

COVID-19

Decree-Law no. 23 of 8 April 2020

Amendments to the Italian Civil Code and new rules regarding business crisis management

Decree-Law no. 23 of 8 April 2020, published in Italian Official Journal no. 94 of 8 April 2020 and entered into force on 9 April 2020, introduced urgent provisions in support of liquidity and exportations. Among other things, it postponed the entry into force of the Italian Business Crisis and Insolvency code and provided for a number of derogations from Italian civil code rules.

DEFERRED ENTRY INTO FORCE OF THE ITALIAN BUSINESS CRISIS AND INSOLVENCY CODE PURSUANT TO LEGISLATIVE DECREE NO. 14 OF 12 JANUARY 2019

Article 5

The date of entry into force of the Italian Business Crisis and Insolvency code has been postponed.

PARTIES CONCERNED

All entities subject to the Italian Business Crisis and Insolvency code.

AMENDMENT

The entry into force of the Code has been deferred to **1 September 2021**.

TEMPORARY PROVISIONS CONCERNING THE REDUCTION OF THE SHARE CAPITAL

Article 6

The application of the Civil Code provisions concerning the actions to be taken if the share capital is reduced as a result of losses has been suspended.

Purpose of the rule is to avoid that losses resulting from the COVID-19 emergency in the year ending 31 December 2020 may force directors to put companies into liquidation if the going concern assumption may no longer be met, with the risk that directors may even be charged with

non-compliance with the obligations imposed by article 2486 of the Italian Civil Code (to preserve the integrity and value of the company's assets during the liquidation process).

ELIGIBLE PERSONS

Italian joint-stock companies (*società di capitali*), cooperative companies, consortia.

AVAILABLE BENEFIT

The following Civil Code articles shall not apply in the **period between 9 April 2020 and 31 December 2020**:

- ◆ 2446(2) and (3) (reduction of the share capital as a result of losses);
- ◆ 2447 (Reduction of the share capital below the legal minimum);
- ◆ 2482-*bis* (4), (5) and (6) (reduction of the share capital as a result of losses);
- ◆ 2482-*ter* (Reduction of the share capital below the legal minimum).

NOTA BENE

During the same period, the reduction or write-off of the share capital as defined in article 2484(1)(4) and article 2545-*duodecies* of the Italian Civil Code will not constitute reasons for dissolution.

NOTES:

- ◆ article 2446(2) and (3) (Reduction of the share capital as a result of losses):
Reduction of the share capital by more than one third as a result of losses
"[...] If the loss is not reduced to less than one third of the share capital within the subsequent accounting year, the ordinary general meeting or the supervisory board approving the financial statements for that year shall reduce the share capital in proportion to the ascertained losses; if not, the directors and the statutory auditors, or the supervisory board, shall ask the court to order the reduction of the share capital by reason of the losses shown in the financial statements. The court, after hearing the prosecutor (Pubblico Ministero), shall do so by a decree, against which a complaint may be filed, to be registered with the companies registry by the directors.
If the shares issued by the company have no nominal value, the articles of association, an amendment thereof or a resolution approved with the majority votes required for resolutions by the extraordinary general meeting, may provide for the reduction of the share capital under the previous paragraph to be resolved by the board of directors' meeting. In this case, article 2436 shall apply".
- ◆ article 2447 (Reduction of the share capital below the legal minimum):
"[...] the directors or the management board or, if no action is taken by them, the supervisory board, shall convene a shareholders' meeting without delay to resolve a reduction of the share capital and its concurrent increase to an amount not lower than such legal minimum, or the company's transformation".
- ◆ 2482-*bis* (4),(5) and (6) (reduction of the share capital as a result of losses):
Reduction of the share capital by more than one third as a result of losses:
"[...] If the loss is not reduced to less than one third of the share capital within the subsequent accounting year, an ordinary shareholders' meeting shall be convened to approve the financial statements and reduce the share capital in proportion to the ascertained losses. If not, the directors or the statutory auditors or the entity in charge of auditing the accounts appointed pursuant to article 2477 shall ask the court to order the reduction of the share capital by reason of the losses shown in the financial statements. The court, inter alia at the request of any party concerned, shall do so by a decree, against which a complaint may be filed, to be

registered with the companies registry by the directors. The last paragraph of article 2446 shall apply, insofar as compatible”.

- ◆ article 2482-ter (Reduction of the share capital below the legal minimum):
“If, by reasons of losses exceeding one third of the share capital, this falls below the legal minimum provided by article 2463(4), the directors shall convene a shareholders’ meeting without delay to resolve a reduction of the share capital and its concurrent increase to an amount not lower than such legal minimum. It is possible to resolve the company’s transformation”.
- ◆ article 2484 (reasons for dissolution):
“[Italian] Joint-stock companies (*società per azioni*), limited partnerships (*società in accomandita per azioni*) and limited liability companies (*società a responsabilità limitata*) shall be dissolved: [...] 4) as a result of the reduction of the share capital below the legal minimum, except as provided by articles 2447 and 2482-ter; [...]”.
- ◆ article 2545-duodecies (Dissolution):
“A[n Italian] cooperative company shall be dissolved for the reasons stated under article 2484(1), (2), (3), (5), (6) and (7), and a result of the loss of the share capital”.

TEMPORARY PROVISIONS CONCERNING THE BASIS OF ACCOUNTING USED IN THE PREPARATION OF FINANCIAL STATEMENTS

Article 7

The rule introduced a temporary derogation from the basis of accounting used in the drafting of financial statements, and in particular the going-concern basis of accounting.

As stated in the explanatory report to the decree, purpose of the rule is to neutralise the distortions caused by the current circumstance, while ensuring that the financial statements continue to provide appropriate information to third parties; for this reason, companies which, before the crisis, would have continued to operate as a going concern, which will be allowed to adopt the going concern basis of accounting in the financial statements for the years ending during 2020; instead, the rule will not apply to companies which were no longer operating as going concerns regardless of the COVID-19 emergency.

ENTITIES CONCERNED

Companies required to prepare financial statements.

AVAILABLE RELIEF

In preparing the financial statements at 31 December 2020, valuations of items can be made on a going concern basis¹ if this assumption was met in the latest financial statements for the year ended at a date prior to 23 February 2020 (the 2019 financial statements, for entities whose fiscal year coincides with the calendar year).

The valuation criteria must be expressly outlined in the notes to the financial statements, including by making reference to the results of the prior year’s financial statements.

¹ Referred to in article 2423-bis(1)(1) of the Italian civil code.

IMPORTANT!

The above provisions also apply to financial statements for a period ending up to 23 February 2020 and not yet approved.

NOTA BENE

The provisions of Article 106 of Decree-Law no. 18 of 17 March 2020 (extending the deadline for approving the 2019 financial statements, generally set at 30 April 2020) will continue to apply.

TEMPORARY PROVISIONS ON LOANS GRANTED TO COMPANIES

Article 8

The procedures to postpone the loans made by shareholders or entities exercising direction and coordination have been suspended.

As explained in the explanatory report to the Decree-Law, this was required by the need to stimulate the channels for an adequate financing of companies. This has required the temporary suspension of the procedures to postpone the loans made by shareholders or entities exercising direction and coordination, since they are deeply discouraged by the current economic situation. This being a contingent situation, this provision applies only to the loans made by 31 December 2020.

ELIGIBLE ENTITIES

Corporations.

AVAILABLE BENEFIT

Loans made to companies between 9 April and 31 December 2020 are not subject to articles 2467 and 2497-*quinquies* of the Civil Code.

NOTA BENE

- ◆ article 2467 (Shareholders' loans):
"Repayment of loans made by shareholders to the company is conditional on the reimbursement of other debt. Shareholders' loans made to the company are those which have been granted in a time when, taking into consideration the type of business activity performed by the company, there is a strong imbalance between debt and shareholders' equity or in a company's financial situation where a contribution would have been reasonable".
- ◆ article 2497-*quinquies* (Loans in the direction and coordination activity):
"Loans made to the company by the entity exercising direction and coordination or other entities which are controlled by it are subject to article 2467".

OTHER PROVISIONS

Provisions on composition with creditors and debt restructuring agreements

Article 9

In order to minimise the risk that composition with creditors and debt restructuring agreements which could actually be successful prior to the outbreak of the crisis due to COVID-19 might be irretrievably jeopardized, this provision prescribes a series of actions regarding composition with creditors and debt restructuring agreements consisting of the following:

- ◆ with regard to compositions with creditors and debt restructuring agreements which have been approved by the court prior to COVID-19 emergency, the limitation period – expiring in the period between 23 February 2020 and 31 December 2021 –has been suspended for six months;
- ◆ with regard to the proceedings approving the compositions with creditors and debt restructuring agreements still pending as at 23 February 2020, the debtor may be granted with an extension of the limitation period to prepare a new proposal of composition or debt restructuring agreement;
- ◆ with regard to the proceedings approving the compositions with creditors and debt restructuring agreements still pending as at 23 February 2020, the debtor may ask to change the limitation period originally envisaged in the proposal and in the agreement, however not longer than six months;
- ◆ a new period of up to ninety days has been granted to the debtor which benefitted from either the term under article 161(6) of the Italian Bankruptcy or the term under article 182bis(7) of the Italian Bankruptcy Law. The new period also applies in the event of an appeal on a bankruptcy declaration, prior to the filing of a request showing the elements which have required the granting of the new period with specific reference to the facts occurred as a result of COVID-19 emergency.

Other temporary provisions on appeals and requests for bankruptcy declarations and insolvency

Article 10

This provision prescribes that all appeals compliant with articles 15 and 195 of Royal Decree no. 267/1942 and 3 of Legislative Decree no. 270/1999 filed between 9 March 2020 and 30 June 2020 are barred to prosecution.

This is a general provision prescribing that all types of requests (for bankruptcy) involving large-sized enterprises as well, but which do not fall within the scope of application of Decree-Law no. 347/2003, are barred to prosecution.

As explained in the explanatory report of the Decree-Law, the suspension period also applies to all appeals and consequently to appeals filed by sole proprietors.

The only exception to being barred to prosecution occurs when the appeal is filed by a prosecutor and includes the request to issue preventive or provisional measures under article 15(8) of the Italian Bankruptcy Law.

The suspension period is not taken into consideration for the purposes of either the calculation of the year in progress from the cancellation from the companies' registry and of the calculation of the limitation period for initiating a claw-back action.

Extension of the expiry date of debt instruments

Article 11

This provision prescribes the extension of the expiry date of debt instruments included in the period between 9 March 2020 and 30 April 2020; it applies to promissory notes, bills and other debt instruments issued prior to the date of entry in force of the Decree, and any other instrument having enforceability on that date.

The extension also applies to debtors and their guarantors, unless they waive to take advantage therefrom.

The limitation period for collection of bank and post office cheques is suspended.

Moreover, the deadline for filing letters of default with the Chambers of Commerce between 9 March 2020 and 9 April is extended; if already published, the Chambers of Commerce will automatically cancel them.

For further clarification please contact:

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