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The New Italian Code of Crisis and Insolvency: A First Glance

In the next few months, reform of the Italian bankruptcy law will be completed with the introduction of the new "Crisis and Insolvency Code" (hereinafter, the "Code"). This Code is composed of nine sections and 362 articles that organize the rules currently contained in the Italian bankruptcy law and the over-indebtedness law for individuals. The Code starts with the general principles of the crisis, then the so-called "minor" procedures, and finally the phase of the crisis which is still reversible until insolvency and judicial liquidation, which is considered the "extrema ratio."

The new Code will regulate in a comprehensive, singular and organic way, all aspects of crisis and insolvency, regardless of the legal nature of the debtor and the type of activity, thus regulating crisis situations affecting both individuals and legal entities.

The Code is inspired by the European legislation (see Commission No. 2014/135/EU, 12 March 2014 and Reg (EU) 2015/848, 20 May 2015 of the Parliament and the Council) and the principles of international commercial law elaborated by Uncitral on insolvency. Thus, the new Code may also be considered part of the evolution of legislation "from a law of morality to a law of continuity," where insolvency must represent a condition to which one should never arrive.

There are two general principles of the reform: the pursuit of the best satisfaction of creditors and the pursuit of business continuity to overcome the crisis. It is assumed that the timely disclosure of the crisis helps overcome the critical phase and is aimed at encouraging the instrument of the preliminary composition with all or part of the creditors. The liquidation procedure is an "extrema ratio" that can only be used if it turns out to be the most practical and profitable way to satisfy creditors.

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In an innovative way for the Italian legal system, the new Code introduces the ideas of alert and crisis. The alert procedure is introduced to promptly bring out the state of crisis. The state of crisis is defined as "probability of future insolvency." Insolvency is manifested by the lack of prospective cash flow to meet planned obligations.

The reform regulates:

- crisis composition bodies entrusted to face the first disclosure of the critical phases, new reporting charges (through new obligations for corporate bodies and individuals) and rewards measures linked to timely disclosures;
- turn-around plans, debt restructuring agreements, preliminary composition with creditors (with continuation of debtors' business or with liquidation), along with the related institutions of complaints, appeals and revocations and precautionary and protective measures; and
- over-indebtedness of individuals and small entrepreneurs, originally excluded from bankruptcy (the subject matter acquires new organic unity and autonomy, compared to what is previously stated by Law 3/2012).

Turnaround plans and arrangements, as well as debt restructuring agreements, are also detailed.

The preliminary composition with creditors becomes the main focus of the reform. In line with the general goal of preventing insolvency and crisis, it is detailed and directly disciplined without any reference to the previous bankruptcy law and without any point of contact with the previous bankruptcy composition agreement.

In its business continuity variant, the new institution can also be configured in the case of the so-called "indirect continuity." This means that the debtor company in operation can be ruled by an entity other than the original debtor, by virtue of assignment/usufruct/rent agreements stipulated even prior to the submission of the petition to the Court, as well as by virtue of transfer of the company to one or more companies, including new ones, or any other title.

It is no longer required that the composition proposal ensure the payment of at least 20 percent of the total amount of unsecured credits as in the current bankruptcy law.

In its liquidation variant, the preliminary composition with creditors must be characterized by a "contribution of external resources that increase appreciably the satisfaction of creditors" (where this measure is quantified as 10 percent).

Even in the liquidation hypothesis, the possibility of the business continuity is not excluded, on the condition that "...creditors shall be satisfied predominantly from the proceeds produced by direct or indirect business continuity, including the sale of the warehouse."

As for the judicial liquidation, the new Code provisions recall the contents of the current bankruptcy law and are maintained by the legislator as necessary institutions, notwithstanding the general principle that liquidation should have represented a marginal regime in the new Code reformation, because it is not aimed at business continuity. The main innovations are certainly those affecting the new judicial liquidation composition, which replaces the old bankruptcy composition with creditors and which may also be filed by petition of the debtor or companies belonging to the same group, "... after one year from the sentence that declared the opening of the judicial liquidation procedure ... ," however, "… only if it foresees the contribution of resources that increase the asset's value by at least 10 percent ... ."

The new Code also introduces provisions relating to the crisis of groups of companies. The clear aim of the reform is to enhance and safeguard a unified vision of the group, to deal more efficiently with the insolvency that involves an economically single enterprise compared to the good performance of the group. The resolution of the insolvency of the individual company must not only be faced in the logic of the business continuity, but also treated as part of the total group reorganization.

The new regulation sets the conditions of what happens to the various companies in crisis or those which are insolvent within a non-insolvent group. In the event of petition of preliminary composition with creditors involving a group of companies, the new Code provides for the unity of the court bodies with the appointment of a single delegated judge and a single judicial commissioner, as well as the possibility of filing a single and unitary resolution plan of the group crisis with a single expense fund. The group resolution plan may organize intra-group contractual and reorganization operations, which are functional to the business continuity of the single companies within the group and the better satisfaction of all creditors involved.

With regards to criminal procedures, the new Code considers the criminal cases that may be committed before the insolvency procedure and delineates their possible developments in light of the opening of the crisis and insolvency procedures. Those criminal offenses are the same that already characterize the current bankruptcy procedures.

In conclusion, at a first glance, the new Code is a commendable effort to reunite, unify and make homogeneous all bankruptcy matters. However, there are some flaws that could create problems. For example, the new Code lacks any reference to privileges, still regulated by the Italian civil code and other specific laws. Indeed, this represents the loss of a good opportunity to rationalize the matter of privileges, reducing its current plethora of law provisions providing for different type of privileges with several different ranks, and avoiding any uncontrolled proliferation.

In addition, it must be kept in mind that both the companies subject to special regulations and the large companies subject to extraordinary administration, are exempted from the general treatment provided by the new Code.

This means that crises involving banks, insurance and financial companies, as well as single large groups (like the well-known cases Parmalat and Alitalia), remain entrusted to other specific regulatory measures to adapt any crisis treatment to the features of such regulated companies and groups. P