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New Italian government measures on bankruptcy law, corporate capital, shareholders and inter-companies loans

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Summary of and comments on the urgent Italian government measures to ensure the continuity of businesses affected by the COVID-19 emergency, as provided in Law Decree no. 23 of 8 April 2020, Section II, addressing “Urgent measures regarding access to credit and tax compliance for businesses, special government powers in respect of strategic sectors, as well as measures for work and health-safety, extension of deadlines for administrative and litigation proceedings” (published in the Official Gazette no. 94 on 8 April 2020), and coming into force on 9 April 2020.

a) Postponement of the entry into force of the Business Crisis and Insolvency Code (Art. 5):

The entry into force of the Business Crisis and Insolvency Code, pursuant to Law no. 14 of 12 January 2019 (scheduled for 15 August 2020) is postponed to 1 September 2021.

The postponement of almost one year allows, on the one hand, that all interested parties continue to operate on the basis of consolidated practices without doubts on interpretation and procedures, and on the other hand, that the most critical phase of the epidemic reduces its effects and the entire economic system returns to normal trends.

b) Suspension of recapitalization obligations and directors' responsibilities (Art. 6):

From the date of entry into force of the Law Decree until 31 December 2020:

- (i) *the obligations for corporate capital reduction (if losses exceed one third of the corporate capital) and corporate capital increase (if losses exceed one third of the minimum corporate capital required) referred to in Articles 2446, paragraphs 2 and 3; 2447; 2482 bis, paragraphs 4, 5 and 6 and 2482 ter of the Italian Civil Code shall not apply;*

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(ii) the grounds for dissolution of a company (for loss or reduction of minimum corporate capital) capital referred to in Articles 2484, no. 4, and 2545 duodecies of the Italian Civil Code shall not apply.

The purpose of this provision is to prevent that capital losses, due to the Covid-19 crisis, put directors of companies in a position of arranging the immediate liquidating of companies, therefore undermining the possibility of business continuity including for performing companies, and with the risk of exposing themselves to liabilities for not preserving the assets of the company pursuant to Article 2486 of the Italian Civil Code.

This is without prejudice to the directors' obligation to inform shareholders, which is also provided, for joint stock companies, by Article 58 of Directive 1132/2017.

c) Temporary provisions on the application of principles for drafting financial statements (Art. 7):

For financial statements as at 31 December 2020, items can be still valuated with on a business continuity basis, as provided by Article 2423 bis, paragraph 1, no. 1) of the Italian Civil Code, if existing in the last financial statements for the year before 23 February 2020, without prejudice to the provisions of Article 106 of Law Decree no. 18 of 17 March 2020. The evaluation criteria is to be specifically illustrated in the notes to the financial statements, also by making reference to the results of the previous financial statements.

This provision aims at neutralizing the deviating effects of the current economic crisis due to the Covid-19 epidemic emergency, allowing companies to draft and approve financial statements by valuating items according to the principles of prudence and business continuity and taking also into account the economic function of the assets or liabilities contained therein, as provided in Article 2423 bis, paragraph 1, no. 1) of the Italian Civil Code. In order to avoid discrepancies among criteria, it is expected that the reclassification of the balance sheet items will be made with reference to the situation existing as at 23 February 2020, that is the date of entry into force of the first measures related to the emergency (Law Decree no. 6 of 23 February 2020, as converted, with amendments, into Law no. 13 of 5 March 2020) and the resulting effects of the economic crisis.

This is without prejudice to the provision of Article 106 of Law Decree no. 18 of 17 March 2020, which extended of sixty days the deadline for the approval of the financial statements for the 2019 financial year, otherwise due by 30 April 2020.

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d) Temporary provisions for funding companies (Art. 8):

The provisions subordinating shareholders and inter-companies loans referred to in Articles 2467 and 2497 quinquies of the Italian Civil Code do not apply to loans made to companies from the date of entry into force of the decree until 31 December 2020.

The temporary non application of provisions subordinating loans made by shareholders or those who exercise management and coordination activities is supported by the need to encourage refinancing of companies.

The rationale of articles 2467 and 2497 quinquies of the Italian Civil Code is to indirectly sanction cases of so-called "nominal undercapitalization", that is circumstances where a company certainly has the means to run its business but these are minimally allocated to capital and mostly granted as loans. However, in the current economic crisis, the application of such rules (which will be in any case partially reduced as of August 15, 2020 due to the partial amendment of Article 2467 of the Italian Civil Code, which eliminates the obligation to repay the reimbursement of loans occurred in the year prior to the company's declaration of bankruptcy) appear to be excessively discouraging in an economic context which requires more efforts from shareholders to fund companies.

The contingent nature of this new provision determines its limited application only to loans made by 31 December 2020.

e) Provisions on Creditors' Arrangements (Concordati Preventivi) and Debt Restructuring Agreements (Accordi di Ristrutturazione) (Art. 9):

(i) the deadlines for the fulfillment of conditions under Creditors' Arrangements and Debt Restructuring Agreements, already approved by Tribunals, which expire between 23 February 2020 and 30 June 2020 are extended of six months.

(ii) for pending procedures as at 23 February 2020 for approval by Tribunals of Creditors' Arrangements and Debt Restructuring Agreements, the debtor may submit, until the hearing date set for the approval, an application requesting the Tribunal a new deadline, not exceeding ninety days, to draft a new plan and a creditors' arrangement proposal pursuant to Article 161 of the Bankruptcy Law or a new debt restructuring agreement pursuant to Article 182 bis of the Bankruptcy Law. The new deadline shall commence from the date of the Tribunal order and cannot be extended. However, the application for a new deadline is not admissible if submitted in respect of a creditors' arrangement when the meeting of creditors has already

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taken place but no majorities have been reached pursuant to article 177 of the Bankruptcy Law.

(iii) for pending procedures as at 23 February 2020 for approval by Tribunals of Creditors' Arrangements and Debt Restructuring Agreements, if the debtor intends to amend only the deadline for the fulfillment of conditions of a creditors' arrangement or debt restructuring agreement, it can file, until the hearing date set for the approval, a request mentioning a new deadline and the documentation proving the necessity to amend the deadline (note: this is a simpler solution, consisting only of the amendment of the deadline for the fulfillment of the conditions originally provided in the proposal and agreement). The deferral of the deadline cannot exceed six months from the original date. In creditors' arrangement procedures, the Tribunal obtains the opinion of the judicial Commissioner (Commissario giudiziale). Once the Tribunal ascertains the existence of the requirements set out in articles 180 or 182 bis of the Bankruptcy Law, it approves the creditors' arrangement or debt restructuring agreement, expressly setting the new deadline.

(iv) for pending Creditors' Arrangement procedures, a debtor who has already obtained a new deadline by the Tribunal under article 161, paragraph 6, of the Bankruptcy Law (so-called "pre-arrangement"), may, within five days of the deadline, submit an application requesting a further extension of ninety days, even in cases where a petition for a declaration of bankruptcy has been filed. The application must indicate the reasons for the extension with specific reference to the circumstances arising from the epidemic emergency COVID-19. The Tribunal, having obtained the opinion of the judicial Commissioner, if appointed, grants the extension if it deems that the application is based on solid and justified grounds. The automatic stay rules pursuant to Article 161, paragraphs 7 and 8, of the Bankruptcy Law apply.

(v) for pending Debt Restructuring Agreement procedures, the same application referred to in the previous point (iv) (requesting a further extension of ninety days) may be filed by a debtor who has been already granted a new deadline under article 182 bis, paragraph 7, of the Bankruptcy Law. The Tribunal, after ascertaining the requirements under article 182 bis, paragraph 7, first sentence, grants the extension if it deems that the application is based on solid and justified reasons and the conditions for reaching a debt restructuring agreement with the majorities required by article 182 bis, paragraph 1 of the Bankruptcy Law continue to exist.

Such new provisions are necessary in order to protect creditors' arrangement and debt restructuring agreement procedures which had a chance of success before the outbreak of the epidemic crisis and in this particular phase could, however, be irreparably compromised with

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obvious negative repercussions on the preservation of Italian business structures relevant for the production and economic cycle.

Therefore, the above measures have been adopted in order to neutralize such negative scenario and ensure that alternative instruments to bankruptcy are made effective. In particular:

- the measure referred to in the above mentioned point (i) is a six-month extension of deadlines expiring in the period from 23 February to 30 June 2020, with obvious delay for the termination of creditors' arrangements pursuant to Article 186 of the Bankruptcy Law;
- the measure referred to in the above mentioned point (ii) allows a debtor to submit, until the hearing date set for the approval of a creditors' arrangement or debt restructuring agreement, an application for a new deadline in order to submit a new creditors' arrangement proposal or a new restructuring agreement, so that the debtor can take into account the overcoming economic factors as a result of the epidemic crisis. However, in case of a creditors' arrangements, debtors whose original proposal have already been submitted to the creditors' vote without reaching the necessary majorities are excluded from this provision. For such debtors, there remains the possibility for filing a new proposal, after the declaration of no admission pursuant to Article 179 of Bankruptcy Law, provided that a declaration of bankruptcy has not been yet issued (such scenario, however, is temporarily excluded by Article 10 of this Law Decree). The new deadline cannot exceed ninety days and, in order to avoid the technical time required to adopt the measure (made more complicated by the current emergency situation affecting Tribunals), it starts from the date of the court order. However, the new deadline cannot be further extended, given the exceptional nature of this measure;
- the measure referred to in the above mentioned point (iii), is simpler compared to scenario (ii) and consists in the mere possibility for the debtor to modify only the deadline originally provided in the proposal and debt restructuring agreement. The amendment is requested through an application mentioning a new deadline not exceeding six months from the original deadline, and attaching documents proving the necessity for the extension. The Tribunal may issue its approval for an extension subject to ascertaining the existence of the conditions set out in articles 180 or 182 bis of the Bankruptcy Law and the approval order will expressly set the new deadline;

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- the measures referred to in the above mentioned points (iv) and (v), allow a ninety day extension of the automatic stay referred to in articles 161, paragraph 6, and 182 bis, paragraph 7, of the Bankruptcy Law, which is made available to debtors whose original deadlines are expiring without the possibility of further extensions. The extension applies also in case of a petition for a declaration of bankruptcy, given the need to give as many chances as possible to support companies but it requires the submission of an application indicating the reasons for the necessity of the extension with specific reference to the events caused by the COVID-19 epidemic emergency. The Tribunal grants the extension subject to (a) the ascertainment of the existence of solid and justified reasons in case of creditors' arrangements (see art. 161, paragraph 6, of the Bankruptcy Law) and (b) the continued existence of the conditions for reaching a debt restructuring agreement with the majorities required in Article 182 bis, paragraph 1, of the Bankruptcy Law (see art. 182 bis, paragraph 7, Bankruptcy Law). As for the latter, in order to facilitate debt restructuring agreements, the cumbersome procedure provided by Article 182 bis, paragraph 7, first sentence, of the Bankruptcy Law does not apply.

As the above measures allow a mere extension of deadlines, the automatic stay rules, including paragraphs 7 and 8 of art. 161, expressly mentioned in the Law Decree, remain applicable.

f) Temporary provisions for applications for a declaration of bankruptcy or insolvency (Art. 10):

(i) all applications pursuant to Articles 15 and 195 of the Bankruptcy Law and Art. 3 of Law no. 270 of 8 July 1999, filed between 9 March 2020 and 30 June 2020, are not admissible:

(ii) the time limits terms pursuant to Article 69 bis of the Bankruptcy Law are suspended in the period from 9 March 2020 to 30 June 2020.

Such provisions introduce exceptional and temporary measures (with limited duration) and are intended, given the extraordinary nature of current social and economic circumstances, to avoid that procedures are compromised by factors unrelated to the actions of entrepreneurs and interested parties, whose complex application for ascertaining direct liabilities, would burden the functioning of the judicial offices which are already undermined by this ongoing emergency.

It is considered essential, for a limited period of time, to relieve companies from bankruptcy and insolvency procedures. This is for two reasons: on the one hand, to avoid that entrepreneurs be pressured by bankruptcy petitions from third parties and be put in a position to choose to file

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themselves bankruptcy petitions in circumstances where the insolvency may derive from external and extraordinary factors, with the risk of losing production assets with no advantages for creditors given that the liquidation of assets would take place in a highly unsettled market; on the other hand, to block a probable increasing number of petitions in a situation where judicial offices are functioning already with great difficulty.

Therefore this general provision does not allow petitions involving companies which, given their dimensions, cannot be subjected to the extraordinary administration procedure of large companies, but maintaining the interruption for a limited period after which the applications for declaration of bankruptcy or insolvency may be filed again.

This blocking measure extends to all types of requests, including applications filed directly by entrepreneurs in order to allow them more time to evaluate the possibility of finding alternative solutions for the business crisis, without being exposed to civil and criminal consequences related to insolvency, which, in any case, would be mostly attributable to external factors.

In order to avoid that this blocking measure could negatively affect the protection of creditors, the second paragraph of the provision provides for a suspension of time limits for the purpose of calculating the terms provided by Article 69 bis of the Bankruptcy Law to start claw-back actions.

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