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Subject: Looking ahead: the epidemiological emergency and crisis solving tools

Summary

In response to the continued expansion of Covid-19 in the Italian territory, the Government and Public Authorities have been forced to adopt urgent measures and place important limitations on companies to contain and reduce the spread of the virus in the territory.

These measures are having a serious effect on the economy in general, and companies in particular as they face two problems, (i) the loss of revenues either as a result of the Government having suspended their production activities or the lack of components and semi-finished products from suppliers, and (ii) the risk of being excluded from major worldwide supply chains.

Our firm would like to offer its support to companies that, during this period of temporary difficulty, may require specific, targeted advice in the legal and or fiscal/tax sectors aimed at:

- reducing the economic impact of the recently issued Government decrees;
- benefitting from actual and future fiscal concessions; and,
- adopting the most suitable measures to deal with an eventual debt/emergency situation thereby avoiding more drastic and penalizing insolvency procedures.

Below, we will briefly explore the various measures that an entrepreneur can adopt to proactively overcome the current crisis focusing in particular on Bankruptcy Law; this in light of the postponement to September 2021 of the implementation of the Crisis Code ("*Codice della Crisi*") aimed at providing entrepreneurs with additional tools with which to face the crisis.

No successful entrepreneur ever wants to hear about bankruptcy procedures, however today we believe such procedures should be considered under a new light, that is, as instruments of relief in a time of difficulty in which entrepreneurs may find themselves through no fault on their part. Today's criticalities, if not properly addressed and managed, could in fact cause an even more significant slowdown for the business in the mid to long term.

Current Tools for Crisis Management

The available tools are the following:

1. Certified recovery plan ("*piano attestato di risanamento*"), pursuant to Article 67 L.F.;
2. Debt Restructuring Agreement ("*accordo di ristrutturazione dei debiti*"), pursuant to Article 182-bis L.F., which also comprises several sub-agreements (an agreement with the tax authorities, pursuant to Article 182-ter L.F. and an agreement with the financial intermediaries pursuant to Article 182-septies L.F.);
3. Composition with Creditors ("*concordato preventivo*"), pursuant to Article 160 ss. L.F. and, in particular, the Composition with Creditors on a *going concern basis* ("*concordato preventivo in continuità*").

The first two remedies are out-of-court tools: although there is a phase that concerns the Court, such tools are focused on a "negotiation" with creditors. The composition with creditors is a judicial procedure, supervised and partly "guided" by judicial bodies or bodies appointed by the Court.

1) Certified recovery plan ("CRP")

This is the most flexible tool, often used against institutional creditors (banks etc.). The main goal of the plan is to satisfy creditors, through debt reorganization, and the economic-financial and managerial reorganization of the company to secure the continuity of business as a going concern.

The feasibility of the recovery plan must be certified by a registered professional - there are no specific rules regarding the content or form of the plan. The recovery plan must not be disclosed to third parties, nor is it subject to the consent of creditors (except in the event, and within the limits, of any agreements executed to redefine individual debt positions).

The advantage of the CRP is that the principle of "par condicio creditorum" (*equal treatment of creditors*) does not apply - the Company in crisis is therefore allowed to make agreements with the various creditors and establish particular conditions of treatment without the risk (or rather, a *greatly reduced risk*) of future clawback actions.

2) Debt restructuring agreement ("DRA")

According to the applicable law, a company can enter into a DRA with creditors representing at least 60% of the credits. The percentage of 60% must be calculated on the entire debt exposure of the entrepreneur, i.e. on the overall amount of credits. The debtor is free to negotiate and offer different conditions to each creditor.

The restructuring plan underlying the agreement must be certified by an independent expert, in a report which validates the feasibility of the plan including its suitability for ensuring the regular payment of "external" creditors (ie those who are not part of the agreement).

The agreement is binding only for creditors who have agreed to it.

Dissenting creditors must instead be fully paid within 120 days from the natural expiration date of their credit, or, if the credit has already expired on the approval date, within 120 days of such approval date.

The agreement is subject to public disclosure in the Companies' Register.

The DRA has the following advantages:

- compliance with the principle of “equality treatment of creditors” is not required,
- even if only temporarily, the executive procedures are “stopped”, and
- the payment of dissenting creditors is postponed for 120 days.

3) Composition with creditors (“CWC”)

The CWC is a plan filed by a company whereby the company freely chooses the means for satisfying the creditors such as: sale of assets, takeover, or other extraordinary operations, including the award to creditors, as well as companies controlled by them, of shares, quotas, or bonds, also convertible into shares, or other financial instruments and debt securities.

The Court will verify and check the feasibility of the CWC. The plan must then be approved by **the unsecured creditors** who represent the majority (50% + 1) of the total outstanding claims having voting rights; in cases involving different classes of creditors, the plan is approved if this majority also occurs in the largest number of classes.

Unlike the CRP and DRA above, the CWC must comply with the principle of “*equality between creditors*” and if the settlement is approved by the required majorities and confirmed by the court, the proposal is binding on all (non-dissenting and dissenting) creditors.

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Please do not hesitate to contact us for further information or clarification.