



*The British Chamber
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The British Chamber of Commerce for Italy is glad to offer its Patronage to CMS on its effort to provide a valuable interpretation in English of the recent updates in regards to the reform of the Italian insolvency system.

THE REFORM OF THE ITALIAN INSOLVENCY SYSTEM

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Foreword

Following a process formally started on 3 February 2017, on 19 October 2017 the Italian Parliament approved a delegation law ("**Law 155**") entrusting the Government to adopt, within 12 months, legislative decrees aiming at the complete reform of the insolvency and pre-insolvency procedures together with the related provisions on security rights and privileges.

Considering the Italian political crisis which resulted in anticipated **general elections** to be held on 4 March 2018, it is unlikely that Italian Government will issue the legislative decree to enact the provisions of Law 155 before the election date. Consequently, the newly elected Italian Parliament would have to re-approve Law 155 and the new Government will then issue the related decrees.

However, the elections should only delay enactment of the reform of the insolvency law, that will most likely be implemented substantially in the same terms regardless of which party or political affiliation will govern the Country. Law 155 was indeed approved by an almost complete majority of voters and there is no reason to expect a rethinking of the future Parliament, as the reform would go beyond politics and is heavily inspired by trends and orientations that have emerged on the higher level of the EU institutions.

Law 155 at a glance

Law 155 contains **16 articles** specifying the limits and the principles to be complied with by the Government in the adoption of the legislative decrees, and reforms all types of insolvency procedures, also through amendments to the Italian Civil Code by introduction of the obligation for the companies

to promptly cope with their crisis and seek the assistance of external bodies.

The specific contents of the delegation to the Government is provided for by Art. 1 of Law 155, which clarifies that the aim of the reform is to adapt the insolvency legislation, mainly consisting in a Royal Decree dated back to 1942 (Italian Insolvency Law – “**IIL**”), and to comply with the stances of EU Regulation 2015/848 and of the EU Commission regulation dated 12 March 2014 and with the insolvency model law principles set out by UNCITRAL.

The legislative decrees will be issued by the Government upon proposal by the Ministries of Justice, Economics and Labor and Social Politics.

The **general principles** with which the Government shall comply in enacting of the reform are provided for by Art. 2 of Law 155, according to which:

- a) the word “*fallimento*” shall be always replaced by “**judicial liquidation**” (“*liquidazione giudiziale*”), and according to the Italian Ministry of Justice Andrea Orlando this is not just a terminology amendment: indeed, it is intended to offer to the entrepreneur declared insolvent actual chances to restart business activities.
- b) In case of “*Extraordinary Administration*” (“*Amministrazione Straordinaria*”), regulated by legislative decree no. 270 of 1999 for larger companies, the insolvency will no longer be automatically declared by the Court, but shall be triggered by a petition by the debtor, its creditor(s) or the public prosecutor.
- c) A definition of “**status of crisis**” (“*stato di crisi*”) will be introduced, being referred to as the likelihood of future insolvency (whereby the meaning of “insolvency” is already provided by the existing laws).
- d) A single procedural scheme shall be enacted for the ascertainment of the status of crisis or insolvency, based on quicker procedures also for the appeals.
- e) Any type of debtor could be subject to crisis or insolvency (companies, individuals, professionals, consumers), with the sole exception of publicly-owned companies.
- f) A definition of “center of main interest” (“**COMI**”) corresponding to that provided for by EU Regulation will be implemented.
- g) Proposals aiming at continuation of the business, pursuing the best interest of the creditors, shall generally be given priority over other solutions (such as the debtor’s liquidation).
- h) Notifications to the debtor shall be simplified through the compulsory use of electronic means, using the system “*posta elettronica certificata*” (certified electronic email – “**PEC**”), which each entrepreneur/company shall be obliged to keep also in the year following its cancellation from the companies’ register.
- i) Duration and costs for the insolvency/pre-insolvency procedures will be reduced, also through a limitation of credits having super-priority (“*crediti prededucibili*”), so to avoid that payment of such costs may absorb the entirety of the assets of the debtor.
- l) All provisions under IIL which are unclear and/or subject to different interpretations will be re-drafted.
- m) Judges of the insolvency sections must be specialised judges, and their staff shall be increased.
- n) A register will be created under the authority of the Ministry of Justice, enrolling companies/individuals which, on appointment by the court, will be in charge of management and control tasks within insolvency/pre-insolvency procedures.
- o) The relevant law provisions on insolvency/pre-insolvency shall be harmonised with the

employment safeguard schemes provided for on the EU basis;

p) Specific rules shall be implemented in relation to insolvency procedures involving companies belonging to the same group.

The remaining articles of Law 155 contain the principles and criteria for the reform of the crisis and insolvency procedures and will be separately examined in this paper.

Namely:

- Procedures of alert and assisted resolution of the crisis (Art. 4).
 - Debt Restructuring Agreements and certified recovery plans (Art. 5).
 - Composition with creditors (Art. 6).
 - Over-indebtedness procedures for individuals and companies formerly not subject to insolvency procedures (Art. 9).
 - Compulsory Administrative Liquidation for special enterprises (Art. 15).
 - Judicial Liquidation in lieu of "fallimento" (Art. 7).
 - "Debtor's rehabilitation" procedure ("esdebitazione") following the judicial liquidation (Art. 8).
 - Amendments to privileges (Art. 10) and securities rights (Art. 11 and 12) in the crisis and insolvency procedures.
 - Relations between insolvency and criminal law measures (Art. 13).
 - Further amendments to the Italian Civil Code ("ICC" – Art. 14).
 - Specific criteria for crisis and insolvency of group of enterprises (art. 3).
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According to one of the rapporteurs of Law 155 at the Italian Parliament¹, the designed innovation satisfies the interests of all players: on one side the **entrepreneur will avoid negative consequences currently associated to the insolvency**; on the other side it is expected that **creditors will obtain higher and more certain dividends**. The **general interest of the State** will also be pursued through a **substantial saving in times and costs of insolvency procedures** which currently may even last for more than 10 years, as unfortunately many foreign creditors already know very well.

Another rapporteur² underlines how the reform will be innovative under many aspects:

- the **preventive alert** will allow the immediate discovery of the status of crisis of a company and will be managed by *ad hoc* bodies;
- companies will have **easier access to the pre-insolvency schemes** available under Italian law;
- provisions on **privileges and securities will be drastically amended**;
- the **recovery of the company** following the crisis will be easier and automatic;
- specific provisions will regulate the cases of crisis/insolvency of **group of companies**, with harmonisation of their restructuring.

In its process of approval at the Italian Parliament, Law 155 was also subject to certain **criticism** mainly related to the non-application of the crisis alert system to larger and listed companies (as initially foreseen in the first version of the law). In such a view larger and listed companies should have also been included in the legal framework of the crisis alert procedure, for the benefit of the higher number of their shareholders and creditors.

However, the final version of Law 155 has maintained such exclusion for a double-fold reason: being consistent with the EU regulations on insolvency (by which Law 155 is strongly "inspired") and avoiding the application of alert mechanisms designed for standard companies to larger and listed companies, which in case of crisis are not subject to standard insolvency procedures but to a tailor-made procedure (*i.e. Amministrazione Straordinaria*).

1 - Davide Ermini

2 - Alfredo Bazoli

Law 155 follows the route of innovation which was started by various reforms of the Italian insolvency system in the last years, the aim of which was (and still is) to design specific procedures allowing to cope with crisis in a quick and efficient way.

Particular focus has been given to the "composition with creditors procedure" ("*concordato preventivo*") which has been drastically renovated by, inter alia, expanding the use of the cram-down mechanism which was previously limited to financial creditors.

The inspiration of the reform seems to be the English "*scheme of arrangement*" (regulated under Part 26 of the English Companies Act 2006), which allows English courts to sanction and give effect to an arrangement between a company and one or more classes of its creditors.

ALERT MECHANISM AND ASSISTED RESOLUTION OF THE CRISIS

- OUT-OF-COURT CONFIDENTIAL PROCEDURE TO FACILITATE NEGOTIATIONS BETWEEN DEBTOR AND CREDITORS
 - *AD HOC* BODIES WILL BE ESTABLISHED AT EVERY CHAMBER OF COMMERCE IN ORDER TO ASSIST THE DEBTOR IN IDENTIFYING A FAVORABLE SOLUTION OF THE CRISIS
 - ALERT DUTIES: AUDITORS MUST PROMPTLY INFORM DIRECTORS AND THE BODY ESTABLISHED AT THE CHAMBER OF COMMERCE AS SOON AS THEY DETECT A SYMPTOM OF CRISIS
 - ALERT DUTIES ARE ALSO IMPOSED ON CERTAIN CREDITORS (TAX AUTHORITY, SOCIAL SECURITY ENTITIES)
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PROCEDURES OF ALERT AND ASSISTED RESOLUTION OF THE CRISIS

Pursuant to article 4 of Law 155, the Italian Government will introduce specific procedures of alert and assisted resolution of the crisis, aiming at facilitating the negotiations between the debtor and the creditors on a confidential basis.

A definition of "crisis" will be introduced as the status of economic and financial difficulty which may lead to insolvency of the debtor; in the case of companies, "crisis" would consist in a non-adequacy of their expected cash-flow to regularly cope with their obligations.

The definition of "insolvency" will not deviate from the current definition, as it will continue to indicate the status of the debtor which is no longer able to regularly cope with its obligations, consisting in breach of contract or other external circumstances.

The enacting of Law 155 will introduce specific limitations for companies in undertaking their obligations, in order to avoid, as much as possible, the recourse to procedures of resolution of crisis.

Namely, the debtor shall undertake its obligations in a careful way and consistently with its capital means. A similar provision, which might appear as a basic rule for a prudential management of a company, was not expressly contemplated by Italian law.

In addition, in the procedures for the resolution of crisis and in the relating negotiations, creditors and debtors must act in good faith and cooperate for the common goal of solving the crisis, and they cannot disclose to third parties any information acquired during the process.

The debtor must also:

- a) illustrate its situation in a complete, truthful and transparent way, providing creditors with all necessary information which appear appropriate for the specific instrument selected for the resolution of the crisis;**
- b) promptly undertake any initiative which is suitable for the quick resolution of the crisis, also with the aim of not jeopardising the rights of creditors;**
- c) manage its assets during the resolution of crisis or insolvency in a way that allows to preserve their integrity and value in the interest of creditors.**

In terms of procedural rules, preference should be given to procedures aiming at the resolution of crisis or insolvency and priority will be granted to any solution contemplating the continuation of the business (as opposed to its liquidation), provided that the request is not prima facie ungrounded.

The court converts any procedure for resolution of crisis or insolvency into a judicial liquidation (see specific section below) when the relevant application cannot be admitted.

The procedures involving a crisis or insolvency resolution will not be subject to the suspension of court activities that typically applies from 1 August to 31 August of every year.

The mentioned scope of facilitating negotiations with the creditors shall be pursued under well-defined principles and criteria, listed below:

- **An *ad hoc* body will be established at every chamber of commerce**, having functions of assistance to the debtor for the favorable solution of the crisis. The body shall set up a three-member board: one member

will be appointed by the President of the section of the Court specialised in corporate law; one member will be appointed by the chamber of commerce and the remaining member will be appointed by the associations representing the various entrepreneurial sectors. The board must try to achieve the resolution of the crisis within a six-month term (which can be extended only once for justified reasons).

- In case of symptoms of the status of crisis, the company's statutory auditors ("*sindaci*") and external auditors shall immediately **inform** the directors and, shall the latter fail to promptly reply, the auditors shall inform the body established at the chamber of commerce (of the district where the debtor has its legal seat).
- An **alert duty** will be also imposed on specific categories of creditors, such as those bearing a public interest (Tax Authority, Social Security entities), which must immediately report to the supervisory body of the company and to the body established at the chamber of commerce every time there is a continued default by the debtor to their obligations if these are of substantial amount. If such categories of creditors do not comply with the mentioned report obligations, they will lose the privileges assisting their credits.

No definition of "substantial amount" has been provided; hence, it must be determined from time to time based on non-binding criteria linked to the dimensions of the debtor company.

Anytime the indebtedness exceeds such substantial amount, the said public creditors must provide immediate notice to the debtor, informing that if in the following three months the relevant credit is not paid, or if the procedure for the assisted resolution of crisis or a pre-insolvency procedure is not started, they will inform the mentioned body.

The above information/alert duties cease to be applicable if a pre-insolvency procedure (as described in this paper) is pending or is started.

- Every time the body established at the chamber of commerce is informed about the crisis of a debtor it is obliged to immediately **call the debtor to appear** (together with its supervisory body/ies), in order to identify the best measures to adopt for the resolution of the crisis.

During the procedure of resolution of crisis, the debtor shall be entitled to request to the court (specifically, at the section specialized for companies) to order protective measures, basically consisting in a general prohibition for creditors to start or continue enforcement actions or to create preferential rights or security in order to successfully complete the negotiations for resolutions of the crisis.

The court shall determine the duration of such protective measures, their automatic termination in case of fraud against creditors or when the entrusted bodies for the resolution of the crisis confirm that there are no concrete chances of coping with the crisis.

- The prompt recourse to the body, or the commencement of pre-insolvency procedures will be beneficial to the company, as it will allow the exoneration from possible criminal liabilities and a substantial reduction of interests and sanctions related to fiscal indebtedness, until the procedure before the body is concluded.

According to the preparatory works of the decrees for the implementation of Law 155, "awarding measures" will be enacted, such as:

a) interest accrued on debts during the procedure will be calculated at the legal rate (currently amounting to 0.3%);

b) fiscal sanctions will be reduced when accrued during the procedure;

c) fiscal sanctions and interests related to the debt treated under the procedure of crisis resolution will be reduced by 50% in the course of the possible subsequent pre-insolvency procedure which may be sought by the debtor;

d) in case of application for a "blank concordato" (please refer to the specific section below), the term for filing the proposal and the relevant plan is doubled.

- Debtors will be entitled to the mentioned awarding measures if they started the procedures for resolution of crisis within six months from the occurrence of the indicators of the crisis.

Under the new legal provisions, indicators of the crisis may consist in a disequilibrium of income, assets or finances, compared to the specific features of the business activity performed by the debtor and to be detected on the basis of ad hoc indexes, with particular reference to the sustainability of debts for the following six months and the perspectives of business continuity, together with serious and repeated delays of the debtor in paying its debt.

The national Council for accountants and auditors will elaborate on a three-year basis the specific indexes which would reasonably allow the presumption of a status of crisis, in relation to every type of business activity.

- Criteria for **ascertainment of liability of the statutory auditors** (*"sindaci"*) shall be clearly set, in order to avoid their joint liability with the directors, in case they promptly complied with their alert duties.
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JUDICIAL LIQUIDATION

FALLIMENTO → **LAW 155** → **JUDICIAL LIQUIDATION**

WHAT	WINDING-UP OF THE COMPANY, THAT WILL BE RUN BY A COURT- APPOINTED RECEIVER
WHEN	INSOLVENCY OF DEBTORS (DEFAULT OR OTHER CIRCUMSTANCES PROVING INABILITY OF THE DEBTOR TO REGULARLY COPE WITH ITS OBLIGATIONS)
WHO	MAY BE REQUESTED BY: 1. DEBTOR; 2. CREDITOR(S); 3. PUBLIC PROSECUTOR
WHERE	COURT OF THE PLACE WHERE THE DEBTOR HAS ITS LEGAL SEAT

MAIN TOPICS

- CLAW-BACK ACTIONS
 - AUTOMATIC STAY
 - EFFECTS ON EXISTING CONTRACTS
 - RULES ON PRIORITIES / RANKINGS
 - SPECIAL PROVISIONS FOR "CREDITO FONDIARIO"
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JUDICIAL LIQUIDATION

- **What is judicial liquidation and its applicability**

“Judicial liquidation” is the name of the procedure applicable to insolvent debtors which are unable to perform their obligations when they fall due, which will replace the “*fallimento*” procedure under the ILL.

The aim of judicial liquidation is to liquidate the business of the company in order to distribute the proceeds as dividends among all creditors, according to their preferential rights, and on the basis of the nature of certain credits which must be paid first, being vested with super-priority (such as credits that arose in the course of the procedure). The *fallimento* procedure had the same scope.

The temporary continuation of the business managed by the receiver may be authorised by the court, even for specific business units, provided that the continuation is not detrimental for creditors.

The procedure starts with a **petition** to be filed at the competent court (the place where the company has its legal seat) either by the debtor itself, its creditors or the Public Prosecutor. The court, having verified the insolvency of the debtor, declares the opening of the judicial liquidation.

The main innovation provided by Law 155 is that **any type of debtor could be subject to judicial liquidation** (companies, individuals, professionals, consumers), with the sole exception of publicly-owned companies.

Under the regime of Law 155, individuals, professionals and so-called “minor companies” facing insolvency, will be subject to judicial liquidation, though under a special regime and specific procedures, such as the “controlled liquidation” (please refer to the specific section below).

“Minor Companies” are those satisfying the following conditions:

(i) annual total assets of the last three years not exceeding Euro 300,000;

(ii) annual gross revenues not exceeding Euro 200,000 in the last three years;

(iii) debts not yet expired not exceeding Euro 500,000.

Under ILL, companies now defined as “Minor Companies”, individuals and professionals were not subject to *fallimento*.

According to Law 155, the judicial liquidation procedure can be opened within one year from the date the debtor terminated its business, if the insolvency status arose before such date or within the following year. In case the debtor is a company, the termination of its business coincides with its cancellation from the companies’ register. This provision was substantially identical under the ILL currently in force.

- **Players of the judicial liquidation procedure**

No innovation has been brought in relation to the public bodies supervising the procedure. As it currently happens in case of “*fallimento*” upon opening of the judicial liquidation procedure, the Court will appoint:

- 1) one or more **receivers** (*curatore*) (typically a professional accountant or a lawyer), who manage the assets of the debtor and prepare the inventory and the list of creditors; inform the creditors to file a petition in the procedure in order to claim their payment; draft the liabilities of the company (*stato passivo*) and the liquidation program;
- 2) a **delegated judge** (*giudice delegato*) who coordinates and authorises all the operations/transactions of the procedure; approves the petitions of the creditors for the admission in the liabilities, and the liquidation program prepared by the receiver;

3) **the creditors' committee** (*comitato dei creditori*), in charge for control/supervision/impulse tasks of all the receiver's activities, in certain cases through veto powers (such as for the authorisation of extraordinary deeds).

- **Main rules and effects of judicial liquidation procedure**

The main effects of judicial liquidation are:

- **dispossession** of the insolvent company (the assets are managed by the receiver);
- **automatic stay** of any enforcement/*ad interim* procedures;
- **claw-back** of non-gratuitous acts performed within 6 months or 1 year before the declaration of insolvency; claw-back is exempted for some non-gratuitous acts performed in the company's usual business or in the context of a pre-insolvency procedure (see specific sections below).

Under article 67 of IIL, which will remain effective following the enactment of Law 155, certain payments, deeds or securities are subject to claw-back actions if they are performed in a so-called "suspect period" and upon occurrence of certain conditions.

According to Law 155, the "suspect period" for the exercise of claw-back actions will be calculated backwards from the date of the petition triggering the judicial liquidation.

Under the IIL regime, as a general rule the suspect period was calculated backwards from the date of the declaration of *fallimento*.

No innovation has been brought by Law 155 in relation to the set-off of credit and debit positions towards the debtor. In the judicial liquidation procedure, creditors are then entitled to set-off their debts *vis-à-vis* the debtor, with their credits towards the same, even if such credits are not yet expired before the opening of the procedure.

If the credits are not yet expired, the set-off cannot apply if the credit arises from agreements executed following the opening of the judicial liquidation or within the preceding year.

- **Existing contracts**

Law 155 does not provide for any change to the current IIL regime in relation to existing contracts to which the debtor is a party. If such contracts are not yet completely performed, the opening of the judicial liquidation triggers their suspension until the receiver, having obtained the authorisation of the creditors' committee, declares his intention to step in.

The other party may request the judge to give the receiver a term not exceeding 60 days to decide whether to step in or not. In the lack of response by the receiver, the contract is considered as terminated.

Law 155 specifies that if the receiver decides to continue a contract, the super-priority will be limited only to credits arisen during the judicial liquidation procedure.

In addition, the election of the receiver on termination/continuation of contracts having a "personal" nature (such as professional advice) will be limited: if the counterparty does not agree on their continuation, they will be necessarily terminated.

If the receiver decides to step in a contract, the receiver must pay all the amounts due for services already performed or for goods already delivered before the relevant step in communication has been served.

If, on the other side, the receiver decides to **terminate the contract**, the other party is entitled to a compensation, to be claimed in the liabilities of the debtor, but is not entitled to claim damages.

Any contractual clause providing for the automatic termination of the contract in case of opening of a

judicial liquidation procedure of one of the parties has no effect.

No innovation has been introduced in relation to the effects of the insolvency of a party to specific contracts, such as those related to property which is under construction, leasing, lease of business as a going concern, insurance, bank account and mandate.

- **Ascertainment of liabilities and future steps**

Once the creditors have been duly informed by the receiver on the opening of the judicial liquidation procedure, they must file a petition for inclusion in the debtor's liabilities, within 30 days before the hearing set for the examination of all petitions.

The petition must be filed in electronic means and completed with the following information:

1. details of the relevant procedure and of the applicant creditor;
2. amount of the credit and/or description of the assets/goods to be returned to the creditor;
3. reasons for the claim and related judicial grounds;
4. the existence and details of privileges/preferential rights, if any.

At least 15 days before the hearing, the receiver files a draft project of liabilities in which he/she peruses the position of each creditor and proposes its exclusion or admission (as secured or unsecured creditor) in the liabilities.

In the next 10 days, creditors may file observations on such project, and at the hearing the delegated judge decides on the admission of each credit and the liabilities project is declared final and enforceable.

Within six months following to the date on which the list of the admitted creditors is declared final and enforceable, other creditors may file late petitions for inclusion in such list and if their credit is admitted, they will be proportionally paid only through the distribution of dividends carried out after their admission.

Under the *fallimento* procedure, the term for filing late petitions was one-year (which might be extended to 18 months) following to the date on which the list of admitted creditors is declared final and enforceable.

Creditors are entitled to file oppositions against the final list of debtor's liabilities, in relation to the admission or exclusion of their credit and the relevant amount/title, or in relation to the admission of other creditors' claims.

According to Law 155, the ascertainment of the company's liabilities will be driven by higher speediness, by means of various further measures such as:

- **all petitions for inclusion in the list of debtor's liabilities will be submitted in electronic form, and the admissibility of late petitions will be strongly limited in comparison to the current system.**
- **The admission of lower-value or undisputed claims will be regulated by simplified procedures.**
- **Any set-off claim shall be examined and discussed in the course of the judicial liquidation procedure.**

- **Liquidation program**

The assets of the insolvent company are then realised in accordance to the **liquidation program** drafted by the receiver, which is typically structured on a liquidation basis save for cases where the court authorises the temporary continuation of the business or business units for the best interest of the creditors.

Within 60 days following the drafting of the inventory – and in any case not later than 180 days from the decision on the opening of the judicial liquidation procedure, the receiver sets out the liquidation program to be approved

by the creditors committee (which may suggest amendments).

The receiver may obtain the authorisation by the judge to entrust other professionals or specialised companies for the performance of certain activities envisaged in the liquidation program.

On the opening of the judicial liquidation procedure, the court may decide for the temporary continuation of the business, even for specific business units, if the termination could create a serious damage to the going concern of the debtor but provided that the continuation is not detrimental for the creditors.

The court, after having obtained the favourable opinion by the creditors committee, may authorise the lease of the business of the debtor to third parties, even in relation to specific business units, if such option appears preferable to the sale of the business or single units of same. Such authorisation may be issued even before the filing of the liquidation program.

When the liquidation program comprises the sale of the business or single business units or other assets as a whole, further specific rules apply, such as:

- in the course of the trade union consultations related to the transfer of the business, the receiver, the purchaser and the employees can agree on a partial transfer of the employees to the purchaser;
- save where differently agreed, the purchaser will not be liable for debts related to the insolvent company which arose before the transfer of the business;
- privileges and security of any kind will keep their validity and ranking in favour of the purchaser.

In the liquidation program, the receiver can also exclude from the insolvency estate specific goods/units/assets, the liquidation of which would be inconvenient (but such choice must be approved by the creditors committee).

Creditors are informed on such decision and will be then entitled to start again enforcement actions over those assets.

Once approved, the liquidation program is communicated to the delegated judge who authorises the performance of any related deed.

Law 155 aims to simplify and render as efficient as possible the transactions envisaged in the liquidation program.

This goal is pursued by means of the introduction of information systems for the liquidation, ensuring the competitiveness of any sale process by the establishment of a specific entity/body which will be in charge for certifying the likelihood of repayment of creditors.

Creditors will be also vested with a "title" for participating at the sales and be repaid in proportion to the percentage indicated in such title, as certified by the mentioned entity/body.

Specific funds will also be created in order to manage the unsold assets of insolvent debtors.

Sales in the judicial liquidation procedure will be (as they were under the *fallimento* procedure) carried out through competitive procedures directed by specialised professionals/companies on the basis of evaluations drafted by expert professionals.

If on the date of opening of judicial liquidation enforcement procedures are in place against the insolvent company, the receiver is entitled to continue them.

In this regard it is worth repeating that, as a general rule, enforcement actions are automatically suspended on the date of the opening of the judicial liquidation (as they were in case of *fallimento*), but

the receiver can decide to continue such actions if it is foreseeable that they may lead to a quicker realisation of the distrained assets, rather than commencing a new sale process within the judicial liquidation procedure.

Different rules apply to enforcement procedures started by qualified creditors under the "*credito fondiario*" regime: please refer to the specific section below.

Law 155 states that the termination of the process will be speeded up by entrusting the receiver with the entire process of dividends distribution which in the current regime is led by the delegated judge (creditors may challenge the distribution process by filing oppositions to the delegated judge).

The receiver will also be entitled to continue existing litigations after the termination of the judicial liquidation and may be entitled to a further fee in case of success in such litigations which lead to an increase of the assets of the company to be distributed to creditors (therefore, the receiver will be authorised to keep the VAT registration of the company alive even following the termination of the judicial liquidation procedure).

- **Special rules on "*credito fondiario*"**

Special rules apply for credits arising out of **bank mortgage loans** ("*credito fondiario*", pursuant to articles 38-41 of Italian Banking Act – legislative decree no. 385/1993 – "**TUB**").

Bank mortgage loan, according to article 38 of TUB, is a medium or long-term loan (exceeding a duration of 18 months), granted by a bank for an amount not exceeding 80% of the value of the mortgaged assets (LTV ratio) and secured by a first ranking mortgage over land or buildings.

Credito fondiario rules ensure several advantages for creditor banks in case of subsequent *fallimento* of their borrower, such as:

- **Exemption from claw-back actions** in relation to the payments performed pursuant to the loan agreement, in case of subsequent *fallimento* of the borrower.
- **Exemption from claw-back actions** in relation to the registration of the mortgage, in case of subsequent *fallimento* of the borrower, provided that the mortgage has been registered at least 10 days before the declaration of *fallimento* (so called "mortgage consolidation period").
- **Right to start or continue enforcement actions** over the mortgaged assets of the debtor in a *fallimento* procedure and to satisfy their claim directly from the proceeds of the sale, in derogation to the general rule whereby creditors cannot start or continue enforcement actions following to the declaration of *fallimento*.
- **Privilege** on any kind of revenue (including rentals) deriving from the mortgage properties, even if generated during the *fallimento* procedure.

According to Law 155, special enforcement procedures and judicial privileges, including those provided for under the *credito fondiario* rules, will no longer apply (starting from the end of the second year following to the adoption of the last legislative decree to be issued for the enactment of Law 155).

In any case, the mortgage will continue to ensure priority over the proceeds deriving from the sale of the mortgaged properties.

- **Rules on priorities**

Law 155 has not changed the regime of ranking among creditors, which is based on the "*par condicio creditorum*" (i.e. *pari passu*) principle.

However, the amounts obtained by the liquidation of the insolvent company's assets are paid in the following order:

- 1) payment of credits having **super-priority** ("*crediti prededucibili*");
- 2) payment of credits which have been admitted in the debtor's liabilities with a **priority right** over the assets sold, according to the order set by law ("*creditori preferenziali*");
- 3) payment of **unsecured creditors** ("*creditori chirografari*"), in proportion to their credit admitted to the debtor's liabilities.

Credits benefit of super-priority when it is so provided by law or when they arose during or in function of a pre-insolvency or a judicial liquidation procedure (including the expenses of the procedure or the fees of the advisors).

Most of the provisions on preferential credits are set forth under the ICC, according to which preferential rights are divided in **privileges, pledges and mortgages**.

- **Criminal measures**

Certain crimes are ascribable to the insolvent entrepreneur, the directors of insolvent companies and any third parties involved, on the condition that a judicial liquidation procedure is opened (under the previous IIL regime, on the condition that a *fallimento* was declared).

The most relevant within such crimes are:

- **Fraudulent bankruptcy** ("*Bancarotta fraudolenta*")

Related to the debtor (if he/she is an individual entrepreneur) or the directors of the insolvent company who conceals or destroys all or part of his/her/the company's assets with the purpose of prejudice creditors, or conceals, destroys or falsifies the corporate documents with the purpose of creating damage to creditors.

The entrepreneur/director who, before or during the judicial liquidation procedure, commits the above crimes and/or performs payments or simulates preferential rights with the purpose of supporting a creditor in prejudice of all other creditors, is subject to imprisonment up to five years. The entrepreneur/director will also be banned from corporate activities/roles for ten years.



According to the Supreme Court, in case of infra-group transactions, it is possible to exclude that a deed was aimed at diverting assets to the creditors if it ensures compensatory advantages for the company and neutralises the negative impact for the creditors (Supreme Court – Criminal Section – 2 March 2017, no. 16206).

- **Simplified bankruptcy** ("*Bancarotta semplice*")

Such crime may be ascribed to the entrepreneur/director who makes personal expenses or for his/her family exceeding his/her economic situation or reduced a consistent portion of his/her/the company's assets through incautious actions/transactions, or seriously delays the opening of a judicial liquidation procedure or does not perform the obligations undertaken in a prior insolvency or pre-insolvency procedure.

Irregularities in the accounting books may also lead to liability under the simplified bankruptcy crime.

The crime may lead to a six-months to two years imprisonment and the ban from corporate roles will last for two years.

Article 217 *bis* of IIL provides an **exemption for the mentioned crimes** for any transaction carried out in a composition with creditors procedure, a Debts Restructuring Agreement or a certified recovery plan, or for any facility authorised by the judge during a pre-insolvency procedure (see specific section below).

Directors, liquidators and entrepreneurs who obtain credit facilities by hiding the situation of distress of the company are also criminally liable.

Under Law 155, the Receiver will be entitled to start and/or continue any actions for damages against the directors on behalf of the insolvent company and its creditors.

Specifically, the receiver may start or continue actions against directors of the company in order to ascertain their liabilities vis-à-vis the company and its creditors, or against the entities/individuals exercising a direct or indirect control on the insolvent company (in case of the so-called "*direzione e coordinamento*" pursuant to article 2497 of ICC).

- **Controlled Liquidation**

The enactment of Law 155 will also introduce specific liquidation procedures for consumers/individuals/professionals and Minor Companies (as defined above).

One of such procedures is the "controlled liquidation" ("*liquidazione controllata*"), which can be requested by a debtor facing over-indebtedness with the aim of liquidating all of his/her/its assets.

In case the assets of the debtor are subject to enforcement actions, the controlled liquidation can be opened also on request by creditor(s) or by the public prosecutor for Minor Companies.

Upon filing of the request for the controlled liquidation, interests no longer accrue over the debts until the liquidation is terminated.

OVER-INDEBTEDNESS PROCEDURES FOR INDIVIDUALS AND COMPANIES

Law no. 3 of 2012 introduced a procedure aiming to remedy situations of over-indebtedness **for companies and individuals not subject to *fallimento* and pre-insolvency procedures**, which may reach an agreement with their creditors as a “crisis settlement”. Similar provisions are also offered to consumers.

Under Law 155, over-indebtedness procedures will be available for all types of Minor Companies/individuals/professionals, provided that they are not subject by statute of law to specific procedures such as Compulsory Voluntary Liquidation (“LCA” – see related section below).

The procedures related to strict relatives of the insolvent individual will be coordinated by the judge and treated as “family procedures”.

Over-indebtedness refers to the continuous disequilibrium between obligations and assets of prompt liquidation, which causes a serious difficulty or the complete inability to fulfil such obligations.

The debtor facing over-indebtedness may propose to its creditors, with the support of the crisis settlement bodies located in the judicial area of the competent court, an agreement for restructuring of debts according to which also credits bearing privileges, pledges or mortgages rights can be only partially paid.

The assets of the debtor can also be entrusted to a third party in charge for their liquidation.

Once the proposal is filed with the court, it is transmitted by the crisis settlement body to the tax agent and the fiscal offices within the following three days.

The plan is filed together with a detailed report drafted by the crisis settlement body specifying the reasons for the indebtedness and the reason of the inability of the debtor to cope with his/its obligations.

In order to be homologated, the agreement must obtain the approval of at least 60% of the creditors and will be binding on all creditors having claims arisen prior to the filing of the proposal. The creditors whose credit arose following to the filing of the proposal cannot start enforcement actions over assets comprised in the plan. Homologation must be perfected within a 6-month term.

According to Law 155, the over-indebtedness procedure will extend to shareholders of partnership (who are jointly liable for the partnership obligations).

Law 155 also provides for the introduction, through the implementing Government decrees, of protective measures for the benefit of the debtors under an over-indebtedness procedure.

Creditors and the public prosecutor will be vested with initiative powers to request the conversion of the over-indebtedness procedure into a judicial liquidation procedure (in the simplified form of controlled liquidation – see specific section above), in case of fraud or breach of obligations by the debtor.

"ESDEBITAZIONE" PROCEDURE FOLLOWING THE JUDICIAL LIQUIDATION

Article 8 of Law 155 regulates the "*esdebitazione*" procedure aiming at rehabilitating the debtor after a judicial liquidation procedure.

Under the "*esdebitazione*", all debts that remain unpaid following a procedure of liquidation are fully cleared and waived.

The "*esdebitazione*" has no effects on the rights of the creditors against the guarantors of the debtor.

The benefit of "*esdebitazione*" can be requested within three years from the date of opening of the judicial liquidation procedure (or two years if the debtor has successfully sought recourse to the bodies in charge for the resolution of crisis).

The "*esdebitazione*" is declared by the court upon termination of the judicial liquidation procedure, following the hearing of the receiver and the creditors committee, and following to the ascertainment of the required mentioned conditions.

In case of controlled liquidation procedures (please refer to specific section above) the "*esdebitazione*" is automatic upon issuance of the order that terminates the procedure or even before such date, once three years have passed since its opening.

CONCORDATO PREVENTIVO

(COMPOSITION WITH CREDITORS)

WHAT	COURT-DRIVEN DEBTOR-IN-POSSESSION PROCEDURE, BINDING ON ALL CREDITORS
WHY	COMPANIES FACING CRISIS OR INSOLVENCY, SEEKING RESTRUCTURING
WHEN	TYPICALLY BEFORE INSOLVENCY
WHO	THE COMPANY REQUESTS THE ADMISSION TO THE PROCEDURE. CREDITORS HOLDING AT LEAST 10% OF INDEBTEDNESS MAY FILE COMPETITIVE PROPOSALS
WHERE	COURT OF THE PLACE WHERE THE COMPANY HAS ITS LEGAL SEAT

MAIN REFORMS BY LAW 155

- LIMITS TO *CONCORDATO* PROCEDURES AIMING AT A MERE LIQUIDATION OF THE ASSETS
 - DIVISION OF CREDITORS INTO DIFFERENT CLASSES NO LONGER COMPULSORY (SAVE FOR CASES OF CREDITORS ASSISTED BY EXTERNAL GUARANTEES)
 - IN CASE OF BUSINESS CONTINUATION: MORATORIUM OF PRIVILEGED CREDITORS FOR MORE THAN ONE YEAR (IN WHICH CASE PRIVILEGED CREDITORS ARE ADMITTED TO VOTE)
 - THE COURT MAY APPOINT AN ADMINISTRATOR IN CASE OF INACTIVITY BY THE DEBTOR FOR THE PERFORMANCE OF THE *CONCORDATO*
-

MAIN CHARACTERISTICS

The so-called “*concordato preventivo*” (composition with creditors) is the most frequent court-driven pre-insolvency scheme sought by Italian companies facing crisis.

It aims at the **partial repayment of creditors** through **liquidation of the assets** or, more often, **continuation of the business**. Acts and payments performed during the procedure are exempted from claw-back actions.

Below it follows a description of the main characteristics of the *concordato preventivo* procedure, that will remain substantially unvaried following implementation of Law 155.

- **Application for admission to the procedure of concordato preventivo.**

The application for the concordato preventivo must be filed before the competent court, being that of the place where the company has its legal seat.

Variation of the legal seat that occurred within the year preceding the application have no effect in changing the COMI of the company, which will still be considered the place where it had its legal seat.

The court appoints a **judge** and a **judicial commissioner**, with supervision/control functions.

The *concordato preventivo* consists in a debtor-in-possession procedure, with the company being regularly run by its own management, under the surveillance of the court and the judicial commissioner, and with the need to obtain specific authorisation for any transaction/activity not included in the day-to-day business.

The filing of the request at the court will cause an **immediate stay** of enforcement actions started or to be started by creditors.

The proposal for the composition with creditors may provide:

- the **restructuring** of debts through any means, even sale of assets or allocation of shares/quotas of the company to its creditors;
- the **division of creditors into specific classes** linked to homogeneous titles and economic interests;
- the **different treatment** of creditors belonging to different classes.

The proposal must be filed at the court in the form of a petition together with:

- a) an updated report on the economic and financial situation of the company;
- b) an analytic and estimative report on the assets and the list of the company’s creditors, specifying the possible privilege rights;
- c) a list of those having personal rights or rights *in rem* over assets owned by the debtor or in its possession;
- d) the value of the assets and a list of specific creditors of the share/quotaholders which are fully liable, if any;
- e) a plan containing the analytic description of terms and timing for the fulfilment of the *concordato* proposal, specifying the utility for each creditor.

The mentioned documents shall be filed together with a **report drafted by an expert professional**³ entrusted by the debtor, certifying that the corporate data are true and accurate and that the plan is feasible.

Any “substantial” amendment to the proposal or the underlying plan implies that a new report is drafted by the expert with same purposes.

According to Law 155, specific criteria will be set for the professional expert in ascertaining the trueness of corporate data in the report.

3 - The definition of “expert” is provided under Art. 67 IIL as an independent professional appointed by the debtor, enrolled in the register of auditors, in charge for certifying that the corporate data is true and that the plan is feasible. The professional is considered independent when he has no professional or familiar links with the company and with those bearing interests in the restructuring transaction which might jeopardize the evaluation independence, in any case, the professional (not even through other persons of the same professional association) must not have acted in the last five years as employee or self-employed in favor of the debtor, neither participated to the administration or control bodies of the debtor.

Also, the remuneration of the expert shall not exceed certain thresholds (currently not indicated in Law 155) and the credits of professionals that arose in connection with the filing of the application for the concordato preventivo will have super-priority only provided that the procedure is subsequently homologated.

- **Main features of the concordato preventivo procedure**

The *concordato preventivo* may be structured as a liquidation process (in the course of which the unsecured creditors must obtain repayment of at least 20% of their credit) or rather as a process aiming at continuation of the business.

According to Law 155, a *concordato preventivo* aiming at liquidation will be admissible only when it contemplates cash-funneling by third parties aimed at increasing the percentage of satisfaction of creditors and, in any case, only if the percentage of satisfaction of the unsecured creditors is at least equal to 20%.

When *concordato preventivo* is structured for **business continuity**, the underlying plan must also provide an analytic specification of expected costs and incomes for such continuation of the business and a detailed description on how the company intends to cope with the related expenses.

The report drafted by the expert professional must also certify that the continuation of the business is functional to the better satisfaction of creditors.

The plan may also provide for a **moratorium** for the payment of the secured/privileged creditors.

Before Law 155, the moratorium provided for the payment of secured/privileged creditors was admitted for a limited period of maximum one year, whilst Law 155 extends such period up to two years following the homologation of the *concordato preventivo*.

Such moratorium in excess of one year will be allowed only if the plan does not provide the liquidation of the relevant assets subject to security of privilege.

The described rules on moratorium will be also applicable for proposals that contemplate a partial liquidation of assets which are not functional for the business continuity.

In such case it is necessary for the applicant company to demonstrate that the creditors will nevertheless be mainly repaid through the means obtained under the business continuity.

The debtor company applying for a *concordato preventivo* with business continuity may also request to the court the authorisation for the payment of existing creditors (in derogation to the *par condicio creditorum* rules), provided that an expert professional certifies that such payments are necessary for the continuation of the business and are functional for the better repayment of creditors.

The payments performed are not subject to claw-back actions.

- **Termination/continuation of existing contracts in a concordato preventivo procedure**

The filing of the proposal for a *concordato preventivo* procedure does not trigger an immediate suspension of the existing contracts to which the debtor is party.

The debtor, through the initial petition or at a subsequent time, may request to the court the authorisation to **terminate existing contracts** which are yet to be – even partially – performed. The contractual counterparty must be informed on such request.

A **suspension of the existing contracts** can also be requested by the debtor for a term not exceeding 60 days, which may be extended only once.

The contractual counterparty will in such cases be entitled to an **indemnity** for an amount equal to the damage compensation for the non-fulfilment of the contract and such indemnity will be treated as any other claim arisen prior to the "*concordato preventivo*".

In case of financial leasing, the lessor is entitled to claim re-delivery of the asset and must pay to the lessee which is subject to a "*concordato preventivo*" procedure the possible difference in value between its remaining credit and the sums obtained from the sale of the asset, if higher. If the lessor's claim exceeds the value of the assets, the lessor will be treated as unsecured creditor for the relevant amount.

None of the mentioned provisions on suspension and termination applies to employment contracts.

According to Law 155, the enacting Government decrees shall contain detailed provisions on the conditions for the possible suspension and termination of the existing contracts and in particular in relation to the body that will be competent for determining the amount of the indemnity due to the contractual counterparty in case a contract is terminated.

In case of *concordato preventivo* with business continuation, no termination can be triggered even for the contracts executed with the public administration (and contractual provisions on similar termination will be null and void).

In case of transfer of the debtor's business as a going concern in the context of a *concordato preventivo*, also the transferee will benefit of the continuation of the contracts transferred within the business unit.

In addition, a company subject to *concordato preventivo* will still be entitled to participate in public procurement/tenders, provided that it is able to attach to its offers:

- a report drafted by an expert professional stating that the participation is in line with the plan and that the company is in the condition to perform the contract, if awarded.
- a declaration by a third party that undertakes to provide the financial coverage required for the public contract throughout its whole duration, and to replace the company in the contract in case it is declared insolvent.

- **Competitive Offers**

Following to the recent reform of IIL in 2015, one or more creditors holding at least 10% of the company's indebtedness are entitled to file a **competing proposal of concordato preventivo**, together with the underlying plan, not later than 30 days preceding the hearing fixed for the vote of creditors.

The competitive proposal must be filed together with the report drafted by a professional expert and must provide the repayment of at least 40% of unsecured creditors (or the lower percentage of 30% in case the procedure aims at the continuation of the business).

If the competing proposal divides the creditors in various classes, the court must preliminarily verify that the classes are correctly composed of creditors bearing homogeneous titles/rights.

If the *concordato preventivo* proposal is based on an offer by an already identified third party for the purchase of the business or its going-concern(s), the court will fix a competitive procedure for the filing of possible increased irrevocable offers by other parties, specifying the amount of minimum increase for the offers, the dates for the related hearing and the publicity duties.

The competitive procedure is intended to allow the applicant company to obtain a higher return from the sale of its business or specific branches of the same and to avoid possible abuse by shareholders as in the past very often the shareholders purchased the business of the company in *concordato preventivo* at an undervalue through a

newco or an affiliated entity.

- **The “blank” application for “*concordato preventivo*” (concordato con riserva)**

In recent years a new law provision has been introduced in order to allow the debtor to file a “blank” application for a *concordato preventivo* procedure, asking the Court to order the suspension of any enforcement action and to fix a term (from 60 up to 120 days, which may be extended by further 60 days in case of justified serious reasons) by which the debtor shall file a complete application for *concordato preventivo*.

Together with the blank application the debtor shall also file the balance-sheets of the last three years and the list of its creditors.

The Government decrees enacting Law 155 will in all likelihood reduce the mentioned terms to be fixed by the court, especially for cases where the blank application is filed while a request for the opening of a judicial liquidation procedure is already pending.

In case of blank application for *concordato*, the judge will order the debtor to periodically report on the financial management of the company and the activities performed, and to provide a monthly financial situation of the company to be published at the companies’ register.



It is worth mentioning that the Court does not evaluate the report drafted by the professional expert but has the power to verify the adequacy of the information provided to the creditors, in order to allow them to vote on a free and conscious basis (decision rendered by the Italian Supreme Court on 28 March 2017, no. 7959).

- **Provisions on the financing granted in the course of the procedure**

Law 155 has not substantially innovated the regime of credit facilities granted in the context of a “*concordato preventivo*”, which are repaid with **super-priority** (“*crediti prededucibili*”).

Super-priority is also granted to the facilities granted to the debtor for the filing of the petition for *concordato preventivo* or for Debt Restructuring Agreements (see related section below), provided that such facilities are contemplated by the underlying plan (or by the relevant agreement) and that the super-priority is expressly granted by the decision of the court which declares the opening of the *concordato preventivo* procedure or which homologates the Debt Restructuring Agreements.

In relation to the facilities granted by the company’s shareholders, the general rule under article 2467 of ICC is that their claim is subordinated to any other credit. Under article 2497 *quinquies* of ICC, the same rule applies in case of facilities granted to the company by those which exercise management and coordination activities over such company.

In derogation to the mentioned provisions of ICC, in the course of the *concordato preventivo* procedure, super-priority is also given to credit facilities granted to the company by its shareholders or by those which exercise management and coordination activities over such company, up to the 80% of value of their amount.



The rationale of the provision above is to encourage the financing of a company by its shareholders or third parties in the course of pre-insolvency procedures in order to enhance the satisfaction of all creditors.

The Court may also authorise the debtor to grant pledges or mortgages or to assign credits in order to secure such facilities.

- **Special provisions related to capital duties**

The company applying for a *concordato preventivo* is exempted from the minimum capital requirements under the ICC, so that the directors are not obliged to call a shareholders' meeting to resolve on capital injection.

Such exoneration applies for the period running from the filing of the application until the homologation of the concordato preventivo, and in such timeframe the possible reduction or loss of capital does not integrate a reason for the compulsory winding-up of the company (which would be the ordinary rule out of a *concordato preventivo* procedure).

In any case, prior to the filing of the application for concordato preventivo, according to article 2486 of ICC the directors will be personally and jointly liable for the possible damages caused to the company, the shareholders, the creditors and third parties for the violation of the mentioned ordinary rules which impose them to promptly take all actions in case of reduction or loss of capital.

Same rules apply for the company in case of application for homologation of a Debt Restructuring Agreement (see specific section below).

- **Approval of the concordato preventivo by the creditors**

At the hearing fixed for the voting by the creditors, the judicial commissioner illustrates the *concordato proposal* and the underlying plan (and the competitive proposals filed by the creditors, if any), that is then voted by creditors.

Law 155 will eliminate the hearing set for the voting by the creditors, to be replaced with a mechanism of electronic votes.

The *concordato preventivo* is approved with the favorable **vote of the majority of creditors admitted to vote, and the majority of classes**, if creditors are divided in different classes.

A mechanism of votes based on majorities calculated by number and not just by percentage of credits will operate following the full enactment of Law 155, when a single creditor holds more than 50% of credits admitted to vote.

In addition, the Government decrees implementing Law 155 shall identify in which cases the division of creditors in classes will be compulsory or not (the division will remain necessary in case of creditors assisted by third party guarantees).

Creditors holding security and/or privilege rights in relation to which the *concordato preventivo* proposal contemplates full repayment, are not entitled to vote if they do not waive their priority right(s).

Under the provisions of Law 155, when the *concordato preventivo* with business continuity provides for a moratorium exceeding one year for creditors having security/privilege rights, such creditors will be granted voting rights.

The effects of the implementation of Law 155 rules will allow secured creditors such as banks, which are imposed a moratorium for a term exceeding 1 year and up to 2 years, to vote for the approval (or rejection) of the *concordato preventivo*.

In addition, given that the division of creditors in classes will no longer be compulsory and considering that historically banks hold the majority of debts of Italian companies, it will be easier to impose a **cram-down** to other creditors if the debtor obtains the favorable vote of the banks.

Following the successful voting process, the *concordato preventivo* is homologated by the court.

According to Law 155, the company's management will have the duty to give prompt enactment to the homologated proposal of *concordato preventivo*, and in case of dilatory

and obstructive behaviors the enactment might be entrusted by the court to a temporary administrator who will be entitled to exercise the same rights as the shareholders, provided that adequate systems of publicity are granted to the company shareholders.

Furthermore, in case of merger or transformation of the company perfected during the *concordato preventivo* procedure, the creditors will be entitled to file oppositions only in the course of the judicial control on the legitimacy of the *concordato preventivo* proposal, and the effect of such merger/transformations will be irrevocable even in case the *concordato preventivo* is subsequently annulled/revoked, and the shareholders and/or third parties will be entitled to claim for damages compensation, if any; the shareholders will have no right of withdrawal from the company as a consequence of transactions affecting the organisational or financial structure of the company.

- **The treatment of tax and social security credits**

Through the *concordato preventivo* procedure the company may propose the partial or deferred payment of tax and social security debts pursuant to article 182 ter of IIL, provided that the relevant public creditors are paid by a percentage not lower than that they would obtain from the liquidation of the debtor's assets over which they have a legal privilege.

A report by an expert professional shall certify the mentioned condition.

Additionally, the percentage of payment of tax and social security claims and the timing for such payment cannot be lower or less favourable in comparison to those offered to creditors having a lower ranking privilege.

The petition for tax settlement shall be filed with the tax agent, which will then calculate the right amount of the taxes not yet paid by the applicant company, so that also the court will be able to verify that the proposal covers all the existing tax indebtedness.

CONCORDATO LIQUIDATORIO GIUDIZIALE: COMPOSITION WITH CREDITORS IN THE COURSE OF A JUDICIAL LIQUIDATION PROCEDURE

A petition for application to a composition with creditors may also be filed within the judicial liquidation procedure ("***concordato liquidatorio giudiziale***"), in order for the company to be rehabilitated as solvent company and to "cancel" its insolvency, but also in order to avoid the effects of bankruptcy crimes, which are applicable only if a judicial liquidation procedure is opened and continued.

Before Law 155, such form of composition with creditors was defined as "*concordato fallimentare*" which could be applied for by the debtor in "*fallimento*".

The *concordato liquidatorio giudiziale* may be requested by one or more creditors or by a third party not earlier than one year following the declaration of insolvency and not later than two years from the issuance of the decree which renders enforceable and final the list of admitted creditors.

The relevant petition for the *concordato liquidatorio giudiziale* is filed with the Court already "in charge" for the existing judicial liquidation procedure, by means of a proposal which shall obtain the favorable opinion of the Receiver and the Creditors' Committee and must then be then communicated to the creditors which are entitled to raise objections within 30 days.



The Court has a limited control and must verify only the formal regularity of the procedure and the correct process of voting, whilst it has no control on the merits of the proposal that must be evaluated by the voting creditors.

The proposal is approved in case of positive votes by the majority of the creditors, and additional majority in each class of creditors if the proposal provides for different classes of creditors (e.g. privileged and secured creditors, when they are not paid in full). If a creditor does not communicate its objection within the mentioned term, its vote will be considered as favorable to the proposal.

The Delegated Judge then issues a decree to be published at the companies' register informing on the positive outcome of the voting process and fixing a thirty-day term for interested parties to raise oppositions.

If no oppositions are filed, the Delegated Judge issues a decree which homologates the *concordato liquidatorio giudiziale* so terminating the judicial liquidation.

If oppositions are filed, the court fixes a hearing to hear the parties and then decides through a motivated decree which is challengeable before the court of appeal within 30 days.

DEBT RESTRUCTURING AGREEMENTS ("ACCORDI DI RISTRUTTURAZIONE")

WHAT	COURT-ASSISTED PROCEDURE DEBTOR-IN-POSSESSION PROCEDURE BINDING ONLY ON ADHERING CREDITORS
WHY	COMPANIES FACING CRISIS, SEEKING RESTRUCTURING
WHEN	COMPANY IS IN A SITUATION OF CRISIS - NOT YET INSOLVENT
WHO	THE COMPANY REQUESTS THE HOMOLOGATION OF THE DEBT RESTRUCTURING AGREEMENTS EXECUTED WITH CREDITORS REPRESENTING AT LEAST 60% OF THE COMPANY'S INDEBTEDNESS (OR A REDUCED PERCENTAGE IF CERTAIN CONDITIONS ARE MET)
WHERE	COURT OF THE PLACE WHERE THE COMPANY HAS ITS LEGAL SEAT

MAIN REFORMS BY LAW 155

- REDUCTION OF THE 60% THRESHOLD WHEN THE COMPANY DOES NOT REQUEST MORATORIUM OF NON-ADHERING CREDITORS
 - CRAM-DOWN MECHANISM TO APPLY ALSO WHEN CREDITORS ARE NOT BANKS OR FINANCIAL INTERMEDIARIES
 - EFFECTS OF THE RESTRUCTURING AGREEMENTS WILL BE EXTENDED ALSO TO THE SHAREHOLDERS WHICH ARE JOINTLY LIABLE ACCORDING TO LAW
-

DEBT RESTRUCTURING AGREEMENTS

Article 5 of Law 155 contains amendments to the rules governing the Debt Restructuring Agreements ("*Accordi di ristrutturazione del debito*") and the Certified Recovery Plans ("*Piani attestati di risanamento*"), which are pre-insolvency procedures already regulated by ILL.

Through the **Debt Restructuring Agreements**, a company facing crisis may request to the court the homologation of an agreement entered into with creditors representing at least 60% of the company's indebtedness, based on a plan certified by an expert professional who shall assess the truthfulness of the corporate data and the feasibility of the underlying plan with particular focus on the ability of the company to fully repay the non-adhering creditors.

According to Law 155, the certification by the expert professional must have analytic contents and must be re-certified in case of any non-minor amendment of the plan.

If no cram-down applies, creditors not adhering to the agreements must be fully paid by the applicant company according to the following timing:

- a) within 120 days following the homologation, in case of credits already due and payable at such date;
- b) within 120 days following to their expiration, in case of credits not yet due and payable at such date.

The Debt Restructuring Agreement executed with at least 60% of creditors is published at the Companies Register and from such date no enforcement actions may be started or continued against the company for the next 60-days in relation to existing credits (credits arising following to the mentioned publication are not subject to automatic stay).

Law 155 provides for a reduction (probably down to 30%) of the 60% percentage currently required for the approval of the Debt Restructuring Agreement, when the debtor (i) does not apply for the mentioned moratorium of non-adhering creditors and (ii) waives any temporary protective measure.

The debtor may request the application of such moratorium also during the negotiations, but it will be granted only if it files at the court a draft of agreement with a self-declaration confirming the existence of negotiations with creditors holding at least 60% of the credits and a report drafted by an expert professional confirming that the agreement will guarantee full payment of non-adhering creditors or creditors which do not participate in the negotiations.

The Debt Restructuring Agreements may comprise a wide set of options such as standstills, partial or full waiver of credit and/or interest.

Creditors and interested third parties are entitled to file oppositions in the 30 days following the publication of the Debt Restructuring Agreement; the court decides on the oppositions and then homologates the debt restructuring agreement through a decree which is challengeable before the court of appeal within the 15 days following to its publication at the companies' register.

If the oppositions are successful or the agreement is not homologated for any reason, there will be no automatic opening of the judicial liquidation procedure.

If the agreement is homologated, any act/payment performed in execution of the agreement and of the underlying plan is exempted from claw-back actions.

- **Agreements with financial intermediaries and banks**

Different majorities for approval of the Debt Restructuring Agreement may apply if the company's creditors are banks or financial intermediaries holding at least 50% of the company's overall indebtedness.

In such case, the agreement will cause a cram-down, which is binding also on dissenting creditors belonging to the same class of creditors of banks and financial intermediaries, if the latter hold at least 75% of the credits of such class.

The company may request that the effects of the agreement are extended to non-adhering creditors which belong to the same category, provided that all creditors:

- have been informed on the negotiations; and
- were given the chance to participate in good faith in such negotiations; and
- credits of banks and financial intermediaries represent the 75% of credits of that category.

The debtor must notify the application and the related documents to the banks and the financial intermediaries that are to be bound by the agreement, and they may raise oppositions within the following 30 days.

The court verifies that the negotiations were carried out in good faith and that the banks and the financial intermediaries which are bound by the agreement:

- a) have judicial title and economic interests which are homogeneous compared to those of the banks and the financial intermediaries adhering to the agreement;
- b) received complete and updated information on the patrimonial, economic and financial status of the debtor, on the agreement and on its effects, and were allowed to participate in the negotiations;
- c) may be repaid, on the basis of the agreement, by an amount not lower than the alternative options which are concretely feasible.

In no case the agreement can impose on the non-adhering parties new fulfilments/duties or the obligation to grant credit facilities to the debtor.

Art. 5 of Law 155 extends the described cram-down mechanism also to creditors that are not banks or financial intermediaries, on the condition that the Debt Restructuring Agreement is not aimed at the liquidation of the debtor's assets and pursues the continuation of the business.

In addition, the effects of the Debt Restructuring Agreements will be extended also to the shareholders which are jointly liable with the company/partnership according to law.

- **Provisions on the financing granted in the course of the procedure**

The provisions applicable for the financing of a company under a Debt Restructuring Agreement are the same provided for the financing granted in the course of a *concordato preventivo* procedure (please refer to the specific section above).

In particular, super-priority is granted to the facilities obtained by the debtor for the filing of a Debt Restructuring Agreement, provided that such facilities are contemplated by the relevant agreement and that the super-priority is expressly granted by the decision of the court which homologates the Debt Restructuring Agreement.

CERTIFIED RECOVERY PLANS

("PIANI ATTESTATI DI RISANAMENTO")

WHAT	OUT-OF-COURT PROCEDURE FOR CRISIS RECOVERY
WHY	COMPANIES SEEKING AGREEMENTS WITH ONE OR FEWER CREDITORS
WHEN	EVEN BEFORE CRISIS
WHO	THE COMPANY AGREES WITH ONE OR MORE OF ITS CREDITORS ON A WIDE RANGE OF MEASURES SUCH AS MORATORIUM, FURTHER FINANCING, CUTTING-OFF OF PRINCIPAL OR INTERESTS
WHERE	NO COURT INVOLVED - NO OBLIGATION TO DISCLOSE NO PUBLICITY DUTIES

CERTIFIED RECOVERY PLANS

Certified recovery plans consist in out-of-court agreements with one or more creditors of the company, providing for moratoriums, postponement, partial repayments of the company's debts.

They are based on a plan endorsed by an expert professional certifying the truthfulness of the corporate data and the feasibility of the plan.

Acts, payments and security performed or granted on the assets of the debtor are not subject to claw-back actions if they are comprised in the plan certified by the professional expert.

Given that the agreement and the underlying plan are not subject to publicity duties and must not be published at the companies' register (unless the applicant company decides so) and given the exemption from claw-back actions and criminal liabilities, Certified recovery plans have been used very often by companies in restructuring their indebtedness essentially with banks.

**Law 155 specifies that the plan must be in written form, bear date certain at law⁴ and have analytic contents.
In addition, the endorsement by the expert professional must be re-certified in case of any non-minor amendment of the plan.**

4 -The certainty of a date ("*data certa*") is borne by a document when it is executed before a public official such as a notary, or if it results from the date of sending of the document via certified electronic email ("*posta elettronica certificata*").

EXTRAORDINARY ADMINISTRATION

- WHAT** PROCEDURE DRIVEN BY THE COURT AND THE MINISTRY, APPLICABLE ONLY TO LARGER COMPANIES
- WHY** PRESERVE THE ASSETS OF THE COMPANY, THROUGH THE CONTINUATION OR CONVERSION OF THE BUSINESS
- WHEN** TWO STAGES: (i) DECLARATION OF INSOLVENCY BY THE COURT AND (ii) OPENING OF THE PROCEDURE BY THE MINISTRY
- WHO** THE REQUEST OF INSOLVENCY MAY BE ADDRESSED BY THE COMPANY, CREDITORS, PUBLIC PROSECUTOR OR THE COURT.
THE COURT REQUESTS THE MINISTRY TO OFFICIALLY OPEN THE PROCEDURE
- WHERE** COURT OF THE DISTRICT WHERE THE COMPANY HAS ITS LEGAL SEAT
-

EXTRAORDINARY ADMINISTRATION

- **Applicability and scope**

Extraordinary administration (*Amministrazione Straordinaria*) is mainly regulated by Legislative Decree no. 270 of 1999 (whilst Law no. 39 of 2004 relates only to companies with over 500 employees) and is a procedure applicable to large companies, with the scope of **preserving their assets, through the continuation or conversion of the business**.

Law 155 has not innovated the above provisions.

To be admitted to Extraordinary Administration, companies must be eligible for judicial liquidation and the following requirements shall also occur:

- a) not less than 200 employees;
- b) debts for an amount not lower than 2/3 of the assets and turnover of the last fiscal year.

- **Procedure**

If the mentioned requirements are met, the insolvency of the company can be declared by the court of the place where the company has its legal seat, on request by the company itself, its creditors or the public prosecutor.

Law 155 eliminated the provisions whereby the insolvency of a company under an Extraordinary Administration regime can be automatically declared by the court.

The company is obliged to file with the court a wide set of corporate documents.

The court fixes the hearing of the company which shall also be attended by the Ministry of Industry, and the court appoints:

- A **delegated judge**;
- A **judicial commissioner** (three commissioners are appointed in more complex cases).

The decision can be challenged by any interested party in a thirty-day term and, if the outcome of the challenge is favourable, the procedure is converted into a judicial liquidation procedure (previously, into *fallimento*).

The judicial commissioner invites the creditors to file their requests for the inclusion in the list of liabilities of the company, according to the same rules applicable to the judicial liquidation procedure (and previously, applicable to "*fallimento*").

Within 30 days from the declaration of insolvency, the judicial commissioner must draft an analytic report on the company and the credits claimed, and the report is communicated also to the Ministry, which in the following 10 days must provide its opinion on the eligibility of the company to the Extraordinary Administration procedure.

On the basis of the opinion by the Ministry, the court, in the following 30 days, decides on the opening of the Extraordinary Administration procedure.

If the Extraordinary Administration procedure is opened, the court decides also on how to regulate the **continuation of the business**, under the supervision of the judicial commissioner(s), until the appointment of the Extraordinary Commissioner.

Within 15 days from the appointment of the **Extraordinary Commissioner**, the Ministry of Industry appoints a **surveillance committee** comprised of three or five members who are reputed persons of renowned expertise in the business sector of the company (one or two members are selected by the unsecured creditors).

The committee issues opinions and is vested with inspection powers.

- **Immediate effects of the Extraordinary Administration**

No enforcement actions can be started or continued over the assets of the company admitted to the Extraordinary Administration procedure.

Claw-back actions are started by the Extraordinary Commissioner.

The Extraordinary Commissioner is entitled to terminate **existing contracts** and the other party can request the Extraordinary Commissioner to decide on the continuation within a thirty-days term. In lack of response the contract is deemed to be terminated.

Different provisions apply for the employment contracts and for tenancy contract of properties owned by the company under the Extraordinary Administration, in which case the Extraordinary Commissioner replaces the company in the contract.



Any contract leading to the liquidation of the assets of the company is considered as an ordinary contract executed by the commissioners on behalf of the company.

Therefore, contracts will not be regulated by the special rules for public contracts and any challenge will be examined by ordinary courts (Supreme Court, 29 May 2017, no. 13451).

Any credit that has arisen for the continuation of the business is vested with super-priority, even in the course of judicial liquidation procedure which may follow the Extraordinary Administration.

- **Liabilities – assets - payments**

The ascertainment of the company's liabilities is made under the same rules set for the judicial liquidation (see specific section above), and the commissioners have the functions of the receiver.

Within 60 days following the opening of the procedure (subject to one single prorogation of further 60 days), the Extraordinary Commissioner proposes a program to the Ministry of Industry illustrating how to cope with the company's insolvency.

Every four months the Extraordinary Commissioner proposes to the delegated judge a **distribution plan** for the sums at that date available, together with the related opinion issued by the surveillance committee.

The **final distribution** is made following the approval of the final balance and the payment of the commissioners.

Interim payments can be made by the Extraordinary Commissioner in favour of creditors at any stage of the procedure, once the opinion of the surveillance committee and the authorisation of the delegated judge are obtained. Payments are made in proportion to the expected final repayment and according to the preferential rights.

- **Conversion of the procedure**

Save for the case of **conversion of the procedure into judicial liquidation** upon successful appeal against the decision which declares the opening of the extraordinary administration, the opening of judicial liquidation can be declared at any time of the procedure, upon request by the Extraordinary Commissioner or *ex officio* by the court.

Before the conversion, the Ministry of Industry must be informed.

The conversion may also be ordered at the end of the extraordinary administration upon occurrence of the following circumstances:

- a) the sales contemplated by the liquidation program have not been timely performed;
- b) a restructuring program has been approved, but the company did not regain the capacity to regularly fulfil its obligations when they become due.

The conversion decree is issued by the court, following to the hearing of the Ministry of Industry, the extraordinary commissioner and the insolvent company.

By means of such decree the court appoints the delegated judge for the judicial liquidation and the receiver.

The ascertainment of the company liabilities continues on the basis of the conditions stated in the declaration of insolvency.

- **Termination of the procedure**

The Extraordinary Administration procedure is terminated when:

- a) within the timeframe provided in the decision on insolvency, no petitions for inclusion in the liabilities are filed;
- b) even before the expiration term of the liquidation program, the company regained the capacity to fulfil obligations;
- c) the decision approving the *concordato preventivo* is final and no longer challengeable⁵.

Furthermore, if the liquidation program envisages the sale of business units, the Extraordinary Administration is also terminated:

- a) even before the completion of the program, if distributions to creditors are satisfactory and the bodies of the procedure have fully received their fees;
- b) upon the final distribution to creditors.

The termination of the procedure is declared through motivated decree of the court, upon request of the Extraordinary Commissioners or the company or *ex officio* by the court itself.

Within five years following to the issuance of the termination decree, on request by the company or any creditor, the court may order that the procedure is re-started, by way of conversion into judicial liquidation, if the amount of assets of the company justifies such decision or if the company offers to repay at least 10% of the credits.

- **Inclusion in the Extraordinary Administration of companies belonging to the same group of the insolvent company**

From the date of the decree which opens the Extraordinary Administration procedure and while the same is ongoing, the companies belonging to the same corporate group which are also insolvent are eligible for the admission to the Extraordinary Administration even if they do not meet the dimension requirements set out above.

The admission is granted if the companies of the same corporate group have concrete chances of recovery, or in any case if a single management of all the procedures under the Extraordinary Administration appears more beneficial for the creditors.

The relevant request can be addressed even by the Extraordinary Commissioner appointed for the main procedure.

⁵ - In the course of the procedure it is indeed possible to file a *concordato preventivo* proposal having the same features and rules set for the "*concordato giudiziale liquidatorio*" (please refer to the specific section above), provided that is consistent with the conservative scope of the extraordinary administration procedure.

COMPULSORY ADMINISTRATIVE LIQUIDATION

The **compulsory administrative liquidation** ("*Liquidazione Coatta Amministrativa*" – "**LCA**") is a procedure applicable to particular categories of companies identified by law, which Law 155 reduced only to **banks and insurance companies**.

If a company eligible to LCA is facing insolvency, the court of the place where the company has its legal seat, upon request of one or more creditors or the Authority in charge for the surveillance of the company, or the company itself, declares such status of insolvency.

The initiative could also be of the receiver in the event that a company which is eligible to LCA applied to a *concordato preventivo* procedure, when the receiver ascertains that the latter procedure cannot be continued.

Through the decision on insolvency, the court issues the more convenient decisions in the interest of the creditors until the liquidation procedure is started.

The debtor and the **surveillance Authority** must be heard by the court, the decision of which is communicated to the same Authority in order to allow it to decide on the liquidation of the company.

The decision on liquidation is published at the companies' register and on the official publications ("*Gazzetta Ufficiale*").

- **Main features of the LCA**

The court appoints a **liquidation commissioner** and a **surveillance committee** comprised of three or five members, who are persons of renowned expertise in the same business of the company, possibly selected within the creditors.

The existing litigation procedures will be managed by the commissioner.

The **liabilities** and the related admission or exclusion of credits shall be completed within 90 days from the date of the decision on liquidation.

Appeals and oppositions are regulated under the same rules set for the judicial liquidation procedure (please refer to the related section above).

The liquidation is managed by the commissioner, but any sale of properties must be authorised by the surveillance Authority and by the surveillance committee.

The sums obtained from the liquidation are distributed to the creditors in accordance to their preferential rights.

Before that last distribution to creditors, the **final liquidation balance**, with a report by the surveillance committee, must be authorised by the surveillance Authority for the deposit at the court and approves the amount of the fees due to the commissioner.

Creditors are informed on the deposit and are entitled to file oppositions at the court within the following twenty days. In lack of oppositions, or when they are rejected, the procedure is terminated.

Law 155 states that the judicial liquidation procedure shall also be applied to the companies currently subject to a LCA procedure, and the special LCA regime will remain in place only for a limited number of cases (in particular, for banks and insurance companies).

The Authorities in charge for the surveillance of the company subject to LCA will be also in charge for any duty of alert for the status of crisis.

**AMENDMENTS TO PRIVILEGES AND SECURITY RIGHTS
IN THE CRISIS AND INSOLVENCY PROCEDURES**

Article 10 of Law 155 provides for the reduction of the legal privileges rights of general and special nature, therefore changing the order of priorities established by law.

According to Italian law, privileges are statutory rights which cannot be granted on a voluntary basis. They can be of general or special nature, over all or specific assets of the debtor.

- **Non-possessory security**

Article 11 of the Law 155 designs new provisions on the **non-possessory security rights on moveable assets**.

A specific type of non-possessory security will be created and will apply over moveable assets, even when intangible or not yet existing, provided that certain requirements are met (i.e. indication of the maximum guaranteed amount, written form, registration at the specific register still to be created).

The rules and mechanism for the functioning of the electronic register will be implemented and will regulate the data protection, registrations, annotations, payments of register's fees.

The secured assets will be freely disposed by the debtor/security provider, and in case they no longer exist, the security will be transferred over the assets/money obtained from the disposal of the original assets and will keep the original ranking.

The security holder will nevertheless be entitled to start conservative or inhibitory actions in case of abuse of the disposal right by the owner of the secured asset.

Such security creates a derogation of the so-called "*patto commissorio*" prohibition provided for by article 2744 of ICC.

The *patto commissorio* is the agreement according to which in case an obligation is not fulfilled, the ownership of the asset mortgaged or pledged is automatically transferred to the creditor.

A long-dated prohibition has always existed on such agreement, although recent amendments to Italian law started to admit the validity of the *patto commissorio* or similar agreements.

In particular, a new type of **floating charge**, namely "**non-possessory pledge**", was already introduced by Law Decree no. 59 of 3 May 2016, as subsequently converted into law, allowing creditors to obtain, as security for loans, a **pledge over existing or future, identifiable assets** of the debtor (or third-party guarantor), which does not require the dispossession of the latter.

In case of enforcement the pledgee has the right to have the pledged assets sold through competitive procedures based on an estimate of the assets made by expert appraisers, which may be appointed by mutual agreement between the creditor and the debtor or by the judge or to appropriate the relevant assets. The creditor will retain the sums obtained by the sale up to the amount of its credit and pay the difference to the debtor/pledgor or other creditors, if any.

Law 155 entitles creditors to out-of-court enforcement of the described non-possessory security also in derogation to the prohibition of the *patto commissorio* rules, provided

that the value of the assets is pre-determined in an objective way and save the obligation to pay to the debtor or to the other creditors the difference in value between the amount obtained from the sale of the asset and the amount of the credit, if any.

Also, specific rules on publicity will be introduced for the described out-of-court sale, and rules will also be implemented for the conjunction of such sale with the enforcement and insolvency judicial procedures, and for the protection of third parties which might have acquired, in good faith, rights on the assets subject to the security.

- **Security rights for purchasers of properties to be built**

Article 12 of Law 155 introduces also provisions related to the guarantees to be issued in favor of the purchasers of properties still to be built.

According to legislative decree no. 122 of 20 June 2005, in case of purchase of properties to be built, the buyer is entitled to obtain **two different guarantees**: one securing the amount paid before the property is transferred, in case the builder will undergo a *fallimento* procedure (**currently to be read as opening of a judicial liquidation procedure**) before the final deed is executed; one to secure the possible damages to the property which might be discovered in the following ten years.

The first of the mentioned guarantees must be issued by a bank, an insurance company or a financial intermediary.

In order to secure the amounts paid by the buyer before the transfer of the property: on a practical point of view it secures the amounts paid by the buyer at the execution of the preliminary contract in case of default or insolvency of the seller, and therefore the guarantee expires when the parties execute the final deed of transfer before the notary.

In order to make possible for a notary to verify that the obligation to provide the guarantee is respected, Law 155 introduces the obligation to execute before a notary as also preliminary contracts for the sale of properties under construction.

In addition, given that the lack of the additional guarantee to be delivered upon transfer of the property, securing the possible damages to be discovered within the following ten years, is not currently sanctioned by the legislative decree no. 122/2005, Law 155 specifies that if the guarantee for damages is not provided, the buyer may request the nullity of the transfer.

SPECIFIC CRITERIA
FOR CRISIS AND INSOLVENCY OF GROUP OF ENTERPRISES

Law 155 has introduced new provisions aimed at coordinating and optimising the management of insolvency of group of companies.

The criteria and principles to be adopted by the Government when issuing the implementing decrees are the following:

- a) A definition of group of companies will be designed on the basis of the notion of supervision and control ("*direzione e coordinamento*") given by article 2497 et seqq. of ICC⁶, accompanied by the mere presumption whereby a company is subject to supervision and control when there is a relation of control as listed under article 2359 of ICC .**
- b) Companies of a group will have to file a group consolidated balance sheet, in order to make public their relation for the possible case of future insolvency/crisis.**
- c) The body in charge for the insolvency/pre-insolvency procedure will be entitled to request to CONSOB (*Commissione Nazionale per le Società e la Borsa – National authority for supervision of listed companies*) or to any other authority/body any useful information for ascertaining the existence of group links, or to request to fiduciary shareholders the disclosure of the real owners of the rights over their shares/quotas.**
- d) Companies insolvent or facing crisis will be entitled to file a single application for the debt restructuring agreements, composition with creditors or judicial liquidation procedures (although the respective assets/liabilities will be treated separately).**
- e) Reciprocal streams of information and cooperation will be compulsory for the authorities in charge for the various procedures, shall the companies be subject to different procedures, in Italy or abroad.**
- f) Credits of companies belonging to the same group will be subordinated, save for specific provisions aiming at facilitating the disbursement of loans functional to, or in performance of, a composition with creditors or a debt restructuring procedures.**

For the best management of the single *concordato preventivo* procedure for the whole group of companies, the following provisions will apply:

- a) one Delegated Judge and one Judicial Commissioner only will be appointed;**
- b) creditors of each company will vote at the same time but separately;**
- c) the effects of the possible annulment or termination of the proposal for *concordato preventivo* shall be determined in advance;**

6 - According to article 2359 of ICC, are considered controlled companies: 1) the companies in which another company has the majority of votes in the ordinary meetings; 2) the companies in which another company has sufficient votes to seriously influence the ordinary meetings; 3) the companies which are under the serious influence of another company due to particular contractual relationships.

d) companies of the group having credits *vis-à-vis* other companies which are subject to judicial liquidation/pre-insolvency procedures will not be entitled to vote;

e) criteria shall be defined in advance for the filing of the single plan for restructuring of

the group, possibly comprising contractual transactions and infra-group re-organisation aiming at the business continuity and the best repayment for creditors.

Such provisions are generally to be applied also to the judicial liquidation, in the course of which the receiver shall be vested also with the power to start claw-back actions against any transaction which dates prior to the insolvency and finalised to move assets of a company to another company of the group, to the damage of the creditors.

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