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## Client Alert | Restructuring & Turnaround

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Italy

### Law Decree No. 23/2020 – emergency provisions in insolvency

April 2020

#### Introduction

Law Decree No. 23 of 8 April 2020 (the "**Decree**") sets some emergency provisions regarding insolvency procedures, among others. In a nutshell, these concern:

1. entry into force of the new Insolvency Code (the "**CCI**") is pushed back by one year;
2. bankruptcy filings made until 30th June will not be heard;
3. certain terms in *concordato preventivo* (compositions with creditors) and debt restructuring agreements, both pending and already confirmed, can be postponed;
4. temporary relaxation of corporate rules relevant also under insolvency law.

#### 1) New Insolvency Code

##### Entry into force postponed

Art. 5 of the Decree postpones the entry into force of the new Insolvency Code from 14 August 2020 to 1 September 2021.

In the macroeconomic framework of the COVID-19 outbreak emergency which will likely continue for some time in the future, the main reasons can be summarized as follows:

- the measures setting up the early detection of distress and assisted composition procedure, perhaps the most important innovation of the CCI, was conceived in light of a stable economic framework and could not work properly in a situation in the aftermath of a global crisis;
- the introduction of a new legal framework, with inevitable uncertainties of interpretation and application, is not suitable in an economic emergency.

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The entry into force of the CCI has therefore been pushed back by more than a year, when not only the worst phase of the crisis will be hopefully over, but also all those measures that appear necessary for the CCI to operate with a real chance of success will have been implemented both at a national and international level.

## 2) Declaration of Bankruptcy

### Insolvency filings

According to Art. 10 of the Decree, all bankruptcy filings filed in the period between 9 March and 30 June 2020 (including those aimed at opening the special compulsory administrative liquidation and extraordinary administration procedures) will not be heard and will be terminated. They may be submitted again after June 30, 2020.

Only companies subject to the special administration under Legislative Decree No. 347/2003 (so-called "Marzano" Law) are excluded from the operation of this provision.

The reasons for this provision have been identified, on the one hand, in the need to exempt companies from the growing pressure of third party bankruptcy petitions and to avoid them choosing to file for bankruptcy on their own in a situation in which the state of insolvency may derive from extraordinary factors, without any related advantage for creditors in a highly disrupted market context; on the other hand, in the opportunity to block an otherwise growing flow of petitions in a situation in which the Courts find themselves in great difficulty.

This provision applies to any filing, without any need to show whether the state of insolvency is to be referred or not to the COVID-19 emergency.

An exception to the rule is limited to cases where the petition is filed by the public prosecutor and contains a request for the issue of protective or precautionary measures.

### Effects on time limits for claw-back actions

In order to prevent undesired effects undermining the protection of the *par condicio creditorum* (or *pari passu* rule), the period between 9 March and 30 June 2020 will not be taken into account for the purposes of the look-back period of claw-back actions.

The wording of the provision suggests that the same applies only in the event of the actual termination of a filing and therefore not as a general effect.

## 3) Concordato Preventivo and debt restructuring agreements

### Confirmed concordato and agreements - extension of payment terms

Art. 9 of the Decree extends by six months the deadlines expiring between 23 February 2020 and 31 December 2021 for performing payments and other obligations according to *concordato preventivo* proposals and debt restructuring agreements already confirmed by the Court.

This extension does not any and all obligations, but only on those whose due date expires in the period between 23 February 2020 and 31 December 2021. The effect is not to defer the due



date after 31 December 2021, but only to extend the due date by six months compared to the original one.

This is clearly aimed to provide protection to companies having already gone through a restructuring procedure, now in the implementation phase, and to prevent possible breaches and consequent termination of the composition or agreements.

## **Pending *concordato* and debt restructuring agreements - possible submission of new plan and proposal, extension of deadlines**

Art. 9 of the Decree allows the debtor to apply, in procedures pending as of 23 February 2020, for:

1. a term up to 90 days to submit a new *concordato* proposal or agreement, with a new plan;
2. an extension up to six months of the due dates envisaged in the *concordato* proposal or agreement already submitted and awaiting confirmation;
3. an extension up to 90 days of the deadline for submitting the *concordato* proposal or agreement.

These provisions are meant to support the "survival" of pending restructuring frameworks alternative to bankruptcy liquidation, avoiding the failure of arrangements with a real chance of success, were it not for the COVID-19 emergency.

The first measure allows the debtor to submit, until the hearing set for the confirmation of the *concordato* proposal or agreement, an application to be authorized to submit a new proposal and plan, taking into account the economic and financial factors arisen as a result of the pandemic crisis. As to *concordato* proposals, however, this does not apply to those who have already been rejected by the vote of the creditors (these debtors would still be able, under general rules, to make a new filing, which should be more feasible considering the aforementioned termination of new bankruptcy filings).

The term starts from the date of the Court order, so to avoid that it is shortened as a matter of fact.

Reasonably, the new proposal and the new plan will have to undergo a new process of admission by the Court and vote by the creditors.

The second measure allows the debtor to unilaterally modify the due dates originally envisaged in the *concordato* proposal or debt restructuring agreement. The debtor must file an application setting forth the new due dates - deferred by no more than six months – together with documentation supporting the request. The Court can directly proceed to confirmation of the amended *concordato* proposal or agreement, expressly acknowledging in the confirmation order the amended due dates.

The third measure allows the debtor to apply for an extension up to 90 days of the term to submit the *concordato* proposal or debt restructuring agreement. The application can be made only before the term, already extended according to the ordinary rules, is about to expire. The extension is also allowed pending a request for declaration of bankruptcy, in order to increase the chances of saving the company. The application must specify the reasons for the extension,



with specific reference to the events that occurred as a result of the epidemiological emergency COVID-19. The Court can grant the extension on the grounds of sound and justified reasons and - in the case of debt restructuring agreements - of the continued existence of the conditions for reaching an agreement with as many creditors as required under ordinary rules. In case of debt restructuring agreements, the cumbersome procedure provided for in the first sentence of the seventh paragraph of Article 182-*bis* of the Bankruptcy Law should not be applied, in order to speed up the overall process.

The ordinary rules regarding the interim management of the company under the supervision of the Court, expressly referred to, apply pending the extension of the terms.

#### 4) Temporary relaxation of corporate rules

##### Net equity and dissolution of the company

Art. 6 of the Decree establishes that from 9 March to 31 December 2020 the provisions of the Italian Civil Code on the reduction of capital for losses below the legal minimum (articles 2446, 2447, 2482-*bis* and 2482-*ter* of the Italian Civil Code) shall not apply and that, for the same period, the related cause for the dissolution of the company shall not apply as well (articles 2484 and 2545-*duodecies* of the Italian Civil Code).

On the other hand, the provision requiring that shareholders of S.p.A.s be informed remains applicable.

The provision refers to "*events occurring during the financial years closed by*" 31 December 2020. The issue then arises whether this also concerns the fiscal year 2019, whose approval deadlines for the financial statements are pending. A positive answer – which seems to be authorized by the wording of the rule – involves a significant degree of uncertainty, given that the provision would in that case end up allowing to set aside mandatory rules, also with regard to facts which had already occurred at the date of entry into force of the Decree.

Broadly speaking, the measure aims at avoiding that (due to the material losses impacting on the share capital) directors and shareholders are forced to choose between the immediate liquidation of the company and recapitalization. This "relaxation" of the above rules (normally aimed at preventing companies' activity without a minimum share capital) is designed to allow the company to continue trading (even without such minimum share capital) during the crisis and throughout 2020.

##### Financial statements and going concern outlook

Art. 7 of the Decree provides that, in the financial statements for the year in progress at 31 December 2020, valuation on a going concern basis (i.e. in the perspective of continuity of the company's activity) can be applied as long as such valuation was applicable in the last financial statements pre-pandemic (i.e. before 23 February 2020).

The aim of this measure is to allow companies to avoid the negative impact on balance sheet resulting from the possible lack of going concern outlook during (or due to) the COVID-19 emergency. In other words, a pandemic-related lack of going concern outlook can be temporarily disregarded for financial statement purposes.



This will make it possible to avoid the representation in the financial statements of a negative equity situation - with the consequences mentioned above - resulting from a write-down of assets as a result of the inevitable and transitory current uncertainties regarding the sustainability of the business as a going concern.

### Shareholders' loans

Art. 8 of the Decree establishes that Articles 2467 and 2497-*quinquies* of the Italian Civil Code do not apply to loans made to companies in the period from 9 March 2020 to 31 December 2020.

In the current emergency, it was considered that the subordination under ordinary rules of loans made by shareholders - or by individuals and entities exercising direction and coordination over a company - would have prevented companies to gather much needed financial resources.

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*For further enquiries please contact your entrusted professional or you may write to Fabio Marelli.*