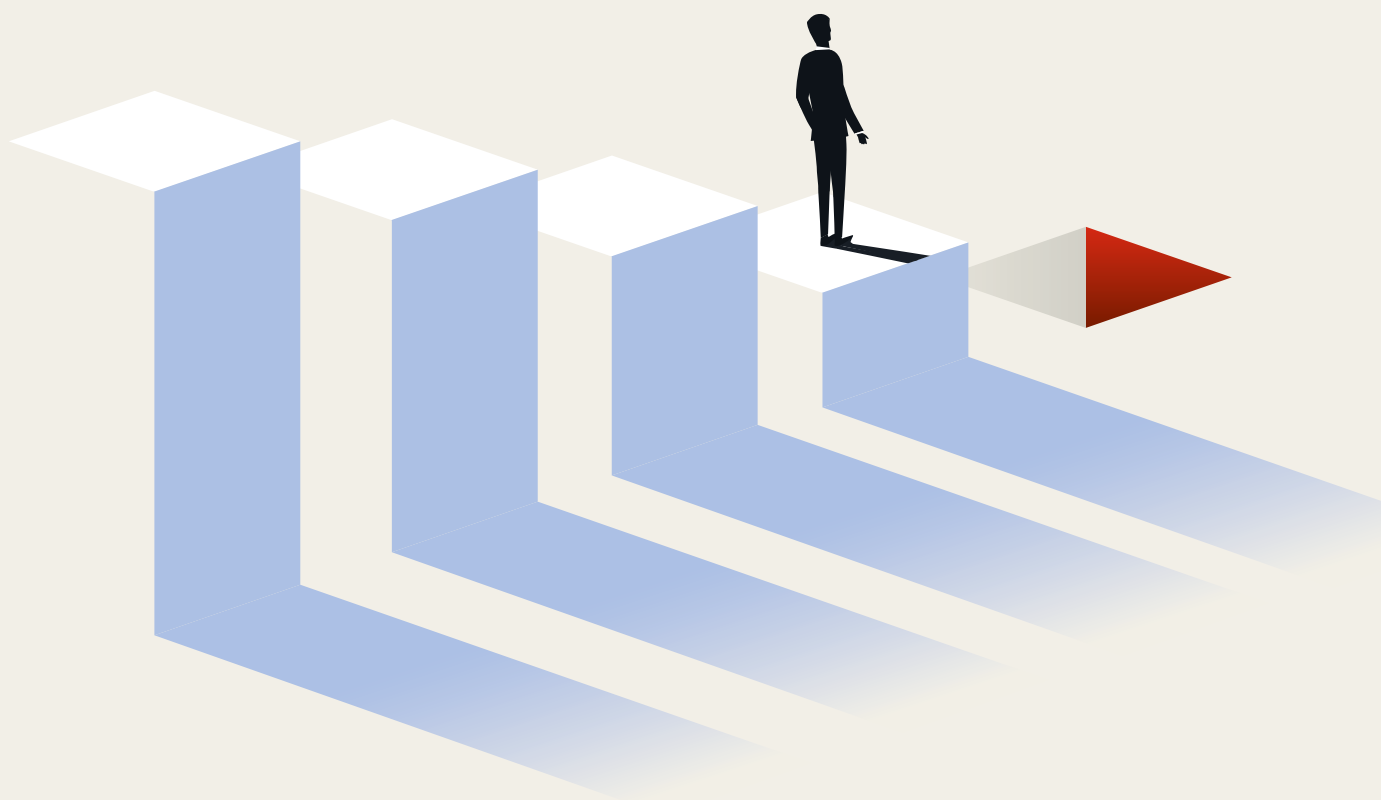


THE NEW CRISIS AND INSOLVENCY CODE



INTRODUCTION TO THE ITALIAN BANKRUPTCY LAW REFORM

On 10 January 2019 the Italian Parliament approved the new Crisis and Insolvency Code (hereinafter the "Code"). The Code shall repeal the provisions contained in the Royal Decree No. 267 of 16 of March 1942 (so called "Bankruptcy Law") and amend some rules about companies' governance established by the Italian Civil Code. The key changes can be summarized as follows:

- 1
Alert and business crisis settlement procedures aimed at the early detection of crisis and prompt recovering of the business economic balance (Sections 12 through 25 of the Code).
- 2
Amendments to the Italian Civil Code regarding corporate law, with special reference to the directors liability and obligation of appointment of the internal audit bodies for small companies (Sections 374 through 383 of the Code).
- 3
New rules on debt restructuring agreements and certified recovery plans (Sections 57 through 64 of the Code).
- 4
Replacement of the present bankruptcy procedure with the faster "procedure of judicial assessment of the crisis and insolvency" (Title V of the Code).
- 5
Reduction of the "earlydeductible" credits to make the liquidation procedure more efficient (Section 6 of the Code).
- 6
Amendments to the Settlement Agreement with Creditors Procedure (in Italian "concordato preventivo") aimed at avoiding the liquidation of the business assets (Chapter II, Title IV of the Code).
- 7
•Further powers to the procedures Receivers without the need of Court authorization or the approval of Creditors' Committees (Sections 125 through 137 of the Code).
- 8
Amendments to the rules concerning pending contracts in case of insolvency, preliminary purchase agreements and going concern leasing (Section V, Chapter I, Title V of the Code).
- 9
Extension of timeframe to bring "claw back" civil actions (Section 163 of the Code).
- 10
Entry into force of an innovative systems of sale during the phase of liquidation of the business assets (Sections 214 through 219 of the Code).
- 11
Entry into force of the right of rehabilitation of the entrepreneur natural person and consumer (in Italian "esdebitazione") (Chapter X, Title V of the Code).
- 12
Entry into force of a sole insolvency procedure for groups of companies (Title VI of the Code).



I. ALERT AND BUSINESS CRISIS SETTLEMENT PROCEDURES

Two remarkable changes introduced by the new Crisis and Insolvency Code (“Code”) -- which will enter into force 18 months after its publication on the Official Gazette of the Italian Republic -- are the alert and business crisis settlement procedures, aimed at permitting businesses to carry on an early diagnosis of their own economic difficulties: Thus -- hopefully -- preventing such difficulties from turning into outright insolvency.

SCOPE

The alert and business crisis settlement procedures are reserved for debtors engaged in commercial and agricultural activities, with the exclusion of large corporations, industrial groups and public companies.

THE ALERT TOOLS

The new “alert tools” are:

- (a) **Reporting duties**, concerning signs of impending business crisis (Sections 14 and 15 of the Code); and
- (b) **Organizational duties** of individual/collective entrepreneurs (Section 3 of the Code and Section 2086 of the Italian Civil Code).

Reporting Duties

The duties of monitoring and reporting signs of business crisis require the constant survey of the financial balance of the business “from the inside” and “outside”. From the inside, the supervisory bodies shall monitor the organizational structure of the business, reporting -- in case of inaction or ineffectiveness of directors -- to the **Organization for Crisis Management** (in Italian “Organismo di Composizione della Crisi d’Impresa” “OCRI”) the signs of a potential crisis. From the outside, the Code would require the Italian Tax Authority, the National Social and Welfare Institute and the Tax Agency (also defined “public qualified creditors”) to inform promptly the debtor, and then the OCRI, that the business has exceeded a certain debts threshold.

Organizational Duties

Under Section 3 of the Code and the new Section 2086 of the Italian Civil Code, companies’ directors must assure that their businesses have an **organizational structure** capable of **early detection** of the crisis and of **putting promptly in place** the actions necessary to restore economic and financial stability.

CRISIS INDICATORS

Section 13 of the Code defines as crisis indicators those revenue, troubled asset or financial imbalances showing unsustainability of the ratio between debts and cash flow of the business, or inadequacy of assets owned (as opposed to those of third parties), and/or **significant and repeated delays in payments**.

Such indicators shall be reviewed by the National Council of Accountants and Auditors every three years, taking into account the various types of economic activities.

SETTLEMENT OF THE CRISIS

Organization

OCRI (see above), as the main recipient/agent of the alert procedures, shall be set up at each Italian Chamber of Commerce and, as provided by Section 16 of the Code, shall **receive reports about business crisis signs**, leading the subsequent phases and attempting to resolve the debtor’s economic difficulties.

OCRI shall provide assistance in choosing appropriate steps to tackle economic distress conditions, and shall also act as **mediator in negotiations between debtor and creditors towards confidential settlement agreements**.

Procedure

The settlement crisis procedure begins with the debtor’s hearing before OCRI, which **must be scheduled within 15 days following the receipt of the report on business crisis signs**, with a panel of three members, with notification to creditors at the same time. After analyzing the business economic situation with the debtor and selecting suitable steps to restore the economic and financial distress conditions, OCRI will set a deadline by which the debtor must either implement such steps or terminate the procedure of the business crisis and/or the requirements provided by the Code cease to occur.

Once the deadline has expired, if the debtor has failed to implement the required steps, **OCRI shall inform the authors of the original crisis report**. At the debtor’s request, OCRI may allow a three-month term -- which

can be extended for three more months -- to carry on negotiations with creditors and pursue a settlement agreement. With the support of OCRI the debtor can then reach a settlement with its creditors, to be forwarded in writing and filed with OCRI. Such agreement (effective only for those who executed it) will cause the same legal effects as the “Certified Recovery Plans” provided by the Code; if required by the debtor and approved by its creditors, the agreement will be published by the Italian Official Register of Commercial Companies.

Protective Orders

Pursuant to Section 20 of the Code, the debtor can request the competent Court to issue protective orders **preventing others creditors from interfering with the crisis settlement procedure**, so that the negotiations will continue (for up to) six months.

Conclusion

If no settlement agreement is finalized, OCRI will instruct the debtor to apply for formal procedure for the resolution of the crisis as provided by the Code within the following 30 days, and **inform the debtor’s supervisory body**



II. DUTY OF APPOINTMENT OF THE INTERNAL SUPERVISORY BODY AND STATUTORY AUDITORS

Section 379 of the Code -- amending Section 2477 of the Italian Civil Code -- has set out more cases where Italian Limited Liability Companies must appoint an **internal supervisory body**. The relevant companies are those which:

- (a) Must file a consolidated set of financial statements;
- (b) Control other companies who must appoint a board of statutory auditors, or
- (c) Have exceeded for two consecutive financial years at least one of the following thresholds:

- (i) Assets worth 2 million Euro or more;
- (ii) Turnover of 2 million Euro or more;
- (iii) Ten employees or more in the average during the year.

The requirements of appointing an internal supervisory body will no longer apply if the relevant company fails to exceed such three thresholds for three consecutive years

III. DUTIES AND LIABILITIES OF THE DIRECTORS

Directors -- as set forth by the new Section 2086 of the Civil Code -- must assure that their company's business is provided with an **organizational structure** capable of (1) early detection of the crisis and (2) **putting promptly in place** the actions necessary to restore economic and financial stability.

Failure to comply with such duty will trigger the application of Section 2049 of the Italian Civil Code (forced termination directors' office by Court order) and, for Limited Liability Companies (Section 2476 of the Italian Civil Code), liability for damages caused by insufficient protection of the **debtor's assets**.

IV. CONCLUSION

The introduction of the Code will certainly have a significant impact **on the duties and liabilities of directors, auditors and accountants**, and enhance the role of creditors in managing a debtor's economic crisis; The Code has evolved towards the protection of ongoing businesses and away from mere assertion of creditors' claims.

The reform of Italian Bankruptcy Law certainly requires companies to improve their internal structure and affect significant changes in their By-Laws and contractual arrangements, aimed at avoiding or reducing **potential losses**.



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Gabriella Tedeschi deals primarily with commercial and bankruptcy law issues with a particular focus on the effects of the new business crisis and insolvency rules on creditors' rights.

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Mr. Luigi Zumbo

Luigi Zumbo has been dealing over the years with the protection of creditors involved in bankruptcy procedures with a pragmatic looking-forward approach, also through the planning of contractual programs between creditors and debtors aimed at preventing Clients from the crisis and insolvency consequences. In this perspective of anticipating risks, the starting point is the constant updating and upstream study of the effects deriving from the bankruptcy reform on the current praxis of commercial transactions.

Further, Mr. Zumbo is active in the sector of corporate law with regard to international trading, distribution and data protection law.

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