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The new Italian statutory framework for insolvency/crisis situations: key features

After 80 years of application, former Italian bankruptcy law (“IBL”, which was enacted in 1942) has been finally substituted by the new Code for crisis and insolvency (so called “CCII”, which entered into force on July 15, 2022).

CCII provides for a comprehensive and almost complex reshaping of the Italian insolvency and crisis legal system, taking also into account the principles set out under the so called “Insolvency EU Directive”¹.

Among the many new provisions recently enacted – which also include the “modernization” of previous tools available to debtors in financial crisis under IBL, especially as far as pre-insolvency proceedings are concerned – we may highlight the following areas which represent the most innovative features of the CCII.

1. Negotiation with creditors in a safe out-of-Court environment (or in a mildly court driven process)

CCII has enhanced certain duties of the entrepreneur aimed at monitoring his economic and financial situation², in order to anticipate the assessment of a possible situation of crisis and to promptly react.

The “mildest” reaction (in the sense that it is the possible solution which does not trigger *per se* a Court intervention) is the request for the appointment of a “professional negotiator” by the Companies’ Register, with the duty to facilitate negotiations between the debtor and creditors (it is worth pointing out that, if necessary, the debtor can require the Court to issue and order of “stay” for a period normally not exceeding four months); if the negotiation fails, the debtor, if the relevant requirements are met, can access to formal restructuring proceedings³.

Among formal restructuring proceedings, under the former IBL (and also under the recently enacted CCII) it is common to distinguish between out-of-Court proceedings (certified recovery plans⁴) and judicial procedures

1 CCII, is still under review by legal scholars and the interpretation of certain provisions is still open to different solutions which only a forthcoming court decisions will be able to determine.

2 In particular, section 3 of CCII provides that the entrepreneur has to set up an internal organization which shall allow to:

- (i) detect and verify any financial/economic unbalance which, in relation to the dimension and the activity carried out by the entrepreneur, may become relevant as material index of a crisis;
- (ii) verify the capability to pay debts and to preserve the continuation of the business for a period of 12 months and detect the possible existence of certain “strong” clues of crisis indicated by CCII (i.e. unpaid debts vis-à-vis employees, commercial debts outstanding for more than 90 days etc.);
- (iii) in case of crisis, assess the reasonable feasibility of recovery (also complying with a practical test provided by the Companies’ Register).

3 The appointment of a professional negotiator is not mandatory (so that the debtor may opt to access directly to pre-insolvency proceedings), but – especially when the debtor has not yet prepared its restructuring plan necessary to file for pre-insolvency proceedings – it is advisable in order to obtain Court protection for a convenient period of time (which, as referred, may last up to one year, opposed to the period of protection which is granted in case of filing with the Court of a preliminary request of access to pre-insolvency proceedings (so called “domanda in bianco” – “white” request), which is 60 days with the possible extension of further 60 days. Furthermore, the previous attempt to pursue the restructuring process through a professional negotiator, even if not successful, grants to the debtor certain procedural and substantial pros in the subsequent pre-insolvency proceedings.

4 The certified recovery plan is prepared by the debtor and addressed to its creditors (commonly an agreement is signed with major creditors), and it is aimed at pursuing the reorganisation of the indebtedness and the recovery of the debtor's economic and financial strength. There is no Court involvement at all, but the plan, in order to benefit of the provision set out under the CCII (mainly the exemption from claw back actions in case of subsequent declaration of insolvency), has to be certified as feasible by an independent professional.

(debt restructuring agreements⁵ and judicial composition with creditors): CCII has now enhanced such tools (in particular, see below, with regard to judicial composition with creditors with continuation of the business) and has also introduced a new instrument (debt restructuring agreements subject to homologation), which is a sort of combination between “normal” debt restructuring agreements and judicial composition with creditors and allows the debtor to overcome the strict priority regime set out under Italian Law (*i.e.* the debtor can pursue, provided that certain conditions are met, its restructuring plan without the limits deriving from the so called “absolute priority rule”).

2. “Try to preserve the business” in the context of a judicial composition with creditors

The preservation of the business on a going concern basis (both directly by the debtor and indirectly by a third purchaser of the business) is one of the key goals of the reform of the judicial composition with creditors (“*concordato preventivo*”) pursued by the CCII.

The discipline of *concordato* with continuation of the business – if compared to the former provisions of IBL – is definitively inspired to such goal; in a nutshell:

- (i) There is no need (as it is in case of *concordato* with liquidation of the business and as it formerly was under IBL in any case of *concordato*) to reach a general majority of voting creditors (*i.e.* 50% +1 by value of all creditors entitled to vote), it being sufficient a) to reach the positive vote of all classes⁶ of creditors (*i.e.* at least 50% +1 by value of the creditors inserted in each class⁷) b) or if such threshold is not met, to reach the majority of the number of classes (provided that one of the class in favour must include secured/privileged creditors or creditors which in a liquidation would not be entitled to receive any payment);
- (ii) While the value of the assets existing at the date of the opening of the proceedings must be distributed according to the so called “absolute priority rule”, the benefit deriving from the continuation of the business activity can be distributed according to the less strict “relative priority rule” (thus allowing partial payments in favour of classes with a minor ranking even if classes with higher ranking have not yet been fully satisfied);
- (iii) Provided that any plan shall provide to each creditor a treatment improved if compared with insolvency liquidation there is no minimum percentage of satisfaction to be offered to unsecured creditors (whereas in the *concordato* with liquidation of the business minimum percentage of 20 % must be granted in favour of unsecured creditors).

3. “Shareholders, look out!”

The new provisions contained in the CCII provide that:

On the one side:

- (i) The power to adopt the decision to file for a *concordato* is vested exclusively with the directors, who are fully entitled to prepare and structure the plan and the proposal to creditors, without any entitlement of the shareholders to veto directors’ decisions;

5 Debt restructuring agreement is a quite powerful tool available under the CCII (as it was under IBL) and may be entered into between the debtor and creditors representing at least 60% per cent in value of the total indebtedness (with the possibility, meeting certain requirements, to lower such threshold to 30 %). The agreement shall be grounded on an economic and financial plan, to be reviewed by an independent who shall also assess and confirm that the agreement, once approved by the Court, allows the debtor to pay in full (within 120 days) creditors who are not party of the agreement.

In this respect, however, it is worth pointing out that section 61 of CCII allows the debtor to require to the Court the extension of the effects of the agreement also to non participating creditors (both financial and commercial ones in case of continuation of the business, only financial creditors in case of closing of the business).

6 Under the CCII, in case of *concordato* with continuation of the business, it is mandatory to divide creditors into classes

7 In case of lack of majority in one or more classes, a supplemental rule is applicable: the class is deemed as in favour if (i) at least 50% by value of the creditors entitled to vote have participated to the voting operation casting their vote and (ii) 2/3 by value of the voting creditors have expressed their positive vote.

- (ii) The restructuring plan prepared by the directors can provide for amendment of the by-laws of the company and for other operations which directly affect shareholders' interest (*i.e.* share capital increases with the exclusion of option rights, changes in shareholders' rights, extraordinary operations such mergers and de-mergers) which are automatically (without necessity of a shareholders' meeting resolution) carried out as a result of the Court approval of the *concordato*;
- (iii) from the date of filing of the proposal for *concordato* and until the final approval by the Court, directors cannot be revoked (unless there is a motivated ground – it being expressly stated that the decision to opt for the restructuring proceedings is not a valid ground for dismissal – and in such a case the dismissal of directors must be validated by the commercial court);

On the other side:

- (i) if the restructuring plan directly affects shareholders' rights (see point (ii) above), shareholders must be inserted in a class and have the right to vote in the *concordato* proceedings;
- (ii) shareholders representing at least 10% of the share capital are entitled to submit to creditors a proposal for *concordato* alternative to the proposal filed by the directors.

4. Opportunities from the standpoint of investors

The CCII has enhanced the possibility of a successful approach to crisis situations when financial investors are involved (namely funds interested in investing in a business potentially reshaped as a result of a restructuring process).

An investor may seek opportunities through the purchase of credits (usually credits owed by the debtor to banks): CCII allows then – if a creditor owns more than the 10 % of the whole indebtedness of the debtor – to submit a proposal of *concordato*, alternative to the one filed by the debtor.

In addition, the power of directors to submit a restructuring plan directly affecting shareholders' rights also provides a significant tool for deals aimed at preserving the business on a going concern basis through its sale or through a share capital increase paid by new investors.

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For any further clarification or research please contact:

Gabriella Covino
Partner

Co-Head of the Insolvency and
Reorganisations Department
Rome
+39 06 478751
gcovino@gop.it

Luca Jeantet
Partner

Co-Head of the Insolvency and
Reorganisations Department
Turin
+39 011 0924000
ljeantet@gop.it

Antonio Auricchio
Partner

Co-Head of the Litigation and
Arbitration Department
Rome
+39 06 478751
aauricchio@gop.it

Paolo Gnignati
Partner

Co-Head of the Litigation and
Arbitration Department
Padua
+39 049 6994411
pgnignati@gop.it

Paolo Dominis
Partner

Litigation and Arbitration
Padua
+39 049 6994411
pdominis@gop.it



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