

COVID-19: Shareholders' meeting season 2020 and COVID-19 emergency

1. Introduction

On 18 March 2020, the Decree #CuraItalia¹ introduced “*measures to strengthen the national health service and economic assistance to families, employees and companies related to the epidemiological emergency of COVID-19*” (the “**Decree #CuraItalia**”). In particular, in light of the containment measures imposed in the context of the exceptional emergency triggered by the COVID-19 outbreak and the practical difficulties faced by listed companies to organize shareholders' meetings given the imminent start of the shareholders' meeting season, art. 106 of the Decree #CuraItalia (“*rules governing the conduct of shareholders' meetings of companies*”) allows companies to postpone their ordinary shareholders' meetings, and introduces rules to ensure that these meetings are held in compliance with the provisions aimed at reducing the risk of contagion and ensuring adequate distance between physical persons.

Which companies are covered under these changes?

Art. 106 of the Decree #CuraItalia

(i) applies to joint-stock companies (*società per azioni*), limited liability companies (*società a responsabilità limitata*), companies listed on regulated markets and multilateral trading systems (*società quotate su mercati regolamentati e su sistemi multilaterali di negoziazione*), companies with shares widely distributed among the public (*società con azioni diffuse fra il pubblico in misura rilevante*), partnerships partly limited by shares (*società in accomandita per azioni*), cooperatives (*società cooperative*) and mutual insurance companies (*mutue assicuratrici*), cooperative banks (*banche popolari*) and cooperative credit banks (*banche di credito cooperativo*) and

(ii) temporarily derogates from the provisions of the Civil Code, the by-laws and the special regulations applicable to listed companies, cooperative banks (*banche popolari*) and cooperative credit banks (*banche di credito cooperativo*).

For how long will the new rules stay in place?

The Decree #CuraItalia entered into force on the day of its publication in the Official Gazette of the Italian Republic and will be submitted to Parliament for conversion into law.

The new rules² apply to shareholders' meetings called by 31 July 2020 or any later date until which the state of emergency relating to the COVID-19 epidemic will be in force.

What are the changes to the organization of the shareholders' meetings?

1. Call of the shareholders' meetings

The first paragraph of art. 106 of COVID-19 Decree focuses on the terms to call meetings. In particular, companies may call the shareholders' meeting **within the extended period of 180 days from the end of the 2019 financial year**, even if this is not provided in the by-laws.

Indeed, the current legal framework provides that joint-stock companies (*società per azioni*) and limited liability companies (*società a responsabilità limitata*), partnerships partly limited by shares (*società in*

¹ Law Decree no. 18 of 17 March 2020 published in the Official Gazette no. 70

² Art 106 of Decree#CureItaly, paragraph 7

accomandita per azioni) and cooperatives (*società cooperative*) must call ordinary shareholders' meetings at least once a year, within the term set forth in the by-laws and, in any case, within 120 days from the end of the financial year.

In addition, the by-laws may also provide for a longer term, not exceeding 180 days, if this is necessary for companies required to prepare consolidated financial statements or when special circumstances relating to the structure and purpose of the company so require³.

The new rules allow companies greater flexibility in scheduling the date for their shareholders' meeting, given the current extraordinary movement restrictions, and allow them to benefit from the so-called "longer term" even if this possibility is not provided in the by-laws. For listed companies, the possibility to call shareholders' meeting within the longer term (if it is provided in the by-laws) is expressly provided for by Article 154-*ter*, paragraph 1, of Legislative Decree 58/1998 (the "TUF").

2. Remote participation in shareholders' meetings

The second paragraph of art. 106 of the Decree #Curaltalia regulates the conduct of the meetings. In particular, even if the by-laws contain no provisions or contrary provisions to this effect, the notice of call must ensure that:

- **votes may be expressed by correspondence or electronic means** or, for limited liability companies (*società a responsabilità limitata*), **through written consultation or express written consent**: and
- **shareholders may participate through telecommunication means.**

In addition, companies may provide in the notice of call that the shareholders' meeting is **exclusively held through telecommunication means**, provided that these means ensure the identification of the attendees, their participation and the exercise of voting rights in accordance with the law in force. Moreover, the chairman of the meeting, the secretary and the notary public (where applicable) must not necessarily be in the same place. This provision confirms the interpretative solution recently proposed in resolution (*massima*) no. 187 (11 March 2020) by the Consiglio Notarile di Milano.

3. Representation and proxy voting

The Decree #Curaltalia provides for several temporary exceptions, again on a temporary basis, regarding the representation at the shareholders' meeting. In particular, companies with shares listed on regulated markets or on a multilateral trading system (*società quotate su mercati regolamentati o su sistemi multilaterali di negoziazione*), and companies with shares widely distributed among the public (*società con azioni diffuse fra il pubblico in misura rilevante*) may apply art. 135-*undecies* of the TUF even if this possibility is not provided in the by-laws, and **appoint the so-called "designated representative"** (*rappresentante designato*) for the next ordinary and/or extraordinary shareholders' meetings⁴.

In addition, these companies may provide in the notice of call that the right to intervene at the shareholders' meeting will be exercised exclusively through the designated representative. Moreover, the fourth paragraph of art. 106 introduces an exception to Article 135-*undecies*, fourth paragraph, of the TUF, which provides that the designated representative may be granted proxies only through the procedure, with the modalities and within the terms governed by Article 135-*undecies* of the TUF. As an exception to the above, the Decree #Curaltalia provides that the designated representative may also be granted with "ordinary" proxies (and/or sub-proxies) pursuant to art. 135-*novies* of TUF.

Moreover, given the current situation, cooperative banks (*banche popolari*), cooperative credit banks (*banche di credito cooperativo*), cooperatives (*società cooperative*) and mutual insurance companies (*mutue assicuratrici*) may appoint the designated representative pursuant to art. 135-*undecies* of the TUF, also by derogating from the limits ordinarily provided for by the applicable special rules and the

³ Art. 2364, paragraph 2, of the Italian Civil Code

⁴ Art. 106, paragraphs 4 and 5 of the Decree #Curaltalia

provisions of the bylaws which provide for limits on the number of proxies that may be granted to the same person⁵. These companies may also provide in the notice of call that participation in the shareholders' meeting shall take place exclusively through the aforementioned designated representative. The term for granting the proxy pursuant to Article 135-undecies, paragraph 1, of the TUF is set at the second day prior to the date of the first call of the shareholders' meeting.

Finally, for publicly controlled companies as per article 2, paragraph 1, letter m), of legislative decree no. 175/2016, the eighth paragraph of the Decree #CuraItalia provides that the provisions of article 106 can be implemented within the financial and instrumental coverage available under current legislation and do not entail new or increased costs for public finance.

2. ESMA's recommendations and impact of COVID-19 epidemic on financial statements

On 11 March 2020, the European Securities and Markets Authority ("ESMA") – following a discussion of the Board of Supervisors examining the impact of the COVID-19 outbreak on financial markets in the European Union and the extraordinary emergency measures taken by supervised entities – issued certain recommendations to financial market participants.

In particular, with regard to issuers, ESMA's recommendations focus on on-going market disclosure and financial reporting. Issuers are, in fact, recommended to promptly disclose any relevant significant information concerning the impacts of COVID-19 outbreak "*on their fundamentals, prospects or financial situation*" in compliance with the transparency obligations set forth in Regulation no. 596/2014 concerning market abuse ("MAR"). Given the reference to the MAR, it is reasonable to consider that the above disclosure obligations are already covered under the MAR. Therefore, companies are required to publish information on the impact of the COVID-19 epidemic when such information presents the characteristics of "inside information" pursuant to art. 7 MAR.

With regard to financial reporting, ESMA further recommends to issuers to ensure transparency on the actual and potential impacts of COVID-19 on the business activities, financial situation and economic performance. This information must be based, to the extent possible, on qualitative and quantitative assessment and must be provided in the 2019 year-end financial report, if not already approved, or in the next interim financial reporting disclosures (quarterly report or, in the absence thereof, half-yearly report).

If the relevant financial statements have not yet been approved, companies will be required to include in the notes to the financial statements (*nota integrativa*), in line with the provisions of Article 2427, paragraph 1, no. 22-quater, of the Italian Civil Code, among the "significant events occurring after the end of the financial year" the nature and financial and economic effect of the COVID-19 epidemic.

Moreover, the management report (*relazione sulla gestione*) must also contain a description of the main risks and uncertainties to which the company is exposed⁶. The effects of the COVID-19 epidemic on business and financial data may be considered to fall into this category.

Finally, ESMA recommends to all financial markets participants to be ready to apply their contingency plans in order to ensure operational continuity and to asset managers to continue to apply the requirements on risk management.

⁵ Art. 106 of the Decree #CuraItalia, paragraph 6

⁶ Article 2428, paragraph 1 of the Italian Civil Code

Gianni, Origoni, Grippo, Cappelli & Partners has set up an in-house Task Force to constantly monitor the evolution of legislation in the regions affected by the Coronavirus and is at your entire disposal to support you in defining, drafting and implementing the most advisable strategies to limit the impact of the spread of the Coronavirus on the operations of your business and the management of your existing commercial relations. For our previous newsletters on this subject, please click [here](#).

For any questions, please send a mail to coronavirus@gop.it.

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