 1 January 2024 by the Company will result in the forfeiture of the tax benefit and the obligation to reimburse the amount of the tax savings, together with interests.

The aforesaid tax benefits will be granted up to a limit of maximum Euro 2 billion for 2021, with all the relevant criteria to be set forth within the next 30 days by the Italian Minister of Economy and Finance.

The tax benefits under Article 26 are cumulated with each other and with any other aid measures granted to the Company pursuant to paragraph 3.1 of the Communication from the European Commission on a "*Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak*". The total gross amount of the aid measures shall not exceed Euro 800,000 for each company <sup>(6)</sup>.

The Decree, by granting tax benefits to both shareholders and companies that elect to carry out capital contributions, seems to aim at encouraging equity injections and, thus, limiting the recourse of financial indebtedness by shareholders <sup>(7)</sup>.

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<sup>(5)</sup> Pursuant to Article 73 of the Italian Consolidated Income Tax Act Presidential Decree No. 917/1986.

<sup>(6)</sup> Such amount reduces to Euro 120,000 for companies operating in the fisheries and aquaculture sector and to Euro 100,000 for companies operating in the primary production of agricultural products. For these purposes, paragraph 20, of Article 26 of the Decree, provides that measures granted under Commission Regulation no. 1407/2013, Commission Regulation no. 702/2014 and Commission Regulation no. 717/2013 or pursuant to Regulation (EU) no. 651/2014, Regulation (EU) no. 702/2014 of 25 June 2014 and Regulation (EU) no. 1388/2014 of 16 December 2014 shall not be taken into account.

<sup>(7)</sup> Indeed, it is worth noting that, on the other hand, the Law-Decree no. 23 of 8 April 2020 (so called "*Decreto Liquidità*") and, in particular, Articles 6 and 8 of the same, temporarily waive until 31 December 2020 (i) the obligations to reduce and simultaneously increase the share capital in case it is reduced for losses and (ii) the subordination, pursuant to Article 2467 of the Italian Civil Code, of shareholders' loans, and, thus, encouraging the funding of companies by their shareholders through loans.

### *State Fund for SMEs*

The Fund, with an initial endowment of Euro 4 billion for 2020, is aiming at underwriting by 31 December 2020 bonds or other debt instruments issued by the Targets (the “**Financial Instruments**”) whose funds must be employed by the Companies to finance personnel costs as well as investments or working capital expenditures exclusively for activities located in Italy. For the sole purpose of access to financing provided by the Fund, it is also required that the Target has less than 250 employees.

The Financial Instruments shall have the following features:

- the maximum amount of the Financial Instruments is equal to the lower amount between: (i) the amount of the Capital Increase multiplied by three and (ii) 12.5% of the Revenues; however, in case the Issuer is a beneficiary of other aids in form of guarantees on loans or subsidised interest rates, the sum of such aids and the amount of the Financial Instruments shall not exceed the greater of (i) 25 % of Revenues, (ii) twice the company’s personnel costs for 2019, and (iii) the company’s liquidity needs for the 18 months following the granting of the aid measure as proven by a self-certification;
- the redemption of the Financial Instruments shall take place 6 years after subscription, without prejudice to the right of the Issuer to redeem the notes in advance but not prior than 3 years after subscription;
- interests shall accrue annually and shall be paid in a lump sum on the date of repayment;
- the financing provided by the Fund is subordinated in the event that the Issuer is subject to bankruptcy or other insolvency procedures <sup>(8)</sup>.

The Decree also waives the limit generally provided under the Italian law for the issuance of notes by joint stock companies and, thus, it is allowed to exceed the double of the share capital, the legal reserve and the available reserves resulting from the latest approved financial statements <sup>(9)</sup>.

The Issuer of the Financial Instruments undertakes to:

- not to resolve or make, from the date of the application and until the full repayment of the Financial Instruments, distributions of reserves and buy-backs of shares and nor repay shareholders’ loans;
- allocate the financing to support personnel costs, investments or working capital employed in production facilities and business activities located in Italy;
- provide Invitalia with reports, whose contents and frequency shall be set forth by the latter, also in order to prove the compliance of the Issuer with the said requirements.

The Italian Minister of Economy and Finance, in agreement with the Italian Minister of Economic Development will adopt a decree in order to define the features of the Financial Instruments. Such decree will also set forth certain goals whose achievement by Targets may lead to reduction in the redemption value of the Financial Instruments.

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<sup>(8)</sup> Namely, the Decree provides that the Fund’s claims for repayment of capital and interests are satisfied after all the other unsecured credits and before those provided for in Article 2467 of the Italian Civil Code.

<sup>(9)</sup> Reference is made to the limits set out in Article 2412, paragraph 1, of the Italian Civil Code.

## DEDICATED ASSETS (“PATRIMONIO DESTINATO”) OF CASSA DEPOSITI E PRESTITI S.P.A. FOR INVESTMENTS IN FAVOR OF JOINT-STOCK COMPANIES, ALSO LISTED COMPANIES

Article 27 of the Decree empowers Cassa Depositi e Prestiti S.p.A. (“CDP”), a state owned entity aiming to foster sustainable development in Italy, to set up dedicated assets (“*patrimonio destinato*”) called “*Patrimonio Rilancio*” (the “**Dedicated Assets**”) through contribution of assets and legal relationships owned by the Italian Ministry of Economy and Finance (the “MEF”), in order to support joint stock companies, including listed companies, with registered office in Italy and a turnover exceeding Euro 50 million.

The Decree sets forth the general framework of the Dedicated Assets, delegating to secondary legislation and the Regulation of the Dedicated Assets the relevant implementing provisions, including the eligibility criteria of the companies that may benefit from the aids as well as the features of the investments.

### *Set up of the Dedicated Assets*

The Dedicated Assets should be established by resolution of the CDP shareholders’ meeting; it may be split into independent sectors (“*comparti*”). To fund the Dedicated Assets, the Government has already allocated for 2020 to CDP the issuance of dedicated treasury bills for the maximum amount of Euro 44 billion.

CDP will issue financial instruments in favour of the MEF whose repayment conditions are subject to the economic performance of the Dedicated Assets.

The Dedicated Assets, along with its sectors (“*comparti*”), shall be independent and separate from CDP’s assets. The Dedicated Assets will be liable only for the obligations incurred on its behalf within the limits of its assets and legal relationships and no claims by or on behalf of creditors of CDP may be made towards the Dedicated Assets, and *vice versa*.

The activities of the Dedicated Assets may be financed through the issuance of bonds or other debt instruments also beyond the limits and procedures generally set forth by the Italian Civil Code <sup>(10)</sup>.

In the event of insolvency of the Dedicated Assets, its creditors may benefit from the State guarantee of last resort, whose criteria shall be established by the MEF. The MEF may also provide a State guarantee destined to the holders of the debt notes issued to finance the activities of the Dedicated Assets up to a maximum amount of Euro 20 billion.

The Dedicated Assets will end after 12 years. Such term may be extended on request of the MEF by a resolution of the Board of Directors of CDP.

### *Companies which may benefit from the intervention of the Dedicated Assets and type of investments*

The Dedicated Assets operate in the forms and under the conditions provided for by the European Union’s regulatory framework on State aid adopted to face the epidemiological emergency due to “Covid-19” or at market conditions.

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<sup>(10)</sup> Namely, under Article 2412 of the Italian Civil Code issuance of notes cannot exceed an overall amount equal to the double of the share capital, the legal reserve and the available reserves resulting from the latest approved financial statements. The Decree also provides that Articles from 2415 to 2420 of the Italian Civil Code do not apply. The prohibition on raising savings from the public under Article 11, paragraph 2, of the Legislative Decree no. 385 of 1 September 1993 and the related implementing regulations, as well as the quantitative limits on funding provided for by current legislation, do not apply.

Namely, the investments of the Dedicated Assets shall be destined to joint-stock companies (*società per azioni - S.p.A.*), including listed joint-stock companies and cooperative companies, which:

- have their registered office in Italy;
- are not active in the banking, financial or insurance industries;
- have an annual turnover exceeding Euro 50 million.

The conditions, criteria and procedures for the investments of the Dedicated Assets will be defined by decree of the Italian Prime Minister, following a proposal by the MEF, after consultation with the Italian Minister of Economic Development.

The investments shall be made in companies that have a social impact *inter alia* in terms of technological development, critical and strategic infrastructures, strategic production chains, environmental sustainability, logistics and supply networks, employment rates and the labour market. Investments may be carried out in connection with the restructuring of companies that, despite temporary equity or financial imbalances, are featured by adequate profitability prospects.

Preferentially, the Dedicated Assets shall carry out investments through subscription of convertible bonds, equity contribution, or the purchase of shares listed on the secondary market in case of strategic transactions.

Article 27 of the Decree also provides that transactions carried out by CDP through the Dedicated Assets do not trigger any contractual and/or statutory change of control clauses or equivalent provisions that might otherwise apply.

The investments carried out by CDP, through the Dedicated Assets, shall not be subject to claw-back claims under Italian Bankruptcy Law.

## **STATE FUND TO SUPPORT EMPLOYMENT RATES AND GOING CONCERN OF BUSINESSES**

Article 43 of the Decree sets up a State fund to support employment rates and going concern of companies. The endowment of such State Fund for 2020 amounts to Euro 100 million.

The State fund is aimed at rescuing and restructuring distressed companies that own historical trademarks of national interest <sup>(11)</sup> and joint-stock companies, with 250 or more employees.

The State fund operates through equity investments ("*capitale di rischio*") at market conditions, in accordance with the Communication of the European Commission 2014/C 19/04 on guidelines on State aid to promote risk financing investments, and measures to support employment rates, in compliance with existing labour market policies.

The Italian Minister of Economic Development, after consultation with the Italian Minister of Labour and Welfare, shall establish the criteria and procedures for the access to the aforesaid fund, giving priority to those applicants that have the greater impact on employment rate and production system.

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<sup>(11)</sup> These companies shall be registered in the register referred to in Article 185-bis of Legislative Decree no. 30 of February 10, 2005.

## TEAM



*Equity Partner*

**Francesco Gatti**

[francesco.gatti@gplex.it](mailto:francesco.gatti@gplex.it)



*Junior Partner*

**Alessandra Ghezzi**

[alessandra.ghezzi@gplex.it](mailto:alessandra.ghezzi@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.

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### **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)

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