The Italian Code of Business Crisis

Giorgio Cherubini and Giovanna Canale summarise the new Code which represents a revolution in the area of Italian restructuring law

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In our Country Report in the Winter Edition of *eurofenix* 2018/19, we anticipated that the Code of Business Crisis and Insolvency was in the process of being finally approved.

The Code of Business Crisis and Insolvency was introduced by Legislative Decree n°14 of January 12, 2019, published in the Official Gazette dated February 14, 2019, and implements the Law n°155 of October 19, 2017 - the contents of which was drafted by the "*Rordorf Commission*", established by the Minister of Justice by a Decree dated October 5 2017.

The final wording has taken into account the opinions expressed by the Competent Parliamentary Commissions.

The Legislative decree consists of 391 articles: a code of considerable complexity that almost paradoxically ends with the financial invariance clause: a reform to be carried out "*at no cost,*" "*without new or greater burdens for public finance*".

Undoubtedly, the new Code represents a revolution in the area of Italian restructuring law. The aim of the aforementioned Code is, first of all, to allow the timely detection of the crisis that could invest a company, and secondly, to protect the entrepreneurial business during the crisis.

The Corporate Crisis and Insolvency Code provides some provisions that have already came into force immediately, that is, 30 days after the publication of the Legislative Decree in the Official Gazette, while others – the most relevant part – will come into force in August 2020.

With reference to the provisions that came into force immediately, the most important and which deserve particular attention, are the following.

Register of experts

Article 356, which indicates the establishment at the Ministry of Justice of a Register of experts who will perform, if appointed by the Court, the functions of receiver, judicial commissioner or liquidator, in the procedures provided for in the Code. This provision is of particular importance because – differently from what has happened up to now – it introduces the establishment of a unique National Register of experts who will perform the aforementioned functions.

It also marks a requirement of integrity from the experts who will be introduced in the Register. In particular, paragraph 3 of the article specifies that "*the possession of the following requisites of integrity is a requirement for enrollment in the register*":

a) Not to be in one of the conditions of ineligibility or decadence provided for in Article 2382 of the Civil Code;
b) not to be subject to preventive measures ordered by the judicial authority pursuant to Legislative Decree September 6th 2011, n°159;
c) not have been sentenced by a final judgment for crimes specifically indicated, without prejudice to the effects of rehabilitation; and
d) not to have had, in the last five years, a disciplinary sanction more serious than the minimum required by the individual professional orders.

The requirements are aimed to ensure that the assigning of a mandate takes place in favour of experts of proven experience and integrity.

Organisational structure

Article 375, which introduces new provisions for the organisational structure of a company and reformulates the wording of article 2086 of the Civil Code on the management of the company.

In particular, a second paragraph is added to Article 2086 which, on the one hand, requires the entrepreneur to establish an organisational, administrative and accounting structure in order to favour the timely detection of the crisis; on the other hand, it forces the entrepreneur to take action without delay for the adoption and implementation of one of the instruments envisaged for overcoming the crisis and recovering the business continuity.

Regarding the director's liability, the new provisions aim to empower directors to use a higher degree of attention in a situation of company crisis, in order to exempt them from the criminal provisions foreseen by the legislator.

Directors' liability

Article 378, which introduces changes regarding the directors' liability as amendments to articles 2476[1] and 2486[2] of the Civil Code.

A new paragraph in article 2476 of the Civil Code introduces the provision by which the directors of limited liability companies are liable towards the company' s creditors when the assets of the company are

insufficient to satisfy their claims; the action can be proposed by the creditors, who are entitled to act also in the case of waiver to the action by the company.

The objective of the new provision is to render the directors more responsible with regard to the obligations to preserve the company's assets.

Article 2486 of the Civil Code governs the directors' powers in the period between the occurrence of a dissolution and the time the assets of the company are delivered to the liquidators.

Article 378 of the Code of Business Crisis and Insolvency, with a new paragraph, foresees that the directors, should their liability be ascertained and failing evidence of an amount to compensate the damages, must pay an amount equal to the difference between the net worth at the time a cause for dissolution has occurred and

a) the net worth at the time the director ceases his/her duties; or
b) the net worth at the date of opening of the judicial liquidation procedure.

The costs incurred and to be incurred are deducted from this difference, according to a criteria of normality, in response to the occurrence of the cause of dissolution and until the completion of the liquidation and, if the accounting records are missing or the net worth cannot be determined on the basis of the irregularity of the same records or for other reasons, the damage is liquidated in an amount equal to the difference between the assets and the liabilities ascertained.

Appointment of the control body

Article 379 of the Code of Business Crisis and Insolvency introduces important news concerning the appointment of the control body or the auditor. With respect to the regulations in force, the cases in which limited liability companies are forced to appoint the controlling body or the auditor are extended.

With regard to the previous wording of Article 2477 of the Civil Code, the thresholds of total assets, revenues from sales and services, and average number of employees during the last year are reduced and, according to the new provisions, the appointment of the control body or the auditor indicated at article 379 becomes mandatory for companies which have exceeded at least one of the following limits for two consecutive years:

- €2 million of assets;
- €2 million of revenues;
- Ten employees employed during the year.

The objective of this change is to facilitate the detection and timely management of the crisis.

Thus, it is obvious that the real purpose of the reform is the preservation of company's activity and, for this reason, the provisions introduced allow to act in order to avoid that the crisis becomes insolvency. ■

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Footnotes:

1 Article 2476 Civil Code: "*The directors are jointly liable towards the company for damages deriving from the non compliance with the duty imposed on them by law and the articles of association for the management of the company. However, the liability does not extend to those who prove to be without fault and, being aware that the act was to be carried out, have expressed their dissent.*

The shareholders who do not participate to management have the right to receive from the directors updated information about the trend of the business and to consult, even though professionals of their trust, the company's book and the documents relating to the management.

The liability action against the directors is promoted by each shareholder, who may also request, in the event of serious irregularities in the management of the company, that a precautionary order of revocation of the directors be adopted. Omissis ….

Unless otherwise provided in the articles of association, the liability action against the directors may be the object of a waiver or settlement by the company, provided the majority of the shareholders representing at least two thirds of the equity vote in favour and provided that members representing at least one tenth of the equity do not oppose.

The provisions of the preceding paragraphs do not prejudice the right to damages of each shareholder or a third party who have been directly damaged by willful or negligent acts of the directors. …omissis." Please note that this is the wording of the article before the reform.

2 Article 2486 Civil Code – Directors' powers: "*Upon the occurrence of an event of dissolution and until time of the delivery referred to in Article 2487-bis, the directors maintain the power to manage the company for the sole purpose of maintenance of the integrity and value of the corporate assets.*

The directors are personally and jointly liable for the damages caused to the company, the shareholders, the creditors of the company and third parties for action or omissions in breach of the provisions of the previous paragraph."