GILIBERTI TRISCORNIA E ASSOCIATI

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LATEST THINKING ON LEGAL MATTERS

HEIGHTENED RISKS FOR DIRECTORS UNDER THE NEW ITALIAN BANKRUPTCY CODE

The New Italian Bankruptcy Code introduces - effective after 30 days following its imminent publication on the Italian Official Gazette - a new rule for the determination of the amount of the directors' liability in case they harm the integrity of the company's net equity in continuing the company's activity between the occurrence of a dissolution event and the handover of the management to the liquidators.

The new rule - which introduces a further paragraph to Art. 2486 of the Italian Civil Code - provides that, in case the foregoing directors liability is ascertained, the amount of the relevant damages is presumed in the difference between:

(a) the company's net equity at the date on which the directors have ceased from office (or at the date of the opening of a bankruptcy procedure); and
(b) the amount of the company's net equity at the date on which a dissolution event has occurred (deducted reasonable running costs).

In case a bankruptcy procedure is opened and the foregoing elements cannot be determined, the damages are presumed in the amount equal to the difference between the assets and liabilities as ascertained in the context of the procedure itself.

It is worth noting that, by direct provision of law, the presumption introduced by the new paragraph of Art. 2486 of the Italian Civil Code puts the burden to prove a different amount of the damages on the directors/defendants, with a landmark shift from the principle affirmed by the Italian Supreme Court as recently as 2015 (Case no. 9100/2015), according to which the bankruptcy receiver/plaintiff carried the burden of proof with respect to: (i) specific mismanagement deeds on the directors' part; (ii) the causal link between such deeds and the damages to the company's net equity.

Directors must therefore now pay utmost attention to the elements that may give rise to a dissolution event.

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