L. 155.2017 - Enabling act for the reform of liquidation and reorganization proceedings in Italy

The Italian Parliament has recently passed an enabling act (l. 155/2017) which has the aim to fulfil a complete reform of the whole bankruptcy legal framework.

1. Particularly, the executive, exercising powers delegated under the above-mentioned law, will adopt within twelve months a legislative decree in order to reform the most important procedures for liquidation and reorganization of insolvency (except of the procedure still regulated by d.lgs. 270/1999 for large-scale undertakings) in accordance with the following guidelines:
a) the word "fallimento" (the equivalent of "bankruptcy") shall be replaced by the word "liquidazione giudiziale dei beni", for the purpose of removing all the punitive connotations of this kind of treatment of the insolvency, alternative to the arrangement with creditors;
b) the legislative decree shall back up the definition of insolvency – currently provided by the article 5 of the Italian Bankruptcy Law – with a definition of the concept of state of crisis, based on the business administration's findings;
c) the legislative decree shall introduce a single and speedy judicial framework for the verification and the declaration of insolvency (or state of crisis) and also for appeals against bankruptcy decrees (in the procedure named "liquidazione giudiziale dei beni") and approval decisions (in the arrangement with creditors);
d) the proceeding for the verification and declaration of insolvency will be extended to each category of debtors, also to farmers, consumers and independent contractors;
e) the legislative decree shall provide that reorganization procedures – based on business continuity – will benefit from priority before liquidation procedures.

2. The forthcoming reform has to provide for a specific regulation of the insolvency (or state of crisis) in groups of companies, as groups are a very common form of business model of the economic life. Particularly, the reform has to introduce the option of the companies of the same group:

(i) for filing altogether for a unitary bankruptcy;
(ii) for applying to the same court for the admission to an arrangement with creditors procedure;
(iii) for filing altogether for the approval of a unitary debt restructuring agreement.
The reform has to predetermine the court having jurisdiction in cases of unitary administration of insolvency proceedings. It also:
a) has to introduce the appointment of a single liquidator or a single commissioner for all companies;
b) in the unitary arrangement with creditors' proceeding, has to provide for the separate vote of the creditors of each company on the respective proposal;
c) in the unitary bankruptcy, has to regulate the power of the single liquidator of bringing avoidance actions in case of shift of resources from a company to another one;
d) in the event that the companies of the same groups have opted for a separate administration of the respective insolvencies, has to provide for specific duties of communication and cooperation non only between the liquidators but also between the courts (art. 3 l. 155/2017).

3. The forthcoming reform has also to introduce an alert procedure with the aim of an early detection and agreed settlement of crisis. In particular, an authority for the agreed settlement of insolvency or crisis (named "Organismo di composizione assistita della crisi") is to be established at the Chamber of Commerce.
The reform:
a) will provide that the supervisory board of the company and the accounting firm are duty-bound to warn the directors if there is reason to suppose that the company is drawing to insolvency (or crisis); and that they have the duty to warn the authority established at the Chamber of Commerce if there is no response from the directors;
b) will provide that IRS, the provident societies and the Agency for tax collection have the duty to point out ongoing large-value non-fulfillments of the company to the board of auditors and to the authority established at the Chamber of Commerce, failing which they shall lose their priorities;
c) will provide that the authority established at the Chamber of Commerce, further to put questions to the supervisory board (or the accounting firm, IRS, the provident societies or the Agency for tax collection) or to the debtor, have the duty to call immediately the company for a secret and confidential hearing in order to adopt the best measures to overcome the crisis after having verified the assets and financial position of the company;
d) will enable the company – which has been called for the secret and

confidential hearing by the authority established at the Chamber of Commerce or has filed a motion for the initiation of the alert procedure for the agreed settlement of crisis – to adopt protective measures for the time necessary to take the appropriate steps to discharge his obligations (art. 4 l. 155/2017).

4. With respect to debt restructuring agreements, the reform will extend the procedure provided by the article 182-septies of the current Italian Bankruptcy Law to the agreement (for restructuring, if based on business continuity, or to the arrangement for a moratorium) with creditors – even if different from banks or financial intermediaries – accounting for 75% of credits belonging to a legally economically homogeneous class (art. 5, a, l. 155/2017).

5. The forthcoming reform will impact on the very concept of arrangement with creditors' proceeding. Particularly, the reform shall provide that proposals of arrangement with creditors based on the liquidation of debtor's assets (instead of business continuity) may be eligible only if they include provision of outside resources which appreciably increase the chances of satisfaction of creditors' claims. However, as already provided by the article 160 of the current Italian Bankruptcy Law, in those proposals (based on the pure liquidation of assets) unsecured creditors must be granted the payment of at least 20%.
With respect to the arrangement with creditors' proceeding (art. 6 l. 155/2017), the reform:
a) has to put a ceiling on the salaries for lawyers and certified accountants commissioned by the debtor;
b) has to identify cases where the formation of classes of creditors is mandatory (among these, the event that some creditors are ensured by guarantees);
c) has to delete the meeting of creditors (that will be replaced by an electronic voting system) and to regulate situations of conflict of interests between the creditors;
d) has to give the court competence in making the assessment of the economic viability of the proposed agreement in view of admission to the procedure (this is an important change from current Italian case-law, which gives the court only competence in making an assessment of legal feasibility of the proposed agreement);
e) has to integrate the rules on the arrangement with creditors' proceeding based on business continuity, especially with three new provisions:
(i) the plan may arrange a moratorium of more than one year (since the

approval) for secured creditors, giving them the right to vote (in return for the same moratorium of more than one year);
(ii) the rules on the arrangement with creditors' proceeding based on business continuity will apply even if the plan provides the liquidation of some assets (like currently happens in accordance with article 186-bis of the Italian Bankruptcy Law) but only in cases where creditors are likely to be fulfilled mostly by means of cash flows (than by means of product of the realization of the debtor's assets);
(iii) the rules on the arrangement with creditors' proceeding based on business continuity will apply even if the plan provides that the business assets are leased out to another company (and even if the corporate lease has been made before debtor's application for the admission to the procedure).

6. The new bankruptcy, named "liquidazione giudiziale dei beni", will be regulated with the objective of simplification and shortening of the length of the procedure.
Inter alia, the reform:
a) will introduce an electronic voting system replacing creditors' committee for small-scale procedures;
b) will extend the range of claims for civil liability exercisable by the liquidator (not only against limited liability companies' managers but also against holdings in accordance with article 2497 of the Italian Civil Code, against partnerships' managers and against limited liability companies' shareholders deciding or authorizing harmful acts in accordance with article 2476 of the Italian Civil Code);
c) will streamline the verification of credits and third party rights in debtor's real property;
d) will delete – among the others – the "privilege" currently provided for suppliers (in accordance with article 74 of the Italian Bankruptcy Law) in order to theirs supplier credits which arose prior to the bankruptcy decree (art. 7, comma 6, a, l. 155/2017).