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Italy’s New Business Crisis and Insolvency Code Takes Effect

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On July 15, 2022, Italy’s Code of Business Crisis and Insolvency (CCII or Crisis Code) took effect, following three previous measures: (i) Legislative Decree 14/2019, (ii) the “corrective” Legislative Decree 147/2020, and (iii) Legislative Decree 83/2022 implementing European Directive 2019/1023 (although some minimal parts of the Crisis Code are already in effect).

A key principle of the Crisis Code affirms that it is preferable to resolve a crisis in the least traumatic way possible, either by attempting the restructuring of the company so as to preserve its value or by assigning to the debtor and its creditors a plurality of varied instruments abstractly suitable to regulate the crisis without having to open liquidation proceedings, which often, if not always, result in an atomistic liquidation, disrupting company values. These instruments include (i) negotiated settlement, (ii) reorganization plans, (iii) moratorium agreements, (iv) restructuring plans subject to approval, (v) restructuring agreements, (vi) composition agreements, and (vii) judicial liquidation, where negotiated settlement is the least disruptive option for the company, and judicial liquidation is the most disruptive.

Below is a brief summary of the Crisis Code:

a) Rationalization of the insolvency discipline.

i. Elaboration of general principles and a definition of the concept of crisis.

ii. Unlike the previous Bankruptcy Law, the Crisis Code adopted, or rather tried to adopt, a single procedural model for establishing the state of crisis or insolvency.

iii. The Crisis Code regulates both commercial enterprises and civil debtors. Thus, every category of debtor is included, with the exception of public entities.

iv. Specific protocol is introduced for the crises of “groups of companies.”

v. The Crisis Code displays a preference for business continuity and favors composition with creditors over liquidation. Notably, the latest decree transposing the Insolvency Directive tried to further improve this procedure.

b) New elements.

i. *Increased responsibility of internal bodies*.

In general, the company must have (and, therefore, adopt) a proper organizational structure to detect the state of crisis in a timely manner for the purpose of taking appropriate initiatives.

The supervisory body is obligated to report symptoms of crisis to the board of directors (or legal representative), and qualified public creditors and lending institutions also have new reporting obligations.

ii. *Introduction of "negotiated composition for the resolution of business crisis."*

The Crisis Code creates a new voluntary, negotiated, and out-of-court procedure to support companies facing difficulty. An expert is appointed to guide the simplified procedure, which is proposed by recourse to the Business Registry rather than the court.

The Crisis Code establishes protective measures to carry out the ongoing negotiations for the assisted settlement. Notably, the request may be selective and, therefore, limited to certain initiatives undertaken by creditors or to certain creditors.

Creditors must negotiate in good faith. If it is not possible to proceed with the negotiated crisis resolution procedure, a liquidation arrangement (a so-called "simplified" arrangement) can be utilized; this may be detrimental to creditors as it does not provide for a voting phase. Thus, the "dissenting" creditor can only express opposition to the eventual approval.

iii. *Introduction of tax cram-down.*

Subject to the need to monitor the evolution of interpretation and application with regard to the tax settlement, the court, under certain conditions, can approve restructuring agreements and composition agreements even without acceptance of the settlement, as acceptance is decisive for the achievement of majorities, i.e., when the votes related to the acceptance of the settlement are needed to reach the majorities to approve the procedure.

iv. *Introduction of "restructuring plan subject to approval."*

To comply with the Insolvency Directive, a new instrument of crisis regulation was introduced called the restructuring plan subject to homologation (renamed "PRO") which, in short, consists of a proposal to satisfy debts addressed to creditors divided into classes without respect for *par condicio creditorum* (the so-called "relative priority rule"). In any case, workers must be satisfied within 30 days of approval, and this can only occur if all classes vote in favor. Certification on the feasibility of the plan is required.

v. *Composition with creditors*

Although these procedures are not new to the legal system, the Insolvency Directive provides ways to make them more efficient. For example, (i) constraints aimed at employment protection have been eliminated, but the text affirms that the protection of jobs should be pursued as far as possible, (ii) in addition to the principle of "absolute priority rule," the

principle of “relative priority rule” has been introduced, (iii) on the subject of pending contracts, the Crisis Code stipulates that creditors may not unilaterally change contractual terms, even by refusing performance merely because of the filing of the application for access to the arrangement, just as they may not interfere with the proper performance of essential contracts (a definition of which is provided) merely because past claims have not been paid.

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