ALLEN & OVERY

Covid – 19 coronavirus update

The Italian Government's Liquidity Decree: new measures for the business sector

Contents

KEY INFORMATION

On 9 April 2020 Decree no. 23 of 8 April 2020 (the so-called Decreto Liquidità) came into force. It introduces, *inter alia*, significant changes with respect to:

1. insolvency proceedings and distressed companies;
2. special powers of the Government in strategic sectors ("Golden Powers");
3. disclosure obligations relating to the acquisition of participations in Italian listed companies; and
4. tender proceedings, administrative proceedings and relevant deadlines, including those concerning the payment of sanctions issued by the National Antitrust Authority.

The Liquidity Decree in part covers matters which have already been addressed by prior legislation aimed at counteracting the Covid-19 coronavirus emergency, including Decree no.18 of 17 March (the so-called Cura Italia Decree) and also introduces further measures - Please see our Client Bulletin concerning the credit sector.

1. Has Italy enacted specific measures concerning insolvency proceedings and distressed companies in order to cope with the Covid-19 coronavirus emergency?

Yes, Law Decree n. 23 of 8 April 2020, which came into force on 9 April 2020 (the **Liquidity Decree**), provides specific rules concerning insolvency proceedings and distressed companies, which must be read together with the special legal framework on civil proceedings set forth by Law Decree no. 18 of 17 March 2020 (the **Cura Italia Decree**).

The Liquidity Decree provides several measures which significantly impact the management of companies that are facing financial and economic distress as a result of the Covid-19 coronavirus epidemic. These measures can be divided into the following two macro-categories:

i. measures aimed at protecting and sustaining the continuation of the business as a going concern; and

ii. measures having an impact on bankruptcy and pre-insolvency proceedings and which are aimed at containing the number of bankruptcies.

In addition, the Liquidity Decree postpones the entry into force of the Italian Insolvency Code – which is due to replace the current bankruptcy framework - to 1 September 2021. This is intended to avoid any uncertainty in the legal system during this period of economic and financial instability which might be caused by the innovative provisions contained in the Italian Insolvency Code (some of which are aimed at early crisis detection and prevention).

1.1. Which are the principal measures aimed at protecting and sustaining the continuation of businesses as going concerns?

Between 9 April and 31 December 2020, by way of exception to the ordinary rules:

(a) both the the obligation of shareholders to recapitalise companies and the obligation to wind-up companies due to the reduction of share capital below the minimum amount required by law are suspended. Consequently, companies will not need to be mandatorily recapitalised or liquidated even in the event of a full loss of share capital. However, directors are still required by law to call shareholders' meetings in order to provide shareholders with appropriate information with respect to the company's economic and financial situation; and

(b) shareholders may grant loans, in any form whatsoever, to support companies without the risk of their claims being ranked junior to the claims of third-party creditors. Shareholders therefore have a greater chance of recovering all or part of such claims[1].

With the aim of facilitating the continuation of businesses as going concerns, the Liquidity Decree also provides that in the preparation of corporate balance sheets relating to the ongoing financial year (or relating to the financial period which ended before 23 February 2020, if such balance sheets are yet to be approved),

[1] In addition, note that – in order to incentivise the provision of loans aimed at maintaining SMEs as going concerns – the Liquidity Decree extends, in accordance with Article 13, access to the guarantee scheme of the Central Guarantee Fund for SMEs (*Fondo Centrale di Garanzia*) to companies which, after 31 December 2019, have entered into a pre-insolvency workout agreement on a going concern basis (*concordato preventivo con continuità aziendale*), which have entered into debt restructuring agreements (*accordo di ristrutturazione dei debiti*) or which have implemented a certified recovery plan (*piano attestato di risanamento*). In order to obtain such guarantee, as of 9 April 2020, companies are required to have exposures which are no longer capable of being declared non-performing and to not have any payment obligations in arrears after the granting of the guarantee. Furthermore, the bank, based on an analysis of the relevant borrower's financial situation, must be able to reasonably assume that the exposure will be fully reimbursed at maturity, pursuant to Article 47-*bis*, paragraph 6, letters a) and c) of Regulation 575/2013.

evaluations can be made as if the relevant business activity is continuing if such continuation is shown in the previous balance sheet relating to the financial period which ended before 23 February 2020 (being the date on which the first piece of emergency legislation was enacted).

1.2. Are there any measures having an impact on bankruptcy and pre-insolvency proceedings and which are aimed at containing the number of bankruptcies?

The Liquidity Decree also provides for the following measures, which are aimed at facilitating the more orderly administration of bankruptcy and pre-insolvency procedures in order to avoid a rapid increase in bankruptcies:

- **Inadmissibility (*improcedibilità*) of petitions for the declaration of bankruptcy or for the ascertainment of the state of insolvency**

  Any filings for the declaration of bankruptcy or for the ascertainment of the state of insolvency brought within the period between 9 March 2020 and 30 June 2020 (whether by third parties or by the company itself) are deemed inadmissible (*improcedibili*) and will be required to be filed again after the expiration of such period[2]. However, the public prosecutor (*pubblico ministero*) will still be entitled to file such a petition if it is made both for the declaration of bankruptcy and in order to issue precautionary or conservative measures to protect the assets of the bankrupt company.

  Moreover, for the purposes of safeguarding the *par condicio creditorum* principle, the Decree provides that in the event a bankruptcy is declared after 30 June 2020 following a declaration of inadmissibility during the period between 9 March 2020 and 30 June 2020, such period shall not be taken into account when calculating the deadline for bringing relevant clawback actions.

- **Postponements relating to pre-insolvency workout agreements with creditors and debt restructuring agreements already ratified (*omologati*) by the Court**

  The deadlines for the fulfilment of pre-insolvency workout agreements with creditors or debt restructuring agreements which have already been ratified (*omologati*) by the Court and which fall within the period between 23 February 2020 and 31 December 2020 are extended by a period of six months.

- **Further changes to pre-insolvency workout agreements with creditors and the procedures for the Court's ratification of debt restructuring agreements pending as at 23 February 2020**

  Companies taking part in pre-insolvency workout agreements with creditors or debt restructuring agreements pursuant to Article 182-*bis* of the Italian Bankruptcy Law are entitled to request (before the hearing for the Court's ratification and excluding the cases where the creditors have already rejected the pre-insolvency workout agreement proposal): (i) a new deadline for the filing of a new plan and a new proposal; and/or (ii) a unilateral amendment to extend by six months the deadline for the fulfilment of the pre-insolvency workout agreement with creditors or the debt restructuring agreement.

[2] This provision does not appear to apply to very large companies that are subject to the extraordinary administration procedure governed by Legislative Decree no. 347/2003 (Marzano Decree).

- **Postponements relating to pre-insolvency workout agreements with creditors "with reservation"**

  Companies which have applied for a pre-insolvency workout agreement with creditors "with reservation" pursuant to Article 161, paragraph 6, of the Italian Bankruptcy Law are entitled, under certain circumstances, to request a further extension of up to 90 days of the deadline for the filing of a fully-fledged pre-insolvency workout agreement with creditors or a debt restructuring agreement pursuant to Article 182-*bis* of the Italian Bankruptcy Law.

- **Postponements relating of suspension terms in civil proceedings** (please see our Client Bulletin in this respect)

2. Changes to rules concerning "Golden Powers"

2.1. Overview

The Italian Government has amended Legislative Decree no. 21/2012 on the so-called "Golden Powers" by way of the Liquidity Decree, by extending the scope of application of the Government's special powers to sectors that had thus far been excluded, and by extending the notification obligations to transactions carried out by foreign EU and non-EU entities.

The new rules, in force as of 9 April 2020: (i) aim to contain the negative effects of the Covid-19 coronavirus emergency on assets of national strategic importance (many of the rules have limited temporal application and are due to expire on 31 December 2020); and (ii) amend and supplement provisions under the initial "Golden Powers" legislation, enacted through Law Decree no. 21/2012 (as converted by Law no. 56/2012), and the more recent Law Decree no. 105/2019 (as converted by Law no. 133/2019) that had introduced new rules, *inter alia*, to adopt government decisions on transactions related to 5G networks.

2.2. Which share deals are subject to notification?

The Liquidity Decree extends the duty to notify the acquisition, as part of any transaction, of participations held in companies that own assets in the sectors listed in article 4.1 of EU Regulation 2019/452, being:

(a) critical infrastructure, whether physical or virtual, including energy, transport, water, health, communications, media, data processing or storage, aerospace, defence, electoral or financial infrastructure, and sensitive facilities, as well as land and real estate crucial for the use of such infrastructure (the credit and insurance sectors are expressly included by the Liquidity Decree as part of the broader financial sector);

(b) critical technologies and dual use items as defined in point 1 of Article 2 of Council Regulation (EC) No 428/2009, including artificial intelligence, robotics, semiconductors, cybersecurity, aerospace, defence, energy storage, quantum and nuclear technologies as well as nanotechnologies and biotechnologies;

(c) supply of critical inputs, including energy or raw materials, as well as food security;

(d) access to sensitive information, including personal data, or the ability to control such information; or

(e) the freedom and pluralism of the media (sectors from (a) to (e) together, the **Strategic Sectors**).

Notably, the acquisition is to be notified if carried out by:

– a foreign, non-EU purchaser, if it leads to the latter obtaining control of the company whose shareholding is the subject of the purchase (this rule is due to survive the 31 December 2020 expiration date and extend to acquisitions carried out beyond that date);

– a foreign, EU purchaser, if it leads to the latter obtaining control of the company whose shareholding is the subject of the purchase (this rule is due to expire on 31 December 2020);

– a foreign, non-EU purchaser, if it leads to the latter obtaining 10% of the voting capital of the target company and the value of the investment is higher than Euro 1 million (this rule is due to expire on 31 December 2020); acquisitions that result in the 15%, 20%, 25% and 50% thresholds being exceeded must also be notified.

2.3. Which other transactions are subject to notification?

Any resolution, act or transaction, adopted before 31 December 2020 by a company that holds one or more assets in the Strategic Sectors, which has the effect of changing the ownership, control or availability of the assets themselves or of changing their purpose, including, without limitation, resolutions of shareholders' meetings or of administrative bodies concerning the merger or de-merger of the company, the transfer of the registered office abroad, the modification of the corporate purpose, the dissolution of the company, the transfer of the going concern (*azienda*) or branches thereof in which said assets are included or the assignment of the same by way of guarantee, as well as any resolution concerning the transfer of subsidiaries that hold the aforementioned assets.

2.4. What are the prerequisites for the exercise of the special powers in the Strategic Sectors?

The special powers can be exercised by the Government if the protection of the essential interests of the State, or the protection of security and public order, is not considered to be adequately guaranteed by existing specific sector regulations.

2.5. What are the special powers of the Government?

The special powers of the Government, which are required to be applied according to the principles of proportionality and reasonableness, include the imposition of prescriptions or conditions. In cases where implementation has taken place before the deadline for the exercise of special powers has elapsed, the Government may order the company to restore the previous situation at its own expense.

2.6. Which other provisions have been enacted?

The Liquidity Decree also expressly provides that:

(a) in a number of circumstances not clearly covered by previous "Golden Powers" legislation, the Government has the power to promote *ex officio* the relevant procedures even when the interested party fails to notify,

(b) the competent office of the Presidency of the Council of Ministers has the power to request public administrations, public bodies or individuals, companies or other third parties, to provide information and documents; and

(c) Consob, the Italian Stock Exchange Supervisory Authority, may provide, for a limited period of time and pursuant to a resolution grounded on reasons relating to the protection of investors as well as efficiency and transparency of the market, lower disclosure thresholds for the disclosure of significant shareholdings in listed companies upon the occurrence of particular circumstances (for further details please refer to para. 3 below).

2.7. What is the timeframe for notifications under the "Golden Powers" legislation during the Covid-19 coronavirus emergency?

The Italian Government normally has up to 45 business days to issue decisions on notified

transactions under the "Golden Powers" legislation. However, as a consequence of the implementation of the Cura Italia Decree, Golden Powers proceedings have been subject to a 36 business day suspension period (between 23 February and 15 April). The Liquidity Decree further extends this period until 15 May. For pending proceedings notified before 23 February, the timeframe for issuing a decision is equal to the sum of the period from the date of notification until 21 February (i.e., the last business day before 23 February) and from 15 May onwards until the 45th business day is reached. In relation to notifications made on or after 23 February, the 45 day period runs as of 15 April. With regard to authorisations due to expire between 31 January and 15 April, their validity is extended until 15 June 2020.

3. Are there any changes to disclosure obligations relating to acquisitions of participations in Italian listed companies?

The Liquidity Decree broadens the powers of Consob with the aim of (a) ring-fencing listed companies from those takeovers which may be made easier by the Covid-19 coronavirus emergency, and (b) increasing protections for investors and the level of efficiency and transparency of the corporate control market and the capital markets.

A first amendment concerns the thresholds referred to in paragraph 2 of Art. 120 of the TUF, which if exceeded give rise to the obligation to disclose significant shareholdings in listed companies (such thresholds being 5% of capital for SMEs and 3% for all other companies)[3]. The Liquidity Decree provides that Consob has the power to reduce these thresholds with reference to companies with a particularly widespread shareholder base, regardless of their respective current market value.[4] Prior to this change, Consob was only entitled to provide, for a limited period of time, lower thresholds for companies with a particularly widespread shareholder base[5] and a high market capitalisation.

The Liquidity Decree introduces further changes in relation to acquisitions of "particularly significant" shareholdings pursuant to paragraph 4-bis of Art. 120 of the TUF which provides that, in the event of the purchase of a stake in a listed company which is equal to or greater than the thresholds of 10%, 20% and 25%, the purchaser must also declare the objectives that they intend to pursue over the next six months. Under the Liquidity Decree, Consob is authorised to reduce these thresholds and to provide, for a limited period of time, a 5% threshold for companies with a particularly widespread shareholder base, for reasons of "investor protection" and "efficiency and transparency of the corporate control market and capital markets".[6]

4. Have new deflationary measures been introduced in relation to tender proceedings?

Yes. In relation to public works and services contracts that (i) are for amounts higher than Euro 200,000 in which the use of workmanship is significant, (ii) concern activities that are mainly carried out on the physical premises of the granting authorities and (iii) are characterized by the use of instrumental goods of the granting authority, the 4-month validity of the Single

[3] Pursuant to Art. 120 para. 2 of the TUF, those holding more than 3% of the share capital of a listed company having Italy as home Member State must inform that company and Consob. If the issuer is a SME, the threshold is 5%.

[4] Pursuant to these newly extended powers, on 9 April 2020, Consob reduced these thresholds from 3% to 1% for 39 non-SME listed companies and from 5% to 3% for 65 SMEs, effective until 11 July 2020 (Consob Resolution no. 21326).

[5] In the context of Resolution 21304 of 18 March 2020, Consob explained that the requirement of a "particular widespread shareholder base" may be assessed by reference to the controlling structure and should be excluded whenever the issuer is subject to "control" pursuant to Art. 2359, para. 1 n.1) of the Italian Civil Code.

[6] Pursuant to these newly extended powers, on 9 April 2020, Consob introduced a lower threshold of 5% for 104 listed companies, effective until 11 July 2020 (Consob Resolution no. 21327).

Document of Tax Compliance (*Documento Unico di Regolarità Fiscale* - DURF) - which enables contractors and subcontractors to avoid tax compliance assessments by the granting authority – has been extended by law until 30 June 2020 if such document was issued before the end of February 2020. This amendment will have deflationary effects on the workload of the Tax Agency, in its capacity as competent authority for the issuance of such certifications, and will speed up the conclusion of tender proceedings.

5. What are the effects of the Liquidity Decree on administrative proceedings?

The original suspension of deadlines in relation to judicial administrative proceedings has been extended (with respect to deadlines for the notification of appeals only) from 15 April to 3 May. From 16 April, deadlines for the filing of briefs and documents will start running again. In relation to new appeals, the suspension period does not apply to proceedings in which an *interim* measure (*misura cautelare*) has been requested.

6. Have deadlines applicable to administrative proceedings, including those concerning the payment of sanctions issued by the National Antitrust Authority, been subject to further suspensions?

Yes, Art. 103 of Law Decree No. 18 of 17 March 2020 provided that in relation to all administrative proceedings commenced by an applicant or by the public authorities which were pending as at 23 February 2020, all procedural and "infra-procedural" (*endoprocedimentali*) deadlines were suspended until 15 April 2020. Article 37 of the Liquidity Decree extends this suspension to 15 May 2020.

Until further clarification is received from the competent authorities, the suspension of the payment of antitrust sanctions expiring in the suspension period should be considered postponed to 1 October 2020 (save for any further extensions), as established by the National Antitrust Authority in a communication dated 1 April 2020. As for sanctions concerning consumer protection, when calculating the expiry period (both in relation to the entire amount and to the single instalments) the suspension period from 23 February to 15 May will not be taken into account.

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