



COVID-19 EMERGENCY

What's new in Company Law?

INTRODUCTION

The emergency regulatory measures issued by the Italian Authorities as a result of the Covid-19 emergency have provided some significant new developments in company law in the following areas:

→ Postponement for the approval of the 2019 financial statements and remote meetings (1)

→ Losses, capital and dividends (2)

→ "Golden Power" (3)

The purpose of this summary is to provide some general information in relation to these new aspects, without claiming to be exhaustive.

Updated to 19.04.2020





(1) Approval of the financial statements and Shareholders' Meetings conducted with the help of "Telecommunications"

As you know, the key rules for approving the budget are:

"art. 2364, paragraph 2, Italian Civil Code."

"The Ordinary Shareholders' Meeting must be called at least once a year, within the term established by the Articles of Association and, in any case, no later than one hundred and twenty days after the end of the financial year. The by-laws may provide for a longer term, but, in any event, not exceeding one hundred and eighty days, for companies required to prepare consolidated financial statements and when special requirements relating to the structure and purpose of the company so require; in these cases, the directors shall indicate the reasons for postponement in the report provided for in Article 2428 of the Italian Civil Code".

"Article 2478-bis of the Italian Civil Code."

«Financial statements must be drawn up in accordance with the provisions of Section IX of Chapter V of this book (1) and presented to shareholders within the time limit established by the articles of association and, in any case, no later than one hundred and twenty days after the end of the financial year, without prejudice to the possibility of a longer time limit within the terms and conditions provided in the second paragraph of Article 2364 of the Italian Civil Code".



(1) Approval of the financial statements and Shareholders' Meetings conducted with the help of "Telecommunications"

The possibility for companies to hold Shareholders' Meetings with the help of "**telecommunications**" originates from:

«Art. 2370, paragraph 4 of the Italian Civil Code.»

Which provides that: "The by-laws **may allow for the participation in the meeting using telecommunications** or to cast votes by correspondence or electronic **means**. Those who vote by correspondence or electronically are considered to have attended the meeting".

and also,

"art. 2388, paragraph 1 of the Italian Civil Code."

which, in turn, provides that: "the use of telecommunications must promptly guarantee:

- verification of the **identity** and **validity** of those involved;
- to adequately **perceive** the events of the meeting on the agenda of the minutes;
- to allow those present to **take part in the discussion** and **vote** simultaneously on the items on the agenda".

The foregoing has been subject to review in accordance with Article 106 of the



Law Decree no. 18 of 17 March 2020 (the so-called "Cura Italia« Decree)

In the **approval of the financial statements**, it has been expressly provided that «as an exception to the provisions of Articles 2364, second paragraph, and 2478-bis of the Italian Civil Code or the various provisions of the Articles of Association, the ordinary shareholders' meeting shall be convened within 180 days from the end of the financial year".

In this regard, it is widely held that, since this is normally aimed at facilitating activities for the approval of the financial statements by the Shareholders' Meetings (i.e. for the benefit and, in the interests of the company and its shareholders), companies may decide whether or not to avail themselves of the longer term currently granted by Article 106, also given the use of the term "within". In this sense, it is not a matter of automatic postponement, since companies can approve the financial statements within the ordinary term.

Where the directors intend to use the longer term, they will have to mention this in the management report, without explaining the reasons (pursuant to Article 2364 of the Italian Civil Code), since it is clear that the decision is justified in the national emergency situation. Finally, a resolution of the administrative body seems appropriate (even if, not necessary) if the company intends using the extended deadline.





In relation to the manner in which the shareholders' meetings are held, art. 106 of the «Cura Italia» Decree, also provides, exceptionally, that:

- ❖ With the notice of call of the shareholders' meetings, also in derogation from the various provisions of the Articles of Association, companies with share capital may provide for voting by electronic means or correspondence and participation in the shareholders' meeting using telecommunications; the aforesaid companies may also provide for the shareholders' meeting to be held, even exclusively, using telecommunications that guarantee identification of the participants, their participation and the exercising of voting rights, pursuant to and for the purposes of Articles 2370, paragraph 4, 2479-bis, paragraph 4, and 2538, paragraph 6, of the Italian Civil Code, without the need for the Chairman, Secretary or Notary Public to be in the same place, where applicable;
- ❖ the S.r.l. may, in any case, use the vote by written consultation or express written consent, even in the absence of statutory provisions to this effect;
- ❖ in the case of shareholders' meetings of listed companies or companies with shares widely distributed among the public, the representative provided for in Article 135-undecies of the TUF may be appointed, even if the Articles of Association provide otherwise. The notice of call must stipulate that attendance at the shareholders' meeting must take place exclusively through the designated representative".*

*when provided for, by way of derogation from the limit of proxies provided by the law or the bylaws, this also applies to meetings of cooperative banks, cooperative credit banks, cooperative companies and mutual insurance companies.

It follows that:

- the use of electronic or postal voting may be used, but only if combined with the possibility for the shareholder to use telecommunications to participate in the shareholders' meeting, also in derogation of the statutory provisions;
- the fact that use of telecommunications has been authorised by said provision, clearly determines that such an eventuality is only allowed during the period of validity of the emergency legislation, in the absence of express statutory provision*;
- the use of "enhanced" telecommunications, i.e. means that guarantee the identification of participants, their participation in the meeting's proceedings and the exercise of voting rights**, only where they are used as the sole means of participation in the meeting's proceedings;
- the exclusion of the necessary simultaneous presence in the same place of the Chairman and the Secretary (or the Notary Public), for the simultaneous formation of the minutes of the meeting, applies, also in this case, only for the emergency period***.

*The well-known orientation of the Interregional Committee of the Notarial Councils of the Triveneto whereby "in closed joint-stock companies, even in the absence of a specific provision in the articles of association, it must be considered possible to participate in the shareholders' meeting using telecommunications" is therefore disavowed;

**In this way, adopting the orientation of an enlightened and forerunner maxim of the Notarial Council of Milan dating back to 16 January 2001;

***This, on the one hand, offers partial legislative confirmation of the orientation expressed by the Notarial Council of Milan on 11 March 2020, on the other, makes it contrary to the law regarding applicability (i.e. not necessary to have the simultaneous presence of the Chairman and Secretary) regardless of the





Please Note

It should be remembered, however, that these provisions only apply *"to assemblies convened by 31 July 2020 or by the date, if later, until the state of emergency on national territory relating to the health risk associated with the outbreak of the COVID-19 epidemic, remains in force"*.

In this sense, once the state of emergency has ceased, the ordinary rules will once again apply:

- ✓ The subsequent financial statements must be approved within the terms provided for in Articles 2364 and 2478-bis of the Italian Civil Code.
- ✓ In the absence of a provision in the bylaws for the longer term, the financial statement will have to be approved in the ordinary term (120 days);
- ✓ Long-term approval, where provided for, must be justified;
- ✓ Meetings may be held using telecommunications only where provided for in the articles of association;
- ✓ The Chairman and the Secretary of the Shareholders' Meeting, where provided for by the Articles of Association must, in any case, be in the same place for the purposes of drawing up and signing the subsequent minutes.



What about meetings of the Board of Directors or other corporate bodies?

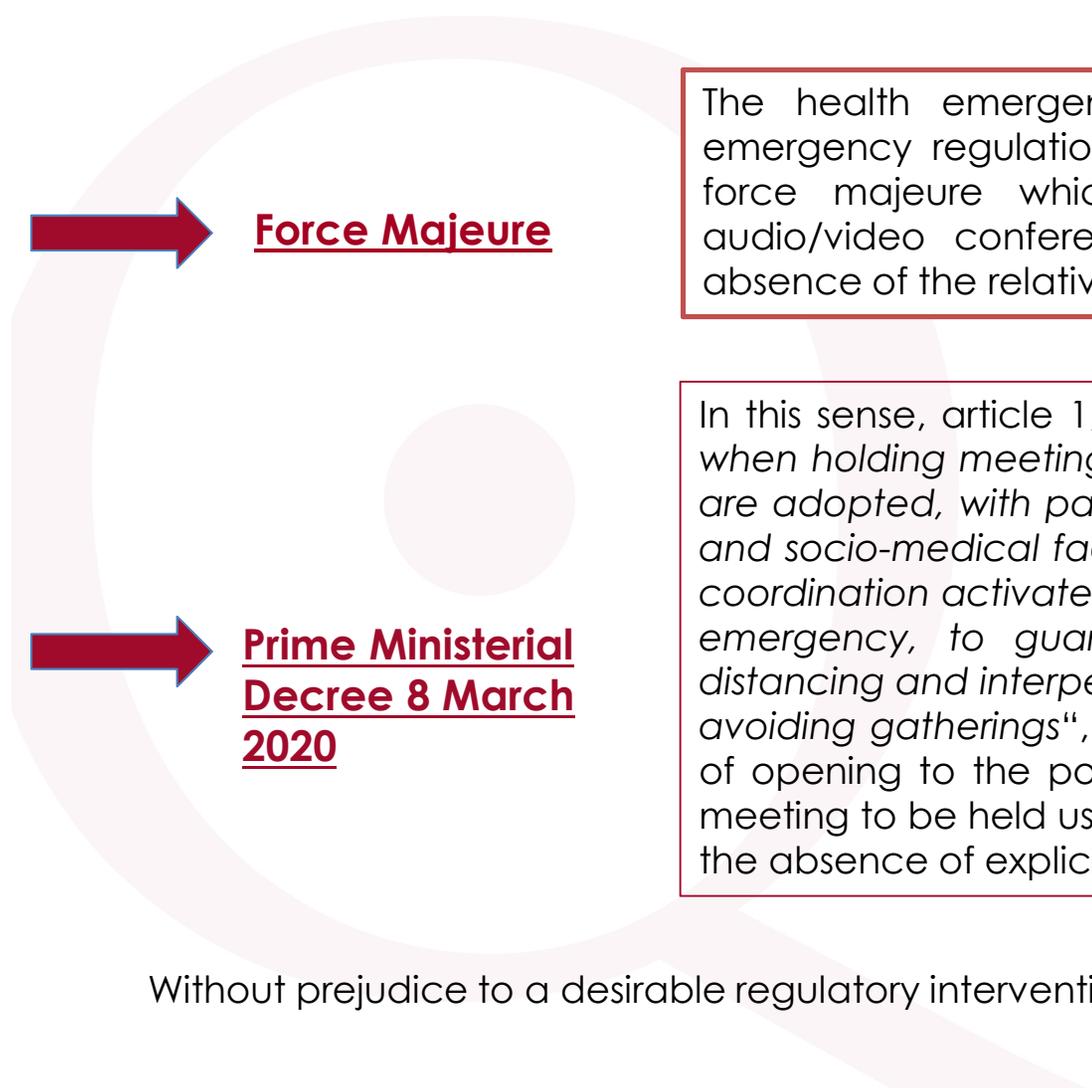


It is well known that Article 2388, paragraph 1 of the Italian Civil Code allows the Articles of Association to "*provide that attendance at Board meetings shall also be using telecommunications*".

Indeed, no legislative intervention expressly relates to other collegiate bodies of the companies, first of all the Board of Directors (a gap that should be filled in some way) which, therefore, in the absence of express provision in the bylaws, could not meet in this way and, where provided, would require the simultaneous presence of Chairman and Secretary.

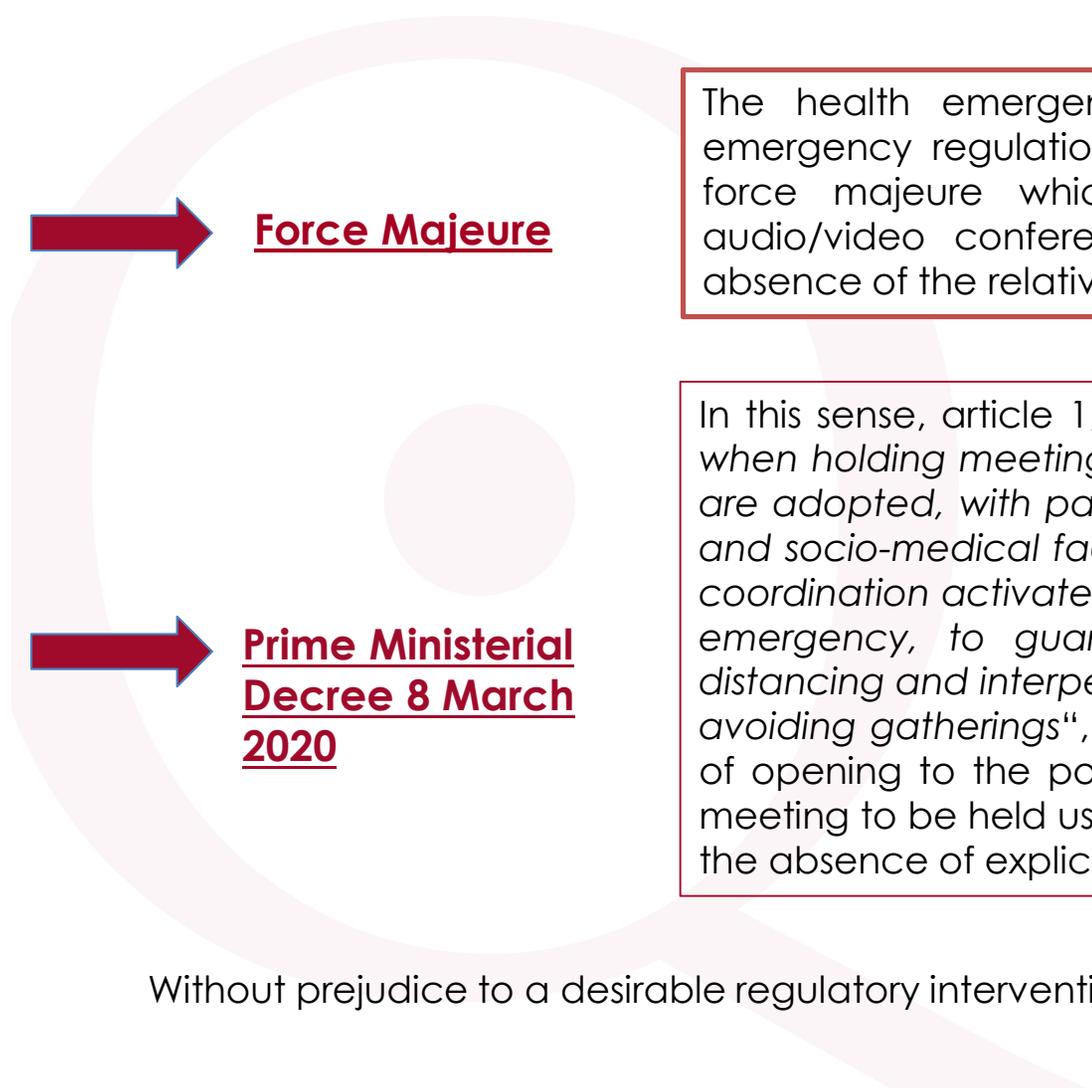
Neither the very recent maxim (of 11 March 2020) of the Milan Notarial Council and even less that of the Interregional Committee of the Notarial Councils of the Triveneto, refer to meetings other than those of the Shareholders' Meetings.

Excluding an extensive solution for the interpretation of art. 106 of the «Cura Italia» Decree, which would constitute an obvious forcing (the rule expressly only refers to the shareholders' meetings), a different element could be used, strictly resulting from the situation we are experiencing now.



Force Majeure

The health emergency situation and subsequent emergency regulations may constitute an event of force majeure which would make the use of audio/video conferencing legitimate even in the absence of the relative statutory provision.



Prime Ministerial Decree 8 March 2020

In this sense, article 1, letter q) *"in all possible cases, when holding meetings, remote connection methods are adopted, with particular reference to healthcare and socio-medical facilities, public utility services and coordination activated in the context of the Covid-19 emergency, to guarantee respect for the social distancing and interpersonal safety of one meter, and avoiding gatherings"*, could constitute a general rule of opening to the possibility of a board of directors' meeting to be held using telecommunications even in the absence of explicit statutory provisions.

Without prejudice to a desirable regulatory intervention to fill this obvious gap.



BRIEFLY

Meetings during the emergency period:

- May **only** take place using telecommunications, without there being necessarily a statutory provision allowing this;
- The presence in the same place of the chairman and the secretary (or notary) taking minutes is not **necessary** for the meeting to be valid;
- In the S.r.l., the wishes of the Shareholders' Meeting may also be expressed using **voting in written consultation or written consent**.

For the Boards of Directors during the emergency period:

- **At present, there is no rule** that would allow them to take place with the assistance of telecommunications, in the absence of specific statutory provisions, and without the simultaneous presence of the Chairman and Secretary (where required by the bylaws), as they **must, at most, justify such procedures on the basis of the Force Majeure** created as a result of the Covid-19 emergency.



(2) Losses, Capital and Dividends

With the



"Decree-Law no. 23 of 8 April 2020 – (the so-called «Liquidity Decree»)

regulations have been enacted regarding the:

(a) Sterilisation of losses (Article 6);

(b) Postponement of shareholders' loans (Article 8);

(c) Business continuity assessment (art. 7).



(a) LOSS STERILIZATION

Pursuant to art. 6 of the «Liquidity» Decree, from 9 April to 31 December 2020, for cases that occurred during the financial years closed at that date, the so-called 'sterilisation' of the provisions of the Italian Civil Code referred to in the articles is envisaged:

2246 and 2247 Cod.Civ. (for S.r.l.)

2482-bis and 2482-ter Civ.Cod. (for S.p.A.)

respectively governing the hypothesis of a capital reduction by more than one third due to losses and the hypothesis of a capital reduction below the legal limit.





Therefore, in essence, it is intended to **DEACTIVATE THE OBLIGATION of** Directors to adopt measures that, in the absence of the regulations introduced by the «Liquidity» Decree, would put the directors of many companies in the situation between going into liquidation (in the absence of shareholder intervention to cover losses) and the risk of exposing themselves to liability for non-conservative management, with obvious serious consequences on the business continuity of companies that, without the emergency caused by the Covid-19 epidemic, would normally be productive; in this way the protection of the Italian entrepreneurial fabric so seriously affected by the emergency situation is pursued.

(b) REPLACEMENT OF MEMBERS' FINANCING - DISAPPLICATION

The emergency legislator also intervened in relation to the *financing of shareholders* and those exercising management and coordination activities, carried out in the period from **9 April to 31 December 2020**. It is well known that,



pursuant to Articles 2467 and 2497-quinquies of the Italian Civil Code*

the financing of shareholders and those who carry out management and coordination activities is **subject** to the satisfaction of the other creditors of the company when such financing has been granted, in any form, at a time when, also in consideration of the type of activity carried out by the company, there is an excessive imbalance of debt in relation to the shareholders' equity, or in a financial situation in which a contribution would have been reasonable.

* dictated on the subject of S.r.l., but considered extendable to S.p.A. with limited number of shareholders





The aforesaid regulatory provision is therefore **DISAPPLIED** in order to encourage the involvement of shareholders in raising financial resources useful for business continuity in a time of severe crisis, which will require every possible entrepreneurial effort.

(c) ASSESSMENT OF COMPANY CONTINUITY

The accounting principle of "**going concern**" is established by:

art. 2423-bis of the Italian Civil Code.

The evaluation of items in the **BALANCE SHEET** must be carried out **prudently** and on a **going concern** basis.

OIC 11 - Paragraphs 21-24

Management must make a **prospective assessment** of the company's ability to continue to constitute a functioning economic complex, earmarked for income generation for a foreseeable future period of at least **12 months** from the balance sheet date.

To sum up, the Directors must verify whether, when preparing the financial statements, there is a presumption of **COMPANY CONTINUITY; i.e.**, whether the company has the strategic, organizational, human, economic and financial capabilities and resources to reach the end of the year.





Emergency COVID-19: the «Liquidity» Decree expressly addresses the issue of going concern, specifying in art. 7 that in preparing the financial statements for the year ending 31 December 2020, ***the going concern postulate is considered applicable if it exists in the last financial statements for the year ended before 23 February 2020.***



Basically, for financial statements for the year 2020, the Directors (statutory auditors and/or auditors) will have to verify whether or not the requirement of **CONTINUITY** existed at the date of **23 February 2020**.



Therefore, it is clear that **the aim of** the provision is to **neutralise, as far as** possible, the **potentially devastating effects on company balance sheets** induced by the COVID-19 epidemic.



(3) "GOLDEN POWER"

The GOLDEN POWER, introduced in Italy with Legislative Decree no. 21 of 15 March 2012 (but the subject of numerous subsequent measures), is an instrument that provides the Government with special powers to dictate specific conditions for the purchase of equity investments, veto or even impose certain corporate resolutions in specific sectors, such as national defence, energy, transport and communications.

Its purpose is to **SAVE** the ownership structures of specific companies operating in sectors considered **STRATEGIC** and of **NATIONAL INTEREST**.



BRIEFLY

To sum up (and without claiming to be exhaustive), the regulations cover all operations that have the effect of **changing** the **ownership, control, availability** or **destination of** strategic resources, including **mergers** or **demergers, transfers** of the company or branches of the company or its subsidiaries, **transfers abroad** of the registered office, etc..

When the target of the transaction is a 'strategic' company/activity, it is usually mandatory to transmit:



a full report on the operation before it is implemented to the President of the Council of Ministers.



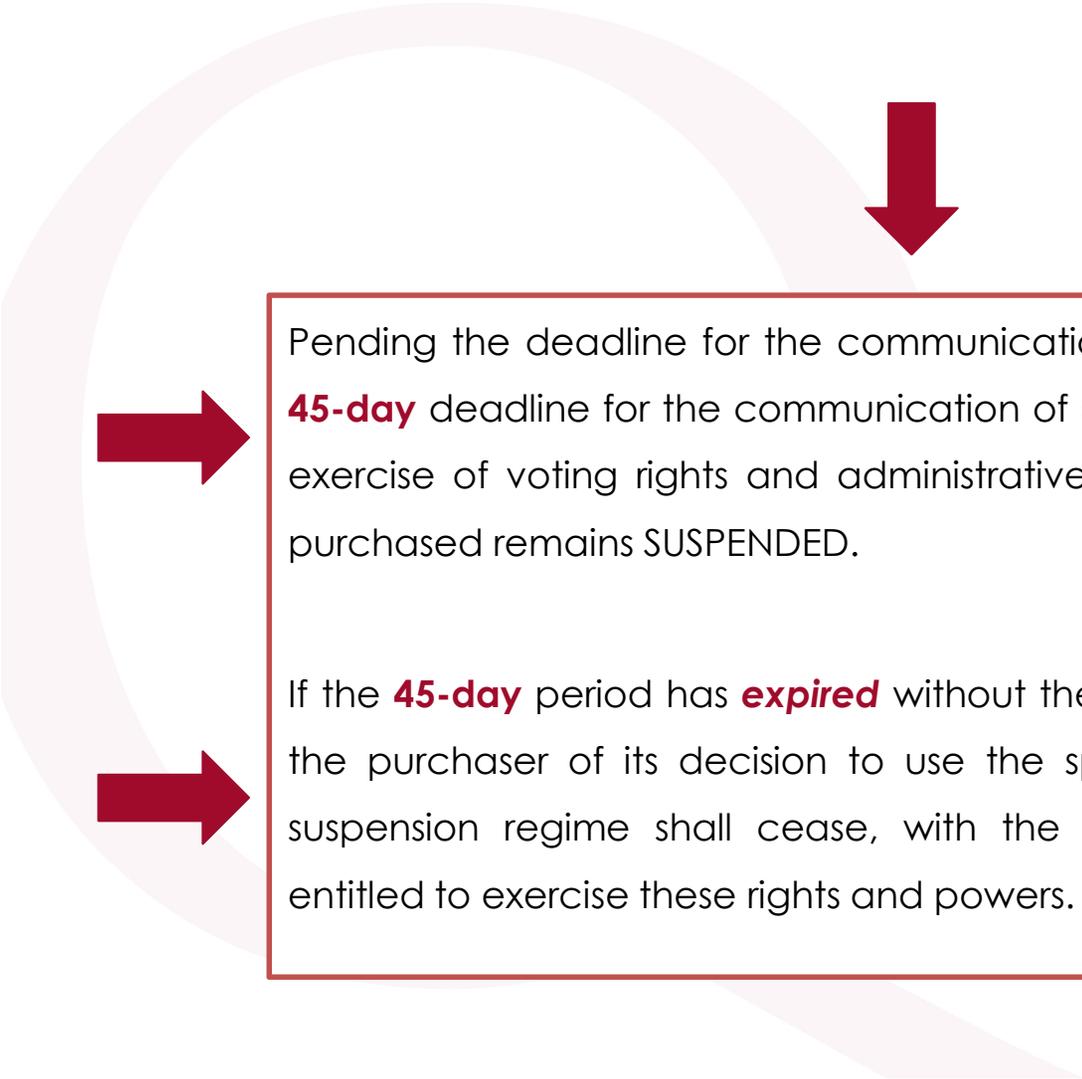


Within **45 days** of such communication, the Government may:

- **IMPOSE** the adoption of specific requirements or conditions that ensure adequate protection of public interests related to the respective strategic sector on the company;

OR

- Absolutely **prohibit** the deliberate operation, if there are insufficient measures to allow its implementation without prejudice to these overriding public interests.

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Pending the deadline for the communication of the transaction and the **45-day** deadline for the communication of any government decision, the exercise of voting rights and administrative powers for the shareholding purchased remains SUSPENDED.

If the **45-day** period has **expired** without the Government having notified the purchaser of its decision to use the special powers indicated, the suspension regime shall cease, with the effect that the purchaser is entitled to exercise these rights and powers.



Violation of the veto or of the prescriptions imposed by the Government may entail different types of **SANCTIONS**, depending on the cases provided for in the regulations. They can be summarised as follows:

- If the Government has merely imposed requirements, which have not been complied with, this may result in: (i) **NULLITY of** the resolutions and acts carried out; (ii) **AUTOMATIC SUSPENSION** of the voting rights and administrative powers for the shareholding acquired for as long as the violation continues; (iii) **NULLITY of the** resolutions subsequently approved with the casting vote of the purchaser;
- **NULLITY** of the relevant resolution or deed of approval of the operation or, if the operation had already been carried out or if it had already been fully carried out despite the suspension regime, the Government may request the **RESTORATION** of the situation *quo ante*;
- **PECUNIARY SANCTION**, determined for an amount equal to twice the value of the transaction and, in any case, not less than 1% of the turnover of the company resulting from the last financial year (except for specific cases for particular sectors).

THE EXPANSION OF "GOLDEN POWER"

Following the COVID-19 emergency, with the so-called **Liquidity Decree (Articles 15 and 16)**, the Government decided to extend the so-called Golden Power to other sectors defined as **STRATEGIC, in order** to avoid that resources of national strategic importance are acquired by persons who take advantage of the economic and financial difficulties resulting from the health emergency, also extending its powers of intervention. The main new aspects are:



Extension of the special framework for the energy, transport and communications sectors to all acquisitions, by anyone in the sectors:

- infrastructure, whether physical or virtual and critical technologies for energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructure (including the credit and insurance sectors), as well as investments in land and buildings, which are essential for the use of such infrastructure;
- critical technologies or dual-use items referred to in Article 2(1) of Regulation (EC) No 428/2009 of 5 May 2009, including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum and nuclear technologies, as well as nanotechnology and biotechnology;
- security of supply of critical inputs, including energy and raw materials and food security;
- access to sensitive information, including personal data, or the ability to control such information;
- freedom and pluralism of the media.





THE ABSOLUTE POWER OF GOVERNMENT

But above all, it should be made clear that there is a considerable increase in the power that can be exercised by the Government, since the latter, even in the absence of NOTIFICATION or COMMUNICATION by the parties concerned, can exercise the powers of veto and direction provided for by the special regulations and, therefore, AUTOMATICALLY prohibit extraordinary transactions and acquisitions, or require their implementation with the adoption of special measures.





Q&A





Is it possible for companies to envisage holding Shareholders' Meetings exclusively with the use of telecommunications in the absence of statutory provisions ?

Until 31 July 2020 (and unless the emergency situation is extended) it is possible for companies to decide to hold Shareholders' Meeting exclusively through the use of telecommunications, even in the absence of an express provision in the Articles of Association.

The telecommunications used must, however, be able to ensure: identification of participants; active participation and voting.

This is exclusively for the purpose of facilitating the functioning of the assembly body, in full respect of the collegial method.

Is it necessary for the minutes and the validity of the meeting to be held in the same place as the Chairman and the person taking the minutes?

The presence in the same place of the Chairman and the Minutes of the Shareholders' Meeting is not considered a requirement for the validity of the Shareholders' Meeting and, therefore, it is not necessary until July 31, 2020 (and unless the emergency situation is extended) even where provided for in the Bylaws.



Is it possible for companies to envisage holding Boards of Directors' meetings exclusively with telecommunications in the absence of statutory provisions?

At present, there is no rule that would allow them to be carried out with the aid of telecommunications, in the absence of specific provisions in the articles of association, and without the simultaneous presence of the Chairman and Secretary (where required by the articles of association), since they must, at most, justify these procedures on the basis of the Force Majeure created as a result of the Covid-19 emergency.



If the capital is reduced by more than one third due to losses or if the capital is reduced below the legal limit, do I have to recapitalise immediately ?

On the basis of the provisions contained in the «Liquidity» Decree, from 9 April until 31 December 2020, for losses incurred during the financial year ended on or before that date, there is no obligation to proceed immediately with recapitalisation, with the resulting exclusion of directors' liability for failure to recapitalise in good time.



What happens to loans made by a shareholder to deal with the crisis caused by the Covid-19 emergency and consequent disqualification measures?

Where this loan was disbursed after 9 April 2020 and before 31 December 2020, the shareholder will be entitled to obtain repayment, without the need for all other debts of the company to be honoured in advance. In essence, no deferment of repayment will occur for this loan.



In order to determine whether the requirement of going concern exists, for the purposes of financial statements for the financial year 2020, to what date should reference be made ?

Pursuant to art. 7 of the «Liquidity» Decree, in preparing financial statements for the year ending on 31 December 2020, the going concern assumption will be deemed to have existed if present in the last financial statements for the year ending before 23 February 2020. In essence, therefore, for financial statements for the year 2020, the directors (the statutory auditors and/or auditors) will have to verify whether the requirement of going concern existed on 23 February 23, 2020.



What should be done if you intend to carry out a corporate transaction in a sector of strategic importance and national interest, as defined by the Golden Share regulations?

The operation must be notified in advance to the Presidency of the Council of Ministers, waiting for at least 45 days for its response and complying with any indications that may be provided by the Presidency, in order to avoid any significant sanctions.

In the event of failure to comply with the above deadline, the operation may be freely carried out.





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