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THE NEW BUSINESS CRISIS AND INSOLVENCY CODE Innovations in Company Law

ABSTRACT. The paper examines the impact of the enactment of the new Code of “Business Crisis and Insolvency” (CCI), Legislative Decree no. 14/2019, on existing Italian company law. The CCI, indeed, brings significant changes to the entrepreneurial and corporate organizational structures, both with regard to the supervisory bodies and the liability actions against directors. While the wide majority of the CCI provisions will enter into force not earlier than 18 months after their enactment, the company law rules, Articles 375, 377, 378 and 379, are already enforced.

The aim of this paper is to provide a first summary and commentary of those rules that, under several respects, amend the Italian Civil Code.

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1. Introduction to Legislative Decree no. 14/2019

Implementing Law no. 155 of 19 October 2017,¹ Legislative Decree no. 14 was enacted on 12 January 2019.²

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1 With the aforementioned law, the Italian government was delegated to reform the law governing business crisis and insolvency. For an accurate analysis, see V. DE SENSI, *Adeguati assetti organizzativi e continuità aziendale: profili di responsabilità gestoria*, in *Soc.*, 2017, p. 311.

2 The new Code was published in the Italian Official Gazette on 14 February 2019. For the complete code, see Official Gazette, General series, 14 February 2019, no. 38, Ordinary Supplement no. 6, in www.gazzettaufficiale.it/eli/id/2019/02/14/19G00007/sg. For a detailed overview of the previous stages of the provision, see F. LAMANNA,

The Legislative Decree, entitled “*Code of Business Crisis and Insolvency*” (hereinafter, CCI, from the Italian name “*Codice della Crisi di Impresa e dell’Insolvenza*”), is composed of 391 articles³ and will completely replace Royal Decree no. 267 of 16 March 1942, *i.e.*, the Bankruptcy Law, currently in force. Over a decade after the previous intervention,⁴ the Italian legislature overcame the old model of the Bankruptcy Law of 1942.

The massive size of the new Code is the result of the clear legislative intent to overcome the regulatory framework of the Bankruptcy Law⁵ and reorganize the number of different laws regulating the subject (*e.g.*, the discipline of non-commercial over-indebtedness)⁶ into a single text.

The entry into force of the CCI is not uniform for all its provisions (see Article 389 CCI). While most of the new provisions on business crisis and insolvency will be effective from 15 August 2020, after 18 months of “*vacatio legis*”,⁷ some provisions have

Il Codice concorsuale in dirittura d’arrivo con le ultime modifiche ministeriali al testo della Commissione Rordorf (I), in *ilFallimentarista.it*, 17 October 2018; Id., *Il testo in itinere del Codice della crisi e dell’insolvenza approda in Parlamento*, in *ilFallimentarista.it*, 15 November 2018. Cfr. F. PASQUARIELLO, *Italian bankruptcy code moving towards a reform era*, in *Dir. Fall.*, II, 2016, p. 347 to 368.

3 The Legislative Decree is divided into four parts: Part I – *Code of business crisis and insolvency* [Arts. 1 to 374], which contains and constitutes the actual new Code (so called, CCI.); Part II – *Amendments to the Civil Code* [Arts. 375 to 384], which makes changes to various provisions of Book V, Titles II and V and provides for the repeal of certain provisions (*e.g.*, Art. 2221 of the Italian Civil Code); Part III – *Guarantees in favor of buyers of buildings to be built* [Arts. 385 to 388]; Part IV – *Final and transitional provisions* [Arts. 389, 390 and 391].

4 The latest amendments in bankruptcy law occurred with Legislative Decree no. 5 of 9 January 2006. However, in many scholars’ view, the previous reform did not fully respect the intent of an organic reform of the subject. Indeed, the structure of Royal Decree no. 267 of 16 March 1942 has remained unchanged, above all maintaining the basic inspiration, which is historically linked (according to the thought of M. GABOARDI, *Spunti sulla legge delega per la riforma organica delle procedure concorsuali: profitti processuali*, in *Riv. Soc.*, 2018, p. 137) to the paradigmatic (but now declining) notion of the individual entrepreneur to the detriment of the prevailing corporate entrepreneurial phenomenon and, on the other hand, to the logic of subordination of negotiated solutions of business crisis with respect to bankruptcy, as a liquidation-based solution.

5 It should be noted that the new Code presents 125 additional articles compared to the previous Bankruptcy Law of 1942.

6 Some bankruptcy-style procedures were however left outside the reform, such as the regulation of the extraordinary administration of large companies.

7 As some scholars have pointed out (R. RORDORE, *Prime osservazioni sul Codice della crisi e dell’insolvenza*, in *I Contratti*, 2019, II, 129 ss.), the unusually long period is fully justified by the need to prepare adequate organizational structures and by the need of players to have adequate time to study and assimilate all the regulatory changes.

already become effective on 16 March 2019,⁸ essentially covering the organizational structure of collective businesses, especially when they are run by companies, while specific organizational requirements are established for limited liability companies (LLC), including new rules on directors' liability.

2. Entrepreneurial and corporate organizational structures

As anticipated, the first relevant changes affect the organizational structure of collective businesses. Considering that collective businesses are predominantly companies, it is easy to predict that those provisions will translate into regulatory changes in the organization and management of companies.

Article 375 CCI amends Article 2086 of the Italian Civil Code in two ways:

1) firstly, it changes the title of the heading from the old, fascist-era, "*Direction and hierarchy in the business*" to a new, more functional and neutral "*Business management*", thus eliminating any reference to "*hierarchy*" (Article 375, para. 1, CCI);

2) secondly, it introduces a new paragraph providing the collective business's duty to detect the emergence of the crisis at an early stage⁹ (Article 375, para. 2, CCI).

Moreover, the Government has reserved the possibility to intervene with corrective measures, before the decree becomes operational in its entirety. The need for further adjustments, furthermore, could impose itself if, in a fairly short time, the process of issuing the European insolvency directive was completed. In November 2016, a first proposal was drafted. Indeed, "This directive aims at providing access to sustainable enterprises in financial difficulties to preventive restructuring frameworks to enable them to restructure at an early stage, and so prevent insolvency. It also gives reputable bankrupt entrepreneurs a second chance, and introduces measures to increase the efficiency of restructuring, insolvency and discharge procedures." See *Directive on business insolvency: Council agrees its position*, in www.consilium.europa.eu/en/ 11 October 2018.

8 In particular, Article 27, para. 1, and Articles 350, 356, 357, 359, 363, 364, 366, 375, 377, 378, 379, 385, 386, 387 and 388 CCI. The latter are part of Part I, Title X, entitled "*Provisions for the implementation of the crisis and insolvency code, coordination rules and transitional regulations*" and of the second and third parts, respectively "*Changes to the civil code*" and "*Guarantees in favor of buyers of buildings to be built*." Furthermore, other individual specific rules provide for a further deferred entry into force. Regarding the main discipline of the new Code, Article 390 provides some specific rules for the transitory discipline: notwithstanding the general term of 18 months, all the proceedings pending on 15 August 2020 will continue to be governed by the current Bankruptcy Law. Lastly, the second paragraph of the same Article provides applicability of the "old" discipline to all the procedures opened before the CCI came into effect.

9 Article 2, lett. a) CCI defines the state of crisis as a state of economic-financial difficulty that makes insolvency likely, *i.e.*, for going concerns it consists in the inadequacy of expected cash flows to regularly meet scheduled obligations.

In particular, any collective business (mainly companies, but also, possibly, associations or public entities conducting businesses) shall now “set up an organizational, administrative and accounting structure appropriate to the nature and size of the company,¹⁰ also in view of the timely detection of the company crisis and the loss of business continuity, as well as to take action without delay for the adoption and implementation of one of the instruments envisaged by the regulation for overcoming the crisis and recovering business continuity.”¹¹

Therefore, that provision¹² becomes a reference standard of general scope for all (company and non-company) collective enterprises to assess the correct and functional organization of the business¹³ and to detect a company crisis at the earliest possible stage. The new obligations stated in the second paragraph of Article 2086 of the Italian Civil Code are expressly extended – under Article 377 CCI – to all forms of companies, through the amendment of the relevant provisions regulating partnerships, both general and limited, as well as dictated in the matter of simple companies (Article 2257 of the Italian Civil Code), joint stock companies (Articles 2380-*bis* and 2409-*novies* of the Italian Civil Code), limited liability companies (Article 2475 of the Italian Civil Code).¹⁴

10 As some authors pointed out (N. ABRIANI, *Commento al Codice della crisi di impresa e dell'insolvenza*, in *Quaderni in eXecutivis*, III, 2019, p. 39), it is a relative parameter that will change considering the type of business conducted, the size of the company and the organizational structure.

11 This novelty seems to be compatible with the changes made to Article 2381, para. 5, of the Italian Civil Code: the delegated bodies ensure that the organizational, administrative and accounting structure is adequate to the nature and size of the company and report to the Board of Directors and the Board of Statutory Auditors [...] on the general operating performance and on its foreseeable evolution as well as on the most significant transactions, due to their size or characteristics, carried out by the company and its subsidiaries.

12 Provision that first sanctioned only the power of the entrepreneur to direct and control his/her collaborators. A. PILATI, *Sub Art. 2086 Italian Civil Code*, in G. CIAN-A. TRABUCCHI, *Commentario breve al codice civile*, Torino, Cedam, 2014, p. 2343. The Code is limited to recognizing a generically hierarchical power of the employer towards the worker and the mentioned Article “constitutes the normative transcription of a material reality of a sociological order, which is that of the organization of industrial work,” as stated by E. GHERA, *Diritto del lavoro*, Torino, Giappichelli, p. 122.

13 Unlike Article 2381 of the Italian Civil Code, which establishes an obligation solely for joint-stock companies. See footnote 9, *supra*.

14 The text of the Article is shown below: «1. All'articolo 2257 del Codice civile, il primo comma è sostituito dal seguente: “La gestione dell'impresa si svolge nel rispetto della disposizione di cui all'articolo 2086, secondo comma, e spetta esclusivamente agli amministratori, i quali compiono le operazioni necessarie per l'attuazione dell'oggetto sociale.

It is interesting to note that this amendment creates a link between company law and bankruptcy law, which was previously unknown.

Legal scholars have pointed out that organizational structures and corporate control systems must be adequate to the “*going concern*” and to the purpose of a timely detection of the crisis.¹⁵ Moreover, the new Code introduces a principle of correct entrepreneurial management for every collective business, which is likely to produce its most relevant effects to spot the emergence of crisis.¹⁶

3. Liability actions against directors for breach of duties and how to establish damages

Article 2476 of the Italian Civil Code, as amended by Article 378, para. 1 CCI, now expands the duties owed by directors of LLCs to include the “obligation of preserving the corporate assets,” similarly to what is provided for joint stock companies by Article 2394 of the Italian Civil Code.

Under Article 2476, LLC directors are now liable with respect to the obligation to preserve the company’s assets, as it is expressly provided that they are liable to creditors when the company’s assets are insufficient to satisfy their claims.¹⁷

Salvo diversa pattuizione, l'amministrazione della società spetta a ciascuno dei soci disgiuntamente dagli altri”. 2. All'articolo 2380-bis del Codice civile, il primo comma è sostituito dal seguente: “La gestione dell'impresa si svolge nel rispetto della disposizione di cui all'articolo 2086, secondo comma, e spetta esclusivamente agli amministratori, i quali compiono le operazioni necessarie per l'attuazione dell'oggetto sociale”. 3. All'articolo 2409-novies, primo comma, del Codice civile, il primo periodo è sostituito dal seguente: “La gestione dell'impresa si svolge nel rispetto della disposizione di cui all'articolo 2086, secondo comma, e spetta esclusivamente al consiglio di gestione, il quale compie le operazioni necessarie per l'attuazione dell'oggetto sociale”. 4. All'articolo 2475 del Codice civile, il primo comma è sostituito dal seguente: “La gestione dell'impresa si svolge nel rispetto della disposizione di cui all'articolo 2086, secondo comma, e spetta esclusivamente agli amministratori, i quali compiono le operazioni necessarie per l'attuazione dell'oggetto sociale. Salvo diversa disposizione dell'atto costitutivo, l'amministrazione della società è affidata a uno o più soci nominati con decisione dei soci presa ai sensi dell'articolo 2479”. 5. All'articolo 2475 del Codice civile, dopo il quinto comma è aggiunto il seguente: “Si applica, in quanto compatibile, l'articolo 2381”».

15 As remarked by P. MONTALENTI, *La gestione dell'impresa di fronte alla crisi tra diritto societario e diritto concorsuale*, in *Riv. Soc.*, 2011, p. 820; Id, *Diritto dell'impresa in crisi, diritto societario concorsuale, diritto societario della crisi: appunti*, in *Giur. comm.*, I, 2018, 62.

16 On this point, see N. ABRIANI, *Commento al Codice della crisi di impresa e dell'insolvenza*, 2019, p. 39.

17 See G. D. MOSCO, *Doveri e responsabilità di amministratori e sindaci nelle società di capitali*, in *Società*, I, 2019, p. 117. Cfr. N. ABRIANI, *Le azioni di responsabilità alla luce del codice della crisi*, in *AA.VV., Il codice della crisi d'impresa, Italia Oggi*, 2019, p. 56.

The new Code lays down a criterion for determining the amount of damages due by directors for acts or omissions in breach of Article 2476, para. 1, Italian Civil Code.¹⁸

Indeed, Article 378, para. 2, CCI introduces a presumption on the “*quantum*”, adopting the criterion of the so called “*Netto patrimoniale*” (net assets).¹⁹ This criterion is definable as the difference between the net worth of the company on the date when the director has left his/her office²⁰ and the net worth of the company on the date in which a cause for dissolution occurred pursuant to Article 2484 of the Italian Civil Code.²¹

However, in the event of unreliability or absence of accounting records, damages may be quantified by calculating the difference between the value of assets and liabilities as calculated in the insolvency procedure – the so-called “*Criterio differenziale*.”²²

In so doing, the law resolves the existing contrast among different courts²³ in the matter and the objective difficulty of liquidating damages in all those (frequent)²⁴ cases in which the accounting records are missing or have been irregularly kept during the life of the then declared insolvent business.

The rule concerns all liability actions, even if they have been promoted without an initiated bankruptcy proceeding.

18 It will be used to calculate the amount of indemnifiable damage in liability actions, exercised when a dissolution case has occurred.

19 New paragraph 2, Art. 2486 of the Italian Civil Code. For more details on this criterion, see L. JEANTET-P. VALLINO, *La responsabilità degli amministratori: guardare al passato, pensare al futuro e interpretare il presente*, in *il-Fallimentarista.it*, 2 May 2019.

20 Or, in the event of the commencement of an insolvency procedure, on the date of its opening.

21 Minus the costs already sustained (and to be sustained) after the occurrence of the cause of dissolution and until the closing of the liquidation.

22 On this topic, see N. ABRIANI, *Nuova disciplina della crisi d'impresa e modificazioni del Codice civile: prime letture*, in *Società*, IV, 2019, p. 411.

23 For a reconstruction of the conflict between Courts, see A. JORIO, *La determinazione del danno risarcibile nelle azioni di responsabilità*, in *Giur. comm.*, 2011, I, p. 149. Cf. M. SPIOTTA, *L'atteso chiarimento delle Sezioni Unite sull'utilizzabilità del criterio del deficit*, in *Giur. it.*, 2015, p. 1417.

24 As stated by A. BARTALENA, *Le azioni di responsabilità nel codice della crisi d'impresa e dell'insolvenza*, in *Fall.*, III, 2019, p. 298, the liability actions against directors and auditors of failed companies have become much more frequent and involve higher amounts.

4. Obligation to appoint the supervisory body and auditor for limited liability companies. Applicability of Article 2409 of the Italian Civil Code

Among the most interesting regulatory changes introduced by the Code, Article 379 CCI amended Article 2477 of the Italian Civil Code (paragraphs 3 and 4), extending the number of companies, in particular limited liability companies, obliged to appoint the statutory auditors, as an internal body, or an external auditor.

Indeed, at first,²⁵ Article 379, para. 1(c), CCI has significantly reduced the threshold, the time limit within which LLEs are required to appoint the supervisory body. It is thus required to exceed, for two consecutive years, at least one of the following limits:

- 1) total assets in the balance sheet: 2 million euros;
- 2) revenues from sales and services: 2 million euros;
- 3) average number of employees during the financial year: 10 units.

That obligation ceases if the company has not exceeded, for three consecutive financial years, any of the limits indicated above.

It is clear that the increase in the number of companies subject to the appointment of statutory auditors or external auditors is functional to the better functioning of the so-called “alert measures”²⁶ – one of the main innovations of the CCI.²⁷

Indeed, supervisory bodies play a fundamental role in preventing the insolvency of a company. Both statutory auditors and internal auditors have the duty, pursuant to Article 14, para. 1 CCI, “to verify that the management body constantly evaluates, assuming the consequent appropriate initiatives, if the organizational structure of the company is adequate, if there is an economic and financial balance and what is the

25 Please see paragraph 4.1 below.

26 See S. BASTIANON, *Early warning, allerta e probability of default nel nuovo Codice della crisi d'impresa*, in *il-Fallimentarista.it*, 14 May 2019.

27 The main objective of the Reformation is to “anticipate” by facilitating the emergence of the corporate crisis – before it results in the most serious and overt insolvency – through specific indicator instruments, offering the companies in difficulty the assistance of the so-called “OCRI”. The acronym refers to independent bodies that make up the business crisis. Indeed, as claimed by authoritative legal scholars, one of the basic objectives of the CCI is “safeguarding the residual value of the company, rather than dispersing it in a liquidation perspective,” providing the entrepreneur with the possibility of “getting back into the game,” as stated by R. RORDORF, *Prime osservazioni sul Codice della crisi e dell'insolvenza*, 2019.

foreseeable trend of the management, as well as to immediately report to the same management body the existence of well-founded indications of the crisis.”

The provision mentioned above is likely to have a strong impact on many SMEs that would thus be required to appoint a body, with all the difficulties and, above all, the costs involved, which they considered so far unnecessary.

The legislature – aware of the difficulties that such provision may entail – has decided to grant a “transition period” of nine months²⁸ since the entry into force of Article 379 CCI.

Hence, a longer period has been granted to limited liability companies to appoint the supervisory body or the auditor, amending – if necessary – the memorandum and articles of association.

Lastly, Article 379, para. 2, CCI provides the applicability of the procedure envisaged by Article 2409 of the Italian Civil Code to limited liability companies. Before the reform, most scholars and courts excluded the applicability of Article 2409 of the Italian Civil Code to LLCs.²⁹ Now, by filing a claim to the Court, it is possible to report the suspicion of serious irregularities committed by directors.³⁰ The assumption is the “well-founded suspicion that directors, in violation of their duties, have performed serious irregularities in the management that can prejudice the company or one or more of its subsidiaries.”

In the most serious cases the Court can remove the directors (and, if necessary, also the auditors) and appoint a judiciary administrator.³¹ The powers and duration of the judiciary administrator’s office are established by the Court.

28 If the articles of association provide for a mere reference to the Italian Civil Code (instead of inserting *ad hoc* clauses in the statute), the amendments are directly applicable and the requirement to appoint such body is imposed from the entry into force of Article 379 CCI (*i.e.*, 16 March 2019), with no transitional period.

29 See D. FICO, *Denuncia al tribunale e controllo giudiziario sulla gestione*, in *ilSocietario.it*, 21 November 2018. See Corte di Cassazione, 13 January 2010, no. 403, in *Società*, 2010, p. 665. Cfr. A. BERTELOTTI, *Denuncia al tribunale*, in *Giur. it.*, IV, 2018, p. 900.

30 The investigation which must be carried out by the Court concerns the whole management activity. In this regard, see V. SALAFIA, *La società r.l. e l’art. 2409 c.c.*, in *Società*, IV, 2019, p. 458.

31 Authoritative legal scholars remark that there is a very strong interference by the judge in the course of corporate life. See R. RORDORE, *Brevi note in tema di controllo giudiziario della gestione delle società previsto dall’Art. 2409 c.c.*, in *Società*, 2015, p. 1212.

Moreover, the decree ordering the removal of directors and the appointment of a judiciary administrator can be appealed to the Court of Appeal within twenty days of the notification.

4.1. The Italian legislature retraced its steps

Pending this paper, the so-called “*Sbloccacantieri*”³² decree was approved and made some other changes to Article 2477 of the Italian Civil Code.

No later than three months after Article 379 CCI was enforced, the Italian legislature has retraced its steps, increasing the time limit within which limited liability companies must appoint the supervisory body or the external auditor.

Article 2-*bis*, para. 2, of Legislative Decree no. 32 of 18 April 2019, converted with amendments into Law no. 55 of 14 June 2019, rewrote the letter c) of the second paragraph of Article 2477 of the Italian Civil Code, doubling the limits set, at first, by Article 379 CCI. Now, it is required to exceed, for two consecutive years, one of the following limits:

- 1) total assets in the balance sheet: 4 million euros;
- 2) revenues from sales and services: 4 million euros;
- 3) average number of employees during the financial year: 20 units.

The rationale of the change is the overcoming of critical issues (for small-sized companies) connected to the increase in costs and to the organizational difficulty to appoint the supervisory body.

SMEs must comply with the legal obligation within nine months of the entry into force of Article 379 CCI, *i.e.*, by 16 December 2019.

Further problems still exist for companies that have already appointed the supervisory body, based on the previous text of the new “*Business crisis and insolvency*” Code.

Although the law has not provided anything in this regard, it should be possible to proceed with a dismissal for cause, since the raising of the limits has made the appointment no longer mandatory.³³

32 Literally, “unlocks construction sites”. Law no. 55, 14 June 2019 published in the Italian Official Gazette on 17 June 2019.

33 Indeed, the solution is not that simple. As some authors pointed out, (see G. NIGRO, *Sbloccacantieri: raddoppiate le soglie per la nomina dell'organo di controllo nelle s.r.l.*, in *Quotidiano giuridico Pluris*, 21 June 2019), there are different solutions. Following Article 4, lett. i) of Italian Ministerial Decree no. 261, 28 December 2012, “the supervening absence of the obligation of legal audit due to the lack of law requirements” is one of dismissal cause. The same cannot be said if a supervisory body has been appointed. In fact, Article 2400 of the Italian Civil Code provides that the dismissal must be approved by the Court, after hearing the interested party.