

14 April 2020

Liquidity Decree - Restructuring Support Measures

1. Introduction

The Italian Government has adopted Law Decree no. 23 of 8 April 2020¹ (the "**Liquidity Decree**"), which provides for additional measures to support companies in the current COVID-19 emergency.

The Liquidity Decree has four main goals:

- to strengthen liquidity for businesses;
- to provide for tax measures;
- to strengthen the Government's special power in areas of strategic importance and avoid "predatory purchases"; and
- to ensure business continuity in going concern during this emergency period.

Set out below is a summary of the key measures introduced in Chapter II (*Urgent measures to ensure the going concern of companies*) of the Liquidity Decree.

2. Postponement of the entry into force of the Consolidated Insolvency Code pursuant to Legislative Decree no. 14 of January 12, 2019

Art. 5 of the Liquidity Decree postpones the entry into force of the so-called Consolidated Insolvency Code (Legislative Decree no. 14 of 12 January 2019, implementing Law no. 155 of 19 October 2017, abbreviated "**CIC**") until **1 September 2021**.

The postponement of the entry into force of the CIC was requested by several parties for various reasons. First of all, the **early warning measures** and related reporting obligations set out in articles 14 and 15 of the CIC are postponed until **1 September 2021** (as opposed to 15 February 2021, which was provided under article 11 of the Law Decree no. 9 of 2 March 2020). In fact, the crisis factors, early warning alerts and related reporting obligations introduced under the CIC are aimed at detecting a crisis at an early stage. However, when the crisis situation involves the entire economy, these provisions are likely to affect companies, which, under normal circumstances and without the economic and financial consequences resulting from the pandemic, would be considered in good financial health.

More generally, the postponement of the entry into force of the CIC will prevent the new rules from being applied for the first time in a period when the procedures provided under the CIC are likely to be applied to a very large number of companies. **Companies and operators will therefore be able to continue to rely, in this emergency phase, on a set of procedures and rules for which there is a consolidated practice.** This avoids uncertainty related to the use of new legal procedures, especially at times when these procedures must be implemented fast and smoothly.

Finally, the postponement of the entry into force is appropriate to **align the CIC with the upcoming implementing legislation of the EU Directive 1023/2019.**

¹ Published in the Official Journal of the Italian Republic no. 94 of 8 April 2020

3. Temporary freeze on recapitalization and liquidation duties

Art. 6 of the Liquidity Decree provides that, during any financial years ending on or before 31 December 2020, companies are **not obliged to reduce and/or increase the share capital as required by the Italian civil code** (articles 2446, 2447 and 2482 *bis* of the Italian civil code) in the event of losses which (i) reduce the company's share capital by more than one third or (ii) cause the share capital to fall below the minimum capital required by law.

During the same period, the causes of dissolution (*cause di scioglimento*) under article 2484, first paragraph, no. 4 and 2585 *duodecies* of the Italian civil code **do not apply**. Therefore, companies are not obliged to vote on their voluntary liquidation (*liquidazione*).

This measure aims to **avoid that**, due to the probable losses caused by the pandemic and the lockdown of production activities, **directors are obliged to ask the company to be put into liquidation (*liquidazione*)**.

It is indeed predictable that the sudden drop in revenues which many companies will experience in 2020 may lead to significant losses, which may trigger the undercapitalization thresholds for which the Italian civil code requires measures to be taken by promptly reducing and, if necessary, increasing, the share capital, or to ask for liquidation (*liquidazione*). The new rule suspends the liquidation (*liquidazione*) duty, which may in many cases have been the only possible alternative.

As a result, **the directors are, therefore, allowed to continue to manage the company notwithstanding significant losses**, without being exposed to liability for not having managed the company for the sole purpose of preserving the value of its assets, as is normally required under article 2486 of the Italian civil code.

This rule applies if the circumstances occur during the financial years ending on or before 31 December 2020. Therefore, it applies also to any losses caused by the write down or depreciation of assets (*svalutazioni*) because of the COVID-19 pandemic, reported in the financial statements for any previous years, to the extent they have not been approved on the date when the Liquidity Decree was issued.

That said, the obligations to promptly call a shareholders' meetings and inform the shareholders in relation to the any undercapitalization, in accordance with article 2446, first paragraph, of the Italian civil code, which applies to joint stock companies (S.p.A.s), has **not** been suspended.

4. Going concern in the preparation of financial statements

Under art. 7 of the Liquidity Decree, **the value of any items included in the current financial statements and in the financial statements closed before 23 February 2020 but not yet approved, can be reported on a going concern basis** according to article 2423 *bis*, first paragraph, no. 1 of the Italian civil code, as long as the going concern condition existed in the latest financial statements closed before 23 February 2020.

The valuation criteria **must be specifically illustrated in the notes** (*nota informativa*) to the financial statements, also through a year-to-year comparison. The directors should therefore provide for an explanation, for information purposes, about the uncertainties surrounding the going concern, even though they continue to adopt a going concern valuation.

This rule is consistent with the rules described above on the temporary freeze of recapitalization obligations. In fact, (i) it avoids that financial statements are drafted adopting a liquidation criterion, in cases where, due to the effects of the spread of the COVID-19 epidemics, the going concern cannot be properly assessed under the normally applicable accounting principles; and (ii) it therefore allows companies whose outlook in the coming 12 months is highly uncertain due to the COVID-19 pandemic, to continue to apply the going concern principle.

The rule applies only if, in the latest financial statements closed before 23 February 2020, the going concern could be ascertained by applying ordinary accounting principles. However, the rule also applies to financial statements closed but not yet approved on 23 February 2020. As a result, if the going concern was ascertained in the financial statements relating to the previous financial years, the current financial statements can be lawfully approved on a going concern basis regardless of the fact that the going concern has become uncertain due to the effects of the COVID-19 epidemics².

5. Temporary freeze of the subordination of shareholder loans and intercompany loans

Art. 8 of the Liquidity Decree provides for the **non-applicability of the subordination of shareholders loans and intra-group loans**, provided under articles 2467 and 2497 *quinquies* of the Italian Civil Code, with reference to loans made until 31 December 2020.

Articles 2467 and 2497 *quinquies* of the Italian Civil Code are aimed at discouraging the so called under-capitalization of companies. These articles provide that, in the event loans are granted by the shareholders and/or by other group companies under centralized “management coordination activity”, the repayment of such loans is subordinated to the repayment of the other creditors if the beneficiary of the loan was in a financially unbalanced situation and/or would have reasonably required an equity injection.

This rule therefore allows these entities, which are likely to be the most immediate funding entities, to make loans to the company without being exposed to the subordination risk on such a loan. It is clearly a rule aimed at promoting such forms of financings in the current emergency phase.

6. Composition agreements with creditors (*concordato preventivo*) and restructuring agreements: extension of performance deadlines, possibility of submission of new plan and new proposal, possibility of unilaterally amending performance deadlines, extension of automatic stay

With regard to composition agreements with creditors and restructuring agreements, art. 9 of the Liquidity Decree provides for:

1. **Six months deferral for the performance** of any composition agreement with creditors and approved (*omologati*) restructuring agreements, which expire between 23 February 2020 and 31 December 2021;
2. In any proceedings for the approval of the composition agreement with creditors or restructuring agreements already **pending** on **23 February 2020**, the debtor may ask the Court to obtain an additional term of up to ninety days for the filing of a **new plan and a new proposal for a composition with creditors**;
3. Possibility to **modify the deadline for the implementation** of the composition agreement with creditors or the restructuring agreements, until the hearing for the approval (*omologa*);
4. Possibility to obtain an **extension of up to 90 days**:
 - in the event that a term has been granted under article 161, paragraph 6, of the Italian Bankruptcy Law and already extended by the Court, and also in the event that an application for bankruptcy has been filed;
 - in the event that a term has been granted under article 182 bis, seventh paragraph, of the Italian

² The above is without prejudice to article 106 of the Law Decree no. 18 of March 17, 2020, which allows all the companies to, *inter alia*, convene the shareholders' meeting for the approval of the financial statements within the longer term of 180 from the relevant reference date.

Bankruptcy Law.

The first of the above measures **automatically extends the deadlines for complying with obligations under the composition with creditors plan and/or restructuring agreement by six months**. This is to avoid a negative impact (with possible exponential effects of the preservation of complex businesses of significant size) on any composition agreements with creditors and restructuring agreements which have already been approved (*omologati*) and therefore having an actual chance of success before the COVID-19 pandemic,

The second measure allows the debtor to submit, until the date of the hearing for the approval (*omologa*) of the composition agreement with creditors and the restructuring agreements, **a request for an extension of up to 90 days for the submission of a new proposal for a composition with creditors or a new restructuring agreement**, to take into account the economic effects arising from the crisis.

For composition agreements with creditors (*concordato preventivo*), this possibility is excluded for debtors whose original proposal was already submitted to the creditors' vote and has been rejected.

The extension can be granted for maximum ninety days, starts running from the date of the Court's decision and cannot be extended further, given the exceptional nature of the measure.

The third measure (*i.e.* modification of the deadlines for the implementation) allows the debtor to **unilaterally modify the original deadlines for the implementation of the** composition agreement with creditors and restructuring agreement.

The application must be submitted together with a statement indicating the new deadlines, which can extend the original ones by maximum six months, coupled with the necessary documentation proving the need to amend the deadline.

In the procedure to approve the composition agreement with creditors, the Court also acquires the opinion of the Judicial Commissioner.

In the event of such unilateral amendment, the Court proceeds with the approval subject to verification of the continued existence of the conditions set out in articles 180 or 182 *bis* of the Italian Bankruptcy Law, expressly acknowledging the new deadlines set out in the approval decree (*decreto di omologa*).

The fourth measure allows to ask an **extension** of up to ninety days of the **automatic stay** period provided for the so-called pre-composition with creditors (*preconcordato*) and the proposal of restructuring agreement, regulated respectively under article 161, paragraph six, and article 182 *bis*, paragraph seven, of the Italian Bankruptcy Law. It also applies to debtors who have already been granted the same terms and these terms are expiring without the possibility of further extensions.

The extension of the automatic stay does not apply to proceedings under article 161, paragraph 6 and article 182 *bis*, paragraph 6 of the Italian Bankruptcy Law, which were already pending when the Liquidity Decree entered into force.

The extension also applies in the event that, pending the relevant proceedings, a third party has filed a request for insolvency.

For composition agreements with creditors (*concordato preventivo*), the application for the extension of the automatic-stay period must be submitted before the expiry of the deadline under article 161, paragraph six, of the Italian Bankruptcy Law and must indicate the reasons that justify the extension request with specific reference to the events caused by the epidemiological emergency COVID-19.

The Court, in granting the extension, acquires the opinion of the Judicial Commissioner, if appointed, and assesses whether there are actual and justified reasons.

In the event of proposals of restructuring agreements, the Court grants the extension subject to verification

of:

- the existence of actual and justified reasons for the extension, and
- the existence of actual chances of concluding a debt restructuring agreement with creditors representing the majority quorum under article 182 *bis*, first paragraph, of the Italian Bankruptcy Law.

To obtain such an extension there is no need to repeat the procedure referred to in the first sentence of the seventh paragraph of article 182 *bis* of the Italian Bankruptcy Law.

Since this is a mere extension of the original deadline, all the other rules that apply during the automatic-stay, including article 161, paragraphs 7 and 8, expressly referred to, will continue to apply.

7. Temporary inadmissibility of filings for bankruptcy and insolvency

Art.10 of the Liquidity Decree provides for the **inadmissibility** of any filings:

1. for **bankruptcy** under article 15 of Italian Bankruptcy Law;
2. for insolvency (*dichiarazione dello stato di insolvenza*) before the administrative **compulsory liquidation** under article 195 of the Italian Bankruptcy Law;
3. for the declaration of insolvency (*dichiarazione dello stato di insolvenza*) prior to **extraordinary administration** under Legislative Decree No. 270/1999,

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

The introduction of this extraordinary rule is justified by the fact that, in the current macroeconomic scenario, insolvency may derive from external and extraordinary factors.

The rule refers to the "**inadmissibility**" (*improcedibilità*) **without clarifying whether the proceedings** started after 9 March and still pending on the date of entry into force of the rule **are** only **suspended** until the end of 30 June 2020, or whether they should be declared extinct.

Any bankruptcy requests or compulsory administrative liquidation and extraordinary administration proceedings filed between the entry into force of the Liquidity Decree and 30 June 2020, are, without any doubt, completely inadmissible.

The above rule **does not apply when the Public Prosecutor files the request** and when it contains the request to adopt the precautionary and conservative measures under article 15, paragraph 8, of the Italian Bankruptcy Law.

Nothing is provided in relation to individual enforcement proceedings, precautionary measures and monitoring proceedings, which - in the absence of specific provisions - may be initiated or continued.

The rule further provides for the **suspension** of the terms referred to in **articles 10 and 69 *bis*** of the Italian Bankruptcy Law.

This measure was introduced to avoid that the lock-down irreversibly precludes (due to expiry of the relevant time limit) any filings against the debtors after their cancellation from the Company's Register or any filing of claw back actions. The second paragraph of the rule provides for the sterilization of the suspension period:

1. to determine the one-year term from the date of cancellation of the debtor from the Company's Register for bankruptcy filings, and
2. to determine the terms under article 69 *bis* of the Italian Bankruptcy Law for bringing claw back actions.

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