

NEW EMERGENCY RULES TO FACE DISTRESSED SITUATIONS

Law Decree 118 of 24 August 2021 (the "**Decree**") has been converted into Law no. 147 of 21 October 2021¹. With the aim of supporting businesses to contain and to address the negative effects of the Covid-19 pandemic, the Decree introduced (a) a new negotiated settlement procedure, accessible by means of a digital platform, for the purposes of identifying and implementing at an early stage possible solutions in case of distress and (b) a simplified assets liquidation procedure.

NEW PROCEDURES

The Decree introduced, with effect as from 15 November 2021, two new procedures:

- I. **Negotiated settlement procedure (*composizione negoziata per la soluzione della crisi d'impresa*)**
 - **Purpose and summary:** The procedure is aimed at identifying and implementing, at an early stage and with the assistance of an independent expert (the "**Expert**"), possible solutions in case of distress. The Expert, appointed few days after the submission of the debtor's request by a commission established in each Chamber of Commerce (the "**Commission**"), will facilitate the negotiations between the debtor and its creditors and other stakeholders. Banks and financial intermediaries (including their assignees) must participate to the negotiations in a proactive and informed way. All parties involved shall collaborate promptly, motivate their answers, and keep the procedure and the information received confidential.
 - **Who:** The procedure can be initiated only by a commercial and agricultural entrepreneur that is in a status of economic and financial or assets/liabilities imbalance (*squilibrio patrimoniale o economico-finanziario*) likely to lead to a crisis or to an insolvency, and **only if restoring balance appears reasonably achievable** (according to the test on the online platform and to the following evaluation by the Expert). The application must be submitted on a national digital platform, accessible via the website of each Chamber of Commerce, where the debtor shall also upload the required documents and information.

Key issues

- New procedures to address businesses' crisis or insolvency: the negotiated settlement procedure (*procedura di composizione*) and the simplified composition with creditors with the purpose of the asset liquidation (*concordato semplificato per la liquidazione del patrimonio*).
- Postponement of the Code of Business Crisis and Insolvency, which will enter into force in December 2023.
- Option to extend the effectiveness of the debt restructuring agreement vis-à-vis third parties and to reduce the percentage of adhering creditors.
- Possibility to enter a debt-restructuring agreement with creditors representing 30% (instead of 60%) of the indebtedness.

¹ The full text of the Decree as converted into law is available [here](#).

The same procedure can be commenced by a group of companies.

- **Immediate effects:** The debtor **will continue to be entrusted with the ordinary and extraordinary management of the company** (with the obligation to inform the Expert in advance of any extraordinary act and payments that are not in line with the negotiations or the prospects for recovery) and can request:
 - protective and precautionary measures, which shall be confirmed/amended by the competent court;
 - the suspension of recapitalisation obligations and the non-applicability of the winding up requirement in case of reduction of corporate capital;
 - a court order authorising it to assume super senior financings (*finanziamenti prededucibili*) and to transfer the ongoing concern(s); and
 - to redetermine, in good faith, the content of existing contracts providing for continuous, periodic or deferred performance of the relevant obligations, if performance has become excessively onerous as a result of the Covid-19 pandemic;

Access to the negotiated settlement procedure does not *per se* represent a cause for the revocation of the credit lines granted to the debtor.

- **The outcome:** if a suitable solution to overcome the crisis is identified, the debtor can enter into: (i) an **agreement** with one or more creditors ensuring business continuity for a period of at least 2 (two) years; (ii) a ***moratorium agreement*** pursuant to Article 182 *octies* of the bankruptcy law currently in force (the "**Bankruptcy Law**"); (iii) an **agreement to be signed by the Expert with the same effects as a restructuring plan pursuant to article 67**, third paragraph, letter d) of the Bankruptcy Law with no need for the expert's certification (*attestazione*).

Alternatively, the debtor may (i) request the homologation (*omologazione*) of a restructuring agreement pursuant to articles 182 *bis*, 182 *septies* and 182 *novies* of the Bankruptcy Law; (ii) prepare a certified restructuring plan pursuant to article 67, third paragraph, letter d) of the Bankruptcy Law; (iii) file a request for a simplified composition with creditors (*concordato semplificato*) or (iv) access the applicable bankruptcy procedures (e.g. extraordinary administration).

- **Benefits:** by accessing the procedure, the debtor will obtain also the following benefits:
 - the acts, payments and guarantees implemented by the company during the procedure and consistent with the status of the negotiations are not subject to claw-back actions;
 - certain exemptions from criminal liability in connection to the allegations that the debtors and creditors may face in the event of a subsequent bankruptcy, such as fraudulent bankruptcy and negligent bankruptcy;
 - the reduction of interest and penalties related to tax claims and tax debts;

- the preservation of the effects of the acts authorised by the Court, even if the procedures lead to one of the procedures envisaged by the Bankruptcy Law.

II. Simplified composition with creditors with the purpose of the asset liquidation (*concordato semplificato per la liquidazione del patrimonio*):

- **Purpose and summary:** the debtor can submit to the Court a proposal for the liquidation of its assets under a liquidation plan. The court shall examine the liquidation plan and the report drafted by the expert appointed by the debtor confirming that the underlying financial data are true and the feasibility of the proposal to creditors.
- **Who:** the new procedure can be started only by a commercial or agricultural entrepreneur if a negotiated settlement procedure is started and it is not successful.
- **Effects:** like the traditional *concordato preventivo*, after the filing for *concordato semplificato* the debtor is prevented from repaying creditors (whose claims arise out of circumstance prior to the application) and enforcement/precautionary measures cannot be commenced or pursued.
- **The innovation:** unlike the traditional *concordato preventivo*, the *concordato semplificato* (i) is not subject to the creditors vote; (ii) does not provide for a minimum 20% recovery for unsecured creditors and (iii) no judicial commissioner(s) is appointed.
- **The outcome:** The Court shall approve the debtor's proposal if:
 - proper notice of the proposal has been given to creditors, which have no voting powers but can oppose the *homologation*;
 - the pre-emption rights (*cause di prelazione*) have been correctly applied;
 - the proposed plan appears feasible;
 - the liquidation does not adversely affect creditors' positions compared to a judicial liquidation process.

OUR COMMENT

On the **negotiated settlement procedure**:

- this can be a valid instrument to address the crisis at an early stage by means of a private out-of-court and confidential procedure;
- its success will largely depend also on the expertise and skills of the Expert, that will be material to the success;
- the possibility to submit a unique application for a group of companies is a significant innovation: this is the first example in Italy of a restructuring process available to a group of companies;
- to facilitate the access to the procedure, the legislator should clarify who within a company is entitled to assess (and alert) if restoring balance appears reasonably achievable;
- an expert can be paid up to Euro 400,000, which risks to discourage the recourse to the relevant procedure.

OUR COMMENT

The **simplified composition with creditors with the purpose of the asset liquidation** (*concordato semplificato per la liquidazione del patrimonio*) is expected to facilitate restructuring process of small and medium businesses, since simplified documentation shall be submitted and the court ruling ordering the cram down is applicable to all creditors with no need for creditors to vote.

It should be noted that, unlike the traditional *concordato preventivo*, this procedure does not provide for the minimum 20% recovery for unsecured creditors. This point has been largely discussed and could maybe reconsidered to align this procedure to the *concordato preventivo* standards.

AMENDMENTS TO THE BANKRUPTCY LAW

The Decree also introduced certain amendments/novelties to the Bankruptcy Law, effective as from 25 August 2021, which anticipates the content of the upcoming Code of Business Crisis and Insolvency:

- **debt restructuring agreements with "extended effects"** (*accordi di ristrutturazione ad efficacia estesa*): article 182 *septies* of the Bankruptcy Law has been amended to allow a debt restructuring agreement to be binding also for non-adhering creditors (including creditors that are not banks or financial intermediaries) that belong to the same class, provided that, among other conditions, the adhering creditors represent at least 75% of the claims of that class;
- **moratorium agreement** (*convenzione di moratoria*): new article 182 *octies* of the Bankruptcy Law regulates the *convenzione di moratoria*, which allows to postpone the claim maturity date and to agree for a standstill or a suspension of interim and protective measures. The agreement can be entered into by the debtor with any creditors and will be binding on non-adhering creditors belonging to the same class provided that, among other conditions, (i) the adhering creditors represent at least 75% of the claims of that class; and (ii) an independent expert (*attestatore*) certifies that the financial data underlying the agreement are true, the agreement is suitable to provisionally regulate the effects of the crisis and the effects on the non-adhering creditors are proportionate and coherent with the envisaged solution of the crisis or insolvency;
- **facilitated debt restructuring agreements** (*accordi di ristrutturazione agevolati*): new article 182 *novies* of the Bankruptcy Law allows debtors to execute a debt restructuring agreement with creditors representing only 30% (rather than 60% as in the past) of the debtor's total indebtedness if (i) the automatic *moratorium* of 120 days for the payment of non-adhering creditors is waived; and (ii) the debtor has not filed a petition for a composition with creditors with reservation (*concordato*

preventivo con riserva) and has not requested any temporary protective measure;

- **significant changes to the restructuring plan and/or the relevant debt restructuring agreement:** paragraph 8 of article 182 *bis* of the Bankruptcy Law has been amended to clarify that, in case of significant changes to the restructuring plan or to the debt restructuring agreement, the certification (*attestazione*) of the Expert must be renewed and, in case the changes occur prior to the homologation (*omologazione*) of the debt restructuring agreement, the debtor must also obtain renewal of the adhering creditors' consent.

The **new debt restructuring agreement with "extended effects"** (*accordi di ristrutturazione ad efficacia estesa*) is a significant change, given that, before the Decree, the binding effects of debt restructuring agreements could be extended only to creditors that were banks or financial intermediaries.

The **moratorium agreement** (*convenzione di moratoria*) can now be entered into by all creditors (and not only by banks and financial intermediaries) and be extended to non-adhering creditors.

POSTPONEMENT OF THE ENTRY INTO FORCE OF THE CODE

To align Italian law to Directive (EU) 2019/1023 on preventive restructuring frameworks and considering the entry into force of the emergency rules, the Decree postponed the entry into force of the Code of Business Crisis and Insolvency to 16 May 2022 (although certain provisions of this have been anticipated by the amendments to the Bankruptcy Law provided for under the Decree).

Only the provisions of the Code relating to the early warning procedures (*procedure di allerta e di composizione assistita della crisi*) - which should be adjusted in light of the Directive (EU) 2019/1023 (Directive on restructuring and insolvency) - will become effective on 31 December 2023².

² It shall be noted that certain provisions have already entered into force shortly after the publication of the Code, i.e. in March 2019. Such provisions govern, *inter alia*: the identification of the competent court with reference to the procedures ascertaining the state of insolvency for the purposes of the extraordinary administration of large companies in state of crisis and to the other procedures regulating the crisis and insolvency of a company already subject to extraordinary administration; amendments to the civil code regarding corporate structure of companies, responsibility of the directors of limited liability companies vis-à-vis corporate creditors and the obligation of limited liability companies to appoint a control body (*organo di controllo*) or an auditor.

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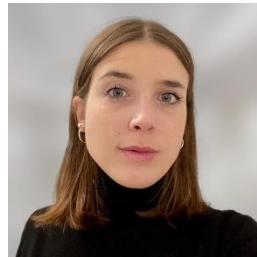
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