Reform of Insolvency Legislation is Approved

Restructuring Alert

By: Daniela Andreatta, Federico Perego and Elena Brunetta

On 11 January 2019, the Council of Ministers approved the text of the legislative decree containing the new code of corporate distress[1] and insolvency (the "**Insolvency Code**"). The new code was adopted to implement Law 155 of 11 October 2017 (the "**2017 Law**"), with which the Parliament delegated the Government to reform the pre-insolvency and insolvency rules and proceedings so as to supersede the current bankruptcy law (Royal Decree 267/42, the "**Bankruptcy Law**"), somewhat outdated and fragmented by the many amendments and integrations made over the years.

The publication of the Insolvency Code in the Official Gazette is due in the next few days, and **the new code will come into force after 18 months from such publication**, except for certain provisions (especially of a corporate nature) that will come into effect after 30 days from the same publication[2].

The Insolvency Code bears the general principles set forth by the 2017 Law[3] and overall reflects the draft legislative decree drawn up by the Commission chaired by Renato Rordorf, established by the Renzi government after the approval of the 2017 Law.

This document summarizes the main new features of the new code and the provisions that will come into force shortly; however, for the sake of brevity, it does not deal with the proceedings dedicated to small distressed enterprises and consumers[4] and the forced administrative liquidation, which will be dealt with separately.

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[1] Named "crisis" in the legislative decree.

[2] The *vacatio* period (the time elapsed from the passing of a bill to the entry into force) was set particularly long in order to allow the legislator to remedy any imperfections of the new text or even improve it in light of the likely requests from the operators in the sector.

[3] For further information, please read Orrick's Restructuring Alert from 23 October 2017 https://www.orrick.com/Insights/2017/10/Delega-al-Governo-per-la-Riforma-delle-discipline-della-crisi-di-Impresa-e-dellinsolvenza

[4] Eligible for over-indebtedness settlement proceedings (*procedura da sovraindebitamento*) are consumers, professionals, minor enterprises, agricultural businesses, innovative start-ups and any other debtor who is not subject to court liquidation, forced administrative liquidation or other winding-up proceedings provided for by the Italian Civil Code or special laws. The Insolvency Code defines as "minor" companies that jointly meet the following requirements: (i) assets not exceeding € 300 thousand in each of the three financial years prior to the date of filing for insolvency or from the beginning of the business, if earlier; (ii) revenues, in whatever form they may be, for a total annual amount not exceeding € 200 thousand in the three years prior to the date of filing for insolvency or from the start of the business, if earlier; (iii) debts, including debts not yet due, not exceeding € 500 thousand.

The following paragraphs are based on the new code passed by the Council of Ministers on 11 January 2019 and we do not exclude that it will undergo changes during the publication process, as has often happened in recent legislative activities. Likewise, the contents of this document may be affected by the frequent incompleteness or shortcomings in the wording of the reference legislative text.

1. INTRODUCTION

The Insolvency Code offers a comprehensive and clear set of rules on corporate distress and insolvency, which largely reflect the contents of the Bankruptcy Law. The differences compared to the original text lay in the introduction of some newly established provisions and the implementation of consolidated industry guidelines and practices.

Starting from the general principles of the new code, and leaving the description of the single reformed provisions to the following sections, the main novelties of the new regulation can be summarized as follows.

(a) ***Erga omnes*** **(towards all) application.** The Insolvency Code applies to each debtor category (natural or legal person, collective body, consumer, professional or business, agricultural operators or artisans) with the exclusion of the State and public bodies. It regulates all insolvency proceedings, with the exception of the extraordinary administration (*amministrazione straordinaria*) of large distressed companies (subject of separate attempts at reform) and of the forced administrative liquidation (*liquidazione coatta amministrativa*) dealt with by dedicated laws.

(b) Timely disclosure of the distress (*emersione tempestiva della crisi*). The new regulation is based on the assumption that, if promptly addressed, a company distress can be resolved without excessive damage to the various stakeholders, thus providing for a set of new rules aimed at making it emerge quickly; among these rules, there are organizational and action-taking obligations imposed on the debtor, reporting obligations for some public entities and procedures to be followed, all coupled with bonuses and penalties.

(c) Strengthening court liquidation. In the Insolvency Code, bankruptcy proceedings (now called court liquidation proceedings, hereinafter the "**In-Court Liquidation**") are the main proceedings for the liquidation of the insolvent debtor at the expense of the in-court composition with creditors for liquidation purposes (*concordato preventivo liquidatorio,* hereinafter the "**In-Court Liquidation Composition**") discouraged through more stringent access requirements; in view of the importance of the In-Court Liquidation, the new regulation sets out new procedures to accelerate its completion.

(d) Parties' obligations. Alongside the debtor's obligation to take action to promptly deal with the distress, the new regulation inserts in the insolvency regulation the principles of good faith and fairness in negotiations and establishes the creditors' duty to collaborate "*loyally with the debtors*" (the aim is to remedy the never-ending consensual restructuring negotiations).

(e) Creditors' interest. For the first time, the reform grants expressly priority to the creditors' interest in any restructuring or insolvency, thereby attempting to channel the actions of management in any restructuring process.

Before moving on to the individual provisions, it should be noted that the new legislation does not include two important aspects that Government was requested to deal with pursuant to the 2017 Law, namely the specialization of bankruptcy judges and the reorganization of the lien system (*sistema dei privilegi*). In addition, by will of the delegating legislator under the 2017 Law, the reform does not cover the extraordinary administration for large distressed companies and the criminal aspects of insolvency, which will be dealt with separately.

We will now move on to the individual provisions, new or reformed.

2. EARLY WARNING AND ASSISTED COMPOSITION PROCEEDINGS

The goal of the Insolvency Code is to force an early diagnosis of the distress; to achieve this goal, the reform introduced the early warning and assisted composition procedures (collectively the "**Early Warning Procedures**").

Subject to the Early Warning Procedures are all debtors[5] who engage in entrepreneurial activities, with the exception of:

- **(i)** large enterprises[6];
- **(ii)** groups of enterprises of a significant size[7];
- **(iii)** companies with shares listed on regulated markets or widely distributed among the public (the subjects from (i) to (iii), collectively the "**Excluded Subjects**").

Dedicated early warning and composition procedures apply to companies subject to forced administrative liquidation (*liquidazione coatta amministrativa*).

Early Warning Procedures work as follows.

Reporting duties. The procedure can be initiated by the debtor or by one of the following categories of subjects:

- **(i)** corporate supervisory bodies, including auditing firms and independent auditors (collectively, the "**Supervisory Bodies**") and

[5] The Early Warning Procedures apply also to agricultural companies and minor companies without prejudice to the remit of the "bodies for the composition of over-indebtedness" (in short, "**OCC**") in lieu of the Composition Body (as defined below).

[6] The Insolvency Code defines as "large enterprises" companies that, as at the reference date of the financial statement, exceed at least two of the following three thresholds: **(i)** total assets and liabilities: € 20 million; **(ii)** net revenues from sales and services: € 40 million; **(iii)** average number of employees employed during the financial year: 250.

[7] "Significant-size business groups" are defined as groups consisting of a parent company and subsidiaries to be included in the consolidated financial statements which, on a consolidated basis as at the reference date of the parent company's financial statements, exceed at least two of the following three thresholds: (i) total assets and liabilities: € 4 million; (ii) net revenues from sales and services: € 8 million; (iii) average number of employees employed during the fiscal year: 50.

(ii) the Italian Revenue Agency (*Agenzia delle Entrate*), the National Social Security Institute (INPS) and the Collection Agency (*Agente della Riscossione*) (collectively the "**Public Subjects**").

Both these categories of subjects **(i)** must report to management (*i.e.* board of directors) the existence of well-grounded signs of distress[8] (which, in the case of Public Subjects, translates into exceeding certain tax and/or social security debt thresholds[9]) and, in the event management does not take action, **(ii)** must report the distress to a newly-introduced body set up at the Chamber of Commerce, Industry, Craft and Agriculture called the "body for the composition of corporate distress" ("**Composition Body**").

(a) The composition procedure. Within fifteen days of the commencement of the Early Warning Procedures, the debtor and the supervisory bodies are summoned before the Composition Body[10]. The procedure is kept confidential and cannot trigger termination of existing contracts or credit lines. During the procedure, the recurrence of the distress is verified, and the most suitable measures for its solution are identified with the assistance of the Composition Body. The procedure can be concluded in the following ways:

(i) with a simple closing, when the Composition Body ascertains that there is no distress;

(ii) with the debtor adopting appropriate measures to overcome the distress (including entering into agreements with creditors, where that is necessary for the restructuring; such agreements that will produce the same effects as agreements signed in execution of a recovery plan and shall bear a "certified" date (*data certa*)), or by filing a debt restructuring agreement in court or apply for an in-court composition with creditors (*concordato preventivo*, hereinafter the "**In-Court Composition**") (in which case the Composition Body, at the request of the debtor, certifies the truthfulness of the accounting data);

(iii) with the Composition Body reporting the state of insolvency (where applicable) to the Public Prosecutor whenever the debtor does not act, or the procedure fails

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[8] Distress indicators are any imbalances of an income, asset or financial nature compared to the features of the activity performed by the debtor, which can be identified by means of indexes that highlight the inability of the debtor to pay debts that become due in the following six months, and the prospective shortfall in business continuity. The new regulation indicates some of these indicators (*i.e.* ratio between **(i)** cash flow and assets, **(ii)** equity and liabilities, **(iii)** financial expenses and revenues, delays in payments) and delegates to the Italian Association of Chartered Accountants to dictate specific indexes of distress also for start-ups, companies in liquidation and companies incorporated for less than two years.

[9] The relevant thresholds are as follows: **(a)** ***Agenzia delle Entrate***: overdue and unpaid VAT payables equal to at least 30% of the after-tax revenues in the reference period and not lower than **(i)** € 25 thousand for the previous year's after-tax revenues up to € 2 million; **(ii)** € 50 thousand for the previous year's after-tax revenues up to € 10 million and **(iii)** no less than € 100 thousand for the previous year's after-tax revenues of over € 10 million; **(b) INPS, National Institute of Social Security**: delay of over six months in the payment of social security contributions for an amount higher than half of those due in the previous year and above the threshold of € 50 thousand; **(c) Collection Agency**: total of debts, self-declared or definitively ascertained and overdue by more than ninety days in excess of € 500 thousand for individual companies, and € 1 million for collective enterprises.

[10] The Board of Experts consists of three professionals, one of whom is appointed by the court, one by the chamber of commerce and one by the referent (the secretary general of the Chamber of Commerce or a delegate).

and no alternative procedure is started (the Public Prosecutor must file for insolvency (*i.e.* for the In-Court Liquidation) whenever the debtor is insolvent).

(b) Protective measures. After the hearing before the Composition Body, the debtor can ask the competent court to order a standstill to enable the debtor to conclude the negotiations protected from creditors' initiatives[11]. The standstill cannot exceed 12 months (including renewals and extensions).

(c) Criminal relevance of documents filed with the Composition Body. While the insolvency code requires that the procedure before the Composition Body be carried out in the strictest confidence, the documents produced or acquired during the same procedure can be used in the possible subsequent In-Court Liquidations and/or criminal proceedings.

(d) Bonus scheme. In order to boost application of the new rules and thereby facilitate the rapid emerging of the distress, the Insolvency Code grants the following bonuses to the debtor and to the Supervisory Bodies, provided they promptly fulfil their obligations:

- *as to the debtor*:
  - **(i)** reduction of interest and penalties on tax liabilities accrued and accruing during the Early Warning Procedures;
  - **(ii)** extension of the terms applicable in the context of the "Early In-Court Composition"[12] for the application for an In-Court Composition or the filing of a restructuring agreement;
  - **(iii)** reduction from 30% to 20% of the threshold of satisfaction of unsecured creditors that prevents the submission of competing composition proposals (currently governed by Article 163, paragraph 4, Bankruptcy Law);
  - **(iv)** non-punishment of bankruptcy crimes, including fraudulent borrowing, occurred prior to the starting of the procedure before the Composition Body, provided such crimes have caused minor damage;
- *as to the Supervisory Bodies*:
  - **(i)** exemption from joint liability with the directors for damages originated from facts or omissions occurred following the reporting of the distress by the Supervisory Bodies.

For the purpose of applying this bonus scheme, the Insolvency Code qualifies as "prompt" the debtor's initiative whenever the debtor commences the composition proceedings before the Composition Body within 3 months from occurrence of the following events (the "**Material Events**"):

[11] During the assisted composition proceeding and until its conclusion, the debtor can ask the judge to postpone the obligations provided for in Articles 2446, second and third paragraphs, 2447, 2482-*bis*, fourth, fifth and sixth paragraphs, and 248-2-*ter*, Italian Civil Code, and the non-applicability of the cause of termination of the company due to the reduction or loss of the corporate capital referred to in Articles 2484, first paragraph, no. 4), and 2545-*duodecies*, Italian Civil Code. At the request of the debtor, the provision can be published in the Companies' Register.

[12] The so-called "Early In-Court Composition" (*concordato in bianco*) is currently governed by Article 161, paragraph 6, Bankruptcy Law.

(i) employees salaries outstanding for more than 60 days exceed 50% of monthly salaries;

(ii) payables to suppliers outstanding for 120 days exceed the amount of unexpired debts;

(iii) the distress indexes (to be dictated by the Italian Association of Chartered Accountants) are exceeded for over 3 months.

(e) **Sanctions.** To boost reports from the Public Entities, the new regulation links to their non-fulfillment: (i) as regards the Italian Revenue Agency (*Agenzia delle Entrate)* and the National Social Security Institute (*INPS*), the loss of the right of preference in respect of their claims and (ii) as regards the Collection Agency, the unenforceability of its claims for collection costs and charges.

Finally, **Excluded Subjects** - as mentioned – are not subject to the Early Warning Procedures. However, they **benefit from the bonus system** reserved to the debtor (as described in paragraph (g) above), provided they commence one of the restructuring or insolvency proceedings set forth by the new code within 6 months of occurrence of one of the Material Events. Under the Insolvency Code, reporting obligations or criminal exemptions triggered by timely action are not currently extended to the Supervisory Bodies of the Excluded Subjects, but it is likely that this will be amended before the reform comes into force.

3. RESTRUCTURING PROCEEDINGS

The restructuring proceedings envisaged by the Insolvency Code (in addition to the composition proceedings before the Composition Body[13]) are:

(a) the recovery plan (as of now governed by Article 67, paragraph 3 letter d), Bankruptcy Law);

(b) the debt restructuring agreements (as of now governed by Article 182-*bis*, Bankruptcy Law);

(c) the In-Court Composition (as of now governed by Articles 161 and following, Bankruptcy Law).

The proceedings have remained essentially the same as those already in force, but have undergone significant changes, especially with regard to debt restructuring agreements and In-Court Compositions:

- the former have been facilitated in some circumstances by lowering access thresholds and extending the minority cram-down mechanism, while
- the In-Court Composition has been reformed with the main purpose of discouraging the In-Court Liquidation Compositions, safeguarding employment and limiting the trend of compositions "steered" by the majority creditor.

[13] or over-indebtedness before the OCC.

The next paragraphs describe the material changes to the various proceedings, while the list below sets out the main provisions that are confirmed in the Insolvency Code that are common in debt restructuring agreements and In-Court Compositions. Confirmed are the provisions on:

- super-senior loans granted during the proceedings and in execution of debt restructuring agreements or an In-Court Composition, while the regulation of super-seniority on loans granted prior to the opening of the proceedings has not been confirmed (now governed by Article 182-*quater*, paragraph 2, Bankruptcy Law);

- Early In-Court Compositions (*concordato in bianco*)[14], but the deadline for filing a debt restructuring agreement or an application for an In-Court Composition is reduced from the current 60-120 days (which can be extended to 180 days) to 30-60 days (which cannot be extended by more than 60 days, provided there are serious reasons and no pending applications for insolvency);

- suspension of recapitalization obligations pursuant to Article 2446, paragraphs 2 and 3, Italian Civil Code, Article 2447 Italian Civil Code, Article 2482-*bis*, paragraphs 4, 5 and 6, Italian Civil Code, and Article 2482-*ter*, Italian Civil Code, starting from the filing of any restructuring proceedings[15];

- exemption from claw-back and criminal liabilities for wrongful trading and preferential payments (which apply also to certified recovery plans);

- preference in court for restructuring proceedings *vs.* insolvency proceedings (*i.e.* In-Court Liquidations), provided that the restructuring plan confirms the convenience for creditors and the filing is not manifestly inadmissible or ungrounded (same proceedings for all filings have been established).

An overview on the single proceedings follows in the next paragraphs.

3.1. Certified Plans

The Insolvency Code dictates more precise provisions in respect of the expert-assessed recovery plan (*piano attestato di risanamento*) (the "**Certified Plan**") compared to the very general ones currently included in the Bankruptcy Law, but does not change its substance. The Insolvency Code reforms not only the purposes of the Certified Plan (*i.e.* restructuring of the debtor's indebtedness and rebalancing of its financial position) but also its minimum content, which must include:

(i) the main reasons for the crisis;

(ii) the restructuring strategies and the time necessary to ensure the rebalancing of the debtor's financial position;

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[14] As of today, governed by Article 161, paragraph 6, Bankruptcy Law. It should be noted that the standstill is not automatic once the proceedings are commenced, but must be requested by the debtor. Although the wording is not clear, it is likely that the debtor may make such a request when filing an Early In-Court Composition (*concordato in bianco*).

[15] It is unclear whether this suspension applies also once an Early In-Court Composition is filed but this is possibly the intention.

(iii) the list of creditors and the amount of the debts to be restructured and the status of any negotiations (unless completed);

(iv) any new money;

(v) the timing of the actions to be carried out as well as the remedies in the event of deviation from the plan.

The restructuring agreements underlying the Certified Plan must bear a "certified" date (*data certa*) and an independent expert is requested to validate the truthfulness of the accounting data as well as the economic and (now) legal feasibility of the plan. The plan can (like today) be published in the Companies' Register if requested by the debtor. The same documents required to access an In-Court Composition or file a debt restructuring agreement[16] must be attached to the Certified Plan.

3.2. Debt restructuring agreement

The Insolvency Code introduces significant changes to the set of rules governing debt restructuring agreements (*accordi di ristrutturazione dei debiti*). The aim is to facilitate and spread their use. The most important changes are listed below.

(a) Agreements with "extended effects" and standstill agreements. The new set of rules extends the cram-down mechanism to all debt restructuring agreements and moratorium agreements and no longer only to those entered with banks and financial institutions. Pursuant to the Insolvency Code, all creditors, including non-financial creditors, may therefore be forced to accept the treatment agreed to by the majority of creditors included in the relevant class (a class that the debtor can create only among creditors having uniform legal status and economic interests).

The main condition for the application of the cram-down (which however - like today - cannot force any creditor to provide new services to the debtor) is the adherence to the restructuring or standstill agreement by 75% of creditors included in the relevant class; additional conditions apply that substantially replicate those provided for by Article 163-*septies* Bankruptcy Law, with some corrections[17].

(b) "Facilitated" debt restructuring agreements. The Insolvency Code introduces a form of "facilitated" debt restructuring agreement that enables the debtor to apply for the confirmation of the debt restructuring agreement (*omologa*) even if the debt restructuring agreement(s) is (or

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[16] Including the last three financial statements, an updated statement of assets and liabilities, an estimate on the status of the activities, the list of creditors with details of claims and rankings, the list of creditors holding personal or in rem rights on assets in the debtor's possession, a certification relating to tax claims.

[17] These are the conditions: (i) creditors to be crammed down must have been informed of the negotiations, have been allowed to participate in negotiations and have received all relevant information; (ii) the agreement must provide for the continuation of the business (this condition does not apply when cramming down creditors in the context of a standstill agreement); (iii) creditors to be crammed down in the context of a debt restructuring agreement must receive a higher satisfaction than that delivered in an In-Court Liquidation, while creditors who are to be crammed donw in the context of a standstill agreement must have "concrete prospects" of satisfaction not lower than that possible in an In-Court Liquidation, and this must be confirmed by an independent professional.

has been) entered only with creditors representing (at least) 30% of the overall indebtedness (instead of the current 60% threshold). In order to benefit from such facilitated instrument, the debtor:

(i) must not benefit from the legal postponement of payments to non-adhering creditors (*i.e.* 120-day term from confirmation of the debt restructuring agreement or due date of the relevant claims);

(ii) must not request any in-court standstill.

(c) **Changes to the agreement**. The new set of rules clarifies what to do in case of substantial changes to the debt restructuring agreement: these changes are expected to be accompanied by a new expert certification (*asseverazione*) and the amended agreement together with the new expert certification (provided changes are made following confirmation of the agreement by the court) must be published in the Companies' Register and notified to creditors who are entitled to challenge the new agreement in the following 30 days.

(d) **Tax settlement**. In order to facilitate debt restructuring agreements, the Insolvency Code enables the court to confirm the debt restructuring agreement despite the tax office not having accepted the proposed tax settlement, provided that **(i)** the acceptance of the tax office is decisive to reach the thresholds needed to initiate the proceedings and **(ii)** the expert has confirmed that the settlement proposal submitted to the tax office is more convenient than the possible treatment of the tax claims in an insolvency scenario. On the contrary, it is not clear whether the proposed tax settlement must comply with the criteria set forth in Article 182-*ter* Bankruptcy Law, which are reproduced in the Insolvency Code only in respect of In-Court Compositions.

(e) **Administrator appointment**. Finally, the new regulation provides for the appointment of an administrator (*commissario*) whenever insolvency filings are pending.

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Apart from the amendments summarized in paragraph 3, the set of rules governing debt restructuring agreements is mostly unchanged.

3.3. In-Court Compositions (*concordato preventivo*)

The Insolvency Code reserves the In-Court Composition to those debtors able to show business continuity and to preserve a certain level of employment; in addition, the new rules have increased protection of minority creditors. The role of the court is paramount once again. The main changes are below.

(a) **In-Court Liquidation Compositions (*concordati liquidatori*)**. According to the new set of rules, In-Court Liquidation Compositions are only admissible if:

(i) external funding is provided increasing the satisfaction of unsecured creditors by at least 10% compared to their treatment in an In-Court Liquidation, and

(ii) unsecured creditors are not offered less than 20% of the overall amount of unsecured claims.

(b) In-Court Composition On a Going Concern Basis (*concordato in continuità*). The Insolvency Code confirms In-Court Compositions On a Going Concern Basis but dictates the following two requirements that In-Court Composition plans must meet in order to be qualified on a going concern basis:

(i) satisfaction of creditors must be funded from revenues originated to a prevalent extent from the going concern itself[18], and

(ii) 50% of the labour force employed in the two years preceding the In-Court Composition must be kept (or re-employed) for one year from confirmation of the plan.

The new set of rules also clarifies the idea of "prevalence of revenues from going concern", which is assumed when the expected revenues for the first two years of implementation of the plan originate from a business activity entrusted with at least half of the labour force employed in the two years prior to the In-Court Composition.

(c) Court examination. The reform requires the Court to verify not only the legal feasibility but also the economic feasibility of the plan underlying the In-Court Composition. In order to facilitate such examination, the Insolvency Code enables the Court to request a feasibility opinion to the administrator, where appointed.

(d) Extended payments to secured creditors. The Insolvency Code extends from 1 to 2 years from confirmation of the In-Court Composition the payment term in respect of claims secured by liens, mortgages or pledges (unless the relevant asset is sold earlier) but vests the relevant creditors with the right to vote on the plan for the amount of "loss" caused by the extended payment term[19].

(e) Voting and mandatory classes. The reform aims to avoid the phenomenon of compositions "steered" by majority creditors (including where the majority is reached via debt assignments) and to do so, it provides:

(i) a double majority for the approval of the In-Court Composition, by amount and by number of creditors, if only one creditor holds unsecured claims of an amount equal to or higher than the majority of those admitted to vote;

(ii) the exclusion of creditors in conflict of interest from both voting and majorities calculation;

(iii) mandatory classes for the following creditors: creditors proposing the In-Court Composition, including their related parties, creditors holding social security and tax claims, creditors holding claims guaranteed by third parties and the creditors satisfied in kind.

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[18] Which includes the sale of the warehouse.

[19] The "loss" is calculated by discounting the payments envisaged in the plan at a rate equal to 50% of the default rate applicable to commercial transactions.

Finally, voting operations are carried out online (no longer in person before the court).

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Excluding the changes mentioned above, the new regulation essentially confirms the regime established by the Bankruptcy Law for In-Court Compositions and in particular it confirms:

- the regime of competing offers in pre-packaged deals (*offerte concorrenti*) (now also applicable in the event the pre-packaged deal is based on agreements that involve the non-immediate transfer of companies or going concerns) and competing composition proposals (*proposte concorrenti*) (except for the reduction of the threshold blocking the filing of competing proposals which operates to reward debtors promptly tackling the distress[20]);
- the right to suspend or terminate pending agreements;
- the option to pay pre-petitioned claims, which is however limited to In-Court Composition on Going Concern basis and applied also to the repayment of loans secured by mortgages on assets that are instrumental to the running of the business (this last provision is somewhat unclear).

4. IN-COURT LIQUIDATION

The In-Court Liquidation remains (as the former bankruptcy) aimed at the liquidation of the assets of the insolvent debtor and the distribution of the relevant proceeds to creditors. According to the legislator, the In-Court Liquidation is meant to be the preferred route to liquidate the debtor's estate whenever the business continuation on going concern basis is not feasible[21]. Basically, while maintaining a substantial continuity with the current bankruptcy proceedings, the legislator has standardized and simplified the proceedings in order to speed up their completion.

The main substantial innovations of this proceedings are as follows.

(a) Auditors filing. The Insolvency Code vests also in the auditors and the supervisory authorities the power to file for the In-Court Liquidation.

(b) The paramount role of the court. The reform gives back to the court a central role in the proceedings. Among other tasks, the court (namely the judge in charge of the relevant case) approves the liquidation program as well as the execution of the single actions envisaged for the same.

(c) Efficiency of the proceedings. The reforms aims to make the proceedings more efficient both in the proof of claim phase as well as in the assets liquidation phase. In addition to providing for the use of digital tools as much as possible, the new rules abbreviate the deadline after which filing a claim will be considered "extra-late" (reduced from 12 to 6 months) and

[20] See paragraph 2(f).

[21] To this end, the reform has limited access to the In-Court Liquidation Composition only to cases in which creditors are guaranteed a better satisfaction by virtue of new money.

introduce a more detailed regime of asset sales and in general the liquidation phase (that cannot exceed five years, instead of two as currently envisaged).

(d) Business continuity. The reform intends to encourage the continued running of the business (also during the In-Court Liquidation). To this end, it provides that the court must authorize the continued running of the business whenever any interruption thereof may cause a "serious damage" and provided in any case that such continuation is not prejudicial to creditors.

(e) Calculation of the claw-back period. The Insolvency Code states that the relevant period for claw-back actions starts from the date of the filing of whichever restructuring proceedings that then ended with the In-Court Liquidation and no longer, as currently set, from the date of the declaration of insolvency.

(f) Pending agreements and super seniority. If the trustee (*curatore*) steps in pending agreements, super-seniority is granted only to claims accrued during the proceedings.

(g) In-Court Liquidation *v.s.* forced administrative liquidation. The scope of the In-Court Liquidation has been widened also in view of the significant reduction in the scope of the forced administrative liquidation (according to the Insolvency Code eligible for the forced administrative liquidation are only certain categories of debtors such as banks, financial intermediaries and insurance companies).

(h) By-Outs from In-Court Liquidations *(concordati fallimentari)***.** The by-outs from In-Court Liquidations remain basically unchanged. However, it has been clarified that buy-out proposals coming from the debtor are admissible, provided they are supported by new money increasing the assets' value by at least 10%.

5. GROUPS DISTRESS AND INSOLVENCY

The Insolvency Code has introduced a single procedure for when several companies of the same group are in distress or insolvent[22]. Therefore, several companies of the same group may commence a single restructuring process (in the form of a Certified Plan or debt restructuring agreements or an In-Court Composition) which, in turn, can be based on a single group restructuring plan or several plans mutually linked. However, despite the single process assets and liabilities of each company of the group must stay separate.

Also, the reform provides for a single group In-Court Liquidation, provided that a single application for insolvency is filed against (or by) all relevant companies and that the single group process improves the satisfaction of creditors by best coordinating the assets liquidation phase for the various companies.

The main aspects of the group proceedings are the following.

[22] Pursuant to the Insolvency Code, group means a group of companies "*that, under Articles 2497 and 2545-septies of the Italian Civil Code, are subject to the direction and coordination of a holding, an institution or a person based on a participation or a contractual arrangement*". However, it should be specified that "*it is presumed, unless otherwise proven, that: 1) the management and coordination of a company is exercised by the company or entity required to consolidate its financial statements; 2) the subsidiaries, directly or indirectly controlled, or subject to joint control, are deemed subject to the management and coordination of the parent company*".

(a) **Intragroup transactions**. The restructuring plan may include intragroup transactions involving the transfer of resources from one company to another, provided that this is conducive to the better satisfaction of creditors of each company and to the going concern.

(b) **Overall assessment**. The confirmation by the court of the debt restructuring agreement(s) or the In-Court Composition filed for the whole group requires, on the one hand, an overall assessment of the group and, on the other hand, that creditors of each company be paid not less than the value of the respective claims in a liquidation scenario of the relevant company.

(c) **Approval of a group In-Court Composition.** The creditors of each company involved in the group proceedings vote at the same time but separately on the proposal/plan of the relevant debtor. The group In-Court Composition is then approved when the proposals/plans of each debtor have been approved with the required majorities.

(d) **Cancellation-termination of the In-Court Composition**. The group In-Court Composition cannot be canceled or terminated when only some of the group companies have implemented the plan, unless the implementation of the plan by the other companies is also significantly compromised.

Finally, the Insolvency Code also provides that if several companies of the same group are subject to separate In-Court Compositions or In-Court Liquidations (even pending before different courts), the administrators of such proceedings must cooperate to ensure efficiency.

6. CORPORATE LAW AND FURTHER PROVISIONS

The legislative decree that contains the Insolvency Code includes also changes to Civil Code provisions on rights and duties of management with a view to prevent and manage the distress and the insolvency. As already pointed out, these changes lay the grounds for what can be considered the new branch of corporate law dedicated to the distress, filling the gap between corporate law in going concern scenarios and insolvency law.

These changes are analyzed in Le novità in materia di diritto societario varate in sede di adozione del "Codice della crisi di impresa e dell'insolvenza" of 24 January 2019 to which reference should be made.

These amendments to the Civil Code together with the additional provisions on guarantees in favor of purchasers of properties to be built and provisions on jurisdiction over extraordinary administration proceedings for large groups of companies will become effective after 30 days from the publication of the legislative decree in the Official Journal.

These novelties, like other novelties not covered in this brief overview, will be dealt with in further newsletters.