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The Italian Insolvency Law Reform: Reboot

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After a very long process the insolvency law reform came into force on 15 July 2022. The process started in 2017, when the government was enabled to reform the Bankruptcy Act. The "Code of enterprise crisis and of insolvency" was passed on 14 February 2019, some sections immediately applicable, some intended to come into force sometime later, at a date always postponed. In the meanwhile, the best 'pieces' of the Code came into force, formally in separate acts amending the old Bankruptcy Act, in 2020 and 2021. When the deadline for the implementation of the Directive on Restructuring was getting too near, in April 2021 a new committee of experts was appointed to amend the Code as needed.

In a final turn of events, on 17 June 2022 (published in the OJ on 1st July 2022) the amended Code was adopted and came into force on 15 July 2022, with very significant changes as compared to the versions circulated previously.

The Code confirms the general lines of the Bankruptcy Act as deeply modified in the reform season of 2005-2015, with some innovative aspects. It solves some apparently minor issues that were a matter of discussion amongst academics and practitioners and could have a significant impact on restructuring plans. Other parts are new, but very country-specific, so to say. A good example, difficult to comprehend for non-Italian lawyers, is that the law envisages a new form of judicial composition with creditors, the 'restructuring plan subject to confirmation', which allows the debtor to freely allocate resources to consenting classes of creditors, albeit with the backstop of the 'no creditor worse off' principle (Art. 64-II). This 'new' procedure was created because it was felt that the term 'judicial composition with creditors' inevitably related, under Italian legal tradition, to a procedure in which constraints on the payment order apply (the bankruptcy waterfall) even for consenting classes, although moderated by the RPR.

The new law also provides for very different rules for judicial composition depending on its proposed outcome, restructuring or liquidation. Strict rules on class formation to avoid conflicts of interests – already envisaged in the 2019 text – are also now in place (Art. 85).

Probably the most innovative aspects are those relating to the distribution of surplus, including to shareholders. Firstly, the law provides for a more liberal, albeit not entirely free (as mentioned with regard to the 'restructuring plan subject to confirmation'), distribution of the value exceeding liquidation value (Art. 84(6)). Whether or not such surplus could be freely distributed was not expressly dealt with by the previous law. The matter polarised literature and was heavily litigated, with different courts having different views on the matter.

Secondly, as mentioned, the law applies a RPR, both while drawing the plan (Art. 84(6)) and in dealing with cross-class cram down (Art. 112(2)), in terms very similar to those envisaged by Art. 11(1)(c-d) of the Directive, the wording of which is almost literally translated into the law.

Rules similar to these can also apply to shareholders. Under previous rules as commonly applied, the rule was APR except for shareholders: it could happen, and in fact happened quite often, that debt was restructured with a cram down (even cross-class) whilst shareholders kept their interest in the company. If shareholders are included in the plan, the RPR applies with adaptations, with a rule that will certainly be challenging in its practical implementation.