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Covid-19 as a force majeure event and effects on pending restructuring procedures

Introduction

Covid-19 is a force majeure event, meaning an extraordinary, unexpected and unforeseeable event, which is certainly not attributable to the voluntary conduct of an entrepreneur who is currently undergoing a restructuring or insolvency procedure and now faced with the Covid-19 crisis.

The entire economy, not only in Italy, is facing a negative economic impact, sometimes coupled with pre-existing financial distress which, in certain cases, has already been addressed through one of the restructuring procedures provided under R.D no. 257/1942 (the “**Bankruptcy Law**”).

Set out below are guidelines for companies in financial distress (or already placed under restructuring or insolvency procedures) (the “**Company**”) to manage and overcome this crisis.

STEPS TO BE ADOPTED BY THE COMPANY	
Is the pandemic Covid-19 cause or occasion of the crisis?	<p>First, the Company should verify whether the Covid-19 pandemic, also in light of its business activity and the restrictions introduced by the Government, represents the cause or reason of a crisis or a deviation of the final recovery plan with the prognostic plan established when the restructuring operation was approved.</p> <p>In other words, the Company should analyse whether, in the absence of the force majeure event, it would have found itself in a crisis or, depending on the circumstances, have complied with its recovery plan.</p>
Does the company meet the subjective and objective requirements to access the benefits introduced by the recent legislation to tackle the Covid-19 pandemic?	<p>Second, the Company must check whether it can, based on the applicable objective and subjective conditions, benefit from the support measures that the Government is adopting.</p> <p>Law Decree no. 18 of 17 March 2020 introduced, among others, measures to support:</p> <ul style="list-style-type: none"> • employee’s income by budgeting about EUR 10 billion public spending, mostly dedicated to social shock absorbers, such as <i>Cassa Integrazione Guadagni</i> also extraordinary, the <i>Fondo Integrazione Salariale</i>, and contributions and vouchers also for self-employed workers; • the credit system, to enable banks and financial institutions to meet the demands of companies and to provide, <i>inter alia</i>, for (i) a moratorium on the withdrawal of credit lines or advances on invoices on the amounts granted until 30 September 2020; (ii) the extension of the maturity of non- instalment loans; and (iii) the suspension of any instalments and fees for loans until 30 September 2020; • liquidity of companies, by granting tax payment and other non-tax related deferrals to legal and physical persons located throughout the national territory.

Adoption of an action plan	<p>Third, the Company should immediately adopt an action plan and it is appropriate that its directors constantly monitor the Company's performance and record in the company's books the actions taken to safeguard the company's value and protect it against claims from creditors.</p> <p>In particular, the Company's directors should:</p> <ul style="list-style-type: none"> • identify any internal and external causes that may lead to a relevant reduction of the share capital pursuant to Article 2447 of the Italian Civil Code or Article 2482-ter of the Italian Civil Code; • quantify the aggregate value of the company's debt; • manage the Company's business substantially in ordinary course, in accordance with the corporate purpose and on a going concern basis, to preserve the value of its assets and increase the possibility of recovery of its creditors; • identify and describe the remedies that can be adopted by the Company to address and resolve the current crisis situation; • analyze and evaluate the Company's expected cash flow perspectives until 30 September 2020 or, at least, 30 June 2020; • prepare an updated economic, asset and financial situation; • map and monitor creditors according to their ranking (privileged or unsecured) and to the guarantees issued by the Company and/or third parties in favor of these creditors; • identify the Company's debt exposure to the tax authorities and/or social security institutions; • avoid any transactions (i) with third parties which are of an extraordinary nature and involve new obligations which differ from those existing when the crisis began or (ii) with group companies and related parties, , also to avoid possible liabilities); • assess whether it is recommendable to continue and/or complete ongoing orders, with a view to preserve value for the Company, also to achieve an inventory size that does not affect the going concern; • identify which restructuring and insolvency procedures may reasonably be considered as the most appropriate one to recover from the crisis; • postpone the decision to activate a restructuring or insolvency procedure as soon as the current emergency is over.
Is there an effective need to adopt a restructuring procedure under the Bankruptcy Law?	<p>Fourth, the Company should analyse whether, due to or coupled with the effects of the pandemic, it has a financial deficit or capital deficit. In the latter case, the Company should promptly adopt the remedies required by law in case of negative equity and erosion of share capital, and verify if the accrual of losses that may further erode the creditors' assets can be stopped, if necessary by applying for insolvency proceedings.</p>

What is the most suitable restructuring procedure under the Bankruptcy Law?	<p>The Company should make a forecast on the basis of a cram-down scenario.</p> <p>Any choice and any initiative must compare the current situation of the Company against the alternative bankruptcy scenario in the current Covid-19 pandemic context, to verify if it is in the creditors' interest to continue a restructuring process rather than applying for a different and more incisive insolvency procedure, or apply for bankruptcy.</p>
COMPANY'S CONDITION	
How should the above steps be declined?	The declination of the steps set out above will vary according to the restructuring "state" of the Company.
What about restructuring processes in their early stages of implementation?	<p>The Company should review the current state of business and its perspectives, to analyse if there is a possibility of recovery which can serve as a basis for the restructuring.</p> <p>It is certainly recommended to adopt government support measures aimed at "dragging" the Company beyond the pandemic period, such the moratorium for repayment of bank debts, tax payment deferrals and the possibility to access extraordinary social shock absorbers, in order to identify the most appropriate restructuring procedure to overcome the business crisis.</p>
What about restructuring processes already defined in substance but not yet certified?	The Company may decide to postpone the issuance of the certification, but should consider that it will be difficult to meet the plan's objectives in the current year, which, however, may be confirmed or achieved in the following years. At this stage, however, as long as the situation is not yet stabilized, it is difficult to contemplate a specific certification sensitivity aimed at considering the development of the economic situation.
What about certified restructuring processes that are still pending?	<p>Except for an amicable composition with creditors (<i>concordato preventivo</i>) where this is already provided by law, the Company should ask and obtain from its main creditors a <i>pactum de non petendo</i> (i.e. moratorium on bankruptcy filings) to allow it a "breathing space" until fall 2020, when the health emergency will hopefully be resolved.</p> <p>In this case, once the stay granted by the creditors has expired, it can be verified if the restructuring plan is, in substance, confirmed, perhaps with certain non-substantial corrective measures, or if structural measures in support of the Company are necessary.</p>
What if the composition agreement with creditors has already been filed but not yet voted and approved?	In this case, it is reasonable to assume that the Company must change its business plan and the repayment plan before the creditors cast their vote.
What if the composition agreement with creditors plan has already been approved, but has not yet been fully executed?	When it is back <i>in bonis</i> , the Company will be able to benefit from the measures recently introduced by the Government, to overcome the crisis. Afterwards, it will, however, be necessary to verify if the Company is still able to perform its payment obligations, according to the terms of the approved composition agreement, or if a more incisive intervention is necessary, perhaps through a new restructuring procedure.

PROPOSED AMENDMENTS	
Conclusions	Given the exceptional nature of the current situation, which cannot be remedied through "ordinary" crisis measures and restructurings, it is essential to manage the crisis by effectively considering the interest of all the involved parties. The Italian legislator should also intervene, on the following aspects:
First proposed amendment: evaluation of temporary support measures	(i) Introduce temporary support measures, such as suspension of bank loans, also for companies other than SMEs. The recently adopted lockdown measures have, in fact, stopped revenue flows for many companies, which therefore suffer unjustified unequal treatment. Moreover, as Article 56, paragraph 1, of Law Decree no. 18 of 17 March 2020 provides that the pandemic is an event of force majeure, this event applies equally to companies of all dimensions.
Second proposed amendment: adoption of key decisions in line with foreign experience	(ii) Adopt, like in Germany and Spain, certain key decisions such as (i) suspend the rules on recapitalization obligations; (ii) postpone the entry into force of the so called "Code on the Company's Crisis"; (iii) reintroduce the "silence assent" in the composition with creditors; and (iv) eliminate the 20 % eligibility threshold in the liquidated composition with creditors.
Otherwise?	If no such measures are adopted, and considering the capital structure of many companies in crisis, the most likely development will be the extreme, not to say dramatic, exponential increase of self-declared bankruptcy filings, which would certainly not be desirable.

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