

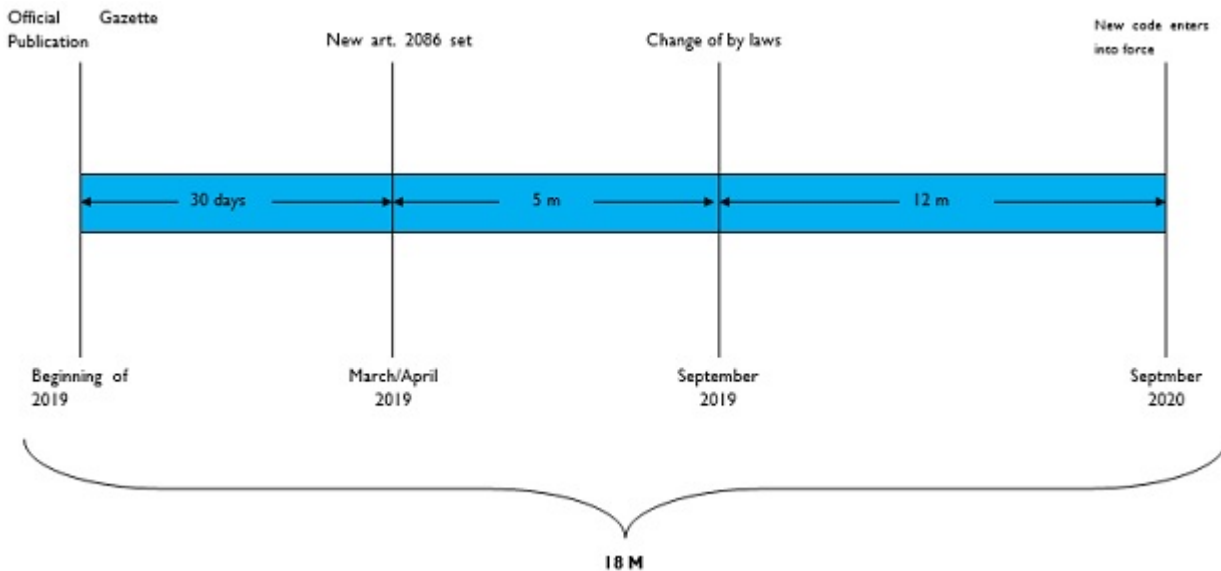
## New Insolvency Code in Italy: what's new?

The Law no. 155/2017 has delegated the Government to adopt a new piece of legislation to reform the legislation on insolvency and replace the 1942 Insolvency Law. The new Code brings significant changes to the current discipline. The target of this work is to briefly present some interesting points (amongst the wide changes brought by this landmark new legislation) to stimulate discussions and follow up. So what are the news?

**What's new?** Some (and not exhaustive) highlights:

- **early warning mechanism** - aimed at early resolving the crisis and preserving the going concern together with new improved out of court restructuring
- crisis vs. **insolvency - bankruptcy** (*fallimento*) is a word repealed; now we will be talking of "judicial liquidation"
- **composition with creditors**: favour for the composition in continuity (liquidation in a composition made less appealing)
- composition with creditors of a group of company
- **conflict of interests** in the voting procedure in composition with creditors.

## Timing



## Early warning and restructuring

### Change of attitude and approach

The law implemented amendments both in the civil code (art. 2086) and in the new insolvency code.

These will require each entrepreneur to adopt (well **before the crisis** i.e. when the company is still running smoothly) **budgeting, annual planning** and **monitoring tools** to detect the crisis at an early stage.

It will be crucial to have companies and businesses (not applicable to banks, financial intermediaries, SGR, funds, insurances, listed companies, etc.) to adopt an appropriate system well before the crisis, as a new attitude and approach to doing business, to make the early warning works. To be verified in the practice how this goes along with the business judgment rule.

Early **warning signs** (*indizi/indicatori della crisi*) are to be implemented in the day to day activity/control by the companies' bodies. The law in the version finally approved by the Council of Ministers on [10] January 2019 focused on the following ones to ensure that they can detect the symptoms of a crisis (without arriving too late or, even worst, by spotting non

crisis situations and cause reputational – sometimes irreparable – damages): debt service vs. cash flows or debt vs. equity as well as frequent delays in payments due. These symptoms are now defined as “*indici significativi*”.

Warning for the crisis are now also required to be made by **qualified creditors** (such as pensions authority and tax authorities): the current **thresholds** to activate these creditors “reporting” duties – compared to the first draft of the reform – have been significantly **increased** so that this kind of alert is now likely to be less effective and to occur when the crisis is more “mature”.

With the early warning mechanism comes a complex and still to be defined amicable solution before new bodies to be created at the level of locally competent Chambers of Commerce as a possible alternative with interesting incentives.

With the some positive attitude to early resolve the crisis and avoid liquidation, some changes are to be adopted for the restructuring agreements (the out of court restructuring): interesting it is the long required extension to trade creditors of the cram down in the restructuring agreement and the possible reduction/deletion of the minimum adhesion percentage (60%) to the restructuring plan.

## Crisis vs. Insolvency and no longer fallimento

I.e. is there now a “**diversely solvent**” debtor?

**Crisis:** a situation of financial difficulty which may probably lead to insolvency (e.g. the cash flow of the business is not sufficient to cover current but also prospective debts). Debtor is still fulfilling its obligations.

**Insolvency:** a situation of default in which the entrepreneur can no longer meet its payment obligations. Debtor is not fulfilling its obligations.

## Composition of creditors (concordato) in continuity vs. with

## liquidation

The composition of creditors plan can either provide for the continuity or for the liquidation of the business.

The continuation of the business can be **direct** (*i.e.* the entrepreneur filing for the composition with creditors procedure continues to carry out the business) or **indirect** (*i.e.* the business is carried out by third parties). In the second option, the plan shall provide for the conservation or the re-hiring of a certain number of employees (half of those employed) for the one year after the approval of the concordato by the Court. This condition might in principle discourage the recourse to such type of procedure.

The proposed amendments mandatorily require the entrepreneur to inject new finance (which shall increase of at least 10% the satisfaction for unsecured creditors compared to the satisfaction in a judicial liquidation scenario) for the implementation of the composition plan if it is with liquidation hence making it less appealing/feasible. The floor of the 20% for the minimum satisfaction of unsecured creditors is unchanged.

## Voting and conflict of interests

Very "strict" amendment which (at the current stage of drafting of the law) does not allow creditors in conflict to vote a composition with creditors (*concordato*) proposal.

This new rule is even stricter than the general one for Italian companies' where a shareholder in a conflict of interest position can elect to vote with the consequence that the relevant decision can be challenged if such vote was necessary for the approval and can potentially damage the company.

## Composition with creditors of a group of companies

Formal and not substantial consolidation.

Each company's assets and liabilities will remain separated from the other's companies involved (however the new law states that the composition plan can be one or comprising

more plans linked one to each other; how this is consistent with the principle of the separation of each company's assets and liabilities is to be seen).

However issues are still to be **tested in practice**. As an example it shall be noted that the termination of a company's single composition (in the context of a group composition) remains possible leading to problems in case such termination can bring to the collapse of the other companies' plans due to the specific business liaison amongst the various entities. In such an event the separation amongst the various companies will no longer ensured.

Many more issues to come...

**(IPSOA Wolters Kluwer 14th January 2019)**