

Italy: Covid-19 emergency and businesses' crisis.

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I. INTRODUCTION

The strategy to cope with the widespread epidemiological emergency has forced the competent authorities to a lockdown not only of all the non-essential commercials and productive activities but also of the judicial system. Companies' primary source of distress is the standstill of the production cycle due to the lack of liquidity.

This scenario is worsened by the fact that, first of all, the credit maturing in the next months will probably not be liquidated according to the already set deadlines, second because legislation has in some cases imposed a postponement of deadlines and, third because all operators are retaining cash flows to face with the current uncertain situation.

The risk of a moral hazard is imminent, and even stable companies have announced non-physiological delays in the ordinary fulfillment of their obligations. An indefinite period of critical financial constraint has started.

The emergency measures aimed to stem the liquidity crisis, still, they are fragmented and cluttered due to the dual intermediation of, on the one hand, the public system with regard to the guarantees offered by SACE and the SME fund, and, on the other hand, the banking system for the inquiry procedure for the refinancing.

The purpose of this article is to clarify some aspects of the provisions that the recent emergency decrees introduced.

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II. PROCEDURE SUSPENSION: IMMEDIATE PROSPECTS

The first emergency intervention on insolvency law is the Decree-Law March 2, 2020, n. 9, "Emergency support measures for families, workers, and companies relating to the epidemiological emergency by Covid-19; in particular, Article 10, provides for the suspension of all procedural deadlines and hearings in civil proceedings pending in all the judicial offices located in the most affected areas by the emergency crisis, starting from the entry in force of the decree until March 31, 2020¹.

Consequently, Article 11 delayed the entry into force of the alert reporting obligations, provided for in Articles 14, paragraphs 2 and 15, "Business Crisis and Insolvency Code"² (hereafter, for brevity, also "CCII") at February 15, 2021³.

¹ By virtue of this provision, therefore, bankruptcy proceedings pending in the various judicial offices have also been merged with proceedings of an insolvency nature, at the same time pending in the various bankruptcy sections.

² Legislative Decree no. 14 of 12 January 2019

³ Provision subsequently amended by virtue of the publication of Decree-Law No 23 of 8 April 2020.

On March 17, 2020, the Council of Ministers adopted a new Decree-Law, the so-called decree "Cura Italia", which although is not explicit on matters of insolvency law, extended the content of the provisions already issued and moved at April 15, 2020, the suspension of all civil and criminal proceedings pending in front of judicial with a postponement of the related hearings, previously fixed.

Most of the Italian judicial offices have adopted internal provisions in order to regulate their activities (*inter alia*, provision prot. n. 346/2020, and provision prot. n. 390/2020 – Tribunal of Rome – insolvency Sect.).

On April 6, 2020, the Council of Ministers adopted a new Decree-Law, so-called "Liquidity Decree" (renamed afterward "Omnibus Decree" by the economics operators), published in the Official Journal on April 8, 2020, containing further urgent measures concerning the access to credit and tax compliance for companies, special powers in strategic sectors, support measures in healthcare and employment, the defer of procedural and administrative deadlines.

Nevertheless, as regards the deferral of the procedural terms, Article 36 of that before mentioned decree provides for a further postponement of hearings and the suspension of all trials until May 11, 2020⁴.

Concerning appeals for a declaration of bankruptcy, Article 10 of the same decree freeze the pre-bankruptcy proceedings with a postponement of all the bankruptcy petitions filed in the period between March 9 and June 30, 2020.

As regards the composition agreements and restructuring agreements already approved, Article 9 of the "Liquidity Decree" provided a six-month delay for all payments which deadlines are between February 23 and June 30, 2020⁵. Also, the deadlines for the submission of the plans scheduled in that timeframe, are thus postponed of 90 days.

Therefore, where *i.e.* a composition agreement has been submitted, the postponement will be of 90 days by the deadline for submitting the plan. This will crystallize for a longer period the blocking of individual executive actions.

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III. POSTPONEMENT OF THE ENTRY IN FORCE OF THE CRISIS CODE: DEFERRAL OF THE ENTRY INTO FORCE OF "WARNING MEASURES".

⁴ On this point, an initial analysis is provided by the Court of Milan with the "guidelines for regulating the conduct of judicial activities of 16 April 2020 ex 83 Decree Law 2020 as amended by Article 36 of Decree Law No. 23 of 8 April 2020" of 10 March 2020.

⁵ Specifically stating that: "All appeals pursuant to Articles 15 and 195 of Royal Decree No 267 of 16 March 1942 and Article 3 of Legislative Decree No 270 of 8 July 1999 lodged between 9 March 2020 and 30 June 2020 are inadmissible". The only exception provided for is that relating to the submission of the appeal by the Public Prosecutor.

Furthermore, the above-mentioned "*Liquidity Decree*" postponed the entry into force of the new Crisis Code (CCII). In this regard, Article 5, provided its deferral to September 1 2021, replacing the first paragraph of Article 389 of the CCII.

Then, due to this new Decree-Law all the new dispositions of the CCII concerning players taking part to the regulation of crisis and insolvency, concerning furthermore, warning measures, new tools to manage company crisis, judicial liquidation, insolvency groups, compulsory administrative liquidation, will be available to users and operators of the sector only from September 1 2021⁶.

Nonetheless, they are still operative, all the provisions set by art. 389, paragraph 2, CCII already entered into force the 30th day after the publication in the Official Gazette of the legislative decree n.14/2019, regarding the Register of subjects who manage and control procedures (Article 356 and Article 357); all the disposals concerning amendments to the Italian Civil Code regarding the organizational structures of enterprises and companies (Article 375 and Article 377); the governance of limited liability companies and liability of directors (Article 378); appointments of supervisory authorities (Article 379); modifies concerning extraordinary administration (Article 350).

With regard to the warnings measures (specifically the provision regarding micro-enterprises⁷, the novel Law Decree postpones the reporting obligations to the supervisory bodies and statutory auditors initially envisaged from August 2020.

In this regard, it should be noted that the types of reports envisaged are the following:

1. inside alert: by virtue of which the company's supervisory bodies, the auditor and the audit firm, each in the course of their duties, are required to verify that the administrative body constantly assesses whether the company's structure is adequate and whether the economic and financial balance is such as to rule out a crisis situation;
2. outside alert: under which, in the event of failure to report within the time limits, inadequate reporting and/or failure to take measures deemed necessary to overcome the state of crisis, the entities referred to in the first subparagraph are required to report the company's situation to the crisis composition body (OCRI).
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In a context characterized by these measures, the advisability of ordering the full postponement of the entry into force of the CCII, highlighted in the explanatory report to the so-called "liquidity decree" appears to be due to a series of considerations, such as:

1. the use of alert measures, aimed at provoking the early emergence of the business crisis, is effective in a stable economic environment characterised by ordinary corporate fluctuations.

⁶ The reading of this decree shows the legislator's intention to ensure business continuity in the difficult emergency phase, through a package of measures impacting on company and insolvency law, as well as the postponement for one year of the entry into force of the CCII - (Confindustria - "Decree Law - liquidity and other measures for companies - first summary note 8 aprile 2020).

⁷ Total assets in the balance sheets: 4 million euros; revenues from sales and services: 4 million euros; employees employed on average during the year: 20 people.

Therefore, in a situation where the entire global economic fabric is affected by an unpredictable crisis such as the current one, the indicators could not play any real selective role, thus failing the primary objective of the standard;

2. the *rationale* of the new CCII is to operate with a view to the constant rescue of companies and their continuity, adopting the liquidation instrument only as a last resort, to be used on exceptional occasions and in the absence of concrete alternatives.

In light of the above, therefore, it was decided to leave in force the bankruptcy law already known to operators in the sector, in order to avoid operational uncertainties in addition to those caused by the health emergency.

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IV. CONCLUSIONS

The recommendation of the Conference of European Restructuring and Insolvency Law (CERIL) has recently expressed significant concerns about the inadequacy of European legislation and that National ones to deal with the present exceptional crisis⁸.

The CERIL Executive Board has therefore suggested the immediate adoption of measures aimed, firstly, at suspending obligations and deadlines for submitting applications for access to insolvency proceedings and, secondly, at tackling the liquidity crisis not only by direct intervention but also by a general moratorium on enforcement actions against insolvent companies.

These desired interventions, only partially implemented by the emergency legislator, would have the advantage of avoiding a massive recourse to the courts, leaving creditors and third parties to control the existence of the necessary conditions to benefit from the protection, providing, only in second and possible instance, the control of the court.

It is therefore still necessary to intervene with more consistent decisions, also harmonising the internal framework for decisions taken by the countries of other Member States⁹.

⁸ The document is available at <https://www.ceril.eu/news/ceril-statement-2020-1>.

⁹ In this context, in fact, the European Commission has published legislation to ensure a decisive approach at EU level, on the control of foreign investment in a period of crisis for public health and consequent economic vulnerability, so as to preserve critical EU businesses and activities, particularly in sectors such as health, medical research, biotechnology and essential infrastructure, without compromising the general openness of the EU to foreign investment. Also calling on Member States that already have control mechanisms to make full use of the instruments at their disposal under EU and national law to prevent capital flows from third countries that could jeopardise the security or public order of the EU - (Covid-19: International Update No. 2 - National Council of Accountants and Bookkeepers).