

URGENT MEASURES CONCERNING BUSINESS CONTINUITY AND CIVIL JUSTICE



SUMMARY

New urgent and extraordinary measures to promote business continuity during the Covid-19 emergency: with the Liquidity Decree, the Italian Government adopts postponement and suspension of procedures impacted by extraneous factors to the business of the affected enterprises.

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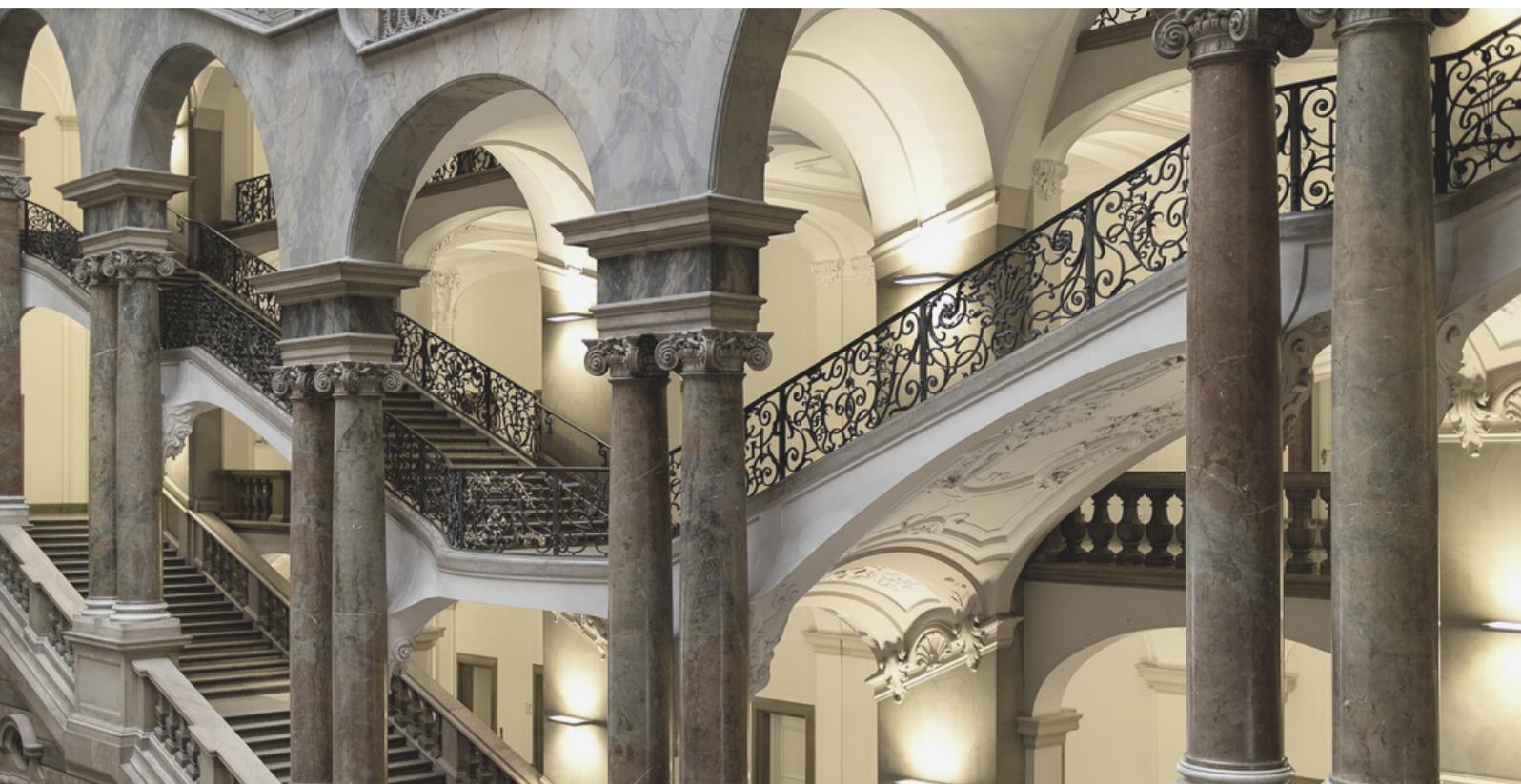
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Through Law Decree No. 23, of April 8, 2020, published in the Italian Official Gazette of the same day (the "**Liquidity Decree**"), the Italian Government adopted new measures to address the country's exceptional economic needs and to regulate the justice sector, which implement the measures previously adopted for the containment and management of the COVID-19 pandemic emergency.

Besides those measures aimed at meeting the liquidity needs of companies (which are not addressed by this Newsletter), Chapter II "*Urgent Measures to Ensure the Continuity of Businesses Affected by the Covid-19 Emergency*" includes a number of provisions to preserve business continuity whilst the emergency lasts, which apply to those companies that, prior to the pandemic emergency, were sound in economic-financial terms and were in a going concern situation.

These are wide-ranging measures, which, on the one hand, affect the main corporate obligations of directors and supervisory bodies and, on the other hand, temporarily freeze the rules on submission of bankruptcy declaration(s) as well as the main obligations and duties accruing from the other insolvency procedures.

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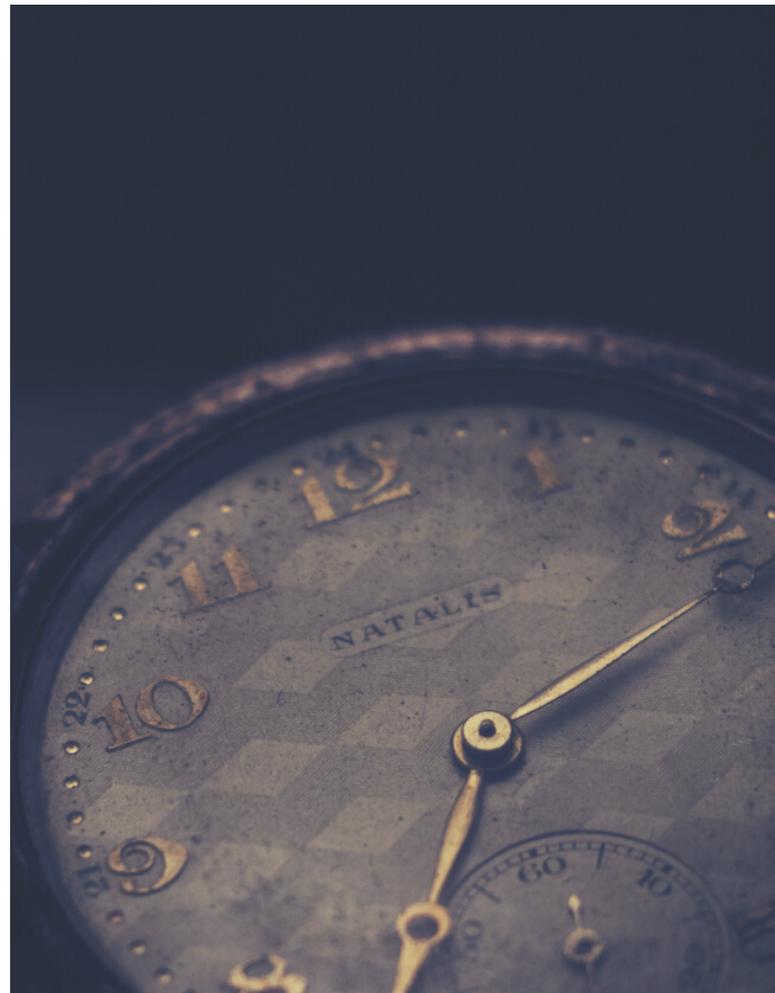
The entry into force of the new Italian Insolvency Code (“IC”) was delayed to September 1, 2021

The new Italian Insolvency Code (Legislative Decree No. 14, of January 12, 2019), that should have entered into force on August 14, 2020, will now not be brought into effect until September 1, 2021. The postponement will not affect the provisions of the IC already in force (e.g. those provisions that amended the Italian Civil Code rules regarding the thresholds for the appointment of a Board of Statutory Auditors or the Sole Statutory Auditor, the liability action pertaining to corporate creditors of a limited liability companies, and the directors’ liability in the event of liquidation).

The postponement also concerns the insolvency early warnings system and the reporting duties imposed upon the directors and the controlling bodies provided by articles 14 and 15 of the IC (which were postponed already to February 15, 2021 by article 11 of the Decree Law No. 9, of March 2, 2020).

This postponement is closely aligned to the serious economic consequences which will continue over a long period of time, even after the end of the epidemic itself and the termination of the current restrictive measures adopted due to the Covid-19 pandemic emergency.

In fact, the launch of the early warnings system during the current crisis would have altered one of the most important innovations of the IC, from being a system aimed at detecting a company’s early financial distress within a framework of economic stability liable to fluctuations as a normal function, to becoming a measure with a negative impact on the very same national economic system.



*Applications
for
declaration of
bankruptcy or
insolvency
cannot be
heard until
June 30, 2020*

The Liquidity Decree provides that all applications for a declaration of bankruptcy or of insolvency (under article 3 of Legislative Decree No. 270, of July 8, 1999 for extraordinary administration of big business) filed between March 9, 2020 and June 30, 2020 will not be heard and will be dismissed by the insolvency courts.

The deadlines to start the insolvency-related claw back actions against a debtor for acts detrimental to creditors (under article 69-bis of Royal Decree No. 267, of March 16, 1942) are suspended as well for the same duration, if after the said dismissal the company is declared bankrupt. The dismissal will not apply to requests submitted by the Public Prosecutor if it also requests precautionary or protective measures to safeguard the assets of the company, under article 15, paragraph 8, of Royal Decree No. 267, of March 16, 1942.

The Decree aims at removing risk of bankruptcy applications against companies filed by third parties (or of bankruptcy application that entrepreneurs would otherwise be forced to file on their own initiative) for the entire period of the Covid-19 emergency, by assuming that such filings derive from extraordinary factors caused by the pandemic emergency itself.

The provision is also intended to avoid (or limit over time) the bankruptcy courts being inundated with claims and the additional burden that those proceedings would generate, should the judge have to ascertain whether the alleged insolvency was attributable to the Covid-19 pandemic emergency or not.

However, the protection of the *par condicio creditorum* is safeguarded by the suspension, for the same period, of the deadlines to file bankruptcy claw back actions, where after the dismissal the company is declared bankrupt, i.e. post June 30, 2020.



Deadlines of existing arrangement with creditors procedure or debt restructuring agreements are postponed for 6 months

All deadlines set forth by existing arrangement with creditors or debt restructuring agreements, which expire between February 23, 2020 and December 31, 2021, are postponed for 6 months.

In the pending procedures as at February 23, 2020, the debtor may request an addition to the deadline not exceeding 90 days in order to submit a new plan and a new proposal for the arrangement with creditors (under article 161 of the Royal Decree No. 267, of March 16, 1942) or a new debt restructuring agreement (under article 182-bis of the Royal Decree No. 267, of March 16, 1942). This request shall not be granted in proceedings where the creditors' hearing has already taken place, but the majority for the approval of the debtor's proposal was not met.

The debtor willing to only amend the deadlines to fulfil its arrangement with creditor proposal or its debt restructuring agreement may file, at any time up to the homologation hearing, a pleading setting forth the new deadlines, which may be extended for no more than 6 months.

A debtor who has filed a request to be admitted to an arrangement with creditors procedure and has already been granted an extension of the deadline to submit the plan, the proposal and the relating documentation, may request an additional extension of this deadline for no more than 90 days. This request may also be submitted pending a request for the bankruptcy declaration. The same request may be filed by a debtor who has already obtained the deadline set forth by article 182-bis, paragraphs seven, of the Royal Decree No. 267, of March 16, 1942 to file the debt restructuring agreement.



Since the entry into force of the Liquidity Decree and until December 31, 2020, the early dissolution of stock companies deriving from the decrease/diminution or the loss of their share capital are suspended by law. Until the end of 2020, articles 2446, paragraphs two and three, and 2482-bis, paragraphs four, five and six, of the Italian Civil Code concerning the decrease of share capital for losses, and articles 2447 and 2482-ter of the Italian Civil Code on the decrease of the share capital below the minimum legal threshold shall not apply.

Likewise, it will also not be possible to dissolve and liquidate a stock or a cooperative company (under articles 2484, number 4 and 2545-duodecies of the Italian Civil Code) due to any decrease of the share capital below the minimum legal threshold.

Where the erosion of shareholders' equity is caused by external and unpredictable factors, this measure will avoid placing the directors in a situation where they would otherwise be forced to choose between the immediate liquidation of the company and incurring the risk of personal liability for the non-conservative management of the company, in violation of their duties set forth by article 2486 of the Italian Civil Code.

Liquidations of a company by reason of the loss/decrease of share capital are frozen until December 31, 2020



Accounting criteria for the 2020 financial statements on a going concern basis

The financial statements as at December 31, 2020 may be drafted on a going concern basis, provided that a going concern existed in the last financial statements closed before 23 February 2020 and that this evaluation is illustrated in detail in the supplementary notes to the financial statements (also through references to the results of the previous financial year).

The rationale of this provision is to allow companies having a going concern status before the pandemic emergency to retain that status while drafting the 2020 financial statements. Specifically, it will be possible to draft and approve these financial statements by valuations according to the principle of prudence and on a going concern basis, in compliance with the principles outlined in article 2423-bis, first paragraph, No. 1) of the Italian Civil Code.

All companies that, regardless of the crisis caused by the Covid-19 pandemic, were in a condition of lack of going concern are excluded from the application of this provision.

The Liquidity Decree also confirms article 106 of Decree Law No. 18, of March 17, 2020, which extended by sixty days the deadline to approve the 2019 financial statements (normally set for April 30, 2020).

Suspension of the rules concerning shareholder loans

All shareholders loans made from the entry into force of the Decree and until December 31, 2020 will not be subject to articles 2467 and 2497 quinquies of the Italian Civil Code (which provide that any such loan made by shareholders or by those who exercise direction and coordination activities over the company, may only be repaid after the repayment all other existing debts).

Extension of civil and criminal proceedings' suspension

The Decree extends the *ex officio* postponement of all hearings in civil and criminal proceedings pending before all judicial offices and the suspension of the deadlines for any judicial act in civil and criminal proceedings, from April 15 to May 11, 2020.

The postponement also applies to mediations pursuant to Law 28/2010, to assisted negotiations pursuant to Decree Law 132/2014, to out-of-court dispute resolution proceedings governed by the provisions in force, to proceedings relating to tax commissions and military judiciary, and all the activities of the Italian Corte dei Conti under article 85 of Decree Law No. 18, of March 17, 2020.



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