STUDIO LEGALE E TRIBUTARIO

Milan, April 29th, 2020

The Covid-19 emergency in Italy

The protracted Covid-19 emergency is raising a multitude of legal issues affecting businesses.

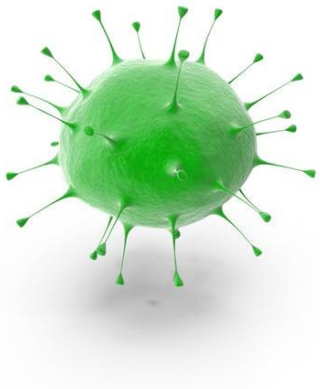
The Italian Government, in particular, has adopted extraordinary legislative measures to limit the spread of Covid-19 and to minimize its effects, including restrictions to the movement of the population in the whole country and the suspension of industrial and commercial businesses deemed not to be essential.

Such measures have been adopted by the Prime Minister's decrees March 11th, 22nd, April 10th, 26th, 2020 and by the order of the Ministry of Health of March 20th, 2020.

Law Decree No. 18 of March 17th, 2020 (so called "*Cura Italia*" Decree) introduced a number of very important measures in order to support the productive and commercial sector.

Following the developments of the emergency, the Italian Government issued the Law Decree no. 23 of April 8th, 2020, so called "*Decreto Liquidità*", providing businesses with financial measures aimed at helping Italian companies to face the consequences of the severe economic crisis due to the suspension of industrial and commercial activities.

Regarding the above mentioned emergency provisions, below we attempt to provide an overview of the legal questions that over the last few weeks are most frequently asked by our corporate clients, dividing them in the following areas: a) Financing b) Commercial Contracts; c) Retail - Real Estate; d) Labor; e) Criminal.



FDL Studio legale e tributario
Associazione Professionale
P.I. e C.F. 08219670158
P.zza Borromeo, 12 | 20123 Milano
T. +39 02 7214921 | F. +39 02 8052565

Member of:
ALLIURIS
Primerus

info@fdl-lex.it
www.fdl-lex.it

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Financing

Which are the main financial measures adopted by the Italian Government to sustain businesses during the economic crisis caused by the Coronavirus pandemic?

- The SACE Guarantee

  SACE S.p.A., a company controlled by the Italian State, is entitled to guarantee repayment obligations originated by new financings disbursed by banks or financial intermediaries (hereinafter, "SACE Guarantee").

  SACE Guarantee can be requested by any type of enterprise with its registered office in Italy at the following conditions:

  – maximum duration, not more than 6 years maturity;
  – as of December 31st, 2019, not classified as a company "undertaking in difficulty" under EU Regulation no. 651/2014, the EU Regulation no. 702/2014 and the EU Regulation no. 1388/2014;
  – liabilities, as of February 29th, 2020, not classified as "deteriorated" by the lending banks;
  – the aggregate amount of all financings granted to the same entity backed by a state guarantee cannot exceed the higher of 25% of the beneficiary's 2019 annual revenue or twice its 2019 employment costs.

  The SACE Guarantee only covers financings and re-financings granted to companies after the entry into force of the *Decreto Liquidità*. Loan percentage covered by a SACE Guarantee will vary depending to the size of the beneficiaries.

  Be aware that the company which benefits from the SACE Guarantee (and any other company of the relevant group) cannot (i) distribute any dividends and/or (ii) repurchase its shares for the 12 months following the granting of the relevant financing.

- The Italian State guarantee

  Decreto Liquidità provides that the obligations of SACE S.p.A. arising from the granting

of the SACE Guarantee are counter-guaranteed by the Italian State.

Furthermore, upon authorization of the Italian Minister of the Economy and Finance the Italian State can also guarantee the exposures of Cassa Depositi e Prestiti S.p.A., which will be incurred before December 31st, 2020 on behalf of banks and authorized entities which grant financings in any form to certain companies, whose turnover has decreased as a consequence of Covid-19.

- The SME fund

The Central Guarantee Fund (Fondo Centrale di Garanzia) provide guarantees of the financial liabilities of SMEs until December 31st, 2020 ("SME Guarantee").

In synthesis:

- SME Guarantees are available to companies with fewer than 500 employees;
- the maximum guaranteed amount for each SME is € 5 million and no fees or commissions are payable;
- the maximum coverage is equal to 80% of the principal amount in case of direct guarantees and 90% in the case of indirect guarantees. An adjustment is possible up to 90% and 100% respectively upon authorization of the European Commission;
- the maximum coverage for a SME Guarantee will be equal to 100% in case of new financings up to € 25,000 or, in case of financings provided to SMEs which have annual revenue not exceeding €3,200,000, for an amount not exceeding 25% of the annual revenue of the borrower;
- the guaranteed liability can also include financings made available in the context of a debt-renegotiation transaction with the SME, provided that an additional credit facility for an amount at least equal to 10% of the residual re-negotiated indebtedness is made available to the SME;
- any pre-existing guarantee issued by the Central Guarantee Fund will automatically be extended if the guaranteed indebtedness is subject to any suspension of payments or extension of the termination date as a result of COVID-19;
- a SME Guarantee can be requested for pre-existing financings entered into not earlier than three months before the request and, in any case, after January 31st, 2020;
- a SME Guarantee cannot be provided in respect of any liabilities classified as Non-Performing Loan.

Commercial Contracts

How does the Covid-19 emergency influence commercial contracts?

The recent spread of Covid-19 and the several measures set forth by the Italian Government to contain the pandemic which had a relevant impact on companies (e.g. Prime Minister's decrees April 10th, 26th, 2020 confirmed the lockdown of a whole series of commercial and entrepreneurial activities, with the exceptions contained in the same legislative provisions), are putting - also in Italy - a lot of pressure on businesses and having considerable impacts on the execution of commercial contracts.

More and more often over the last period, due to the global pandemic and the mentioned urgent measures taken by the Italian authorities, the fulfilment of the obligations underlying commercial contracts (i.e. distribution agreements, supply agreements, partnership agreements, etc.) are delayed, made impossible or much more burdensome than expected.

In view of the foregoing always more attention has been paid to the concept of force majeure.

What do we mean by Force Majeure?

In the Italian legal system there is no a specific definition of Force Majeure ("FM"), although the concept is discernible in some provisions of the Civil Code (such as Articles 1467 and 1256) and could be summarized as an extraordinary, unpredictable and extraneous event, that generates the impossibility or the excessively onerousness of the fulfillment.

Could the Covid-19 emergency be considered a cause of Force Majeure?

Based on the foregoing, also considering the urgent regulatory measures taken by Italian authorities stating that Coronavirus is "an event of exceptional gravity and extreme economic upset", it is likely that the Coronavirus could be considered as a cause of force majeure under the Italian legal system.

That said, to invoke Coronavirus as cause of FM under a specific contract, it is always necessary to verify case by case if, due to such event and/ or said containment measures set forth by the Italian Government, the performance of the contractual obligations of the

parties has become impossible and/or excessively onerous.

What remedies are available for the party whose contractual obligation has been directly affected by the global pandemic?

If the relevant contract does not provide any specific indication (such as a specific FM clause), it is necessary to verify concretely if and how the relevant contractual obligation is affected and/or impeded by the Covid-19 emergency and/or by the containment measures set forth by Italian Government.

Indeed, depending on the specific circumstances, it is possible that a party whose contractual obligation has been directly affected by the global pandemic, could delay its performance, or ask for the termination of the contract, or see its obligation extinguished.

Below please find a brief (and not exhaustive) list of possible situations in which a contractual party might find itself due to the global pandemic, and the related solutions provided for by Italian law.

- If the obligation of a party is **temporarily impeded** by the Covid-19 emergency and/or the containment measures set forth by Italian Government, such party - as long as the impediment lasts - cannot be held responsible for the non fulfilment (or delay) of its obligation.
- If the obligation of a party is **permanently impeded** by the Covid-19 emergency and/or the containment measures set forth by Italian Government, such obligation is extinguished.
- If the obligation of a party is **partially impeded** by the Covid-19 emergency and/or the containment measures set forth by Italian Government, the counterpart has the right to *i)* ask for a reduction of its own obligation, *ii)* withdraw the contract.
- In the case of contracts with periodic or continuous execution or deferred execution, if the obligation of a party has become **excessively onerous** due to the Covid-19 emergency and/or the containment measures set forth by Italian Government, such party could in principle ask for the termination of the contract.
- If a party has asked for the termination of the contract for its excessive onerousness due to the Covid-19 emergency, the counterpart could avoid the termination by offering to **fairly modify the contractual conditions**.

How to act in case of difficulty to perform?

Despite all the above, we would like to remember that - regardless of whether the Covid-19 emergency made the obligation impossible or not - in case of difficulty or economic inability for a party to perform its contractual obligation, the best approach is likely to discuss the matter with the counterpart, if necessary renegotiating the relevant parts of the contract and to agree on possible changes. Indeed, it is probable that both parties have an interest in avoiding possible conflicts and in continuing the contract.

Please keep in mind that, in such cases, it is important to agree if the possible contractual changes only apply for a limited period (e.g. until the Covid-19 emergency lasts), or if they will be valid for the entire duration of the contract.

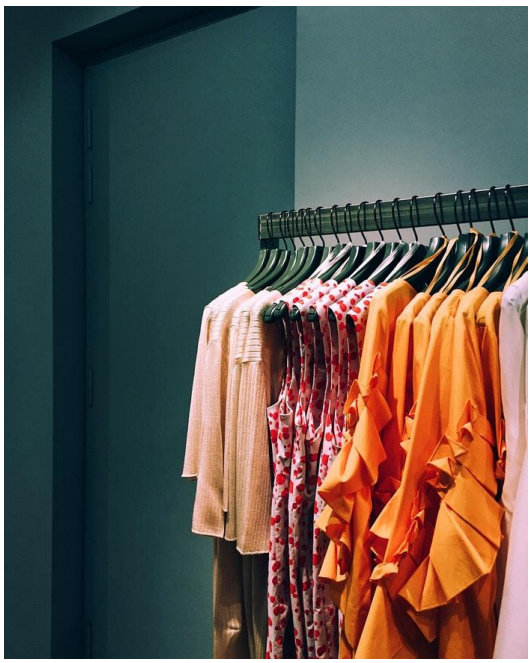
Retail - Real Estate

How could retailers cope with the Covid-19 emergency?

Italian measures aimed at containing the Covid-19 pandemic, as recently updated, provide for the suspension of certain production and commercial activities.

Such suspension includes a huge number of retail activities, with very limited exceptions in order to safeguard the distribution of essential goods (e.g., supermarkets, electronic devices, newspapers, lighting, pharmacies and others).

The question arises whether the retailers whose activities are closed are entitled to suspend and/or reduce the payment of the rent, or to exit the contract. It is also disputable if retailers, whose activity are allowed to remain open, are entitled to suspend/receive a reduction of the rent or exit the contract. The answer to these questions is not straight forward and Italian experts are daily elaborating thereon trying meanwhile to carry out negotiations with landlords.



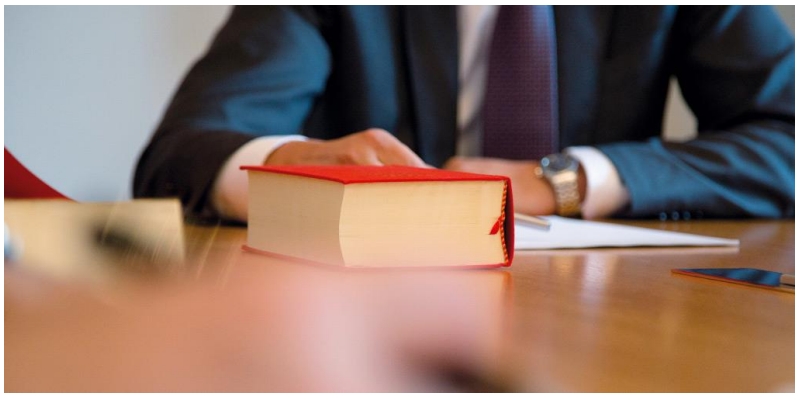
Firstly it would be necessary to analyze the relevant contractual provisions (is there any clause which regulates the effects deriving from a force majeure event?) and to investigate in deep the specific intent of the parties when entering the transaction (which are the assumptions under which I have contracted?).

At the second step it must be ascertained if specific remedies under Italian law (unexpected impossibility under sections 1463 and 1464 of Italian Civil Code, which provide respectively for cancellation of the contract and reduction of the consideration; temporary impossibility under section 1256 of the Italian Civil Code which provides for the suspension of the consideration) can be applied in the case at hand.

Thirdly, all the above must be interpreted in the light of other remedies contemplated more in general by Italian law principles (good faith in contractual relationships, duty of the counterparty to enter into negotiation to adjust the rent if unbalanced) and also, as a suggestable path, by availing from principles of Pecs and Unidroits.

On the landlord side, you might consider that the lockdown does not affect the main performance carried out by them (at least in case of street shops) being the premises still at the disposal of the lessee (even though it is impossible to use them), so that it is not conceivable a breach of the contract landlord's side. For units located instead in malls - which are normally governed through lease of business unit agreements – on the contrary it could be argued that the tenants cannot benefit from those specific and additional provisions of services, and from the goodwill which is typically shared by the mall (and paid by the tenant), and therefore it would be possible to identify a specific breach of the contract by the landlord.

As way-out options, Italian law provides for a civil code remedy (excessive onerousness under section 1467 of the Italian Civil Code) and for a typical remedy included in the law on commercial rent (withdrawal for serious grounds). Both remedies are interesting in case of unsuccessful negotiations with landlords.



Also, Italian Government granted a tax credit equal to 60% of the rent paid in March for shops in streets, even if this provision has not yet been extended to April nor to shops located in malls. Whether such aid is sufficient or not to rebalance the alteration of the economics of the contracts caused by Covid pandemic, it is a question that probably shall be verified by Italian Courts.

In the light of the above it is the common hope that Italian Government would rule on the specific matters and approve material measures balancing the interests of both landlords and tenants.

Labor

What protection instruments are available in Italy for employers in the event of work suspension due to Covid-19 containment measures?

i. Ordinary wage guarantee fund (*Cassa Integrazione Guadagni Ordinaria* - CIGO) and ordinary allowance (pursuant to Arts. 19 and 20 of Law Decree no. 18/2020 - *Cura Italia)*

Companies that operate in the specific sectors indicated under Art. 10 of Legislative Decree no. 148/2015 (i.e. industrial manufacturing, transport, production and distribution of energy, water and gas, and production and work cooperatives) which suffer a reduction of business resulting from the emergency may request a wage supplement (known as *Cassa Integrazione Guadagni Ordinaria* - CIGO).

ii. Ordinary allowance for employers currently receiving solidarity allowance (pursuant to Art. 21 of Law Decree no. 18/2020)

Employers who already contribute to the Salary Integration Fund (*Fondo di Integrazione Salariale* - FIS) and who on 23th February 2020 were already receiving some form of solidarity allowance may apply for an additional ordinary allowance under Covid-19 emergency provisions

iii. Exceptional wage guarantee fund (*Cassa Integrazione Guadagni in Deroga* - CIGD) (pursuant to Art. 22 of Law Decree no. 18/2020)

Employers, regardless of the number of their employees, who cannot benefit from the general protections in the event of suspension/reduction of working hours, will have access to CIGD funds in accordance with the provisions of each region or autonomous province.

* * *

These measures are available for employees already employed by 17 March 2020, and the usual 90-working-day minimum employment requirement is waived for COVID-19 emergency funding.

The employer must contact union representatives to request a joint examination, which must take place, also by electronic means, within 3 days from the request. In order to obtain access to CIGD Funds it is necessary to enter into an agreement (except in the case the company employs fewer than 5 employees).

Subsequently, the request must be submitted to the local INPS (Italian Social Security Authority) offices by the end of the 4th month following the beginning of the suspension/reduction of business and must indicate as motivation "*emergenza Covid-19*". No additional contribution is required. The benefit for each employee amounts to up to 80% of the employee's global salary (but with maximum limits). Social security

contributions related to non-worked hours are covered by the Italian system.
The allowance may be covered for a maximum of 9 weeks and, in any case, no later than August 2020.

Is it possible for companies facing the suspension of business activities to dismiss their employees?

The *Cura Italia* decree, no. 18/2020 (Art. 46), places a moratorium on any new collective dismissal procedures for a period of 60 days, beginning on the date on which the decree took effect (17 March 2020) through 18 May 2020. Moreover, pursuant to the decree, during this period any pending proceedings initiated after 23 February 2020 are also suspended.
Until the expiration of the above period, employers may not terminate employment contracts for justified objective reason (i.e. pursuant to Art. 3 of Law no. 604/1966).
However, during this period it will be possible to proceed with dismissals for subjective reason or for just cause; moreover, according to general principles, it is possible that employers could terminate fixed-term contracts, given that terminations of this sort of contracts are not disciplined by Law no. 604/1966 (although this point could be better regulated in the future).
Please note that live-in caretakers of disabled individuals cannot be terminated for not coming to work, when the need to stay home because of the Covid-19 emergency is communicated in advance to the employer.

What flexible tools for managing employment relationships are available to employers in the event of a temporary closure of the business?

Generally, under the Italian legal framework an employer cannot unilaterally determine the period during which its employees may enjoy holidays and usually holidays are agreed upon with the employees. However, in the face of the Covid-19 emergency, the Italian Government has advised employers to make use of any accrued and un-used holiday and paid leave time.
To this end, employers are encouraged to draft and implement collective agreements at a company level to discipline the use of holidays and permits throughout the duration of the emergency. Furthermore, working hours can be temporarily limited due to the reduced workload caused by the current health emergency. The exact working hour reduction must be defined in an agreement entered into with each individual employee.

What about smart working during the Covid-19 emergency?

The Italian government has strongly recommended that companies engage in smart working where possible during the current emergency. Therefore, under the new protective measures implemented as a response to the on-going health crisis, it is now possible for employers to implement smart-working without a prior agreement with their employees (before the emergency this was obligatory) merely by communicating a list of

the employees involved in smart working via the "Cliclavoro" website. This simplified procedure can be accessed, on a temporary basis, up to 31 July 2020, and that this deadline may be extended.
Employers are required to provide written information to their employees as to how smart working is to be performed. Finally, certain groups of disabled employees have the right to engage in smart working until 30 April 2020, unless this form of work is absolutely incompatible with the employer's business.

What rights do employed parents have?

Cura Italia establishes that working parents with children under 12 years are entitled to 15 days of extraordinary parental leave, with partial payment their salary, while employees with children aged 12 to 16 are entitled to a special unpaid leave to be used until schools reopen, with the right to retain their jobs after the end of the emergency. As an alternative, working parents may opt for the payment of a voucher for baby-sitting services having a maximum value of € 600 per month. Additional leave may be available to parents of children with disabilities.

What steps should be taken if an employee shows symptoms of covid-19?

In the event that symptoms emerge while the employee is at the workplace, the employee must inform the company HR department, which must immediately proceed to isolate the employee according to provisions of the health authority. Additionally, the employer must immediately alert the competent health authorities of the possibility of the infection.
Time away from work spent in quarantine is treated as sick leave for salary calculation purposes.

Criminal

What are the criminal risks in Italy for companies that do not comply with Covid-19 legislation?

On the basis of the combined provisions of the Prime Minister's decrees March 11th, 22nd, April 10th, 26th, 2020 and of the order of the Ministry of Health of March 20th, 2020, a whole series of commercial and entrepreneurial activities are suspended in Italy, with the exceptions contained in the same legislative provisions.
For entrepreneurs who continue their activity despite the suspension orders, a fine from € 400.00 up to € 3,000.00 is foreseen, doubled if the infringement recurs.
As stated by the Prime Minister's Decree April 26th, 2020, for the activities that remain allowed it is mandatory to comply with the "*Shared protocol for regulating measures to combat and contain the spread of the Covid-19 virus in the workplace*", an agreement

signed between the Government and employers' and trade union organizations on April 24th, 2020. For the construction and the transport / logistics sectors, two specific agreements have been signed between the Government and employers' and trade union organizations, respectively on April 24th and March 20th, 2020, which are also mandatory to comply with.

For first, failure to comply with such obligations determines the suspension of the activity until recovery of the security conditions.

Moreover, to the entrepreneur / employer who does not comply with the obligations under the aforementioned provisions, the criminal sanctions contained in the Italian Consolidated Law on Health and Safety in the Workplace (Legislative Decree no. 81/2008) remain applicable, for example in the following cases:

- failure to carry out the assessment of the risks deriving from exposure to biological agents present in the environment (sanctioned with imprisonment from 3 to 6 months or a fine from € 2,792 to € 7,147, 67);
- failure to inform workers about the existing danger, the measures taken and the behaviors to be adopted (sanctioned with imprisonment from 2 to 4 months or a fine from € 837.61 to € 4,467, 29);
- not having provided workers with the necessary and suitable personal protective equipment (sanctioned with imprisonment from 2 to 4 months or a fine from € 1675.23 to € 6,700.94);
- not having required workers to comply with current regulations, as well as company provisions on safety and hygiene at work and the use of protective equipment and for failing to plan the interventions to be implemented in the event of immediate danger (sanctioned with imprisonment from 2 to 4 months or with a fine from € 1,340.18 to € 5,807.48).

Furthermore, in the event of a contagion (and of the eventual death) of one or more employees in the company, the employer might be called to answer for the crimes of culpable injury for violation of the accident prevention regulations (art. 590, paragraph 3, Italian Criminal Code, sanctioned with imprisonment from 3 months to 1 year or with a fine from € 500.00 to € 2,000.00) or of manslaughter with violation of the accident prevention regulations (art. 589, paragraph 2, Italian Criminal Code, sanctioned with imprisonment from 2 to 7 years).

In these cases, moreover, the company, as legal person, could be called to answer for such facts in accordance with the Italian regulation of corporate liability dependent from crimes (Legislative Decree No. 231/2001), if the crimes of culpable injury or manslaughter are committed in the interest or advantage of the company (for example, because economic savings were obtained by not adopting the mandatory anti-contagion measures).

The Italian regulation of corporate liability dependent from crimes (Legislative Decree No. 231/2001) provides significant economic sanctions, in addition to disqualification sanctions such as, in the most serious cases, the interdiction from the exercise of the activity.

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