

Directors' liabilities - Italy

1. Obligation to file?

- i) Is there an obligation on directors to file for formal insolvency proceedings?

According to article 6 of Royal Decree dated March 16, 1942 no. 267 (Bankruptcy Act), the declaration of bankruptcy can be submitted in the following ways: a) by a petition of one or more creditors; b) by means of a demand by the debtor him/herself; c) by a petition of the Public Prosecutor; d) by the Court of its own motion. Therefore, should the entity to be declared bankrupt be a company, the legal representative must file the petition with the competent Tribunal.

Moreover, together with the petition, the legal representative must file with the Court the accounts, balance sheets, the management accounts of the previous two years, a report on the company's state of affairs and a list of creditors (article 14 Bankruptcy Act).

- ii) If so, when does this arise?

The legal representative of the company must file the petition if the bankruptcy is the only mean to limit the damages of creditors as a consequence of the state of insolvency. As a matter of fact, the Bankruptcy Act envisages a criminal sanction for the entrepreneur (i.e. in case of companies, the legal representative) who has increased the state of insolvency by abstaining from filing the petition for bankruptcy or has carried out incautious activities to delay the adjudication of bankruptcy.

2. Who can be held liable?

- i) In addition to directors, which other persons involved in a company's affairs may be held personally liable for their acts, eg, shadow directors, de facto directors, non-executive directors?

The adjudication of bankruptcy may determine criminal sanctions for the so-called bankruptcy crimes. Although the Bankruptcy Act regards the personal liability of directors involved in the daily business of the company, according to case-law also the de-facto directors may be prosecuted.

Moreover, article 147 of the Bankruptcy Act provides for the extension of the bankruptcy of the company with unlimited liability to the shareholders with unlimited liability. This provision applies mainly to partnerships (limited partnership with share capital, limited partnership and general partnership), where the shareholders may carry out the management of the company.

3. Sanctions?

- i) What are the possible sanctions/restrictions against directors of insolvent companies?

The directors must file the accounts and balance sheet within 24 hours from the adjudication of bankruptcy. Moreover, they have to fulfil the duty of residence and the limitations to their right to stay and move. This means

that they cannot move without the judge consent and must appear before the trustee, the judge or the creditor's committee when convened for the needs of the procedure. Such duties are provided by article 146 of the Bankruptcy Act.

Moreover, directors may be personally prosecuted for those bankruptcy crimes committed prior to or during the procedure such as fraudulent or straight bankruptcy. For instance, articles 223 and 224 of the Bankruptcy Act provide for sanctions for those directors who have caused, either directly by infringing law or indirectly for instance by means of fraudulent deals, the insolvency of the company.

ii) Are any of these sanctions/restrictions imposed automatically?

A part the criminal sanctions, the other restrictions constitute effects determined by the judgement adjudicating the bankruptcy. The criminal sanction for fraudulent bankruptcy is imprisonment for between five years and ten years, depending on the gravity of the crime as determined by the competent court. Those directors condemned for one of the bankruptcy crimes are also disqualified for ten years.

4. Proceedings against directors?

i) Who can bring the proceedings against the directors?

Generally speaking, according to the Civil Code directors may be held liable to the company, to the company's creditors and to third parties. Directors are liable to the company if they negligently fail to fulfil duties imposed upon them by the law or the by-laws or to supervise the general conduct of the company or if, being aware of prejudicial acts, they did not do what they could to prevent them from occurring.

Directors are also liable to the company's creditors when the company's assets are insufficient to satisfy their claims, if directors fail to preserve the company's assets. Such actions do not prevent single shareholders or third parties bringing claims for damages if they are directly damaged by the director's conduct.

Should the company be declared bankrupt, article 146 of the Bankruptcy Act empowers the liquidator to bring the fraudulent and wrongful action against the directors in the place of the company itself or the company's creditors. In such a case, the judge, when authorizing the liquidator to bring the action, may also dispose precautionary measures.

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