



Tonucci & Partners

MEMO

Covid – 19.

**A brief guide on the possible
legal implications.**

*Preliminary and general
considerations.*

March 13, 2020



IN GENERAL

The new coronavirus (COVID-19) epidemic, first identified in Wuhan, China, on December 2019, has spread to dozens of countries around the world, infecting many of people and causing several fatalities.

In addition to the humanitarian and public health dimensions, the Covid-19 massive transmission presents complex legal issues for companies, including, among the others, employment-law, contract and so on.

In this respect, it is necessary for companies to adopt procedures for the purpose to protect their employees and, at the same time, their business sustainability and continuity.

Furthermore, for the purpose to ensure business sustainability and continuity it is necessary to evaluate which are the circumstances which allows the early termination of an agreement as a consequence of *force majeure* occurrence due to the Covid-19 transmission.

BRIEF GENERAL INFORMATION ABOUT COVID-19 VIRUS

In summary, it is possible to consider that coronavirus is a respiratory illness which belongs to the same family as the common cold.

In general, it is possible to assess, on the basis of the current information and data, that around five percent of cases are considered critical, while more than two percent prove lethal.

The elderly and people with conditions that weaken their immune system are most likely to develop severe symptoms.

Covid-19 initial symptoms are not different to the ones of the common flu, due to the fact that the virus belongs to the same family. In general, Covid – 19 symptoms include cough, headache, fatigue, fever, aching and difficulty breathing.

The Covid-19 is transmitted primarily through airborne contact or contact with contaminated objects. As per the current data and information, it is possible to assess that the incubation period is 4 to 7 days, with an average of seven days even if it is not possible to exclude an incubation period of more than 7 days.

Public authorities have issued several guidelines for the purpose to invite the population to take certain precautions which are mainly:



- a. wash hands thoroughly and often with soap and water, especially after coughing and sneezing or before eating;
- b. avoid touching eyes, nose or mouth, especially with unwashed hands;
- c. cover nose and mouth when coughing or sneezing;
- d. avoid close contact with people who have symptoms of respiratory illness;
- e. wear a mask if there is a suspect to be ill;
- f. clean off surfaces with alcohol- or chlorine-based disinfectants.
- g. do not take any antibiotics or antiviral medication unless it's been prescribed by a doctor.

BRIEF INFORMATION ABOUT ITALIAN SITUATION

On January 31, 2020, the Italian Council of Ministers declared a 6-month state of emergency and is constantly issuing several new legal provisions, Law Decrees and urgency measures, for the purpose to contain the virus spread and its consequences.

As of today, the main actions of the Italian Government concern the medical aid and assistance of the population potentially affected by the virus, the strengthening of controls in airport and port areas and the repatriation of Italian citizens from the risk countries as well as the return of foreign citizens exposed to risk to their home countries.

The Head of the Civil Protection Department, Mr. Angelo Borrelli is entrusted with the interventions coordination necessary to deal with the emergency on the national territory.

On March 4, 2020, the Prime Minister Giuseppe Conte signed a new Decree providing for measures to contain the spread of the Covid-19.

As of today, the law provisions issued by the Italian Government for the purpose to face the Covid-19 spread, are the following:

- **Prime Minister Decree**, issued on **March 11, 2020**, with urgent measures for the contagion containment on the whole Italian territory.
- **Law Decree as of March 9th, 2020 no. 14** introducing urgent measures for strengthening the National Health System in relation to the COVID-19 emergency.
- **Prime Minister Decree**, issued on **March 9, 2020**, for the purpose to extend the restrictive measures adopted in force of the Decree issued in March 8, 2020 to all the Italian Regions.
- **Prime Minister Decree**, issued on **March 8, 2020**, named *“Ulteriori misure per il contenimento e il contrasto del diffondersi del virus Covid-19 sull’intero territorio nazionale”*;



- **Prime Minister Decree**, issued on **March 4, 2020**, named “*Ulteriori disposizioni attuative del decreto-legge 23 febbraio 2020, n. 6, recante misure urgenti in materia di contenimento e gestione dell'emergenza epidemiologica da COVID-19, applicabili sull'intero territorio nazionale*”;
- **Law Decree**, issued on **March 2, 2020**, n 9, named “*Misure urgenti di sostegno per famiglie, lavoratori e imprese connesse all'emergenza epidemiologica da COVID 19*”;
- **Prime Minister Decree**, issued on **March 1, 2020** named “*Ulteriori disposizioni attuative del decreto-legge 23 febbraio 2020, n. 6, recante misure urgenti in materia di contenimento e gestione dell'emergenza epidemiologica da COVID-19*”;
- **Prime Minister Decree**, issued of **February 25, 2020** named “*Ulteriori disposizioni attuative del decreto-legge 23 febbraio 2020, n. 6, recante misure urgenti in materia di contenimento e gestione dell'emergenza epidemiologica da COVID-19*”;
- **Prime Minister Decree**, issued on **February 23, 2020** named “*Disposizioni attuative del decreto-legge 23 febbraio 2020, n. 6, recante misure urgenti in materia di contenimento e gestione dell'emergenza epidemiologica da COVID-19.*”;
- **Prime Minister Decree**, issued on **February 23, 2020** named “*Misure urgenti in materia di contenimento e gestione dell'emergenza epidemiologica da COVID-19*”;

In addition to the measures already adopted with the Prime Minister Decree of 8 March 2020, followed by the Prime Minister Decree of 9 March 2020, the Italian Government with the Prime Minister Decree of 11 March 2020 has ordered severe quarantine measures operative in all the national territory until 25 March 2020 to avoid the spread of Covid-19 infection.

Without a “serious” reason that cannot be postponed, such as urgent work or family issues, people are not allowed to leave their houses.

People have to stay at home as much as possible. The Italian authorities are carrying out checks and sanctions for anyone who contravenes the general quarantine measures adopted.

The overall picture is constantly evolving on the basis of the measures that the Government adopts almost on a daily basis.

To date, subject to further specifications, the following rules must be respected:

- (i) People have to stay at home as much as possible;
- (ii) Anyone with a fever above 37.5 degrees Celsius must stay at home in preventive insulation even if they have no other symptoms of viral infection;
- (iii) All schools, universities, museums, nightclubs, bingo halls, gyms, spas, swimming pools and similar public buildings are closed;



- (iv) Retail business activities are also suspended, with the exception of food, newsagents, tobacconists, pharmacies;
- (v) Restaurants, bars, pubs, ice cream shops, patisseries, barbers, hairdressers, beauty centers are closed;
- (vi) Banking, financial and insurance services and agricultural and zootechnical activities remain open as well as the hotels;
- (vii) Civil and religious ceremonies, including weddings and funerals, are prohibited;
- (viii) Churches are closed;
- (ix) Sports events of any kind are suspended;
- (x) Ski resorts are closed;
- (xi) Remote working and teleconferences instead of face-to-face meetings are advised “*in all possible cases*”;
- (xii) Movement within the country are limited to those strictly necessary.

Those who are going to violate the above-mentioned restrictions could be sanctioned by fines and jailed for up to three months and anyone who moves from their home is required to make a self-certification which, if it was ascertained that it contained false reasons, would trigger an additional criminal sanction

For the purpose to avoid the Covid-19 diffusion in the rest of the country, people returning from the areas where the infections are widespread may incur in quarantine period.

COVID-19 AND LEGAL CONSEQUENCES

- **Commercial Contracts.**

a) Force majeure.

Force majeure clause is a contractual clause normally inserted in long lasting commercial contracts, which is both set forth in the Italian contract discipline of plenty of typical contracts and in the international commercial practice and regulations, which aims at preventing the parties to be contractually liable in case of nonperformance and non-fulfilment of its contractual obligation in case of happening “*acts of God*” or other extraordinary events (i.e. war, riot, act of terrorism, embargo, governmental rule, regulation or decree, etc.).

For your convenience, you may find a force majeure clause sample as follows:

“If the performance of the obligations undertaken by any of the Parties with this Agreement is prevented, in whole or in part, by any event of force majeure out of the reasonable control of the Parties - such as, but not limited to, fire, explosion, earthquake, flood, labour disputes, labour or material shortages, accidents, death of



any of the Parties - the mutual obligations of the Parties shall be suspended, and the Parties shall try to agree on appropriate adjustments of respective obligations in accordance with the circumstances of the occurred event. If one or more event(s) of force majeure continue so that the affected Party results in being prevented from performing its obligations, or if the Parties cannot agree on any appropriate adjustments of respective obligations by the term of 30 (thirty) Business Days from the occurrence of the force majeure event(s), this Agreement under force majeure may be terminated (wholly, and not partly) by any of the Parties hereto."

In addition, it should be noted that the notion of "force majeure", as an event capable to exclude the possible liability of a defaulting party, is also provided by the Italian Civil Code.

This can be found in the provisions of Article 1218 of the Italian Civil Code, that states: "*the debtor who does not exactly perform the performance due is responsible for the possible damages if it does not prove that the default or delay was caused by the impossibility of the performance deriving from a cause not attributable to him*".

Moreover, pursuant to Article 1256 of the Italian Civil Code, the case of the temporary impossibility of the performance is considered: "*An obligation is terminated when, for a cause not attributable to the debtor, the performance becomes impossible. If the impossibility is only temporary, as long as the impossibility remains, the debtor is not responsible for the delay in performance. However, the obligation is terminated if the impossibility continues until, in relation to the type of the obligation or the nature of the object, the debtor can no longer be considered obliged to perform the service, or the creditor has no longer interest in achieving it.*"

So, if the conditions are met, the part of a contract that has an interest in it could still object to the exemption of force majeure regardless of the presence or absence of a specific clause.

In this regard, it must also be highlighted that a specific "force majeure" clause in a contract, may also have the adverse effect to limit the applicability of the exemption of liability provided for by the Italian Civil Code, for example when the clause provides for a complete list of the cases of *force majeure* recognized by the parties (circumstance not unusual, for example in insurance contracts).

In order to apply a force majeure clause or the relevant liability exclusion due to the occurrence of epidemic situation *et similia*, you should consider the following:

- (i) whether the event is listed or could be considered as listed within force majeure event. On this regard, in case the contract includes a *force majeure* clause, it should be verified if the event is listed, or at least not excluded, in the clause. In case the contract does not include a *force majeure* clause, it should be verified if, taking into account the relevant circumstances and the nature of the agreement, it makes the performance of the contract impossible.



- (ii) whether the risk of nonperformance was foreseeable and should have been mitigated by taking different actions or omissions or by adopting further cautions;
- (iii) whether the nonperformance arose from any negligence or malfeasance of a party, which has a materially adverse effect on the liability of such party to perform its obligations;
- (iv) whether the performance became effectively impossible, and not only merely impracticable or more difficult, also financially and/or economically, to execute.

With reference to previous nn. (ii), (iii) and (iv) above, please note that the party invoking the force majeure clause has to prove that (a) it has adopted proactive actions both to ensure everybody's safety and continuity of commercial operations in order to meet pending contractual obligations, such as, by way of example, securing alternate supply streams in case supplier operations are impacted; allowing employees to smart work; and/or imposing restrictions for business travels; (b) and that the force majeure event cannot have been mitigated by way of none reasonable preventative caution.

Please also note that, even if the aforesaid proactive cautions did not effectively prevent the force majeure event occurrence, so will be considered in case of litigation for evaluating a. the effective remaining chance to undertake the contractual obligations by the party invoking the force majeure clause, and b. if the performance has become truly impossible with reference to such party; c. the damage quantification, which is of course different according to the material contract and/or obligations not fulfilled.

In addition, with reference to insurance contracts we kindly suggest to verify if pandemic events are covered by the relevant policy, since several insurance companies, after the spread of Severe Acute Respiratory Syndrome (SARS) in 2002-2003 have expressly excluded viral or bacterial outbreaks from standard business interruption policies and so such events – if they may contractually be deemed as force majeure events according to the commercial contract – are not covered by the insurance contracts.

In brief, even if the current pandemic event should meet the legal requirements to be considered a force majeure event that may exclude the responsibility of a defaulting party of a contract, the complexity of the situation and the peculiarity of each contract (that for example may allow the exercise of the force majeure clause/exemption also to the counterparty) make advisable a deep and professional case by case analysis.

b) Hardship.

It should also be noted that Article 1467 of the Italian Civil Code provides that: *“In contracts with continuous or periodic performance or deferred performance, if the performance of one of the parties has become excessively onerous due to the occurrence of extraordinary and unforeseeable events, the party who owes such performance may request termination of the contract, with the effects established by Article 1458. The termination may not be requested if the occurrence of the onerousness falls within the normal scope of the contract. The party against whom termination is requested may avoid it by offering to modify the terms of the contract in an equitable manner”*.



With respect to the possibility of invoking this exception, for one of the contractual parties, it should be remembered that the termination will have retroactive effect between the parties (except in the case of contracts with continuous or periodic performance); therefore, the party for whom performance is excessively onerous and would exercise this exception will have to restore the situation prior to the conclusion of the contract, without prejudice to any rights of third parties.

Having said that, also for this legal case, the complexity of the situation does not allow an univocal evaluation for all existing commercial contracts as it will be necessary to make a deep and professional assessment on a case-by-case basis.

- **M&A Transactions: “Material adverse change” or “Material adverse effect”.**

The second relevant clause of interest is the so called “material adverse change” (“**MAC**”) clause (also called “*material adverse effect*” clause), that is a common clause inserted (basically but not only) in M&A transactions, and provides the right to the seller or to the purchaser to modify the price of the transaction or to withdraw from the transaction itself in case of verification of material change effects (which will be discussed further on in detail).

For your convenience, you may find a sample clause as follows:

“In case of verification of a material adverse change, which is an event, circumstance, condition (or combination thereof) occurring after the date of the Agreement that results in or will result in an adverse effect amounting to at least Euro [•] on the liability or assets of the Company (or its targets and subsidiaries), not attributable, in full or in part, to acts carried out or omissions committed by the Company (or by its targets and subsidiaries) or with the written consent of, or otherwise authorized explicitly or implicitly, by the other Party, the Parties shall try to agree on appropriate adjustments on the purchase price in accordance with the circumstances of the material adverse change or withdraw from the agreement thereof”.

In addition to the above, another main difference between force majeure is related to the type of the event and of the effects arising from it.

As a matter of fact, unlike force majeure events (that have been further detailed and defined above), it can be considered *material adverse effects* all effects, events, developments or changes that, individually or in the aggregate with all other effects, events, developments or changes, are materially adverse to the business, results of operations or physical or financial condition of the real property or improvements taken as a whole.

Examples of material adverse changes may be the loss of a strategic client of the target company, in which to acquire a controlling interest; an unexpected upheaval in the sector of the company to be



acquired; a *factum principis*, which brings down the convenience of the business practiced by the target company; a substantial reduction in assets in the period between agreement and closing; the systematic violation of guarantees signed by the selling party.

Since the MAC impacts on the value of the deal, it is also explained why the remedies guaranteed to the parties are not, as in the case of force majeure, the suspension of obligations and/or termination, but the price review and/or withdrawal.

MAC clauses can be used primarily in two ways:

- i) To qualify the seller's representation and warranties in the agreement; or
- ii) As a condition to close the transaction.

Please note that, unlike the force majeure clause, which is normally included in all contracts, MAC clause is always subject to specific negotiation between the parties.

With respect to the possibility to consider the Covid-19 as a material adverse effect for the purpose thereof - of course, if such provision is inserted into the material transaction documents – it is not possible to make general forecasts and or evaluations, also in consideration of the unclear duration of the current outbreak and of its impact onto the companies involved in the material transaction.

- **Employees health and safety measures.**

In consideration of the general principle that provides for the necessity to ensure a safe workplace for employees, which includes taking steps to guard against the risk of infectious diseases, the Covid-19 diffusion consequently lead principals and employers to implement a strategy to protect their employees' health.

For this purpose, employers shall adopt internal strategies for the purpose to minimize the negative impact of the Covid-19 diffusion with respect to its employees and at the same time ensure business continuity.

In this respect we deem opportune to suggest to:

- (i) execute a risk assessment, aimed at ensuring good hygiene practices in the workplace and training employees on the key facts and risks;
- (ii) inform about symptoms and steps to be taken all the employees should take if they suspect they may have come into contact with someone with coronavirus Covid-19 including details of the nearest medical center equipped to deal with the virus;
- (iii) implement smart working solutions;



- (iv) restrict employees from traveling to high risk destinations unless absolutely necessary. If employees must travel, they should be advised to follow infection control precautions with careful hygiene; avoiding contact with sick people; avoiding contact with animals and uncooked animal products; and wearing personal protective equipment.

Any period of time for which an employee is required to remain away from the workplace should be reasonable, which in general will be no longer than the time taken to establish that the virus has not been communicated

In general, for those who require quarantine, employers should encourage employees to adhere to the quarantine restrictions and either work remotely or take time off work.

As a general remark, during any quarantine period, employers should generally expect to continue to pay the employee their ordinary wages and contractual benefits.

Finally, it is worth mentioning the Italian Data Protection Authority's instructions on employees' personal data processing under the COVID-19 emergency issued on March 2nd, 2020:

- employers must refrain from collecting, in advance and in a systematic and generalized manner, including through specific requests to the individual worker or unauthorized investigations, information on the presence of any signs of influenza in the worker and his or her closest contacts, or anyhow regarding areas outside the work environment (the investigation into and collection of information on the symptoms typical of Coronavirus and on the recent movements of each individual are in fact the responsibility of healthcare professionals and the Civil Protection system);
 - The obligation on the employee to inform the employer of any danger to health and safety at the workplace is left unprejudiced. In this regard, the employers may invite their employees to make, where necessary, such communications by facilitating the way they are routed, including through dedicated channels;
 - The obligations for the employer to inform the competent entities of any change in the 'biological' risk to health at work arising from the Coronavirus are left unprejudiced along with the other tasks related to health surveillance of workers through the competent doctor, such as the possibility to have the most exposed workers undergo an extraordinary medical visit
- **Personnel management measures.**

Please find hereinafter an overview about the emergency measures for the management of employments. Until March 10, 2020 there were different measures for the employees working in the



in the so-called red zone and for those employed by employers which work in areas not involved by the emergency and restrictive decisions.

After the issuance of the Prime Ministerial Decree on March 9, 2020, applicable from March 10, 2020, such measures have been applied to all of the employees in the Italian regions.

In particular, such measures are the following:

- 1) There are easier procedures for demanding the ordinary treatment of salary subsidy or for the ordinary allowance for the suspension or reduction of the working activity and the termination of the business.
- 2) Employer of the private sector, including the agricultural one, that are excluded by the tools of income support set out by the current law, can demand the salary subsidy “in derogation” for the duration of the suspension of the employment relationship and anyway for a period of three months.
- 3) The self-employed workers are entitled to a monthly allowance equal to € 500 for three months.
- 4) With reference to the Public Administration’s employees, informatic tools (laptop and tablet) are made available for allowing the execution of smart working. For public employees it is set that a period of illness or quarantine or fiduciary stay at home, is equated to a period of hospitalization.

The Prime Ministerial Decree issued on March 11, 2020 introduces further measures, entered into force in Italy from March 12, 2020 until March 25, 2020, for the execution of the Legislative Decree n. 6 of February 23, 2020. The smartworking is recommended within the Public Administration (except the activity connected to the management of the emergency), also without the signing of individual agreements and the implementation of the notices set out by law n. 81/2017.

With reference to the private sector (including professional activities), it is recommended the smartworking and the followings actions:

- encourage holidays, paid leaves and others tools as set out by the collective agreements;
- interrupt the activities of the business units that are not essential to the production;
- implement policy against the contagion and, if it is impossible to abide by the personal distance of one metre, it is recommended to use personal protective equipment;
- encourage the sanitisation of the places of work;
- limit the movements within the business units and the access to the common spaces.



- **Financial measures-**

Abi (i.e. *Italian Banking Association*) and the entrepreneurs collective associations signed the agreement for extending the moratory agreement signed on 2019 due to the COVID-19 emergency (The “Agreement”).

The Agreement allows the SMEs (either companies or other entrepreneurial entities) within the Italian territory facing temporary financial difficulties caused by the COVID-19 emergency, but with the possibility to continue and develop the business, in compliance with the provision of Article 1, section 246 of the Stability Law 2015 (law no. 190/2014 called “*Stability Law*”).

In order to avail themselves of the said initiatives, the SME shall be “*in bonis*”, i.e. performing, at the time of the submission of the request. The enterprise is considered performing if it does not have debt positions qualified as non-performing, probable default or debts past due or exceeding the limit for more than 90 days.

The Agreement provides for the concession of a new moratorium on loans taken out by the SMEs, including both the suspension and the prolongation of the loans in force at the date of January 31, 2020.

The suspension for a period equal to 12 months is granted for the capital portion of repayments of medium-long term loans, even if favorable or enhanced by means of issuance of promissory notes. The same suspension can be granted for capital portion of repayments regarding real estate financial lease agreements, while it is halved to 6 months for financial leasing of movable goods. The suspension implies the translation of the repayment plan for an equivalent period and the interests on suspended capital shall be paid at the original deadlines.

The prolongation can concern the duration of loans, the deadlines of short-term credit and of agricultural credit. The maximum prolongation period for loans is equal to 100% of the outstanding period of the repayment plan. In any event, the prolongation period cannot be longer than 3 years for unsecured loans and 4 years for mortgage loans. The prolongation of the deadlines of short-term unpaid credits is equal to 9 months, while for agricultural credit it could get to a maximum of 120 days.

The Agreement allows to suspend or to prolong also the loans that already benefitted of this instrument in the past years, as long as the request was not submitted in the 24 months preceding the date of submission of the new moratorium request.

According to the Stability Law, the moratoriums shall be granted on the basis of individual requests and not through automatic mechanisms, thus allowing the banks, in their own discretion, to reject the applications submitted by the SME at the end of a banking investigation; at last, the moratorium is accessible only for performing undertakings, excluding a priori all the SMEs that are already in economic difficulty. The banks shall give their answer within 30 business days from the application.



The banks cannot increase the costs or the interest rates or the securities, other than the expenses effectively borne.

- **Tax and social security measures.**

Article 2 of Legislative Decree no. 9/2020 provides for a suspension of the terms of payments obligations for natural persons and legal entities with registered office and/or operational headquarters in the 11 municipalities of the “red zone”.

In particular, payments due between 23 February 2020 and 30 April 2020 are suspended with respect to:

- (i) payments of tax bills;
- (ii) payments of withholding taxes;
- (iii) payments of social security and welfare contributions;
- (iv) payments of tax claims issued by local authorities;
- (v) payments of the so called “*rottamazione-ter*” and “*saldo e stralcio*”.

It is expressly provided for that the payments subject to suspension shall be made in a single instalment within the month following the end of the suspension (i.e. by 31 May 2020).

It is specified that, on the contrary, are excluded from the suspension:

- (i) the payment of the instalment, due on 28 February 2020, due by taxpayers who have availed themselves of the procedure for the closure of pending litigation (art. 6, Law Decree no. 119/2018);
- (ii) the payment of the instalment, due on 28 February 2020, due for the definition of the tax minutes (art. 2, Law Decree no. 119/2018);
- (i) the payment of the second and last instalment, due on 2 March 2020, due by taxpayers who have availed themselves of the regularization of formal errors (art. 9, Law Decree no. 119/2018).

Currently, the tax measures would seem to be literally applicable only to the eleven municipalities falling within the “red zone”; nevertheless, in the light of the Prime Ministerial Decree of 9 March 2020 extending the health measures to the entire national territory, a measure is expected shortly to make the fiscal measures described above also extend to the rest of the country.



In addition, it should be noted that the Revenue Agency, through press release no. 17 of March 12, 2020, announced the suspension of the activities of "liquidation, control, assessment, access, inspection and verification, collection and tax litigation", unless they are about to expire soon.

The communication follows Circular no. 73943 of March 11, 2020, with which the Guardia di Finanza has ordered the suspension of:

- tax and labour audits, tax and labour controls, in agreement with the taxpayers concerned, except in cases of non-availability and urgency;
- instrumental controls;
- anti-money laundering inspection activities.

With regard to other police activities, it is also specified that they will be geared towards combating conduct of a markedly more illegal and fraudulent nature and combating illegal phenomena related to the health emergency in progress (including, for example, the monitoring activities of the measures referred to in the Prime Ministerial Decree 8.3.2020).

- **Personal data processing in the context of the COVID-19 emergency.**

According to article 14 of the Law Decree as of March 9th, 2020 no. 14 introducing urgent measures for strengthening the National Health System in relation to the COVID-19 emergency, until the end of the current health emergency and in order to: (1) guarantee protection against the cross-border diffusion of the COVID-19; (2) grant health assistance and diagnosis for affected people; (3) grant the general management of the National Health System, according to article 9, paragraph 2, letters g) h) e i) and article 10 of the EU Regulation EU 679/2016 and to article 2-*sexies* of the Italian Data Protection Code, public entities authorized to operate within the National Civil Protection System, the Minister for Health, the Superior Institute for Health, the public and private bodies operating within del National Health System and the entities in charge of monitoring the emergency measures already enacted may process personal data, also by interchanging and communicating data to each other (both health-related and related to crimes for eventual breaches of the emergency measures).

Communication and dissemination of common personal data (excluding health-related data and data related to crimes) to public and private entities other than the public entities authorized to operate within the National Civil Protection System, the Minister for Health, the Superior Institute for Health, the public and private bodies operating within del National Health System is authorized where indispensable in the context of the management of the health emergency under way.



All the above data processing shall be in any case carried out in full compliance with the principles as set forth in article 5 of the EU Regulation 679/2016, by adopting specific guarantees for the interested subjects.

Public entities authorized to operate within the National Civil Protection System, the Minister for Health, the Superior Institute for Health, the public and private bodies operating within del National Health System are authorized to:

- omit the information as per article 13 of the EU Regulation 679/2016, advising orally the interested subject of this limitation or;
- release a simplified information as per article 13 of the EU Regulation 679/2016, advising orally the interested subject of this limitation;
- instruct the authorized persons as per article 29 of the EU Regulation 679/2016 and 2 - *quaterdecies* of the Italian Data Protection Code by means of simplified modalities, even orally.

All the entities above shall bring back the personal data processing under the ordinary law discipline once overcome the current health emergency under way.

- **Emergency provisions and public procurement.**

The emergency caused by COVID 19 is also having an impact on public procurement (works, services and supplies).

Several tools come into play, such as allocation of resources, centralized procedures (such as Civil Protection, Consip and Commissioners), accelerated procedures (tighter deadlines, e-procurement) and simplified procedures for medical devices, with urgency procedures / direct awards and for reconversion and construction of also temporary healthcare facilities, in order to face on the one hand medical devices demand, on the other hand intensive care beds need.

Article 11 of Law Decree as of March 9th, 2020 no. 14 introducing urgent measures for strengthening the National Health System in relation to the COVID-19 emergency provides for incentives for the production and simplified procedures for buying medical devices, by authorizing the Civil Protection Department to have a dedicated bank account in order to allow fast transactions for immediate or anticipated payment of supplies, signing of contracts and their immediate effectiveness, administrative and damage to public treasury liability of officers limited to actual willful misconduct (article 11, paragraph 3).

Moreover, according to article 12 of Decree, Civil Protection Department, through CONSIP S.p.A., in order to strengthen intensive care units is allowed to buy five thousand mechanical ventilation



systems and their equipment, by direct award also by way of derogation from article 163, paragraph 8, of Legislative Decree no. 50 of 18 April 2016,

More in general, contracting authorities may always resort to negotiated procedures according to article 63, par. 2 letter c) of Legislative Decree no. 50/2016 (with the exemptions expressly provided for by the Order of the Chief of Civil Protection Department no. 630 of 3 February 2020 and subsequent amendments), according to which negotiated procedures without publication of notice can be used, inter alia, *“(c) in so far as is strictly necessary where, for reasons of extreme urgency brought about by events unforeseeable by the contracting authority, the time limits for the open procedures or restricted procedures or competitive procedures with negotiation cannot be complied with.”*. In this regard, it is worth mentioning the *“Negotiated procedure for personal protective equipment and medical equipment for the Covid-19 emergency”* tender, called by Consip on 11 March, divided into 18 lots.

Moreover, it is also possible to start *“Urgent and civil protection procedures”* according to article 163 of Legislative Decree no. 50/2016.

The emergency situation could also lead to measures which, through the appointment of extraordinary Commissioners, will aim to speed up the implementation of major public works that have been stopped, adopting the Morandi bridge in Genoa model.

On the contrary, undertakings and their trade associations ask for measures aimed at streamlining the tendering procedure by means of a public administration that is quick and efficient in issuing the authorizations necessary to start the procedure itself.

It should also be noted that tendering procedures in progress could be interrupted due to the emergency situation; with reference to procedures which have already been awarded, contracts should be entered into when executable. On the contrary, in the event that emergency measures do not allow the widest participation and competition, tenders should be stopped by the authority or upon request of the undertaking. In any case, possible stop of tender procedures could lead to an extension of ongoing and possibly expired contracts.

With reference to the management of public sessions, in light of the movement restriction measures set out by the government for the containment of the risk of infection of Covid-19 virus throughout the country (most recently, Prime Ministerial Decree of 11 March 2020), contracting authorities could consider carrying out procedure sessions through alternative participatory methods, such as videoconference and similar. Conversely, with regard to tendering procedure in progress, the aforementioned government measures could lead the contracting authorities to shut down works at the worksites pursuant to article 1, lett. n) and o) of the Decree Law no. 6/2020 (*“shut down of work activities for contractors... suspension or limitation of work activities in the municipality or area concerned”*), should measures adopted to deal with the emergency, on the contrary, affect the regular execution of works for reasons not attributable to the contractor. The contractor, in order to avoid



penalties, which would be clearly unlawful, should request temporary and/or partial suspension measure, pursuant to article 107 of the Code of Public Contracts (Legislative Decree no. 50/2016), based on special circumstances or unforeseeable causes or force majeure.

Moreover, as to public works, following the requests by a representative body of “*Società Organismi di Attestazione*” (SOA), the Italian National Anti-Corruption Authority (“ANAC”) in its Chairman's press release of 4 March 2020, in light of legislative measures adopted to combat and prevent the spread of the COVID-19 virus, has agreed upon that, for all certification contracts expiring before 31 March 2020, the stay of the proceeding may extend up to a maximum of 150 days, instead of 90 as provided by Article 76, par. 3, of Presidential Decree no. 207/2010. ANAC also pointed out that this exemption may be granted to all companies that file a specific request, provided that they have registered and operational offices in regions identified by Prime Ministerial Decree of 25 February 2020 (based on subsequent provisions, reference should be to all Regions), or that, for qualification purposes, have filed declarations and documents that must be submitted for examination by public administrations.

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