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## COVID-19: Main amendments made by the conversion law to the liquidity decree with respect to the measures aimed at ensuring the going concern of companies

### 1. Introduction

Pursuant to **Law no. 40 of 5 June 2020**, published in the **Official Gazette no. 143 of 6 June 2020** (the “**Conversion Law**”), Law Decree no. 23 of 8 April 2020 (the “**Liquidity Decree**”) was converted into law with amendments.

Below is a summary of the key amendments made to Chapter II (*Urgent Provisions to Ensure Going Concern*) by the Conversion Law.

### 2. Six months postponement of the deadlines to comply with crisis settlement agreements (*accordi di composizione della crisi*) and approved consumer plans (*piani del consumatore omologati*). Submission of a recovery plan pursuant to Art. 67, paragraph 3, letter d) of the Bankruptcy Law following the filing of a pre-composition with creditors (“*concordato in bianco*”) pursuant to Art. 161, paragraph 6 of the Bankruptcy Law.

Article 9 of the Liquidity Decree provided, *inter alia*, for the extension by six months of the deadlines for the fulfilment of composition agreements with creditors (*concordato preventivo*) and debt restructuring agreements (*accordi di ristrutturazione*), which expire between 23 February 2020 and 31 December 2021. The Conversion Law correctly **provides for the application of this extension also to crisis settlement agreements (*accordi di composizione della crisi*) and approved consumer plans (*piani del consumatore omologati*)**, which had not been included in the Liquidity Decree. In addition, the time reference to 31 December 2021 as the last date by which extended deadlines were to expire has been eliminated; therefore, the extension can now be requested with reference to all agreements expiring after 23 February 2020.

Moreover, the most interesting measures with respect to debt restructuring were added to the same Article 9, under paragraphs 5-*bis* and 5-*ter*. In particular:

- 1) Paragraph 5-*bis* provides for the possibility for the debtor - which, by no later than 31 December 2021, has been admitted to the pre-composition proceeding pursuant to Art. 161, paragraph 6, or Art. 182-bis, paragraph 7 of the Bankruptcy Law - to waive the proceedings, by submitting a statement confirming that it has drafted and published in the Commercial Register a recovery plan pursuant to Art. 67, paragraph 3, letter d) of the Bankruptcy Law, by filing the documentation relating to such publication;
- 2) Paragraph 5-*ter* provides that filings pursuant to Art. 161, paragraph 6 of the Bankruptcy Law, which have been made on or before 31 December 2020, are not subject to article 161, paragraph 10 of the Bankruptcy Law, which provides that, in the event of pending proceedings for the declaration of bankruptcy, the deadline for filing the composition plan in the context of a pre-composition procedure (*concordato in bianco*) may not exceed 60 days, which may be further extended for 60 days.

The first measure allows debtors to implement a certified recovery plan (*piano di risanamento attestato*), following (i) the filing for a pre-composition agreement pursuant to Art. 161, paragraph 6, or (ii) the filing for a pre-restructuring agreement pursuant to Art. 182-bis, paragraph 7 of the Bankruptcy Law, provided that the certified recovery plan is published in the competent Company's Register. Such a measure may be useful in cases where the debtor wishes to:

- 1) obtain the suspension of the obligation to recapitalize the company, pursuant to 182-sexies of the Bankruptcy Law, which allows a company not to adopt the remedies provided pursuant to art. 2447 / 2482-ter of the ICC, even in the event that the relevant conditions are met;
- 2) obtain the suspension of enforcement and precautionary actions; and
- 3) impose a stricter timeframe for the negotiation of the agreement to implement a recovery plan pursuant to Art. 67, by avoiding that negotiations are stretched beyond the deadlines granted by the Court.

On the other hand, the second measure is intended to extend – in light of the current crisis, which makes it more complex to draft a composition plan and/or to enter into an agreement - the deadlines for filing a proposal for a composition agreement with creditors (and the additional documentation pursuant to Art. 161, paragraph 2 of the Bankruptcy Law) or a debt restructuring agreement, in the context of pre-composition procedures, even in cases where an application for bankruptcy is pending. The ordinary deadline provided for under paragraph 6 (120 days, further extendable by 60 days) will therefore apply also in the latter cases.

### 3. Exceptions to the temporary inadmissibility of filings for bankruptcy and insolvency

Article 10 of the Liquidity Decree provided for the **inadmissibility** of filings for the:

- **declaration of bankruptcy**, pursuant to Art. 15 of the Bankruptcy Law;
- declaration of insolvency (*dichiarazione dello stato di insolvenza*) prior to **administrative compulsory liquidation** pursuant to Art. 195 Bankruptcy Law;
- declaration of insolvency (*dichiarazione dello stato di insolvenza*) prior to **extraordinary administration** under Legislative Decree no. 270/1999,

which have been made between 9 March 2020 and 30 June 2020.

The Liquidity Decree also provided that such a provision does not apply when the Public Prosecutor files the request to adopt precautionary and conservative measures under article 15, paragraph 8 of the Bankruptcy Law.

The Conversion Law provides for other three events of not-applicability of the rule on the inadmissibility. The first case occurs when the **appeal is filed by the entrepreneur on his own, when the insolvency is not a consequence of the COVID-19 epidemic**. Consequently, bankruptcy proceedings brought by the entrepreneur are always admissible, provided that the insolvency is caused by different facts and circumstances prior to the outbreak of the COVID-19 pandemic. Hence the obligation for the entrepreneur to file for bankruptcy proceedings when the insolvency dates back and is not linked to the extraordinary situation created by the spread of the pandemic

The second case of exclusion of inadmissibility occurs when the bankruptcy petition is filed by any person pursuant to Art. 162, paragraph 2, Art. 173, paragraphs 2 and 3, and Art. 180, paragraph 7 of the Bankruptcy Law. Hence, respectively, the admissibility of bankruptcy petitions filed by the Public Prosecutor or by the creditors, as a result of:

- a) the inadmissibility of the proposal for a composition agreement with creditors;

- b) revocation of the proposal for a composition agreement with creditors;
- c) failure to approve the composition agreement with creditors.

The third case of exclusion of inadmissibility concerns the request of the Public Prosecutor pursuant to Art. 7, paragraph 1) of the Bankruptcy Law, *i.e.* when the insolvency results from criminal proceedings against the entrepreneur, when the latter has escaped, is unavailable or is missing (*fuga, irreperibilità o latitanza*), as well as from the closure of the company's premises or from the stealing, replacement or fraudulent reduction of assets by the entrepreneur.

Lastly, the Conversion Law specifies that – in the events that the declaration of inadmissibility of appeals is followed by the declaration of bankruptcy **by 30 September 2020** - the period of inadmissibility is not counted – not only for the purposes of Art. 10 and Art. 69-*bis* of the Bankruptcy Law, as already provided for by the Liquidity Decree – but also for the events of actions brought pursuant to (i) Art. 64 of the Bankruptcy Law (with respect to the ineffectiveness of free-of-charge acts performed in the two years prior to the declaration of bankruptcy), (ii) Art. 65 of the Bankruptcy Law (with respect to the ineffectiveness in the two years prior to the declaration of bankruptcy of payments of claims falling due on or after the day of the declaration of bankruptcy), (iii) Art. 67, paragraphs 1 and 2 of the Bankruptcy Law (debt-claims revocation (*revocatoria degli atti a titolo oneroso*)), and (iv) Art. 147 of the Bankruptcy Law (with respect to the bankruptcy of companies with unlimitedly liable shareholders (*soci a responsabilità illimitata*)).

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