The new face of bankruptcy law: the proposed guidelines

Contents

1. Introduction

On 11 October 2017, the Senate of the Republic definitively approved Draft Law no. 2681 concerning "Delegation to the Government for the reform of the regulations governing corporate crisis and insolvency" ("**DDL**"). This draft law had already been approved at first reading by the Chamber of Deputies on 1 February 2017 and incorporates the results of the work of the Rordorf Commission.

Within 12 months, the Government must enact one or more legislative decrees that will completely rewrite Italian bankruptcy law, as well as amending Law no. 3 of 27 January 2012 on the settlement of the over-indebtedness crises and the code on priorities and guarantees.

The DDL consists of 16 articles, divided into 3 Chapters: Chapter I (Articles 1-2) contains general provisions, Chapter II (Articles 3-15) sets out guiding principles and criteria for the reform of crisis and insolvency procedures and Chapter III (Article 16) sets out the financial provisions.

Here we focus on the main innovations which have particular relevance for companies and professionals, under the "alternative to bankruptcy" procedures (which will be called "*judicial liquidation*"), and in particular: (i) article 3 of the DDL, in relation to principles and guidelines for the regulation of crisis in group companies; (ii) article 4 of the DDL, which provides for the introduction of a pre-emptive alert phase aimed at anticipating the emergence of the crisis; (iii) articles 5 and 6 of the DDL, concerning, respectively, the incentivisation of out-of-court settlements of the crisis and the reform of the arrangement with creditors procedure.

2. Group companies

In relation to group companies, the DDL main guidelines (article 3) will introduce:

a. a (much needed) definition of group companies, modelled on the concept of management and coordination referred to in articles 2497 et seq. and article 2545-septies of the Italian Civil Code ("**ICC**"), accompanied by a simple presumption of being subject to management and coordination in the presence of a controlling relationship under article 2359 ICC;

b. an express option for group companies to make a single application for the approval of a single debt restructuring agreement or for admission to the arrangement with creditors, without prejudice in any case to the autonomy of their respective assets and liabilities (set out in Cass. 13 October 2015, no. 20559) and, in the arrangement with creditors, the simultaneous and separate vote of the creditors each company in the group;

c. the principle of deferment of repayment of credits of companies or undertakings belonging to the same group, where the conditions set out in article 2467 ICC are met, subject to exceptions aimed at favouring the granting of loans on the basis of or in carrying out of an arrangement with creditors and a debt restructuring agreement;

d. again with reference to the arrangement with creditors, the potential cancellation or termination of the approved single group proposal, with the hope that those companies of the group that comply with the agreed plan do not deteriorate into judicial liquidation.

3. Warning procedures and assisted crisis resolution

In order to encourage the bringing of the economic crisis out into the open at an early stage, as well as assisting the negotiations between debtor and creditor, article 4 of the DDL provides:

a. for the introduction of out-of-court alert and crisis resolution procedures, by establishing, at each Chamber of Commerce, Industry, Crafts and Agriculture, a special panel to assist the debtor in resolving the crisis, composed of three professional experts, one appointed by the Chamber of Commerce, one by the President of the Business Court and one by the relevant trade association;

b. for the bringing forward of the emergence of an insolvency situation (including where insolvency is likely) for it to be "treated" and "resolved" in an appropriate manner, thereby facilitating the negotiations between the debtor and creditors;

c. for access to the relevant procedure for each category of debtor, whether a natural or legal person, collective body, consumer, professional or entrepreneur engaged in a commercial, agricultural or craft activity, but excluding public bodies, listed companies or companies regulated in other markets and large companies, as defined in European Union legislation;

d. that the procedure can last for up to six months;

e. that, in the event of a positive outcome, the panel of the Chamber of Commerce must certify that the entrepreneur has put measures in place to overcome the crisis;

f. that, in the event of a negative outcome or failure to identify suitable measures to overcome the crisis, the panel set up at the Chamber of Commerce must certify the state of insolvency and inform the public prosecutor's office at the court of the place where the debtor has its registered office so that it can establish the state of insolvency at an early stage;

g. that company supervisory bodies, the auditor and the auditing firms, each within their own functions, have a duty to immediately notify the company's administrative body of the existence of well-founded indications of the crisis and, in the event of failure or inadequate response from the company's administrative body, to promptly inform the panel set up by the Chamber of Commerce;

h. for the need for particular public creditors, including the Italian Tax Authority, the social security agencies and debt collection agents, to immediately notify the debtor that the exposure has exceeded the relevant amount, with consequent notification of the company's supervisory bodies and, in any case, the panel of the debtor's continuing default for a significant amount;

i. the application of benefits in relation to assets and personal liability of the entrepreneur who promptly submits an application for an assisted resolution of the crisis or applies for approval of a restructuring agreement or proposes an arrangement or an application for the commencement of judicial liquidation, as well as for the supervising body which acts promptly.

4. Debt restructuring agreements and certified recovery plans

Art. 5 of the DDL provides incentives for the use of restructuring agreements and moratorium agreements, and defines the essential features of the certified recovery plans, laying down the following provisions:

a. with reference to the agreements for the restructuring of debts and moratorium agreements for a situation of business continuity, the provisions of article 182-septies Bankruptcy Law are extended to the minority of creditors, including those other than banks or financial intermediaries, who are not parties to the restructuring agreement or moratorium agreement, provided that at least 75% of the debts of one or more legally and economically homogeneous categories of creditors have joined the agreement or moratorium;

b. the limit of 60% of the credits provided for in the current article 182-bis of the Bankruptcy Law is removed or reduced if debtor does not propose a moratorium on the payment of non-adhering creditors and does not apply for the protective measures provided for in paragraph 6 of that article;

c. the rules governing protective measures for the arrangement procedure and the effects on shareholders with unlimited liability is extended to debt restructuring agreements;

d. the certified recovery plan must be in writing, have a precise date and set out the plan in detail;

e. the authorisations, in the event of subsequent minor changes, issued in relation to a recovery plan or restructuring agreement can be renewed.

5. Arrangement with creditors procedure

In relation to the arrangement with creditors procedure, DDL (article 6):

This document is delivered for informative purposes only.

It does not constitute a reference for agreements and/or commitments of any nature.

For any further clarification or research please contact:

Antonio Auricchio
Tel. +39 06 478751
aauricchio@gop.it

Gabriella Covino
Tel. +39 06 478751
gcovino@gop.it

Paolo Gnignati
Tel. +39 049 6994411
pgnignati@gop.it

Luca Jeantet
Tel. +39 011 5660277
ljeantet@gop.it

a. in the liquidators' agreements, eligibility is conditional on the contribution of "*external resources that significantly increase the satisfaction of creditors*", further confirmation of the legislative "dislike" of this type of arrangement, which will still have to ensure the payment of at least 20% of unsecured claims;

b. introduces ways available to the "interested parties" to mitigate or even revoke the protective measures inherent to the agreed method; in this sense, it can be assumed that the revision of the rules on protective measures could lead to the introduction of remedies for creditors in order to request the shortening of the time limit under article 161, sixth paragraph, of the Bankruptcy Law;

c. sets out the cases in which the division of creditors into classes is compulsory (for example, for cases of preferential creditors, the so-called partially unsatisfied secured creditors ("*creditori privilegiati incapienti degradati al chirografo*") downgraded to unsecured under article 160, second paragraph, Bankruptcy Law), given that this obligation must be provided for with reference to creditors assisted by external guarantees; in this regard, the DDL therefore seems to want to follow the case-law and authorities, which until now have been in a minority, which advocates the compulsory formation of classes in specific cases;

d. introduces procedures for ascertaining both the truthfulness of the company data and the feasibility of the agreed plan; in this latter respect, the DDL gives the Court of First Instance powers to verify the economic feasibility of the plan, an aspect which has so far been completely outside the scope of the Court's review (at least after Cass. Sez. Un. 23 January 2013, no. 1521) and reserved exclusively to creditors;

e. provides for, with specific reference to an arrangement for business continuity, a moratorium on the payment of preferential, secured or mortgaged creditors for a period of time of even more than one year, in which case creditors are given the right to vote;

f. regulates institutions that have not yet been fully regulated, with particular reference to the implementation phase of the arrangement (in practice governed by the authorisation orders), as well as the revocation, termination and cancellation of the arrangement;

g. expressly introduces the prerequisites (and possible limits), on the standing and effects of corporate liability claims and claims by company shareholders in the context of the arrangement procedure;

h. regulates the extraordinary transactions of transformation, merger and demerger carried out in relation to the arrangement, thus providing for the necessary corrective measures - such as, for example, the limitation of creditors' opposition only during judicial review of the legitimacy of the arrangement proposal - and provides for the irreversibility of these transactions even in the event of termination or cancellation of the arrangement.

6. Conclusions

The DDL delivers a new law of insolvency which is more oriented towards finding solutions with continuity and resolving a state of crisis in advance, on the basis of a creditors' agreement, before it becomes irreversible. It is to be hoped that the implementing orders will correctly apply the principles laid down by the primary legislator and that will finally allow the management of a business crisis on the basis of a process of an effective arrangement in the interest of all interested parties, and not on the basis of conflict between private and public interests.

INFORMATION PURSUANT TO ARTICLE 13 OF LEGISLATIVE DECREE NO. 196/2003 (Data Protection Code)

The law firm Gianni, Origoni, Grippo, Cappelli and Partners (hereafter "the Firm") only processes personal data that is freely provided during the course of professional relations or meetings, events, workshops, etc., which are also processed for informative/divulgation purposes. This newsletter is sent exclusively to those subjects who have expressed an interest in receiving information about the Firm's activities. If it has been sent you by mistake, or should you have decided that you are no longer interested in receiving the above information, you may request that no further information be sent to you by sending an email to: relazioniesterne@gop.it. The personal data processor is the Firm Gianni, Origoni, Grippo, Cappelli & Partners, whose administrative headquarters are located in Rome, at Via delle Quattro Fontane 20.