

Newsalert

Finance and Regulated Entities Department
Measures on bankruptcy law, share capital reduction, financial statement and intercompany financing related to the Covid-19 epidemic

On 6 April 2020, the Italian Council of Ministers approved the Law Decree no. 23 of 8 April 2020, published in the Official Gazette n. 94 of 8 April 2020. It sets out, among other things, emergency provisions designed to address the current emergency situation resulting from the COVID-19 epidemic and preserve viable companies and enterprises (including by suspending the application of certain provisions of the Italian Bankruptcy Law) and, likewise, to support companies that are already subject to composition with creditors procedures (*concordato preventivo*) and debt restructuring agreements (*accordi di ristrutturazione*) pursuant to Article 182-bis of the Italian Bankruptcy Law (hereinafter referred to as the "**Decree**").

In this regard, the Decree also enacts provisions relating to insolvency and bankruptcy law, by adopting, among other things, certain measures relating to the requirement to recapitalise companies, the principles governing the preparation of financial statements and the statutory subordination of intercompany loans.

The principal measures provided for in the Decree are, in very brief terms, the following:

- The deferral of the date of entry into force of the Business Crisis and Insolvency Code pursuant to Legislative Decree no. 14 of 12 January 2019;
- the temporary suspension of the Italian requirement to recapitalize, or liquidate, joint stock companies (Italian "S.p.A." companies) and limited liability companies (Italian "S.r.l." companies) in the event of a reduction in share capital due to losses, and the temporary suspension of the obligation to dissolve companies on account of such reduction or reduction in share capital;

- the introduction of temporary measures concerning the principles for the preparation of financial statements, with specific reference to the valuation of balance sheet items on a going concern basis;
- the temporary disapplication of the legal provisions concerning the subordination of shareholder and intercompany loans;
- the extension of the deadlines for the performance of obligations relating to ongoing composition with creditors procedures (*concordato preventivo*) and homologated debt restructuring agreements (*accordi di ristrutturazione*), and the introduction of certain exceptions in relation to procedures for composition with creditors (*concordato preventivo*) and filing for the approval of restructuring agreements that are still pending relating both to amendments to reorganization plans and debt restructuring agreements;
- the temporary suspension of the right to file petitions for bankruptcy or insolvency.

Please note that the Decree is subject to amendments during the process of its conversion into law.

I. Deferral of the date of entry into force of the Italian Business Crisis and Insolvency Code as per Legislative Decree No. 14 of 12 January 2019

The Decree postpones to 1 September 2021 the date of entry into force of the Italian Business Crisis and Insolvency Code (Legislative Decree no. 14 of 12 January 2019), originally scheduled for August 2020. However, the application of the (few) provisions of Italian Legislative Decree No. 14 of 12 January 2019 already in force (including, among other things, those provisions relating to the organizational structure of companies and the appointment of its supervisory bodies, and which have already led to the consequent amendments to the Italian Civil Code) remains unchanged.

The postponement of the entry into force of the Italian Business Crisis and Insolvency Code is motivated by the need to ensure legal certainty, using a widely tested and consolidated legislative framework such as the Italian Bankruptcy Law, in the context of widespread uncertainty and economic crisis. At the same time, the postponement also responds to the need not to jeopardize the basic objectives of the Italian Business Crisis and Insolvency Code, which is aimed at facilitating the early emergence of the state of financial crisis (also by means of the so called “alert instruments”) and at favouring the going concern scenario over liquidation, being objectives, however, that are difficult to pursue effectively in the current context.

The postponement of the entry into force of the Italian Business Crisis and Insolvency Code will also give the Italian Government time to align it with the forthcoming legislation implementing EU Directive 1023/2019 on the preventive restructuring of

companies and take into account the Italian 'Corrective Decree of the Business Crisis and Insolvency Code' currently being prepared.

II. Temporary provisions regarding share capital reduction

The Decree provides that until 31 December 2020, the provisions relating to the reduction of the value of share capital due to losses shall not apply:

- i. with regard to joint stock companies (S.p.A.s), pursuant to Article 2446, paragraphs 2 and 3 (in the event of reduction of the value of the share capital by more than one third) and Article 2447 of the Italian Civil Code (in the event of reduction of the value of share capital below the minimum amount required by law);
- ii. with regard to limited liability companies (S.r.l.s), in accordance with Articles 2482 bis, paragraphs 4, 5 and 6, of the Italian Civil Code (in the event of reduction of the value of the share capital by more than one third) and Article 2482 *ter* of the Italian Civil Code (in the event of reduction of the value of share capital below the minimum amount required by law).

Article 6 of the Decree does not suspend the obligation for directors (both of S.p.A.s and S.r.l.s) to promptly convene a shareholders' meeting in the event of a reduction in share capital value of more than one third due to losses (this is, in fact, without prejudice to the application of Article 2446, paragraph 1 of the Italian Civil Code and paragraphs 1, 2 and 3 of Article 2482 *bis* of the Italian Civil Code). However, for the period between the date of entry into force of the Decree and 31 December 2020, the shareholders' meeting will not be required to adopt the measures otherwise provided for by law in such event (being a formal reduction of share capital, a recapitalization or a liquidation or, as the case may be, the transformation of the company). Shareholders will clearly be entitled to adopt appropriate measures pursuant to the first paragraph of Article 2446 of the Italian Civil Code (a provision that, as noted above, is not waived by the Decree).

In addition to and in support of the foregoing, the Decree provides that, for the period between the date of its entry into force and 31 December 2020, the company shall not be liquidated due to the reduction or loss of share capital as per Articles 2484(4) and 2545 *duodecies* of the Italian Civil Code (in the latter case, with reference to cooperatives (*società cooperative*)).

The purpose of the aforementioned provisions (which are in addition to similar provisions already provided for by Article 182-*sexies* of the Italian Bankruptcy Law for companies applying for composition with creditors (*concordato preventivo*) or a debt restructuring agreement (*accordo di ristrutturazione*) pursuant to Article 182-*bis* of the Italian Bankruptcy Law) is to mitigate the risk that losses resulting from the Covid-

19 pandemic lead to the directors immediately resolving to dissolve the company (even where performing) also in order to avoid any personal liability.

III. Temporary provisions regarding the principles for the preparation of financial statements

The Decree amends the principles for the preparation of financial statements as at 31 December 2020, as well as financial statements closed by 23 February 2020 but not yet approved. In particular, it is provided that, in the preparation of financial statements relating to the aforementioned period, the evaluation of the items on a going concern basis as per article 2423 bis, paragraph 1, no. 1) of the Italian Civil Code may in any case be applied if it was possible to do so in respect of the most recent financial period ending prior to 23 February 2020. This is without prejudice to the right of extension of sixty days (with respect to the original deadline of 30 April 2020) provided by Article 106 of the so-called 'Curaitalia Decree' for the purposes of the adoption of financial statements for the financial year 2019.

The reference period has been set by reference to 23 February 2020 as, on that date, the first measures relating to the COVID-19 pandemic entered into force.

IV. Provisions regarding shareholders and intercompany loans

In order to boost financial support for companies, the Decree provides that, until 31 December 2020, the provisions of Articles 2467 and 2497-*quinquies* of the Italian Civil Code shall not apply to shareholder loans or loans from entities exercising an activity of direction and coordination over them (*attività di direzione e coordinamento*) (*direzione e coordinamento*); accordingly, such loans will not be subordinated by operation of law.

Article 2467 of the Italian Civil Code, the application of which is temporarily suspended by the Decree (as described above), provides for the subordination by operation of law of shareholder loans, in whatever form, granted at a time when the company was overindebted (compared with the amount of shareholder equity) or in a financial situation where an equity contribution would have been appropriate. These provisions expressly refer to limited liability companies (S.r.l.s) but are generally interpreted more widely. Moreover, in application of the ordinary rules, temporarily suspended by the Decree, pursuant to Article 2467 of the Italian Civil Code, if a shareholders loan is repaid in the year before the company's declaration of bankruptcy, such repayment should be returned. Article 2497-*quinquies* of the Italian Civil Code, which is also temporarily suspended by the Decree, extends the provisions of Article 2467 of the Italian Civil Code to loans made in favour of the company by entities exercising an activity of direction and coordination over it (*attività di direzione e coordinamento*) or by other entities subject to it.

The Decree does not impact Art. 182-*quater*, paragraph 3, of the Italian Bankruptcy Law, which provides that, by way of derogation from articles 2467 and 2497-*quinquies* of the Italian Civil Code, shareholder loans made pursuant to compositions with creditors (*concordato preventivo*) or so-called homologated debt restructuring agreements (*accordo di ristrutturazione*), or in order to enable the filing of a petition for admission to such procedures, subject to certain conditions rank super-senior for 80 percent of their amount. In addition, where a lender becomes shareholder as part of a debt restructuring agreement (*accordo di ristrutturazione*) or composition with creditors (*concordato preventivo*), the entire amount of the financing ranks super-senior.

V. Provisions regarding composition with creditors procedures (*concordati preventivi*) and debt restructuring agreements (*accordi di ristrutturazione*) pursuant to Article 182-bis of the Italian Bankruptcy Law

The Decree introduces a number of provisions relating to composition with creditors procedures (*concordati preventivi*) and debt restructuring agreements (*accordi di ristrutturazione*) pursuant to Article 182-*bis* of the Italian Bankruptcy Law to mitigate the risk that the current crisis undermines the successful outcome of procedures initiated before the Covid-19 outbreak.

More specifically, the following measures have been introduced:

- i. with respect to compositions with creditors (*concordati preventivi*) and debt restructuring agreements (*accordi di ristrutturazione*) that have already been homologated (i.e. court-approved), the deadline for compliance with obligations due to be performed between 23 February 2020 and 31 December 2021 has been extended by six months;
- ii. with respect to procedures of homologation of composition with creditors (*concordati preventivi*) and debt restructuring agreements (*accordi di ristrutturazione*) pending as at 23 February 2020, companies can now make an application to court prior to the homologation hearing for an extension not exceeding ninety days for the filing of a new plan and a new proposal for composition with creditors (*concordato preventivo*) or a new debt restructuring agreement (*accordo di ristrutturazione*). Such application cannot be made, however, in the context of a composition with creditors procedure (*concordato preventivo*) where the creditors' meeting has already been held and the necessary majorities for approval of the *concordato preventivo* proposal have not been met;

- iii. debtors may now unilaterally request the postponement of existing deadlines in a *concordato preventivo* proposal or debt restructuring agreement (*accordo di ristrutturazione*) pending as at 23 February 2020. The debtor must file the petition prior to the hearing scheduled for the homologation, together with the documentation evidencing the need for such postponement. The deadlines cannot be postponed beyond six months from the original deadlines;
- iv. the introduction of an extension of up to 90 days for debtors who either (a) have already been granted a deadline in the frame of the so-called "preliminary petition" of composition with creditors (*domanda di concordato con riserva*) pursuant to Article 161, paragraph 6, of the Italian Bankruptcy Law and has already benefited from the "ordinary" extension provided for by law; or (b) have been granted an "automatic stay" pursuant to Article 182 *bis*, paragraph 7, of the Italian Bankruptcy Law, while negotiations for the execution of the debt restructuring agreement (*accordo di ristrutturazione*) were pending. In both cases, debtors may file a reasoned petition for the granting of an extension of the deadline of up to 90 days (even in cases where a petition for a declaration of bankruptcy has been filed) as long as it is filed prior to five days before the expiry of the deadline. The application must state the reasons for the extension with specific reference to the events that occurred as a result of the Covid-19 pandemic. For the duration of any extension, creditors whose claims arose before the beginning of the aforementioned procedures are barred from commencing or continuing enforcement or legal actions against the relevant debtor's assets.

VI. Temporary bar on filing bankruptcy or insolvency petitions

The Decree provides for the temporary inadmissibility of any petition for bankruptcy or insolvency filed between 9 March 2020 and 30 June 2020. The following petitions are expressly inadmissible:

- i. petitions for bankruptcy filed pursuant to Article 15 of the Italian Bankruptcy Law, except for petitions for bankruptcy filed by the Public Prosecutor (*pubblico ministero*) containing a request for the issuance of precautionary or protective measures pursuant to Article 15, paragraph 8, of the Italian Bankruptcy Law;
- ii. petitions for the declaration of insolvency under the Italian 'extraordinary administration' procedure (*amministrazione straordinaria*), pursuant to Article 3, of Italian Legislative Decree No. 270 of 8 July 1999 (the so-called "Prodi *bis*" Decree); in contrast, petitions for declarations of insolvency under the extraordinary administration procedure pursuant to the Marzano Law (Italian Law Decree No. 347 of 23 December 2003, as converted into law) are not

covered by the Decree (and therefore are not inadmissible by operation of law);

- iii. petitions for the insolvency of companies subject to compulsory administrative liquidation (*liquidazione coatta amministrativa*) not subject to bankruptcy proceedings, pursuant to Article 195 of the Italian Bankruptcy Law.

This measure therefore also applies to petitions for bankruptcy filed by entrepreneurs themselves, so as to provide them with a period of time during which they can assess other possible insolvency procedures as an alternative to bankruptcy, without incurring the civil and criminal liabilities as a consequence of a worsening of their financial condition.

At the same time, in order to prevent this period of "suspension" from undermining the principle of the equal treatment of creditors (*par condicio creditorum*), the Decree provides that, for the period from 9 March 2020 to 30 June 2020, the following deadlines are suspended: (i) those under Article 10 of the Italian Bankruptcy Law, for the purposes of the declaration of bankruptcy of the entrepreneur who has ceased trading; and (ii) those under Article 69-*bis* of the Italian Bankruptcy Law for bringing claw back actions under Section III, Chapter III, Title II of the Italian Bankruptcy Law (including claw back actions provided for in article 67 of the Italian Bankruptcy Law), in relation to petitions filed during the same period and for which, following the declaration of inadmissibility, a bankruptcy declaration is subsequently issued.

Please note that the Decree has not suspended the terms for the calculation of the look-back period, for the identification of transactions that may be clawed back.

For further information, please reach out to your usual Chiomenti contact.