COVID-19

During the recent weeks we have faced a rapid increase in the spread of Covid-19 (the "**Coronavirus**") throughout Italy. As of today, we are witnessing the impact of the epidemic disease, which is affecting not only human health, but also our economic system. In fact, since the discovery of the infection in Italy, the rapid spread of Coronavirus triggered severe effects on the Italian economic and social system, the outcomes of which, as of today, are still largely unpredictable.

Under a legal perspective, such massive sanitary emergency is likely to affect most of the pending and future commercial relationships, as well as most – if not all – other relevant fields, ranging from M&A transactions and private equity investments, to real estate investments and related activities (including development/management), transportation and supply chains, as well as employment and other labour relationships, litigation and taxation.

In this critical scenario, the Italian government issued a series of emergency measures, both in the form of Ordinances and Decrees (the last ones dated 8 and 9 March 2020), aimed at limiting the spread of the Coronavirus on the entire national territory and mitigating its sanitary and economic effects. Most measures adopted so far do have a direct impact on daily business operations and economic activities.

Below you will find our preliminary remarks on certain legal and tax implications of the Coronavirus for businesses, which can also be read as a "check-list" of areas to be mindful of.

COMMERCIAL AGREEMENTS

Due to the critical factual circumstances generated by the Coronavirus (such as limitations to access to work places, limitations to transportations, stretching of length of negotiations/transactions, etc.), commercial contracts may be unlikely to be performed in compliance with the agreed terms or, in the worst case scenarios, they may not be performed at all.

In general terms, under the Italian legal system, a defaulting party may be considered exempt from liability for non-performance in case the fulfilment of its obligations becomes impossible, but only as far as its default (or its delay) in such fulfilment is due to reasons not ascribable to the defaulting party itself, under a "force majeure" remedy. Likewise, the Italian legal system provides for some default rules covering the well-known risk of "hardship" in performance of contracts.

In case an agreement with bi-lateral obligations is executed, the impossibility to fulfil the agreed obligations generates its extinction and, as a consequence, the defaulting party is no longer entitled to require its counterparty's obligation under the typical "force majeure" doctrine.

Moreover, with specific reference to continuous or periodic obligations, as well as for agreements providing for deferred performances, the defaulting party may invoke the termination of the agreement in case the relevant performance has become excessively burdensome, due to extraordinary and unforeseeable events which, by their nature, prevent the fulfilment of the contractual obligations or require a party to take any such

steps to be regarded as disproportionate when compared to circumstances existing at the time the contract was executed. In such case, the party who was bound to performance is entitled to either terminate the agreement or request for a renegotiation in good faith of its contractual terms.

In light of the above, with specific reference to the current scenario, it must be assessed whether the Coronavirus and the exceptional legal measures issued by the Italian government – when having a direct impact on performance/non-performance – could be regarded as an extraordinary and unforeseeable event, which may exempt the non performing-parties from the fulfilment of their obligations, as well as from any related liability thereof.

Please consider that, under Italian law, both "force majeure" and "hardship" events are contemplated as general provisions. Therefore, the law does not provide for a specific list of extraordinary and unpredictable events, which are generally defined as events which are beyond the control of the parties and against which the parties can neither resist nor oppose themselves. As a consequence, the application of such rules is largely affected by judicial interpretation and a case-specific analysis is highly recommended.

M&A and Private Equity Agreements

In the context of M&A/PE agreements, unusual and unforeseeable events (such as the Coronavirus) are likely to trigger the enforcement of specific contractual clauses (better known in the market practice as "MAE" - "Material Adverse Effect" or "MAC" - "Material Adverse Change" clauses). The practice of M&A/PE transactions does contemplate a wide range of drafting samples of such clauses, and their applicability depends on the way they are actually drafted. This would therefore require an analysis based on each single clause and on each transaction in order to assess whether, or not, the Coronavirus-related events are likely to trigger the contractual rules and related remedies.

In many relevant cases, MAC clauses in M&A/PE agreements and related transactions (typically including acquisition financing) operate as conditions precedent to completion of the transaction (*e.g.*, closing of a sale and purchase agreement, or drawdown under a financing arrangement).

In such cases, the party suffering a material adverse event may be entitled to legitimately refuse performance or even, in certain cases, to withdraw from or terminate the agreement on the basis of the MAC clause, provided that the language of such MAC clauses can fit with an event such as the Coronavirus. Therefore, a case-specific analysis is highly recommended.

Please further consider that the current situation may be likely to affect other typical contents in M&A/PE transactions, such as price-adjustment, earn-out mechanisms and/or locked box mechanisms, insofar as under the relevant contractual regime such payments are related to economic results in a given time period and these results are affected by contingencies generated by the Coronavirus emergency. The legal implications of these situations must be assessed in light of the contractual regime, as well as the default rules provided by the Italian legal system.

Analogous remarks could be made with reference to long-term incentives for management and PE industry.

Real Estate

The main legal consequences affecting the real estate relationships are expected to concern pending lease agreements and on-going concern lease agreements.

In particular, as the commercial real estate market is already reflecting, claims may be issued by tenants in order to request a reduction of the rent - or, in the worst case scenario, the termination of the lease agreement or the on-going concern lease agreement - due to the Coronavirus epidemic, which renders the tenant's obligation to pay the rent significantly harder to be fulfilled. On the other hand, from the landlord's standpoint, the tenant's duty to pay the rent cannot be delayed or suspended as far as the tenant is granted with the right to fully and freely use the real estate that is the object of the lease agreement.

Therefore, a case by case analysis must be carried out, also taking into account the specific contractual clauses agreed by the parties in the relevant lease agreements.

Furthermore, in general terms, particular attention is to be paid also to the so called "serious reasons" ("*gravi motivi*") which, under the Italian tenancy law (Law no. 392/1978, as amended), may allow the tenants to withdraw from the lease agreement under certain specific circumstances.

LABOUR LAW AND 231 MODEL

The Coronavirus emergency required quick and mandatory actions to be carried out by employers in order to avoid liability arising from the breach of compulsory legal rules set forth by the Italian employment law.

In particular, pursuant to the latest Decree issued on 9 March 2020 (which extended the previous emergency measures – initially issued for the "restricted areas" only – to the entire Country), the employers are requested to:

- use sick leave regime for sick employees and employees located at home in isolation;
- allow flexible time schedule;
- limit as much as possible work travels and circulation;
- adopt appropriate hygienic and sanitary measures;
- use work from remote, if possible, not being required the consent of the employee;
- evaluate holiday regimes and paid leaves;
- organize working activities in a manner that there is a limited number of employees at the same time in the company's premises and maintain the safety distance limit required by law, when working;
- avoid or limit aggregations and multiple contacts (*e.g.*, avoid use of company's canteens, limit meeting and group activities) and maintain the distance limit between individuals;
- limit the access to the company's premises for third parties (*e.g.*, customers, suppliers, etc.);
- apply for unemployment benefits, such as CIGO/CIGD (temporary lay-off procedures), if the emergency *de facto* limits the company's business activities.

Furthermore, in order to manage the emergency, companies throughout the entire territory are required to:

- immediately involve the corporate labour doctor and the RSPP to prepare a management plan for the emergency;

- update the risk assessment document (DVR), with particular focus on biological risk;
- provide personnel with the additional equipment, such as disposable gloves, masks and sanitizing liquid dispensers;
- prepare a specific emergency plan for the event of virus contagion within the company;
- adopt a specific medical surveillance protocol also with particular attention to employee with risky situation (pregnancy women, employee with chronical diseases);
- provide the personnel with accurate, technical and specific information and instructions; and
- create specific email accounts and dedicated emergency numbers that may be useful to report critical situations to the management of the company.

Finally please note that, only for the Lombardy region, regional authorities launched an incentive regime (applications must be sent from 2 April 2020 up to 15 December 2021) in order to obtain financial help for companies that never implemented working from remote programs and now want to start using such instrument.

Obviously, if the Coronavirus emergency were to continue over time, any protocol or procedure taken to address safety on the workplace will have to be reflected in each company's organisational model under Legislative Decree no. 231/2001.

LITIGATION

The Coronavirus outbreak had also a relevant impact in the civil and criminal litigation field.

In particular, Law Decree no. 11 issued on 8 March 2020 provided for significant measures related to judicial activities and to the proceedings, amongst which it shall be noted, on the one hand, the deferral of the hearings already scheduled up, as of today, to 22 March 2020, save for specific proceedings characterized by urgency. All terms for judicial acts and activities are suspended until 22 March 2020.

On the other hand, the mentioned Law Decree has also provided for the suspension of the statute of limitation period ("*prescrizione*"), in relation to claims which are not actionable until the special urgency measures are in force.

Afterwards, the head of each office/Court will be entitled to postpone, even after 31 May 2020, the hearings which are suitable to be delayed.

With particular reference to the Court of Milan, the hearings scheduled as of today, which are not characterized by urgency, have already been postponed.

The government also highlighted that urgent proceedings shall not be affected by such special measures, which shall be valid and effective up to 31 May 2020 save for upcoming positive updates depending on the course of the Coronavirus infections.

PRIVACY LAW

In general terms, pursuant to Section 9 of the GDPR (General Data Protection Regulation - Regulation (EU) no. 2016/679), specific clusters of personal data may be legitimately processed for reasons of public interest in public healthcare – particularly in case of serious cross-border threats against healthcare – while ensuring appropriate measures to protect the rights of the concerned individuals, with a specific focus on professional secrecy.

In case of the Coronavirus epidemic, the right to privacy may be trumped by the need to process personal data for the purpose of limiting the same epidemic. In fact, the Italian Data Protection Authority has approved the emergency measures adopted on 3 February 2020 through Ordinance no. 630.

However, the Italian Data Protection Authority on 2 March 2020 has warned against any "do-it-yourself" data collections, while underlying that workers who find themselves at risk have a duty to alert the employer and the competent health authorities.

TAX

Law Decree no. 9 of 2020 on urgent support measures for families, workers and businesses related to the epidemiological emergency by Coronavirus issued specific fiscal measures.

In particular, the postponement of deadlines pertains, *inter alia*, to:

- the e-filing to the Italian tax authorities of the "Wage and Tax Statement";
- the hand-out of the "Wage and Tax Statement";
- the submission of the so called 730 tax forms for 2020.

Moreover, taxpayers which are tax resident or have the legal place of effective management in the so called "red area" identified with the Law Decree issued on 1 March 2020 (even if it is currently not clear whether these measures apply to the whole "extended red area" as per the Law Decree issued on 8 March 2020) are entitled to benefit for a suspension of the payment of notices of assessment until 30 April 2020, as well as for the terms related to the obligations and payments of welfare contributions, social security and compulsory insurance premiums.

DISCLAIMER
The only purpose of this Client Alert is to provide general information. It is not a legal opinion nor should it be relied upon as a substitute for legal advice.
Il presente Client Alert ha il solo scopo di fornire informazioni di carattere generale. Di conseguenza, non costituisce un parere legale né può in alcun modo considerarsi come sostitutivo di una consulenza legale specifica.

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