Aufsätze

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The new Italian Insolvency Code

In line with the trend throughout the European Union, the principles contained in the European directives on insolvency have also recently been implemented in Italy.

Unlike in the past, the new Italian Bankruptcy Code aims to resolve crises in the least traumatic way possible for the company.

For Italian bankruptcy law, this is a momentous innovation, marking the transition from a basic philosophy that was characterized by a largely punitive profile to a more modern approach consistent with current issues.

It was a significant step toward modernizing the discipline of business crisis, whose objectives were essentially two: (a) to diagnose and identify from the very first symptoms companies „in crisis“ of liquidity, limiting the damage as much as possible and, at the same time, (b) to safeguard the most deserving entrepreneurial activities that for one reason or another find themselves (albeit in a time course that may prove to be limited) experiencing a moment of difficulty.

Among the innovations introduced by the new code is a view of crisis as a physiological phenomenon of business.

Thus, a definition is created that seeks to exclude the concept of bankruptcy to leave room for the expression „judicial liquidation.“

The main actor in the new legislation is no longer personified by the entrepreneur involved in the crisis, but by the company and its preservation.

It introduces a profound change to the underlying philosophy of insolvency law, evolving from a static approach, based on the exclusive safeguarding of the principle of equal treatment of creditors and a maximizing of creditor satisfaction, to a dynamic perspective, in which the preservation of the company as a going concern constitutes a protected value.

Below, we provide a general overview of the Insolvency Code and its main remedies.

The new Italian Insolvency Code went into effect on July 15, 2022, after a postponement caused by the COVID-19 pandemic, due to the need to comply with the implementation of EU Directive No. 1023 of June 20, 2019 (EU Restructuring Directive).

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The Insolvency Code represents a key development for the Italian legal system, opening it to the principles contained in the EU Restructuring Directive, which states that preventive restructuring frameworks should first and foremost enable debtors to effectively restructure their indebtedness at an early stage and thus prevent the further insolvency and avoid the relevant liquidation proceedings.

The new legal framework provides certain remedies for companies in financial distress to help them to address their financials and allow them to overcome their crisis by restructuring their outstanding exposure. The following are the key remedies available under the Insolvency Code:

*a) a **negotiated settlement** under articles 12–25 (composizione negoziata);*

*b) An **agreement in execution of a certified recovery plan** under article 56 (accordo in esecuzione di piano attestato di risanamento);*

*c) a **debt restructuring agreement** under article 57 (accordo di ristrutturazione dei debiti);*

*d) A **moratorium agreement** under article 62 (convenzione di moratoria);*

*e) A **composition of debt with creditors** under articles 84–120 (concordato preventivo).*

a) The negotiated settlement.

It is a **voluntary out-of-court settlement** that may be applied for by any entrepreneur facing financial or economic distress that could potentially lead to insolvency, provided that a restructuring of the company is feasible.

*Article 56 of the Insolvency Code is innovative in its **regulation of the typical content of this out-of-court**.*

The negotiated settlement represents one of the most important provisions of the Insolvency Code and has the following characteristics:

1) It is a negotiated and confidential instrument (except for the information published publicly in the Italian Business Register);

2) It is a voluntary instrument; thus, reports received from qualified public creditors (article 25-novies of the Insolvency Code) or from a supervisory body (article 25-octies of the Insolvency Code) will not determine the occurrence of any obligation of activation upon the entrepreneur

3) It is intended to support preservation of the ongoing business, even indirectly;

4) It is an out-of-court measure, provided that the entrepreneur does not apply for involvement of the judicial authorities (in accordance with articles 18 and 19 of the Insolvency Code) unless the entrepreneur applies (a) for application of asset protection measures (misure protettive) or (b) to be authorized to enter into new financing (nuova finanza).

b) agreement in execution of a certified recovery plan under article 56 of the Insolvency Code

Article 56 of the Insolvency Code is innovative in its regulation of the typical content of this out-of-court instrument, specifically providing that the plan for recovery of the business (as well as the agreement and the relevant executing acts) must be in writing and bear a date.

The typical and simplest form for such plan is a business plan wherein the reasons for the financial distress are described along with a series of appropriate measures aimed at restructuring the company, which may be intended to:

1) *rebalance the business's assets (e. g. capital increase),*
2) *rein in the company's expenses (e. g. divestments, workforce reductions),*
3) *remove technological or market obstacles (e. g. relaunching the activity, partnership, etc.), or*
4) *restore profitability of the company's business.*

c) Debt restructuring agreement under article 57 of the Insolvency Code

A debt restructuring agreement is reached between a debtor company and creditors representing at least 60 percent of the company's total indebtedness and is aimed at restructuring the debtor company's liabilities. The nature of this remedy is strictly contractual; thus, there are no binding effects on creditors not a part of this group (the non-adherent creditors), who will be repaid on contractual or by-law terms. That said, there is a possibility for the debtor, provided that the agreement has been approved by the creditors, to be granted a moratorium of up to 120 days in accordance with article 57, paragraph 3 of the Insolvency Code.

d) Moratorium agreement under article 62 of the Insolvency Code

The purpose of the moratorium agreement—also referred to as a „moratorium and standstill agreement"—is to regulate the relations between the company and its creditors or lenders to avoid recovery initiatives or enforcement actions during negotiations that could jeopardize an already-commenced restructuring process.

It may involve (i) a postponement of the repayment terms of loans, (ii) a waiver of deeds or (iii) a suspension of enforcement and precautionary actions.

e) Composition of debt with creditors under articles 84–120 of the Insolvency Code.

The composition of debts with creditors is a **judicial proceeding** that involves a **judicial intervention** by the competent court (i. e., the court where the company in distress has its main center of business activities) and allows financially distressed or insolvent companies to propose a plan requiring creditors' approval.

Under article 84, paragraph 1 of the Insolvency Code, a composition of debts with creditors has to achieve, on the basis of a plan, **satisfaction of creditors to an extent not less than what would be achieved in a judicial liquidation** through one or more of the following:

1) business continuity on a going-concern basis;

2) a liquidation of the assets;

3) an allocation of the assets to an assignee (assuntore); or

4) In any other form.

Since this legislation has only recently come into effect, it is still too early to judge whether it has achieved the positive effects that lawmakers set as their goal, i. e.

a) enable early diagnosis of the state of difficulty of enterprises, preventing that the delay in perceiving the signs of crisis in an enterprise may later lead to an irreversible state of crisis. Thus, an alert system is introduced to enable the early emergence of the crisis, with a view to recovery;

b) Preserve, as much as possible, the business activity in crisis due to particular contingencies;

c) Ensure creditors obtain satisfaction (albeit partial) of their claims;

d) Avoiding to the community the negative consequences associated with the closure of a business, especially in terms of job losses;

e) Safeguard the entrepreneurial capacity of those who face business failure.

In the coming time, it will be possible to start verifying what kind of impact these regulatory changes have had on the Italian economic system and whether they are in line with the legislator's *desiderata*.