EARLY WARNING TOOLS AND PREVENTIVE RESTRUCTURING FOLLOWING THE TRANSPOSITION OF THE EU INSOLVENCY DIRECTIVE IN ITALY[1]

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ABSTRACT: The legislative decree no. 83/2022, which transposed the Directive no. 2019/1023/EU, made significant changes to the original structure of the Italian Insolvency and Crisis Code, enacted in 2019. The work aims at illustrating the main innovations provided by the Code on early restructuring and crisis prevention, focusing in particular on the rules concerning corporate governance and directors' organizational duties, the early warning tools and the new negotiated settlement procedure.

KEYWORDS: restructuring, insolvency, prevention, early warning.

I. A NEW PARADIGM IN CORPORATE CRISIS MANAGEMENT

Italian Bankruptcy Law, dating back to 1942, provided for a conception of insolvency marked by strong ideological prejudices on the causes and dynamics that lead an enterprise towards crisis. The Latin saying '*decoctor ergo fraudator*' well expresses one of the principles to which the entire Italian insolvency system was firmly anchored before the last reform. This system originally did not provide entrepreneurs with solutions aimed at preserving their value but rather to give coercive satisfaction to creditors' interests under

[1] Even though the work is the result of shared evaluations and close collaboration between the authors, Marco Speranzin (Professor of Commercial Law at the University of Padua) should be credited with paragraphs n. 1, 5.3, 5.9, 6 and Francesco Marotta (PhD students at the University of Padua) with the other paragraphs.

the courts' control[2]. The ultimate objective of such regulation was to prevent the propagation of a *virus* potentially damaging to the entire economic system and sanction the insolvent entrepreneur (considered to be solely dishonest and not worthy of remaining in the economic circuit) on a personal and social level[3].

Although this extremely negative view of the insolvent entrepreneur has gradually waned over the years — thanks to the growing awareness that crises are in most cases not due to the debtor's unlawful/criminal conduct and that the adverse effects of the crisis can be limited if treated at an early stage — the traditional structure of Bankruptcy Law remained virtually unchanged until the season of reforms that concerned Italian insolvency law since 2006. These reforms have had the effect of slowly shifting regulations from the interests of creditors to the 'objectively understood commercial relationship'[4]. In recent years, at least since the great financial crisis of 2008, there have been several attempts to offer entrepreneurs in difficulty a range of tools that are more flexible, less burdensome, and costly than insolvency proceedings, but above all capable of ensuring the preservation of the going concern value[5]. Nevertheless, the above-mentioned reforms, which have followed one another over a period of more than ten years, have not succeeded in their objective of relegating the liquidation of the company to a *last* resort in the event of serious, overt, and irreversible insolvency[6]. The reason for the lack of success of alternative procedures such as debt restructuring agreements (*accordi di ristrutturazione dei debiti*) and composition with creditors (*concordato preventive*) lies in the fact that these procedures, in order

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[2] On the original ideological approach of the 1942 bankruptcy law see VASSALLI, F. (2013), "Note introduttive al trattato. Le procedure concorsuali dalla legge fallimentare alla riforma", in VASSALLI-LUISO-GABRIELLI (ed.), *Trattato di diritto fallimentare e delle altre procedure concorsuali,* Vol. I, Turin, p. 1 et seq.

[3] The Darwinian point of view with which the business crisis was viewed can be seen in the words of EINAUDI, L. (1911), "Intorno al credito industriale — Appunti", in *Riv. soc. comm.*, p.119-120, where it was explained that the solution to the business crisis consisted solely in *'letting those who are least able to live go bankrupt, avoiding keeping the weak alive with little advantage and much to the detriment of the strong and prudent who can only hope for a return to normal conditions when the land is freed from the parasitic vegetation that is tarnishing it'*.

[4] Thus VIETTI, M.-MAROTTA, F.-DI MARZIO, F. (2008), *La riforma fallimentare: lavori preparatori e obiettivi*, Turin, p. 4 ff.

[5] Think of the introduction in the Italian bankruptcy law of the following tools: *i) accordo di ristrutturazione dei debiti* (debt restructuring agreement, provided by Law no. 80/2005), *ii) concordato preventivo in bianco* and *in continuità aziendale* (composition with creditors anticipated and on a going concern basis, provided by Law Decree no. 83/2012), *iii)* debt restructuring agreements with financial intermediaries and moratorium agreement (Law Decree no. 83/2015).

[6] Data provided by the CERVED Institute on bankruptcy proceedings show a clear de-growth in the number of bankruptcy proceedings opened since 2007. Nonetheless, the innovations introduced in recent years have not succeeded in any way in making negotiated solutions (composition with creditors and debt restructuring agreements) prevalent, which on average represent only 10% of the bankruptcy proceedings opened. Four-monthly and annual data on bankruptcy and pre-bankruptcy proceedings can be found at: https://research.cerved.com/temi/fallimenti/.On the outcomes of alternative procedures aimed at fostering business continuity, such as debt restructuring agreements and composition with creditors, see also DANOVI, A.-DONATI, I.-FORESTIERI, I.-ORLANDO, T.-ZORZI, A. (2021), "La continuità aziendale nella crisi d'impresa: una ricerca empirica sull'andamento di accordi di ristrutturazione del debito e concordati preventivi, 2009-2016", in *Dir. fall,* 6, p. 1146 ff.

to be effective, entail a timely initiative of the debtor, whereas most entrepreneurs decide to file for protection under the Bankruptcy Law when they have already passed the point from which the demise curve of the corporate life cycle, after a period of constant downward, slope vertiginously towards general default[7]. In other words: when the restructuring is impossible.

Despite the amendments made to the original text of the Bankruptcy Law have significantly altered the original physiognomy of insolvency proceedings, placing the business and the need to ensure its rescue at the core of the regulation, the Italian system was solely and exclusively designed to 'manage' the crisis and insolvency. Practice, however, has shown the inefficiency of solutions based exclusively on crisis management, however alternative to the traditional liquidation of assets: it is extremely difficult to rescue a troubled company if the entrepreneur or the directors do not promptly become aware of those warning signals that allow to reasonably predict insolvency in advance. These are symptoms, events, and problems that initially affect the company's operations to a limited extent, but which determine at a certain point the breakdown of the economic-financial balance, which very quickly leads to the loss of market confidence and threaten the status of the business as a *going concern*[8].

The European Commission has been aware of this for a long time, and already in its Recommendation no. 2014/135/EU, it pointed out the need to provide for prevention mechanisms[9], marking the path for the harmonization process that ended with the adoption of the Insolvency Directive[10].

In 2017, the Italian Parliament — even before being obliged to comply with the Insolvency Directive — adopted Law No. 155/2017, enabling the Government to review the national bankruptcy regulatory framework. Among the guiding principles established by Law No. 155/2017, that set out in Article 4 was of considerable significance: *"In the exercise of the legislative delegated power provided for in Article 1, the Government shall regulate the introduction of out-of-court and confidential alert and assisted crisis management procedures, aimed at encouraging the early detection of the crisis and facilitating the negotiations between debtor and creditors".*

Two years later, the Italian Crisis and Insolvency Code (CCI) (Legislative Decree No. 14/2019) was adopted: an organic and systematic text that repeals the Bankruptcy Law (1942) and provides for an entire chapter (Titolo II) to the

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[7] On this point see DANOVI, A.-DONATI, I.-FORESTIERI, I.-ORLANDO, T.-ZORZI, A. (2021), "La continuità aziendale nella crisi d'impresa: una ricerca empirica sull'andamento di accordi di ristrutturazione del debito e concordati preventivi, 2009-2016", in *Dir. fall,* 6, p. 1167 ff., who analysed the companies' riskiness in the three years preceding the commencement of the procedure.

[8] For an in-depth study on the "phases" of business' crisis from an economic perspective see GUATRI, L. (1998), *Turnaround. Declino, crisi e ritorno al valore*, Milan, p. 105 ff.

[9] Not to mention that early warning procedures have already been known in French system since 1985 (Art. L. 234-1/234-4, Code de commerce).

[10] Directive (EU) 2019/1023 of the European Parliament and of the Council of June 20, 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU)2017/1132, available at: https://eur-lex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:32019L1023&from=EN

prevention and timely detection of financial distress, filling a loophole that could no longer be admitted within the scope of insolvency regulations. Initially scheduled for 2020, the entry into force of the provisions on early warning tools was however postponed to the 2021, considering the distorting effects that the application of such an unprecedented and incisive legislation would have entailed at a time of extreme economic uncertainty due to the COVID-19 pandemic. In that context, the Italian legislator opted for the early entry into force of certain provisions and — more important — of an entirely new out-of-court instrument: the negotiated settlement of the crisis (*composizione negoziata della crisi* — Law Decree no. 118/2021).

Subsequently, in view of the binding deadline for the transposition of the Insolvency Directive, a new legislative decree was adopted by the Government in July 2022 (Legislative Decree no. 82/2022), by means of which particularly significant changes were made to the original structure of the Code and in particular of Titolo II[11].

The aim of this paper is therefore to understand what the architecture of the regulatory framework on corporate crisis prevention under the new Italian Insolvency Code.

II. A 'MULTILEVEL' PREVENTION SYSTEM

The regulation introduced to force entrepreneurs to adequately monitor the financial health of their business, as to adopt all the most appropriate decisions at an early stage, points out — since the first version of Title II — the organic and systematic approach of the legislator vis-à-vis crisis prevention, which is addressed not only by introducing new tools aimed at preventing insolvency, but also affecting in depth some fundamental aspects of management and corporate governance[12].

Maintaining a difficult balance between the compliance with the principle of free economic initiative (Article 41 of Italian Constitution) and the need to favor the early emergence of distress[13], the Code operates on different levels, identifying several centers of responsibility and persons being assigned the prevention functions: *(i)* the entrepreneur (directors in the case of companies); *(ii)* the supervisory body (if appointed); *(iii)* the public creditors; *(iv)* the banks and the financial intermediaries. The regulations under which each subject is entrusted with a very specific responsibility in the context of crisis prevention, when read together, give the idea of a gradual and orderly system, made up of checks and balances, incentives, reward measures and safety valves engaged to ensure that the above persons operates whenever someone else

[11] The reformed version of the Code entered into force definitively on 15 July 2022.

[12] In this way, a connection is made between regulatory complexes — business law-company law-bankruptcy law — that had hitherto remained detached. On this point see MONTALENTI, P. (2020), "Il Codice della Crisi d'impresa e dell'Insolvenza: assetti organizzativi adeguati, rilevazione della crisi, procedure di allerta nel quadro generale della riforma", in *Giur. comm.*, I, p. 831 ff.

[13] See JORIO, A (2017), "Su allerta e dintorni", in ARATO, M.-DOMENICHINI, G. (ed.), *Le proposte per una riforma della legge fallimentare,* Milan, p. 58.

has not diligently performed his or her duty. Here, it must be noted that 'gradual approach' is probably one of the main characteristics and credits of this statutory framework. On the one hand the Code ensures that the financial difficulties are managed within the firm as much as possible, without the risk of an uncontrolled dissemination of alarming information for creditors and suppliers; on the other hand, it guarantees that where the entrepreneur remains inactive, distinct subjects and professional skills are involved, according to a mechanism that sees as a last resort, when all internal safeguards have proved useless, the commencement of one of the procedures regulated by Title III of the Code. The pillars on which this so-called "monitoring network"[14] is founded are the principles carved out by the legislator in Articles 3-4 of the Code: that of "timeliness", which must characterize the debtor's initiatives aimed at addressing financial distress; those of "good faith and fairness"[15] and of "transparency", which both the debtor and the creditors must comply with in the negotiation phase; that of "fair cooperation", which must necessarily inspire the behavior of all the parties concerned by the negotiations[16].

It is therefore possible to depict the prevention model as a system of concentric circles: the innermost circle contains the core of the prevention system, consisting of the organizational duty of the entrepreneur and, above all, the company's directors; on a second level the monitoring and reporting duties of the supervisory body and of the so-called qualified public creditors can be found; finally, on the external perimeter is the new negotiated settlement proceedings.

III. THE ORGANIZATIONAL DUTIES OF DIRECTORS

The entrepreneur, whether as a sole proprietor or as a company, has a fundamental role in the prevention of insolvency and in detecting the signs of crisis: the entrepreneur is, after all, the person who knows most about his or her own business, the first who can notice the symptoms that presage the decline and the first who can promptly adopt the most effective measures.

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[14] PACCHI, S. (2022), "L'allerta tra la reticenza dell'imprenditore e l'opportunismo del creditore. Dal codice della crisi alla composizione negoziata", in *Dir. fall*., 517 ff.

[15] On the general clause of good faith in the Code see RORDORF, R. (2021), "I doveri dei soggetti coinvolti nella regolazione della crisi nell'ambito dei principi generali del codice della crisi d'impresa e dell'insolvenza", in *Fall*., p. 591 ff.; GUERRINI, L. (2022), "Il d.l. n. 118/2021 sulla composizione negoziata della crisi d'impresa: l'alba di una buona fede "concorsuale"?", in *Nuova giur. civ.*, p. 243 ff.; D'ATTORRE, G. (2022), "I principi generali nel Codice della crisi d'impresa e dell'insolvenza", in *dirittodellacrisi.it*.; FABIANI, M. (2022), "Introduzione ai principi generali e alle definizioni del codice della crisi", in *Fall.*, p. 1173 ff.

[16] According to PACCHI, S. cit., p. 515-516, the principles set out in Art. 3-4 CCI seem to imply that *"timeliness is not compatible with hasty or abusive initiatives; information must not result in harm to the enterprise by disseminating confidentially-learnt information to creditors; confidentiality — which, moreover, constitutes one of the crucial points of the Insolvency Code — must not lead to refusal to share important data; cooperation with the authorities must not mean obstinacy. In short, each of the parties must operate within the binaries of good faith and fairness, debtor and creditors, having as their objective the priority protection of credit and business, in the awareness that damage to one determines damage to the other and vice versa".*

However, experience shows that most restructuring attempts fail because the entrepreneur is not able to detect the first signs of the crisis in time[17] or, even worse, refuses to admit the difficulties, according to a behavioral pattern known as the *oyster syndrome*[18].

It was against this background that the first important legislator's step was to intervene on the duties of entrepreneurs (as sole proprietors) and company directors, forcing them to adopt an organizational structure appropriate to the type of activity exercised, given that if a business is efficiently organized it is less likely to face future difficulties[19].

The latter is a pregnant principle of the new bankruptcy regulatory framework, being it carved into Article 3 CCI. First of all, the provision states that *'the individual entrepreneur must take appropriate measures to detect the state of crisis in a timely manner and take the necessary steps to address it without delay'*[20]. Most important, the second paragraph of Article 3 CCI lays at the basis of the amendment of Article 2086 of the Civil Code, whose second paragraph now provides that '*The entrepreneur, whether operating in corporate or collective form, has the duty to establish an organizational, administrative and accounting structure appropriate to the nature and size of the business, also with a view to the timely detection of the business crisis and the loss of going concern, as well as to take action without delay for the adoption and implementation of one of the tools provided by the law for overcoming the crisis and recovering business continuity'.* In other words, what is required from all directors, regardless of whether the business is experiencing financial difficulties, is to outline the set of directives and procedures established to ensure that decision-making power is assigned and exercised at an appropriate level, as well as the set of procedures aimed at ensuring the orderly conduct of business activities and the proper accounting of management events[21]. Moreover, it is required to incorporate into the chosen model specific control systems dedicated to monitoring company performance and detecting the symptoms of crisis that, if identified, require the directors to act promptly to overcome the crisis.

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[17] See GUIOTTO, A. (2019), "I sistemi di allerta e l'emersione tempestive della crisi", in *Fall.*, 4, p. 409 ff.

[18] HARNER, M. M.-MARINCIC GRIFFIN, J. (2014), "Facilitating Successful Failures", *Fla. L. Rev.*, p. 205.

[19] See ABRIANI, N.-ROSSI, A. (2019), "Nuova disciplina della crisi d'impresa e modificazioni del codice civile: prime letture", in *Società*, pp. 394-395, it is moreover the '*heart of the management function*'.

[20] The concept of organizational 'measures', however, seems to be characterised by a greater generality than that of organizational 'structure': for the former, there would only be a functional constraint and not a content constraint.

[21] On the concept of organisational-administrative structure see in particular BASTIA, P.-RICCIARDELLO, E. (2020), "Gli adeguati assetti organizzativi funzionali alla tempestiva rilevazione e gestione della crisi: tra principi generali e scienza aziendale", in *Banca impr. soc.*, 3, p. 366 ff. According to INZITARI, B. (2020), "Crisi, insolvenza, insolvenza prospettica, allerta: nuovi confine della diligenza del debitore, obblighi di segnalazione e sistema sanzionatorio nel quadro delle misure di prevenzione e risoluzione", in *Dir. fall.,* 3-4, p. 549 ff., the effect of the provision is to introduce a new perspective on the debtor's liability, enriching the performance of the obligation with proactive conduct required him to safeguard his asset guarantee pursuant to Article 2740 of the Civil Code.

But the legislator has gone even further, providing that in all types of companies, including limited liability companies and partnerships, it is the directors alone who must set up and take care of the organizational, administrative, and accounting structures[22].

Upon the entry into force of the amendments to the Civil Code[23], in particular of Article 2086, scholars questioned the degree of innovativeness of the new rule on directors' organizational duties: the debate focused on the interests protected by such a provision and its impact on the standard of review used by the Court when evaluating the triggering conditions for directors' liability vis-à-vis the company or third parties.

Concerning the first issue, it has been appropriately pointed out the dual function characterizing the rules in Article 3 of the Code and Article 2086 of the Civil Code, whose function is, on the one hand, to safeguard the sustainability of the company itself and the interests of those who have invested in it, and, on the other, to protect the rights of creditors/third parties and the trust that the market places in the company[24].

In relation to the directors' liability for organizational choices, divergent opinions have been recorded among scholars. Some considered the amendment to Article 2086 of the Civil Code to be essentially ineffective, in that the legislator would simply have emphasized principles that were not in doubt even before the entry into force of the Code[25] and that, in any case, would not entail an extension of judicial review of business decisions, even of an organizational nature. Accordingly, in fact, the regulatory provision would not impose duties with specific content, but rather general ones, thus leaving directors with a certain degree of discretion in choosing the most appropriate organizational model from a plurality of possible models; a decision which, therefore, can be evaluated by the judge using the business judgement rule as the operative standard for judicial review[26].

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[22] On the interpretative issue due to the introduction of this provision see MAROTTA, F. (2022), "Il dilemma della gestione di s.r.l. alla luce del primo correttivo al codice della crisi e dell'insolvenza: *a fronte praecipitium, a tergo lupi*", in *Nuove leggi civ. comm.*, p. 163 ff.

[23] These were the first regulations of the CCI to enter into force on 16 March 2019.

[24] The thesis is well expressed by FABIANI, M. (2022), "Il valore della solidarietà nell'approccio e nella gestione delle crisi d'impresa", in *Fall.,* p. 5 ff.; GINEVRA, E.-PRESCIANI, C. (2019), "Il dovere di istituire assetti adeguati ex art. 2086 c.c.", p. 1209 ff.; De Angelis, L. (2020), "L'influenza della nuova disciplina dell'insolvenza sul diritto dell'impresa e delle società, con particolare riguardo alle s.r.l.", in IRRERA, M. (ed.), *La società a responsabilità limitata: un modello transtipico alla prova del Codice della Crisi. Studi in onore di Oreste Cagnasso*, Turin, pp. 552-553. CALANDRA BUONAURA, V. (2020), "Amministratori e gestione dell'impresa nel Codice della crisi", in *Giur. comm.*, p. 11, nt. 12; RORDORF, R. (2019), "Doveri e responsabilita` degli organi della societa` alla luce del codice della crisi d'impresa e dell'insolvenza", *in Riv. soc.* p. 929 ff; CIAN, M. (2019), "Crisi dell'impresa e doveri degli amministratori: i principi riformati e il loro possibile impatto", in *Nuove leggi civ. comm.*, p. 1160 ff.

[25] SPOLIDORO, M. S. (2019), "Note critiche sulla gestione dell'impresa nel nuovo art. 2086 c.c. (con una postilla sul ruolo dei soci)", in *Riv. soc.*, p. 262 ff.

[26] BARCELLONA, E. (2022), Business judgment rule *e interesse sociale nella crisi. L'adeguateza degli assetti organizzativi alla luce della riforma del diritto concorsuale*, Milano, p. 57 ff.; BRIZZI, F. (2019), "Procedure di allerta e doveri degli organi di gestione e controllo: tra nuovo diritto della crisi e diritto societario", in *Rivista ODC*, no. 2, p. 328 ff.; ABRIANI, N.-ROSSI, M. (2019), cit., p. 396 ff.; DI CATALDO, V.-ARCIDIACONO, D. (2021) "Decisioni organizzative, dimensioni dell'impresa e *business judgement rule*", in *Giur. comm*, p. 22 ff.; DI CATALDO, V.

Other scholars, on the contrary, have argued that the Court cannot assess the fulfilment of the organizational duties using the standard for the judicial review of the other business decisions, but should rather evaluate the directors' conduct considering the principles of managerial professional diligence, having regard to corporate best practices and standards. Such an interpretation would be imposed by the wording of the provision, which requires that the organizational structure must be 'adequate' and that it must in any case enable the directors to intercept the first signs of the crisis[27].

On this issue, the Court of Rome issued a ruling which seems to be in line with the first opinion, confirming the applicability of the business judgement rule also to organizational decisions. Indeed, according to the Court, *"the organisational function always falls within the broader scope of corporate management, and it must necessarily be exercised employing a margin of discretion (…). In other words, the setting of an organizational structure does not constitute the object of a duty with specific content, but, on the contrary, of a duty that is not predetermined in its content, which acquires concreteness only having regard to the specificity of the business activities and of the moment in which that organizational choice is made. Such an organizational obligation can be effectively discharged by looking not so much at rigid regulatory parameters (since a model of organization useful for all situations cannot be deduced from the code), but rather at the principles elaborated by the corporate sciences or by trade associations or self-regulatory codes*"[28].

The recent Decree transposing the Insolvency Directive, however, may have partially resolved the problem, given that the second paragraph of Article 3 CCI, as amended, now provides in greater detail the profiles subject to monitoring for the purposes of the timely emergence of the crisis, specifying

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(2020), "Dimensioni minime per il dovere di creare assetti", in IRRERA, M. (ed.), *La società a responsabilità limitata: un modello transtipico alla prova del Codice della Crisi. Studi in onore di Oreste Cagnasso*, cit., pp. 572 ff.; IBBA, C. (2019), "Codice della crisi e codice civile", in *Rivista ODC*, p. 246 ff; BENEDETTI, L. (2019), "L'applicabilità della *business judgement rule* alle decisioni organizzative degli amministratori", in *Riv. soc.*, p. 414 ff. An intermediate position was instead expressed by CALANDRA BUONAURA, V. (2020), cit., p. 10 ff. and DE SENSI, V. (2021), "Adeguati assetti organizzativi e *business judgement rule*", in *dirittodellacrisi.it*, who consider that the *BJR* cannot be applied with reference to organisational measures functional to the timely emergence of the crisis, since in this case the rule seems to provide for an obligation with specific content.

[27] Montalenti, P. (2021), "Il Codice della Crisi d'Impresa e dell'Insolvenza: assetti organizzativi adeguati, rilevazione della crisi, procedure di allerta nel quadro generale della riforma", in MONTALENTI, P.-NOTARI, M. (ed.), *Crisi d'impresa. Prevenzione e gestione dei rischi: nuovo codice e nuova cultura*, Milano, p. 26 ff; Id. (2018), "Diritto dell'impresa in crisi, diritto societario concorsuale, diritto societario della crisi: appunti", in *Riv. soc.*, p. 62 ff; GINEVRA, E. (2021), "Tre questioni applicative in tema di assetti adeguati nella s.p.a.", in *Banca borsa tit. cred*., I, p. 552 ff.; MIRONE, A. (2020), "L'organizzazione dell'impresa societaria alla prova del codice della crisi: assetti interni, indicatori e procedure di allerta", in *Rivista ODC,* 1, p. 35 ff. On this point see also RORDORF, R. (2021), "I doveri", cit., p. 594: "*it is certainly possible, and indeed in some respects necessary, to distinguish between choices implying the assumption of a business risk, the merits of which can be assessed in terms of expediency and not also in terms of legal legitimacy, and decisions concerning the company's organisational methods, which must satisfy the adequacy criterion provided for by the Code".*

[28] Trib. Rome, 8.4.2020, in *Giur. comm.*, 2021, II, p. 1358 ff. and cf. Cass. 23.11.2021, no. 36365; Trib. Rome, 15.9.2020, in *ilcaso.it*.

that the business organizational structure should allow: *(a)* the detection of economic-financial imbalances, related to the specific characteristics of the company and of the business run by the debtor; *(b)* the verification of the unsustainability of the debts and the loss of going concern in the next twelve months; *(c)* the processing of the information necessary to follow the check-list and to take the practical "viability" test provided for by Article 13 CCI for the entrepreneur wishing to start the negotiated settlement of the crisis. Moreover, as to facilitate the task of directors, the fourth paragraph of Article 3 identifies specific indicators that suggest the existence of financial distress and therefore should be monitored: *(a)* payroll overdue by at least 30 days amounting to more than half of the total monthly payroll amount; *(b)* payables to suppliers overdue by more than 90 days amounting to more than the amount of payables not overdue (*c)* exposures to banks and other financial intermediaries that are past due by more than 60 days or that have exceeded the limit of credit facilities obtained in any form for at least 60 days provided that they represent in the aggregate at least 5% of the total exposures; *(d)* existence of one or more of the debt exposures set out in Article 25-novies (1), i.e., exceeding the thresholds for public creditors' reporting[29].

With reference to the items above, it is therefore difficult to predict the applicability of the *business judgement rule*, as there is an appreciable limitation of managerial discretion[30].

IV. EARLY WARNING TOOLS

1. The role of the supervisory body

Article 3 of the Insolvency Directive requires member states to ensure *"debtors have access to one or more clear and transparent early warning tools which can detect circumstances that could give rise to a likelihood of insolvency and can signal to them the need to act without delay".*

Early warning tools may consist of *(i)* mechanisms to alert the debtor when he has failed to provide given types of payments, *(ii)* advisory services offered by private or public entities, or *(iii)* reporting obligations imposed on third parties that hold certain information about the debtor.

The regulation on internal and external alert represents the first 'safety valve'[31] set up by the legislator to ensure that company directors deal with

[29] In this perspective, it will therefore be crucial for directors to implement an adequate risk management system (cf. MANCA, F. (2020), "Assetti adeguati e indicatori di crisi nel nuovo codice della crisi e dell'insolvenza", *in Giur. comm.,* I, p. 629 ff. Before the reform, see MONTALENTI, P. (2012), "Sistemi di controllo interno e *corporate governance*: dalla tutela delle minoranze alla tutela della correttezza gestoria", in *Riv. dir. comm*., p. 243 ff.

[30] The legislator thus seems to have accepted the interpretative thesis advanced by CALANDRA BUONAURA, V. (2019), cit., p. 10 ff. On this point see the heavy criticism expressed by GALLETTI, D. (2022), "Una nuova definizione per la crisi d'impresa: bisogna che tutto cambi perché tutto rimane come è ora", in *ilfallimentarista.it*.

[31] PACCHI, S. (2022), cit. p. 550 ff.

difficulties without delay[32], fulfilling their duty of early detection of the crisis and their consequent obligation to take the most appropriate restructuring measures[33].

Originally, the Code outlined a complex and gradual system of alerts which, if duly triggered, had the effect not only of inducing but also of forcing the directors to assess the criticalities flagged, given that their inertia or lack of interest would have rapidly driven the crisis out of the company's internal control sphere, in the hands and under the magnifying glass of a third party body called upon to verify the situation and assist the debtor in finding the most appropriate solution[34]. The alert mechanism, initially modelled on the French *procedure d'alerte*[35], was in fact composed of a purely internal phase, designed to foster dialogue between the directors and the supervisory body, and an external phase before the Insolvency and Crisis Settlement Body (*Organismo di Composizione della Crisi — OCRI*), to be carried out in the event the directors didn't reply to statutory auditors or the solutions pointed out were manifestly inadequate[36].

In addition, as a further 'safety valve' designed to make the entrepreneur or directors aware of the risks incurred, the Code provided for additional reporting duties on certain qualified public creditors who, failing to flag the existence of certain debt exposures to the debtor and the OCRI, would have lost their pre-emption right for the satisfaction of their claims against the debtor.

In the new version of the Code, as mentioned above, only provisions on 'internal' reporting by supervisory body and 'external' reporting by qualified public creditors remain in place, since the external phase before the OCRI has been suppressed. The reason for this change is that the external procedure managed by the OCRI was deemed not to be in line with the Directive and potentially counterproductive, given its excessive rigidity and the provision for reporting to the public prosecutor in the event of the debtor's failure to appear before the board[37].

First, Article 25-octies CCI now provides that *'The corporate supervisory body shall report, in writing, to the board of directors on the existence of the prerequisites for submitting the petition referred to in Article 12(1). The report shall be reasoned, shall be transmitted by means that ensure proof of receipt and shall contain the setting of an appropriate deadline, not exceeding thirty*

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[32] Based on the finding that *'the earlier a debtor is able to identify its financial difficulties, the greater the likelihood that it will avoid imminent insolvency, or in the case of an undertaking whose viability is permanently compromised, the more orderly and effective the liquidation process will be'* (Dir. 2019/1023/EU, recital 22).

[33] The alert rules, however, do not apply to large companies, large groups of companies, and companies listed on regulated markets (or multilateral trading facilities).

[34] Cf. PACCHI, S. (2022), cit. p. 532 ff. and INZITARI, B. (2020), cit., p. 553 ff.

[35] See VACCARI, E. (2021) "The new "alert procedures" in Italy: Regarder au-delà du modèle francais?", In *International insolvency Review,* vol. 30, p. 124 ff.

[36] On the alert procedures initially envisaged by the Code see BONFANTE, G. (2019), "Codice della crisi d'impresa e dell'insolvenza", in *Giur. it*., 8-9, p. 1943 ff.; Perrino, M. (2019), "Crisi d'impresa e allerta: indici, strumenti e procedure", in *Corr. giur*., 5, p. 563 ff.

[37] Cf. VELLA, P. (2021), "Le finalità della composizione negoziata e la struttura del percorso", in *Fall.,* 12, p. 1491.

days, within which the board of directors must report on the initiatives taken. While negotiations are pending, the duty of supervision pursuant to Article 2403 of the Civil Code remains unaffected'.

The provision reproduces almost faithfully the one originally contained in Article 14 of the first version of the Code, although material amendments have been made with regard to the conditions triggering the alert, matching with the requirements that the entrepreneur shall meet in order to commence the negotiated settlement (discussed below), and with regard to the subjects so required, among whom the statutory auditor no longer appears[38].

Differently from what was originally envisaged, the supervisory body will therefore not have to rely on the detection of specific ratios set up by the National Council of Chartered Accountants (CNDCEC)[39], but will have to assess whether, in general, there are economic-financial imbalances leading to the conclusion that there is only a likelihood of crisis or insolvency. This requires therefore an investigation limited to the detection of only those situations that have an actual value that is indicative of a crisis at least likely to occur, for example considering the *red flags* set out in Article 3(4) CCI. In addition, it should be noted that the Code, as amended, does not recall the provision, initially contained in the first paragraph of Article 14 CCI, which oblige the supervisory body to verify that the directors constantly assess the adequacy of the organizational structure, the economic-financial balance, and the prospective business performance. Clearly, this is a 'second level' supervisory activity, the mandatory nature of which could already be inferred from the provisions of Article 2403 of the Italian Civil Code[40] and therefore falls among the auditors' general supervisory duties on compliance with the principles of due diligence, which also entails control over the adequacy of internal decision-making and risk management procedures[41].

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[38] On this subject, see LAMANNA, F. (2022), "Depotenziamento dell'allerta nel D.L. 118/2021, voltafaccia del decreto PNRR e la versione destinata al travaso nel CCI", in *ilfallimentarista.it*.

[39] Initially, the Code envisaged as prerequisites for reporting 'crisis indicators' which in turn could be measured by means of specific 'indices', i.e. quantitative ratios. The system of indices drawn up by the CNDCEC required that the first thing to be done was to check whether equity was lower than the legal minimum. Then, if no critical points were reported, the Debt Service Coverage Ratio (DSCR) for the next six months would have to be calculated and, if that index also turned out to be positive, it was necessary to switch to specific indices for each production sector. On this point see document of CNDCEC (2019), *Crisi d'impresa e indici dell'allerta*, p. 16 ff.

[40] See INNOCENTI, F. (2021), "Composizione e nuovi poteri/doveri dell'organo di controllo e del revisore nelle s.r.l., tra vecchi e nuovi interrogativi", in *Giur. comm.*, I, p. 170 ff.; CALANDRA BUONAURA, V. (2021), "Ruolo e responsabilità degli organi di controllo societari nel Codice della crisi e dell'insolvenza", in *Giur. comm.*, I, p. 794 ff. On the duties to be performed by the supervisory board, see also BUTA, G. M. (2019), "Gli obblighi di segnalazione dell'organo di controllo e del revisore nell'allerta sulla crisi d'impresa", in *Nuove leggi civ. comm.*, p. 1177 ff.; ADDAMO, S. (2019), "Responsabilità del collegio sindacale nella crisi d'impresa", in *Nuove leggi civ. comm.*, p. 913 ff.

[41] Cf. PIAZZA, P. (2022), "Collegio sindacale di s.p.a. e recenti innovazioni del diritto della crisi: le potenziali ricadute di sistema sul rapporto tra soci e creditori, anche nella società *in bonis*", in *Nuove leggi civ. comm.,* p. 218, which also notes that the difference between the duties owed to the supervisory body and the oversight duties owed by the non-executive directors pursuant to Article 2381 of the Civil Code, lies precisely in the fact that the auditors would be responsible for a concrete assessment of the functionality and functioning of the organisational

It is clear, however, that the Code has placed a great deal of emphasis on the responsibility of the statutory auditors[42]. Whereas in the system initially conceived by the legislator, the statutory auditors were essentially supposed to express a judgement on the merits of the decisions taken by the directors to overcome the difficulties flagged[43], the abolition of the duty to report to the OCRI in case of inadequate reply or in case of directors' failure to act, contributes to bringing the auditors' duties back within the perimeter of the control over legal compliance, beside, however, the verification over the conditions for the commencement of the negotiated settlement and the monitoring of early warning signals. The legislator therefore seems to have renounced 'coercion' to bring the company's crisis to light at an early stage, in the belief that the same objective can also be achieved merely by strengthening and making the company's internal information flows and internal control system more efficient. In light of the above, the second paragraph of Article 25-*octies* CCI, provides an incentive for statutory auditors who have duly carried out the report activity: the timeliness of the report will not suffice on its own to exclude their liability for the subsequent directors' conducts or omissions, but may simply be assessed by the judge in any liability judgment under the Article 2407 of the Civil Code.

2. The role of public creditors and intermediaries

With regard to the public creditors' reporting duties, Article 25-*novies* CCI identifies the National Revenue Authority, the National Institute of Social Security and the Collection Authority as entities required to report the existence of given alarming debt exposures, establishing quantitative thresholds relating to overdue debts, above which the reporting obligations are triggered not only for directors but also as regards the supervisory body and the statutory auditor. Compared to the first version of the regulations, there has been a drastic lowering of these thresholds and, therefore, there are real doubts as to the ability of these public entities to handle the high volume of reports they shall provide, even though the failure to report in a timely manner will no longer result in the loss of their pre-emption rights.

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structures and not a mere abstract and prior assessment of the adequacy of the organisational structure

[42] This intention is also made clear by the re-introduction in the regulation of limited liability companies of the provision which grants the members of the supervisory body the power to report serious irregularities to the Court pursuant to Article 2409 of the Civil Code.

[43] Nevertheless, ADDAMO, S. (2019), cit., p. 918 noted that "*an effective understanding of the approach to the state of crisis requires the support of certain evaluations that are not merely economic-financial, among which the analysis of the core business and company policies, the correct identification of potentially risky accounting areas, the consideration of the level of corporate transparency should not be missing, the identification of* risk *factors deriving from the life cycle or market trends*" although "*The assessment of the adequacy of the measures adopted, therefore, should not be extended to the point of assuming a proactive role of the board of auditors or even an imperative role with respect to management choices, which remain the exclusive responsibility of the directors".*

Even in this case, the function of the reporting duty seems to have been partially amended by the legislator, which, by eliminating the obligation to report the debtor's situation to the OCRI, has preferred to enhance the reporting activity as an impulse tool rather than as an instrument to force the detection of business distress, although the lowering of the thresholds casts some doubts on the ability of the system to intercept real crisis or insolvency situations[44].

Finally, as regards warning tools, Article 25-*decies* provides for the so-called 'banking warning', providing that credit institutions must notify the board of directors and the supervisory body of any changes, revisions or termination of credit facilities, so that directors and statutory auditors can perform their supervisory duties effectively and, in particular, can have current information on relevant circumstances in order to identify without delay any signal of crisis[45]. This provision reveals, together with other rules scattered throughout the Code, the intention to make creditors active participants in both the prevention phase and the subsequent negotiation of preventive restructuring frameworks[46].

V. NEGOTIATED SETTLEMENT OF THE CRISIS (*COMPOSIZIONE NEGOZIATA DELLA CRISI*)

On the outermost circumference of the system of concentric centers through which we initially represented the Italian model of crisis prevention, it is to find an entirely new tool, which was not regulated in the original version of the Code, with respect to which both the warning tools and the organizational duties of the entrepreneur are now aimed at[47]. Article 3 of the Code provides that the organizational structure shall make it possible to detect the imbalances that justify the commencement of this proceedings and allow the processing of the information that the entrepreneur or the directors must provide for in the online platform to be admitted to negotiations. Similarly, the internal report of the statutory auditors is based precisely on the existence of the conditions for the commencement of the settlement and its content consists of an invitation to the directors to consider this possibility.

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[44] Doubts about the actual usefulness of the external alert are expressed by LAMANNA, F. (2022), "Depotenziamento dell'allerta nel D.L. 118/2021, voltafaccia del decreto PNRR e la versione destinata al travaso nel CCI", in *ilfallimentarista.it*.

[45] PANZANI, L. (2022), "La composizione negoziata dopo lo schema di decreto legislativo del CDM 17 marzo 2022", in *dirittodellacrisi.it*, p. 7.

[46] V. MAZZOLETTI, V. (2020), "La responsabilità delle banche nelle fasi di allerta e composizione della crisi", in *Fall.,* 3, p. 301 ff. On the credit institution's liability for failure to report, see BALSAMO TAGNANI, S.-CARLONI, M. (2020), "Obblighi di segnalazione degli organi di controllo societari e delle banche nel nuovo CCII", in *Società*, p. 856 ff.

[47] If not the entire insolvency proceedings system, given that the introduction of the simplified composition with creditors as the outcome of negotiations will probably result in making the liquidative "variant" of the ordinary composition with creditors procedure practically useless, as pointed out by GALLETTI, D. (2021), "Breve storia di una (contro)riforma annunciata", in *ilfallimentarista.it*.

The crisis settlement' was introduced by Law Decree no. 118/2021, against an economic background characterized by the negative effects of the pandemic, with the aim of providing companies with a new instrument for the prevention and/or early management of business crises, on the basis of the finding proving that "*many of the companies that will not be able to guarantee their going concern (…) do not have, to date, suitable means or tools to analyze and understand the situation in which they find themselves nor to prevent the crisis from degenerating into non-reversible insolvency"*[48]*.* The legislator's intention, therefore, was not to provide for a new bankruptcy procedure, but rather to set a 'protected environment' where companies could assess their economic and financial situation and at the same time enjoy certain benefits aimed at preserving the integrity of their assets, and then work out with an experienced professional the restructuring solutions to be agreed with creditors[49]. To pursue this task, recourse was made to a scheme similar to that of insolvency mediation, which had been already applied in out-of-court proceedings in the United States[50], but which is also provided for in the French *Code de Commerce* (conciliation) as well as having found a place for a short time in Spanish legislation (*acuerdo extrajudicial de pagos*)[51].

This is a preventive tool that could in fact fall as much within the early warning tools as within the preventive restructuring frameworks provided for by the Directive[52], even though two distinguished members of the Commission which drafted the new discipline stated that this part of the Decree does not transpose any European provision[53].

1. Requirements for the commencement and the continuation of the proceedings

As some scholars have pointed out, it should be made clear that the Code does not set any barriers to access the proceedings by debtors, but rather conditions for its continuation[54].

Article 13 CCI reads *'A commercial and agricultural entrepreneur who is in a state of economic-financial imbalance that makes it likely that he will be insolvent, may request the competent Secretary General of the Chamber of Commerce in whose territorial area the registered office of the enterprise is located to appoint an independent expert when the restructuring of the enterprise is reasonably likely to occur'.*

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[48] Illustrative Report on Law Decree no. 118/2021.

[49] FABIANI, M.-PAGNI, I. (2022), "Introduzione alla composizione negoziata", in *Fall*., 2021, p. 1484. See also SANTANGELI, F. (2022), "Le finalità della composizione negoziata", in *dirittodellacrisi.it*.

[50] See PEEPLES, R. (2009), "The Uses of Mediation in Chapter 11 Cases", in *American Bankruptcy Institute Law Review*, Vol. 17, Issue 2, p. 401-426.

[51] V. PULGAR EZQUERRA, J. (2021), *Preconcursalidad y reestructuracion empresarial*, Madrid, p. 833 ff.

[52] GUIDOTTI, R. (2022), "La composizione negoziata e la direttiva Insolvency: prime note", in *dirittodellacrisi.it*.

[53] FABIANI, M.-PAGNI, I. (2022), cit., p. 1478.

[54] FABIANI, M.-PAGNI, I. (2022), cit., p. 1483 ff.

In order to define the objective condition justifying the continuation of the proceeding and the opening of negotiations, the Code does not mention either the concept of 'crisis' or that of 'insolvency'.

According to Article 2 CCI, a "crisis" is to be identified as *"the state of the debtor that makes insolvency likely to occur and that it results in the inadequacy of prospective cash flows to meet obligations in the next twelve months",* while "insolvency" is defined as *"the state of the debtor that is manifested by defaults or other external facts showing that the debtor is no longer able to regularly meet its obligations"*.

It is quite clear that when the legislator refers to imbalances that make a crisis likely to occur, reference is not made to a 'crisis' situation — to be understood as likelihood of insolvency in the following year — but rather adopts different, broader criteria, also admitting to the proceedings entrepreneurs who find themselves in the '*twilight zone'*[55]. in light of the above, the similarities with the Bankruptcy Code are evident, considering that in the U.S. system even companies suffering temporary economic difficulty can seek rehabilitation under Chapter 11, thus having been often raised in that system the problem of so-called 'strategic bankruptcy'[56].

The negotiated settlement, therefore, can be at the same time an effective and useful crisis prevention tool and an instrument for managing, albeit in advance, the manifest crisis or insolvency[57].

If there were no doubts as to the eligibility of debtors who are not yet in crisis, initially the most important questions arose as to the admissibility of petitions filed by entrepreneurs who are already structurally insolvent, given that, as it will be shown below, the Code link to the settlement certain typical effects of ordinary bankruptcy proceedings, which may potentially have a material impact on creditors' rights. For example, Article 18 CCI provides, upon the debtor's simple request, for the automatic stay on individual enforcement actions, as well as the prohibition for the Court to declare the debtor bankrupt and open the judicial liquidation. It should also be noted that while the proceeding is pending, the debtor continues to operate its own business and may even be authorized by the Court to contract pre-deductible loans or even to sell the business.

A confirmation regarding the eligibility of already insolvent entrepreneurs to the proceedings can be found in Article 21 CCI, which reads '*When, in the course of the settlement procedure, it turns out that the entrepreneur is insolvent but there are concrete recovery chances, the entrepreneur shall carry out the business in the predominant interest of creditors'*. Similarly, the decree

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[55] On the objective condition to be admitted to the negotiated settlement see PANZANI, L. (2022), "La composizione negoziata dopo lo schema di decreto legislativo del CDM del 17 marzo 2022", in *dirittodellacrisi.it*; ROSSI, A. (2021), "Il presupposto oggettivo tra crisi dell'imprenditore e risanamento dell'impresa", in *Fall*., p. 1501 ff.; GUIDOTTI, R. (2021), "Presupposti 'interni' ed 'esterni' della composizione negoziata della composizione della crisi d'impresa", in *Nuovo dir. soc.*, p. 1619 ff.

[56] See DELANEY, K. J. (1998), *Strategic Bankruptcy. How Corporations and Debtors Use Chapter 11 to Their Advantage*, Los Angeles, p. 1 ff.

[57] MONTANARI, M. (2021), "I rapporti della composizione negoziata della crisi con i procedimenti concorsuali", in *dirittodellacrisi.it*.

of the Ministry of Justice of 28 November 2021, which concretely regulates the proceedings and the technical aspects related to the filing of the petition, specifies that *'if the expert detects the presence of insolvency, this does not necessarily prevent him from initiating the settlement procedure'*. However, not all insolvent debtors will be eligible to the negotiated settlement, given that Article 12 CCI, as well as the above-mentioned Article 21 CCI, places the emphasis precisely on the existence of a concrete chance of recovery[58]. If the business results in the loss of assets and wealth, the entrepreneur has no resources to allocate to it and the business remained worthless, the *turn-around* will be impossible or extremely difficult and the debtor will have to turn to the ordinary crisis regulation instruments, i.e. insolvency procedures such as composition with creditors (*concordato preventivo*), debt restructuring agreements (*accordo di ristrutturazione dei debiti*) and, most likely, bankruptcy proceedings (*liquidazione giudiziale*). Where the entrepreneur is insolvent, but the business is viable and it is possible to ensure the going concern — either directly or indirectly — by means of an arrangement with creditors or by selling the company's assets, then the expert will not be able to order the dismissal of the proceeding. These cases, as already pointed out, fall outside the preventive rationale that characterizes this Title II of the Code — since if a company is insolvent, there is essentially nothing to foresee or prevent — and the negotiated settlement simply permits a smoother and faster management of the situation (or a quick liquidation, as we will see below)[59]. There remain, however, considerable perplexities as to the usefulness and systemic consistency of the decision to admit insolvent debtors to the negotiated settlement. The utility is doubted because the turnaround of an already insolvent business, albeit possible, proves itself to be feasible in very few cases. Insolvency, moreover, entails a series of payment failures and the pending of numerous enforcement actions, which could only be interrupted by applying for the stay on creditors' actions. This measure, however, would bring the crisis out in the open, with the causing the creditors and suppliers being driven even further away from the debtor and making any chance of recovery disappear[60].

As to the systematic coherence of the legislative choice, it must be firstly observed that the eligibility of insolvent debtor to the proceedings is likely to jeopardize the main function of the negotiated settlement, which consists in preventing financial difficulties and not in managing actual insolvency[61]. Furthermore, always reflecting on a systematic level, the legislator seems to excessively disregard the interests of creditors, forgetting that in other proce-

[58] When the business is therefore in a 'reversible' insolvency phase. See FABIANI, M.-PAGNI, I. (2022), cit., p. 1483 ff.; JORIO, A. (2021), "Alcune riflessioni sulle misure urgenti: un forte vento di maestrale soffia sulla riforma!", in *dirittodellacrisi.it*; RANALLI, R. (2021), "Il comportamento dell'imprenditore ed il ruolo dell'esperto anche alla luce del decreto dirigenziale", in *Fall.,* p. 1513 ff.

[59] Especially if one considers that among the possible outcomes is also the so-called 'simplified' composition with creditors (for assets' liquidation).

[60] See RANALLI, R. (2021), cit., p. 1518; ROSSI, A. (2021), "I presupposti della CNC tra debiti dell'imprenditore e risanamento dell'impresa", in *dirittodellacrisi.it*.

[61] See GALLETTI, D. (2021), "Breve storia", cit.

dures aimed at preserving going concern — such as the composition with creditors (concordato preventivo) — the debtor is required to demonstrate the actual advantage that creditors can achieve with respect to the judicial liquidation, in order to compensate them for the greater risks that may be borne by the entrepreneur remaining at the helm of his business during the proceedings[62]. In other words, for insolvent entrepreneurs, it remains the risk that the crisis settlement will either become a mere compulsory step towards the simplified composition with creditors for assets' liquidation' or will represent a sort of gamble in which the risks are exclusively borne by creditors.

2. The 'reasonable' chances of recovery

If, on the one hand, it is true that in the negotiated settlement procedure no phase is envisaged to the assessment of the requirements to commence the proceeding, on the other hand, the expert appointed is allowed to commence negotiations only after having verified, together with the debtor, the existence of concrete prospects of recovery, failing which he must request the dismissal of the petition. It is the entrepreneur himself who, in principle, before drafting the petition, must make a self-diagnosis and hypothesize a restructuring plan, thanks to the tools made available on a specific national telematic platform accessible to entrepreneurs registered in the public Register of Companies[63].

First of all, among these useful tools it can be found a practical test by means of which the entrepreneur can briefly understand the complexity of the recovery and to what extent it depends on the adoption of discontinuity measures or the implementation of already planned business initiatives. It should be emphasized that, at this stage, the entrepreneur is not required to infer the data to be provided in the platform on the basis of budgetary results alone, but rather to make a prognostic assessment of the future trend of the cash flows[64]. This data will be the first to be evaluated and rectified by the expert, in order to verify the existence of concrete recovery chances.

Secondly, the entrepreneur is provided with a "check list", i.e. an operational guide, drafted on the basis of the best corporate restructuring practices, aimed at supporting him in the drafting of the restructuring plan to be proposed to creditors during the negotiations[65].

It has been argued, in this regard, that leaving up to the debtor to draw up the documents on the basis of which the expert will have to assess whether the company is *viable* or not, would expose creditors to the risk of abuse, falsification and instrumentalization[66]. Nonetheless, the expert's role in the

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[62] ROSSI, A. (2021), cit.

[63] On the contents of the *platform* see RANALLI, R. (2021), "Le indicazioni contenute nella piattaforma: il test, la check list, il protocollo e le possibili proposte", in *dirittodellacrisi.it*.

[64] RANALLI, R. (2021), "Le indicazioni", cit.

[65] RANALLI, R. (2021), "Le indicazioni", cit.

[66] MINERVINI, V. (2022), "La nuova "composizione negoziata" alla luce della "direttiva insolvency". Linee evolutive (extracodicistiche) dell'ordinamento concorsuale italiano", in *Dir. fall.,* p. 266 ff.

preliminary phase certainly does not only consist of an uncritical reading of the information submitted by the entrepreneur, given that the Code, together with the above-mentioned decree of the Ministry of Justice, provides that the expert is called upon verifying the accuracy of the information, for example by obtaining different information from the supervisory body, the statutory auditor and financial institutions that have pending relations with the entrepreneur[67].

3. The expert: role and function

The EU Directive, in order to make restructuring procedures more efficient, requires Member States to ensure that professionals involved in restructuring, if appointed by the judicial or administrative authorities, have an appropriate level of expertise gained in the field and are chosen on the basis of transparent and uniform criteria[68]. In this regard, Article 26 of the directive provides that practitioners in the field of insolvency shall have the necessary expertise for their responsibilities and be appointed on the basis of transparent and fair conditions, paying particular attention to the practitioner's experience and to the specific features of the case. The term of "practitioners in the field of insolvency" refers to person or body appointed by a judicial or administrative authority to *(a)* assist the debtor or the creditors in drafting or negotiating a restructuring plan; *(b)* supervise the activity of the debtor during the negotiations on a restructuring plan; *(c)* take partial control over the assets or affairs of the debtor during negotiations (Article 2 (12) of the Directive).

Before the 2019 reform, the only professional figures recognized and envisaged by the Italian Bankruptcy Law was the bankruptcy receiver, the judicial commissioner and the independent professional. The former traditionally has the function of managing the debtor's assets in liquidation and distributing the proceeds of the sale to creditors. The judicial commissioner is appointed by the Court in the composition with creditors *(concordato preventivo)* and carries out supervisory tasks for the debtor, who remains in possession of her/his assets and can continue to carry out ordinary business. However, the selection of professionals and the awarding of both roles by the Court did not take place on the basis of uniform criteria and procedures

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[67] As indeed seems to be confirmed by the same second paragraph of Article 16 CCI, which provides that *'The expert, in the performance of the task referred to in Article 12(2), shall verify the overall consistency of the information provided by the entrepreneur, asking the entrepreneur and the creditors for any further useful or necessary information'.*

[68] Recital no. 87 of the EU Directive: *"Member States should also ensure that practitioners in the field of restructuring, insolvency, and discharge of debt that are appointed by judicial or administrative authorities ('practitioners') are: suitably trained; appointed in a transparent manner with due regard to the need to ensure efficient procedures; supervised when carrying out their tasks; and perform their tasks with integrity. It is important that practitioners adhere to standards for such tasks, such as obtaining insurance for professional liability. Suitable training, qualifications and expertise for practitioners could also be acquired while practising their profession. Member States should not be obliged to provide the necessary training themselves, but this could be provided by, for example, professional associations or other bodies. Insolvency practitioners as defined in Regulation (EU) 2015/848 should be included in the scope of this Directive".*

throughout the country. Ordinary practice resulted in drawing up a list of professionals at each bankruptcy Court and often the requirements for being registered were just as different.

The independent professional, on the other hand, wasn't required to meet any specific requirement other than to be an auditor with specific independence. He/she was appointed by the debtor and entrusted with the function of certifying the accuracy of the company data and, above all, the feasibility of the restructuring plan, for the purposes of the Court homologation.

The Crisis Code, complying with the Directive, first of all provided for the creation of a single national register of 'crisis managers', intended to substitute the lists of bankruptcy receivers kept by each Court, in order to encourage the rotation of appointments and to broaden the pool of professionals experienced in the field of insolvency. Henceforth, the Courts must appoint the insolvency receiver, the judicial commissioner and also the independent professional, choosing them from among those listed in this register, meeting the specific professional and training requirements set out in Article 356 (2) CCI.

The innovations introduced by the Code, however, do not end with the harmonization of rules concerning the requirements and appointment of crisis managers in the frameworks of insolvency proceedings. Law Decree no. 118/2021, which introduced the negotiated settlement procedure, has in fact regulated a new figure that is the driving force behind the new procedure: the "expert". In this case, the professional must be listed in a register other than the crisis manager register and, above all, is not appointed by the judicial authority but by a commission within the Chamber of Commerce (and formed by a judge, a representative appointed by the Chamber and a member appointed by the *Prefetto*).

Having been the regulatory provisions on the negotiated settlement incorporated into the Code by Legislative Decree No. 83/2022, the duties and tasks performed by the expert are regulated in Art 13 (2) CCI, which reads: *'The expert shall foster negotiations between the entrepreneur, the creditors and any other interested parties in order to find a solution to overcome the conditions set forth in paragraph 1, also by means of the transfer of the business or branches thereof'*. Article 16 (2) CCI further reads *'The expert shall be an independent 'third-party' with respect to all parties and shall act in a professional, confidential, impartial and independent manner'.*

The tasks the expert is specifically entrusted with can be summarized as follows:

- In the first phase, the expert is responsible for verifying the reasonable feasibility of restructuring by analyzing the documentation provided by the debtor and the information requested from creditors, the supervisory body, and the entrepreneur himself.
- Having verified the existence of the requirements to commence the negotiated settlement, the expert is called upon to establish and manage the negotiations in accordance with the protocol contained

in the Ministerial Decree of the Ministry of Justice, by facilitating the entrepreneur in identifying the parties that may be interested[69].

— During the negotiations, the expert shall monitor the business management, acting pursuant to Article 21 (2)-(4) CCI in the event of payments and/or extraordinary acts that are inconsistent with the negotiations or the restructuring plan and/or potentially detrimental to the creditors' interests.
— During the proceedings, the expert is also called upon to dialogue with the Court, expressing, for example, his opinion on the request for the application of protective measures (Article 19(4) CCI) or on the request for authorization to take out pre-deductible financing or to sell the business without the effects referred to in Article 2560 of the Italian Civil Code.
— At the end of the negotiations, the expert must draw up a final report in which results of the negotiations shall be displayed, as well as the conditions for the conclusion of the agreement pursuant to subparagraph (a) of the first paragraph of Article 23 CCI, or for filing a petition for judicial approval of a debt restructuring agreement pursuant to subparagraph (b) of the second paragraph, or for access to the "simplified" composition with creditors procedure pursuant to Article 25 *sexies* CCI[70].

In general, it can be observed that this is a figure that is completely new for insolvency law — perhaps similar to the mediator — in that the expert is called upon to facilitate negotiations between the entrepreneur and the creditors, while at the same time maintaining equidistance from both parties and creating the conditions for opposing interests to find common ground[71].

In light of the above, the expert cannot be compared to the subjects appointed by the Court to supervise the debtor and manage the debtor's assets in insolvency proceedings, who operate with a view to maximizing the interests of creditors.

Similarly, the expert cannot be compared either to an advisor of the debtor — since the latter take care eminently of his client's interests and that the expert's duties do not include the drafting of the restructuring plan —, nor to the independent professional — considering that the expert is only required to assess the overall consistency of the plan[72]. To the latter regard, it must

[69] On the role of the expert in the phase of negotiations see BEVILACQUA, C.-DI PALERMO, L.-FABBRI, A.-SOLDATI, N. (2022), "La gestione delle trattative con le parti interessate", in BONFATTI, S.-GUIDOTTI, R. (ed.), *Il ruolo dell'esperto nella composizione negoziata per la soluzione della crisi d'impresa*, 2022, p. 230 ff.

[70] On the possible outcomes of the negotiations see Section 5.8.

[71] On this point, see CALCAGNO, L. (2022), "La figura dell'esperto", in *dirittodellacrisi*.it, who observed that the expert must necessarily possess professional skills that allow him to verify the reasonable pursuit of restructuring and, at the same time, a specific aptitude for mediation. On the specific duties of the expert see also D'ALONZO, R. (2022), "I compiti dell'esperto nella composizione negoziata, tra adempimenti e scadenze", in *dirittodellacrisi.it*.

[72] Cf. GUIOTTO, A. (2021), "La figura dell'esperto e la conduzione delle trattative nella composizione negoziata della crisi", in *Fall.,* p. 1528 ff. On this point, however, see ZANICHELLI, V. (2022), "Commento a prima lettura del decreto legislative 17 giugno 2022, n. 82", in *dirittodel-*

be noted that the "viability test" to be conducted by the expert is different from that to be performed by the independent professional in the composition with creditors procedure, since in that procedure the plan must be authorized by the Court and the professional must therefore provide for a more in-depth opinion on both the accuracy of the company data and the economic feasibility of the restructuring initiatives to be undertaken[73]. However, this should not result in deeming the role the expert is entrusted with as merely formal, since if the result of the online test performed by the debtor shows that the feasibility of the restructuring depends directly on the type of measures that the entrepreneur intends to adopt, the expert shall then be obliged to analyze the initiatives proposed in the plan, to determine whether they are clear, reasonable, and whether they allow overcoming the crisis. In particular, he will have to check whether the expected effects of the plan are reliable in light of the available information and whether the prospective profitability is reasonable. On the other hand, he will also have to check whether the plan takes into account the risk and uncertainty factors to which the company is most exposed[74].

The impartiality of the expert is therefore of utmost importance in order to guarantee the proper functioning of the settlement, since a protected and cooperative environment can be effectively set up in this way only. The presence of an impartial professional fosters the entrepreneur to provide all the

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lacrisi.it, who observes that "*The legislator's approach is aimed at avoiding the attribution to the expert of responsibilities equal to those of the independent professional such as that of certifying the truthfulness of company data. In fact, apart from any redundancy on the point as it appears also from the Report, it is very difficult to imagine that the professional who acts as guarantor of the seriousness and efficiency of the negotiations would present himself to the creditors without having carried out any verification of the documentation produced by the debtor as his authority would be undermined; it seems in fact evident that those who must cooperate with the entrepreneur and seek a solution want to have the reasonable certainty that the papers placed on the table are true, thus: either the expert guarantees this truthfulness, or the creditors will systematically request an audit from another professional, as per Article 16 by authorizing the expert to use the services of a statutory auditor, with all that this entails in terms of time and burden for the entrepreneur in crisis".*

[73] Assessments of the feasibility of the plan represents the most critical aspect of the independent professional's role in the composition with creditors procedures, as in the past it was common to distinguish between "economic feasibility" and "legal feasibility". The evaluation of economic feasibility implies an assessment of the reasonableness of the assumptions underlying the plan and a subsequent verification of the consistency of the proposed measures with the plan's objectives. The concept of legal feasibility, on the other hand, refers to the compliance of the plan with mandatory rules, the manifest unfeasibility of the plan, and the manifest irrationality of the judgement reached by the independent professional. This distinction was marked in the ruling no. 1023/2013 of the Italian Supreme Court, which has clarified that the independent professional was entrusted exclusively with an opinion on the economic feasibility of the plan while the Court was responsible for verifying the legal feasibility, being able to review and challenge the professional's conclusions, only when, and to the extent that, they were adopted on illogical and irrational criteria. At the very beginning, the Crisis Code had changed the above approach, entrusting the professional with the control over both legal and economic feasibility, but above all entrusting the Court with a similar control, not limited to legal feasibility. Today's version of the Code has once again adopted the previous solution: the professional must certify the economic feasibility of the plan while the Court must only verify that the plan does not present such problems and criticalities as to render it manifestly unfeasible.

[74] In this regard, the above-mentioned Ministerial Decree of 28september 2021, provides for a comprehensive overview of the audits and verifications to be carried out by the expert

necessary information to the creditors and the latter to join negotiations, being aware that they are handled by a professional in charge not only of verifying the completeness and truthfulness of the information set forth by the debtor, but also of verifying that the proposed solutions ensure an adequate balance between the debtor's interest and creditors' sacrifice[75].

Article 16 CCI provides in this respect that the expert must not accept the appointment if he is a relative or relative by the third degree of kinship of the directors of the company or of the entrepreneur. The same prohibition applies to the professional otherwise personally or professionally linked to the company or to the parties involved, or if the professionals with whom he works have assisted the company in the preceding five years or have held managerial and administrative positions in the company. In addition, a limitation is provided on the expert taking up positions in favor of the company during the two years following the closure of the procedure.

On the other hand, professional requirements are guaranteed and protected by the rules governing the procedures for the selection and appointment of the expert. In particular, the Code provides for the establishing of a special register kept and updated by the Chamber of Commerce of the regional main city (Milan, Venice, Florence, etc.), to which the following subjects may be registered: *(i)* chartered accountants and lawyers belonging to professional association for at least five years, who have accrued specific expertise in the field of business restructuring; *(ii)* labor law consultants who can prove that they have taken part in at least three restructuring operations; *(iii)* anyone who has held management positions in companies involved in restructuring operations (Article 16 (3) CCI). In any case, a compulsory training course of at least 55 hours is required to be registered.

4. The business management in the course of the proceedings

The filing of the petition and the continuation of the proceedings do not entail any limitation of the entrepreneur's property rights: this is one of the fundamental advantages provided as to facilitate the commencement of the settlement at an early stage of the crisis. At the same time, however, the legislator aims at preventing the entrepreneur (or the directors, in the case of

[75] In this regard see GUIOTTO, A. (2022), "Il ruolo dell'esperto nelle trattative con i soggetti rilevanti", in *dirittodellacrisi.it,* who observes that *"Although it appears evident that the formulation of the proposal to creditors is the responsibility of the entrepreneur and his advisors, it is physiological that the expert, by reason of the functions entrusted to him and of his personal competence and authority, contributes to refining the elements of the proposal or, in particular cases, to modifying its structure, not by virtue of the authority attributed to him, but by means of a work of moral suasion that avoids the formulation of manifestly incongruous or unacceptable proposals. The work of facilitation entrusted to the expert requires, in fact, that the distances between the parties be reduced as much as possible, to the point of making their respective desiderata coincide, both through a wise negotiation that takes into account their mutual interests and, even before that, through the formulation of reasonable proposals, which do not have the exclusive objective of maintaining a negotiating space to maximise the utility for the debtor but, rather, that of immediately identifying the points of contact between the reciprocal positions, in order to rapidly reach a synthesis of interests and the conclusion of the negotiations".*

a corporate enterprise) from managing the business in such a way as to worsen the crisis to the detriment of the creditors' rights. Article 21 of the Code provides in this regard the following: *"During the negotiations, the entrepreneur shall retain the ordinary and extraordinary management of the business. The entrepreneur in a state of crisis shall manage the business in such a way as to avoid jeopardizing the business. When, in the scope of the settlement, it turns out that the entrepreneur is insolvent but there are concrete recovery chances, the entrepreneur manages the business in the predominant interest of the creditors. The responsibilities of the entrepreneur shall remain unaffected".*

The latter principle has had no concrete application until now[76] and reflects, on closer inspection, the change of the directors' duties from the vicinity of insolvency phase, when directors play the critical role of independent arbitrators between shareholders and creditors, up to irreversible insolvency, an event that requires the creditors' expectations to be given priority[77]. The violation of this principle, however, may at most be relevant in a possible judgement on the directors' liability, but is in no way capable of limiting ordinary and extraordinary management of the company, nor of limiting the enforceability of any detrimental acts against creditors[78].

In fact, the regulatory provision must be applied together with other provisions regulating the business management pending negotiations.

Firstly, it should be noted that regardless of being the entrepreneur in a state of pre-crisis, crisis or insolvency, the performance of acts of extraordinary administration is not prohibited, nor are payments or the contracting of loans or the issuing of guarantees — to the extent they are consistent with the negotiations and the restructuring plan (Article 18(1) CCI)[79]. In these cases, the Code therefore does not require the debtor to be authorized, as it is the case in other insolvency proceedings: the debtor's contractual freedom therefore remains unaffected even if subject to a form of 'control' by the expert[80].

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[76] On the liability of directors in the "vicinity" of insolvency see: SACCHI, R. (2018), "Sul così detto diritto societario della crisi: una categoria inutile o dannosa?", in *Nuove leggi civ. comm*., p. 1281, 1285 ff.; Id.(2014), "La responsabilità gestionale nella crisi dell'impresa societaria", in TOMBARI, U. (ed.), *Diritto societario e crisi dell'impresa*, Turin, p. 125 ff.; CALANDRA BUONAURA, V. (2014), "La gestione societaria dell'impresa in crisi", in Barachini (ed.), *Il diritto dell'impresa in crisi fra contratto, società e procedure concorsuali,* Turin, p. 3 ff.; ZOPPINI, A. (2014), "Emersione della crisi e interesse sociale (spunti dalla teoria dell'emerging insolvency)", in TOMBARI, U. (ed.), *Diritto societario e crisi d'impresa,* cit, p. 49 ff.; LUCIANO, A. M. (2016), *La gestione della s.p.a. nella crisi pre-concorsuale*, Milan, p. 1 ff.; BRIZZI, F. (2015), *Doveri degli amministratori e tutela dei creditori nel diritto societario della crisi*, Turin, p. 118 ff.; PACILEO, S. (2017), *Continuità e solvenza nella crisi di impresa,* Milan, p. 9 ff., 358 ff.

[77] MAROTTA, F. (2022), "Il dilemma della gestione" cit., p. 186 ff.

[78] MINERVINI, V. (2022) cit.

[79] Among which the executive decree includes: (i) payments of wages to employees; (ii) tax and social security debts; (iii) mortgage or leasing instalments; (iv) commercial debts functional to the cycle of procurement of goods or services; (v) payments of debts in instalments may also be consistent if the failure to perform is punished by forfeiture of the benefit of the term

[80] See BONFATTI, S. (2022), "Profili della composizione negoziata della crisi d'impresa — Gestione dell'impresa; Rinegoziazione dei contratti e cessione dell'azienda; Composizione negoziata della crisi di gruppo", in *dirittodellacrisi*.it; LENER, G. (2021), "Appunti sull'autonomia privata e sulla rinegoziazione nel d.l. 118/21", in *dirittodellacrisi.it*.

Article 18 CCI requires in this respect that acts of extraordinary administration and payments that are not in line with the negotiations must be communicated by the entrepreneur to the expert, who must in turn assess whether *(i)* the act may jeopardize the restructuring, *(ii)* adversely affect the negotiations, or *(iii)* cause damage to the creditors. If, because of its evaluations, the expert considers the act alarming and prejudicial, it must attempt to prevent (moral suasion) the entrepreneur from acting so and, if the latter performs the reported act, it may register its dissent in the Register of Companies within ten days, also notifying the Court that has issued any kind of protective measures requested by the debtor. It should be noted the choice of the legislator to use the term 'may' instead of 'shall', since the decision to register, the dissent is left to the discretion of the expert — unless the act adversely affects the creditors' interests, in which case the registration of the dissent will be mandatory[81]. The registration of the dissent has a twofold detrimental effect: from a regulatory point of view, it entails that the reported transactions will be subjected to the claw-back actions in a subsequent bankruptcy proceeding, thus derogating the rule under the second paragraph of Article 24 CCI, which provides for exemption of acts and payments performed in the period following the expert's acceptance[82]; moreover, the disclosure duty provided for the dissent entails the loss of the secrecy and confidentiality of the proceedings and could lead to the wrecking of the negotiations[83].

Therefore, if, on the one hand, the entrepreneur may continue to manage the business as he would manage it in the context of a mere private and out-of-court negotiation with creditors, albeit under the supervision of the expert, on the other hand, Article 22(1) CCI provides for the intervention of the Court if the debtor intends to contract pre-deductible financing or intends to transfer the business or a branch thereof, with the exclusion of the assignee's liability for past debts. The recognition of the possibility of performing such transactions results in facilitating negotiations, especially considering that the parties do not usually enjoy this opportunity in the context of a private negotiation. Under such circumstances, the entrepreneur is, thus, required to obtain the Court's authorization, proving that it is necessary to preserve the viability of the business and that it is not detrimental to creditors. Once authorized, these acts won't be subject to claw-back actions pursuant to Article

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[81] Cf., MICHELOTTI, F. (2021), "La gestione dell'impresa e il ruolo dell'esperto", in *Fall.*, p. 1568 ff.;

[82] In this regard, moreover, FERRO, M. (2021), "La composizione negoziata e il riposizionamento delle istituzioni della concorsualità dopo il d.l. n. 118/2021", in *Fall*, p. 1589: *"The wording 'in any case subject to the actions', does not however determine their revocation per se: they are therefore not ineffective as such, but they become at risk of not preserving the effects produced, provided that the action is promoted by the insolvency body, while the condition of proposition may already act as a presumptive element of the asset impoverishment and, above all, of the subjective requirement, but without absolute presumptions".* Cf. FABIANI, M.-PAGNI, I. (2022), cit., p. 1487.

[83] This, moreover, appears to be the most critical profile, given that it contradicts the inspiring principles of the reform and the fundamental characteristics of the negotiated settlement, without even giving the entrepreneur the possibility of challenging the registration before the Court.

166-167 of the Code and receivables resulting from these operations will have to be satisfied with priority in any subsequent insolvency proceedings.

It is questioned, however, whether the granting of the authorization requires the actual appointment of the expert and the commencement of negotiations. Doubts in fact arise from the wording of the Article 22 CCI, which doesn't seem to provide any form of involvement of the expert in the authorization procedure. On the latter issue, the Court of Treviso recently ruled that the expert's participation in the authorization procedure is not essential and that the Court may ascertain the existence of the conditions required by law thanks to the support of an auxiliary appointed pursuant to article 68 of the CCI, even before the expert's acceptance[84].

5. The initiation of the proceedings

In general, it can be observed that the crisis settlement does not follow the typical procedural scheme of the other crisis and insolvency procedures[85].

As it has been already mentioned, there is no admission phase dedicated to the verification of objective and subjective requirements: the petition submitted by the entrepreneur pursuant to Article 12 CCI is alone suitable to initiate the negotiated settlement.

Article 17 CCI provides that the petition must be necessarily filed through a specific telematic platform, by filling in a pre-filled form to which must be attached: *(i)* the last three financial statements; *(ii)* a draft restructuring plan and the financial plan for the next six months; *(iii)* the list of creditors and their claims; (*iv)* the certificate of tax debts; *(v)* the certificate of social security debts; *(vi)* the overall debt exposure to the Italian Tax Authority (Agenzia delle Entrate-Riscossione); (*vii)* a declaration regarding the pending of bankruptcy petitions filed by creditors; *(viii)* an excerpt of the information contained in the Central Credit Register of the Bank of Italy referring to no more than three months before. The result of the practical assessment on the concrete prospects of recovery, on the other hand, does not have to be submitted, as it may well be carried out subsequently with the assistance of the expert[86].

Once received the petition, the Secretary of the Chamber of Commerce will have to transmit it to the competent Commission within two days, which in turn shall appoint the expert within five days (Article 13 (7) CCI). From the notification of the appointment, the professional shall verify within two days that he/she meets the requirements of independence, impartiality, and pro-

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[84] Trib. Teviso, 22 December 2021, in *Società*, 2022, p. 305 ff. However, the ruling has been criticised, mainly because reasoning in this way would end up entrusting to the judge the control on the "reasonable prospects of restructuring" that the law entrusts instead to the expert. On this point see PALMIERI, M. (2022) "La concessione dell'autorizzazione giudiziale a contrarre finanziamenti prededucibili antecedente l'avvio della composizione negoziata per la soluzione della crisi d'impresa", in *Società*, p. 305 ff.

[85] Which, following the entry into force of the Code, will be regulated uniformly by Art. 40 ff of the CCI.

[86] The last data released by Unioncamere show that a small proportion of the companies that applied for the appointment of the expert performed the practical test (only 36%).

fessionalism and then communicate whether he/she is willing to accept or refuse the appointment through the telematic platform (Article 17 (4) CCI).

The first step to be taken by the expert is to convene the entrepreneur or the directors (as soon as possible), in order to verify the existence of reasonable and concrete prospects of recovery, also obtaining information from the supervisory body, the statutory auditor and the financial institutions (Article 17(5) ICC).

If, at this stage, the expert deems the company's turnaround as hardly feasible, even in case of the sale of the whole company or of its branches, he/she will notify the entrepreneur and the Secretary of the Chamber of Commerce, who will order the dismissal of the proceeding[87]. if this is not the case, the expert is obliged to enter into negotiations without delay and to communicate to the entrepreneur's counterparties the essential features of the restructuring plan. In doing so, the expert shall be free in choosing independently how to carry out the negotiation process and whether to conduct it separately with each or some of the creditors. Nonetheless, the implementing Decree of the Ministry of Justice contains a specific protocol, serving as a guide and support for the expert both in the first "assessment" stage and in the phase of negotiations. The negotiations cannot in any case last more than 180 days and can be extended for a further 180 days only if all the parties and the expert have agreed thereupon. Once this period has expired, if the parties did not agree on one of the solutions pointed out in Article 23, the proceedings will be dismissed *ex officio* (Article 17(7) CCI).

6. Duties of the parties involved in negotiations

One of the most innovative aspects of the repealing regulations is that the Code provides for specific standards of conduct to be applied to all the parties involved in the restructuring process, with a view to creating a 'cooperative' environment that favors the development of shared solutions: a community of interests based on the value of solidarity[88], as granted by the Constitution (Article 2). In fact, practice clearly shows that in rare cases a relationship of loyal cooperation is established between the debtor and the creditors. Firstly, because the debtor often submits partial/misleading information to the creditors or proposes solutions whose implementation is highly unlikely. Secondly, because most creditors, especially banks and financial institutions, do not actively take part in the negotiations, usually abruptly breaking off all relations with the debtor, thus accelerating the degenerative process that turns the crisis into irreversible insolvency[89].

Article 16 of the Code, therefore, addresses both problems, providing through specific rules the general clause of good faith carved out in Article 4.

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[87] And the entrepreneur may not file a new petition earlier than one year after the filing, as provided by Art. 17 (9) CCI.

[88] FABIANI, M. (2022), "Il valore della solidarietà nell'approccio e nella gestione delle crisi d'impresa", in *Fall.*, p. 9 ff.; For a different perspective see RORDORF, R. (2021), "I doveri", cit., p. 594 ff.

[89] RORDORF, R. (2021), "I doveri", cit., p. 598.

These are clearly legal obligations[90], the breach of which gives rise to a form of liability that shares few features with pre-contractual liability governed by Article 1337 of the Civil Code[91].

As regards the debtor, Article 16(4) of the Code provides that the entrepreneur shall represent his or her situation to the expert, creditors and other interested parties in a complete and transparent manner and must manage the assets and the business without jeopardizing the interests of creditors. This is an obligation of transparency that, in the scope of the settlement, takes on a key role since it is an fundamental requisite for the performance of the functions assigned to the expert and for the successful outcome of the negotiations.

As regards creditors, however, the paragraphs five and six of Article 16 CCI seem to better depict the conduct that could give rise to liability, so as to grant a remedy for the uncertainty that would result from the application of the general clause of good faith, which would require drawing a precise borderline between conduct on the part of the debtor that serves to preserve its interest and conduct that constitutes a breach of the duty of loyal cooperation[92].

The provision, in this regard, significantly differentiates the position of the banks from that of other potentially affected creditors, based on the observation that they usually account for the bulk of the debt. Banks, as well as their agents or assignees of their claims, are bound to active participation in the settlement and are prohibited from revoking or suspending credit facilities granted to the debtor if the decision is solely motivated by the commencement of the settlement proceeding. It is therefore a rather heavier burden than the one borne by all parties (including creditors), regarding which, paragraph six provides for the obligation of secrecy, loyal cooperation and, more specifically, the obligation to promptly respond to the notices and proposals formulated through the expert with a reasoned reply[93].

Lastly, still within the scope of the application of good faith, it is provided the duty of creditors to enter into negotiations with the debtor aimed at redetermining the economic conditions of those contracts whose performance has become disproportionately burdensome for reasons subsequently arisen (the COVID-19 pandemic; the increase in the price of raw materials due to the events of the war). In view of ensuring that production activity does not come to a traumatic halt and thus of favoring the restructuring process, paragraph two of Article 22(2) CCII provides that "*The expert may invite the parties to redetermine, in compliance with the principle of good faith, the content of contracts of continuous or periodic performance, or of deferred performance, if the performance has become* disproportionately burdensome *or if the balance of the relationship is altered due to circumstances that have arisen. The*

[90] On this point see MACARIO, F. (2022), "La composizione negoziata della crisi e dell'insolvenza del debitore", in *Contratti*, p. 7 ff. and FABIANI, M. (2022), "Introduzione ai principi generali", cit., p. 1180 ss.

[91] V. GUERRINI, L. (2022), "Il d.l. n. 118/2021 sulla composizione negoziata", cit., p. 244.

[92] RORDORF, R. (2021), "I doveri", cit., p. 599.

[93] GUIOTTO, A. (2022), "Il ruolo dell'esperto nelle trattative con i soggetti rilevanti", cit.

parties are bound to cooperate with each other to redetermine the content of the contract or to adapt performance to the changed conditions." On the latter issue, the legislator seems to take up what has already been affirmed by Courts in relation to the controversial issue of the adjustment of contracts that have become disproportionately burdensome due to the pandemic emergency, when it was observed that there is no general duty to renegotiate the contract but merely an obligation to enter into negotiations in good faith with the other party[94]. In fact, the rule initially contained in Decree-Law 118/2021 appeared significantly different. Firstly, because the renegotiation obligation arose exclusively where there were needs strictly related to the COVID-19 pandemic, whereas now reference is made to a generic modification of the contractual relationship brought about by supervening circumstances. Secondly, the rule does not provide for the possibility for the entrepreneur to directly request a judicial redetermination of the contractual conditions[95], in the event of the failure of negotiations with the counterparties.

7. Protective measures

The negotiated settlement distinguishes itself from insolvency and pre-insolvency procedures, being it managed out-of-court. The removal of the judicial authority in the phase of early management of entrepreneurial difficulties, in fact, meets the need to favor spontaneous and early restructuring initiatives, given that the debtor usually avoids those instruments characterized by judicial control — albeit minimal — perceived as a sort of prelude to bankruptcy. Moreover, recital 29 of the Directive expressly provides that *"Except in the event of mandatory involvement of judicial or administrative authorities as provided for under this Directive, Member States should be able to limit the involvement of such authorities to situations in which it is necessary and proportionate, while taking into consideration, among other things, the aim of safeguarding the rights and interests of debtors and of affected parties, as well as the aim of reducing delays and the cost of the procedures".*

Along with this objective and with what is laid down in Articles 6-7 of the Directive, the role of courts has been reduced to a minimum, consisting in a merely eventual intervention limited to the granting of those incentives that may directly affect the legal sphere of creditors or that can condition the respect of the *par condicio creditorum* in a possible subsequent insolvency proceeding.

The first possibility for the judicial authority to take part in the proceedings is that of the confirmation or revocation of the protective measures requested

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[94] See Trib. Palermo, 9 June, 2021 in *Leggi d'Italia*; Trib. Lecce, 24 June 2021, both in *dirittodellacrisi.it*. For the most radical approach to the problem see Trib. Rome, 15 January 2021, in *DeJure;* Trib. Rome, 19 February 2021 in *DeJure*; Trib. Rome, 21 May 2021 in *DeJure*; Trib. Rome, 25 June 2021 in *DeJure*; Trib. Rome, 16 July 2021 in *DeJure*; Trib. Florence, 22 September 2021 in *DeJure*; Trib. Brescia, 21 December 2021; Trib. Rome, 5 January 2022 in *DeJure*; Trib. Rome, 12 January 2022 in *DeJure*; Trib. Rome, 11 April 2022 in *DeJure*.

[95] Even before the entry into force of the Law-Decree no. 118/2021, this possibility was recognized by Trib. Rome, 27 August 2020 in *Leggi d'Italia*.

by the entrepreneur, a typically 'bankruptcy' phase that is part of non-bankruptcy proceedings.

Pursuant to Article 18 of the CCI, the debtor may in fact request, in the petition for the expert's appointment or in a separate petition, the adoption of asset protection measures, which are specifically identified and may consist in: *(i)* a general or limited stay on individual enforcement actions on the debtor's assets necessary for the performance of activities[96]; *(ii)* a preclusion for creditors to assume pre-emption rights. With reference to these two types of measures, it should be noted that the entrepreneur may modulate their content and duration at his/her discretion, also with a view to not excessively frightening creditors and suppliers, possibly limiting their application to only a part of creditors (Article 18(3) CCI)[97]. As regards the duration. the protective measures may be effective for a maximum of 120 days, without prejudice to the possibility of extending them for a further 120 days, if it is proved that they are crucial to the successful outcome of the negotiations[98].

In accordance with the Directive, the automatic stay takes effect at the simple request of the entrepreneur, provided that the relevant application is entered in the Companies' Register, since only subsequent intervention by the Court, called upon to verify the existence of the conditions for granting the measures, is envisaged.

For the protective measures to properly take effect until the Court has issued a ruling, however, the entrepreneur is required to publish the petition for the expert's appointment (or only for the application of the measures, if on a later date) in the Companies' Register; at the same time, he must file a specific petition with the Court containing the request for confirmation or modification of the protective measures. Finally, it is provided that the general docket number of the proceedings must also be published in the Companies Register within 30 days, under penalty of automatic ineffectiveness of the protective measures (Article 19(1) CCI).

As regards the proceedings phases, within ten days from the filing of the petition, the Court shall set the date of the hearing to convene the debtor, the expert and any party interested in the protective measures, under penalty of the loss of effectiveness of the requested measures. After simplified preliminary investigation, upon analysis of the information gathered from the entrepreneur and on the basis of an expert's report on the functionality of the measures with respect to the successful outcome of the negotiations[99], the

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[96] Which, moreover, applies to enforcement actions promoted on assets owned by persons other than the debtor, if they are necessary to grant the business continuity.

[97] See BACCAGLINI, L (2022), "Composizione negoziata della crisi e misure protettive: presupposti, conseguenze ed effetti della loro selettività sulle azioni esecutive individuali", in *Fall.*, p. 1105 ff. In general, for a comparison between the protective measures in the negotiated settlement and the same measures in the other pre-bankruptcy proceedings, see DIDONE, A. (2022), "Le misure protettive/cautelari", in *Fall*., p. 1251 ff.

[98] Without prejudice to the possibility for the Court to revoke them at any time upon creditors' or expert's request.

[99] In fact, the rule only provides that the debtor must be heard by the court, but practice shows that the judge often requires the expert to file a written report. See NIGRO, A. (2022), "La fase introduttiva del percorso di composizione negoziata, le prime indicazioni operative e la conclusione anticipata della procedura", in *dirittodellacrisi*.it.

Court will decide to confirm in full the measures requested or modify/revoke them, should they do not meet the objective of ensuring the successful outcome of the negotiations or appear disproportionate in light of the prejudice caused to the creditors.

The Court should therefore limit itself to verifying on the one hand whether the protective measures are essential and functional to the negotiations and, on the other hand, whether their application does not result in unreasonably excessive harm to creditors, as indeed Article 7 of the Directive itself would seem to require, where it provides only that the stay must facilitate the negotiations. The uncertainty remains, however, as to the extent of the power entrusted to the Court[100] since there is the possibility that the judge, also by means of an auxiliary appointed pursuant to Article 68 CCI, may contradict the expert's opinion, engaging in a prior verification of the economic-financial imbalances justifying the access to the negotiated settlement and of the reliability/feasibility of the draft restructuring plan proposed by the entrepreneur. A preliminary analysis of recent case law shows that most of the Courts, also considering that this is a summary procedure, have reasonably limited themselves to verifying (in abstract terms) the existence of the aforesaid prerequisites on the basis of the expert's opinion[101] and relying on the latter's determinations as to the business' viability, thus not carrying out technical evaluations that the law would seem to leave exclusively to the professional. However, in some cases the Court has challenged the reliability or seriousness of the restructuring plan or the likelihood of a successful outcome of the negotiations, adopting criteria similar to that applied for the purpose of assessing the feasibility of the plan to be homologated in the composition with creditors procedure[102].

Finally, it must be pointed out that Article 19 CCI provides once again for the judge's obligation to inform the Public Prosecutor of the existence of the debtor's insolvency, allowing the choice of whether to request the opening of judicial liquidation (Article 38(2))[103].

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[100] In this regard, see DE SANTIS, F. (2021), "Le misure protettive e cautelari nella soluzione negoziata della crisi d'impresa", in *Fall.,* p. 1546, who also points out that such evaluations entrusted to the Court could be conducted both according to an "abstract" approach, verifying that in theory automatic stay could benefit the negotiations, and according to a "concrete" approach, verifying in concrete terms whether the requested measures are useful and essential to preserve the assets and ensure the successful outcome of the negotiations.

[101] On the importance of the expert's role in this phase see BACCAGLINI, L (2022), "Composizione negoziata della crisi e misure protettive", cit., p. 1113-1114.

[102] V. Trib. Bergamo, 15 February 2022 in *dirittodellacrisi.it*, according to which *"The scope of the Judge's assessment for the purpose of confirming the requested measures relates to their functionality to ensure the fulfilment of the objectives of the negotiated settlement, which are to be identified, on the one hand, in the recovery of the business activity, and on the other hand, in the successful outcome of the negotiations that allows the turnaround before the access to bankruptcy proceedings. In making such an assessment, the Judge must strike a delicate concrete balance, ex ante, between the debtor's interest in a negotiated (and not insolvency) solution to its crisis and that of the creditors in not suffering irreparable harm from the application of the measures".* See also Trib. Milan, 17 January 2022 in *dirittodellacrisi.it*; Trib. Rieti, 2 April 2022 in *dirittodellacrisi.it*.

[103] The Public Prosecutor will therefore be entitled to file the petition only if it is the Court that indicates the existence of the state of insolvency. On this point see ZANICHELLI, V. (2022),

In addition to measures that require confirmation by the Court, Article 18 CCI also regulates other types of measures for which no confirmatory intervention by the Court is required and whose effectiveness is linked by law to the registration of the relevant petition with the Companies' Register or, more simply, to the filing of the petition for the appointment of the expert.

Article 18(4) CCI provides that the registration with the Companies' Register of the petition for protective measures automatically triggers the prohibition for the Court to order the opening of the judicial liquidation of debtor's assets until the negotiated settlement is closed or the protective measures are revoked[104]. This is therefore a type of protective measure that is not subject to confirmation by the Court and whose effectiveness is strictly dependent on the effectiveness of the automatic stay, although case law had initially stated otherwise[105].

Article 20 CCI then provides that the entrepreneur may declare in the petition for the appointment of the expert that, until the conclusion of the negotiations or the dismissal of the proceedings, the following provisions shall not apply[106]: (i) Articles 2446 (2-3), 2447, 2482-*bis* (4-5-6), and 2482-*ter* of the Civil Code, which regulate in each type of company the duty to recapitalize the company in the event of relevant losses exceeding one-third of the capital; (ii) Articles 2484 (1), no. 4 and 2545-*duodecies* of the Civil Code, which provide for the company's dissolution in case of the reduction of the capital below the legal minimum. This opportunity seems to be consistent with Article 32 of the Directive[107], even tough some scholars stress the unreasonableness of subtracting this protective measure from the control of the Court[108]. However, it should be noted, that the suspension in these cases does not affect the directors' duty to convene a shareholders' meeting without delay to submit them an updated balance sheet[109], nor does it appear to affect Article 2486 of the Civil Code, which provides the directors must run the business exclusively with a view to preserving the integrity of the company's share capital[110].

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cit. On the role of the PM in the negotiated settlement see also JORIO, A. (2021), "Composizione negoziata e pubblico minister", in *dirittodellacrisi.it*.

[104] There remains, however, the possibility for creditors to file a petition for the opening of judicial liquidation, which in turn can trigger the checks carried out by the Public Prosecutor.

[105] See Trib. Brescia, 2 December 2021 in *dirittodellacrisi.it*; Trib. Roma, 3 February 2022, in *dirittodellacrisi.it*.

[106] As long as the petition is registered with the Companies' Register.

[107] Which amended the Article 84 of the Directive 2017/1132/EU

[108] V. LICCARDO, P. (2021), "Neoliberismo concorsuale e svalutazioni competitive: il mercato delle regole", in *giustiziainsieme*.it. On the contrary, see FABIANI, M.-PAGNI, I. (2021), "La transizione dal Codice della Crisi alla composizione negoziata (e viceversa)", in *dirittodellacrisi*.it.

[109] Article 2446 (1) of the Civil Code.

[110] It should be noted that such a provision can obviously be applied only and exclusively prior to the commencement of the negotiated settlement, even in the event that the entrepreneur has not requested the suspension of the recapitalization obligations, since Article 21 CCI sets out the directors' duties during the negotiations, which do not match with the duties set forth in Article 2486 of the Civil Code. On this point see CIMOLAI, A. (2022), "L'autosospensione dagli obblighi di conservazione del capitale e i nuovi quadri di responsabilità degli organi sociali", in *dirittodellacrisi.it*.

Finally, Article 18(5) CCI provides that creditors, as from the filing of the petition for the confirmation of protective measures, may not refuse to perform pending contracts with the entrepreneur or requesting their termination on account of non-payment of past debts[111]. On closer inspection, this is not a protective measure in the technical sense, but rather a legal effect that automatically follows the filing of the petition and the subsequent confirmation of the suspensive measures[112].

8. Positive outcomes of the negotiations

Article 23 CCI regulates possible outcomes of negotiations, providing for both those solutions that are based on a successful outcome of negotiations and those that instead follow from a substantial failure of negotiations. Nonetheless, it must be noted that a minimum part of the reward measures provided for in Article 25-bis CCI are also available to a debtor who has not found the negotiated settlement to be an efficient solution and has turned to insolvency proceedings, confirming the fact that the only scenario deemed by the legislator as detrimental for the debtor is judicial liquidation[113].

It must be noted at the outset that this list of the solutions that can be reached through negotiations, some of which contains new instruments that are particularly advantageous for the debtor, is not entirely complete and exhaustive. This is due to the fact that, where there is a need to intervene exclusively in the business model or management of the company, it may well be that the negotiated settlement ends with the mere identification of the measures to be adopted, without involving creditors or third parties[114].

Among the solutions implying a successful outcome of the negotiations, the provision indicate:

— An agreement entered with one or more creditors that, according to the expert's final report, can ensure business continuity for the next two years. The content of the agreement is not predefined, but regardless of its subject matter, it must guarantee the overcoming of the imbalances that justify the initiation of the settlement procedure and must therefore allow the entrepreneur to prospectively recover the ability to regularly fulfil his/her obligations[115]. The agreement is also associated with special benefits for the entrepreneur, since Article 25-bis (1) (3) CCI, provides for the reduction to the legal minimum of the interest owed to the Italian Tax Authority and accrued during the negotiations, as well as the possibility of requesting the payment

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[111] See BONFATTI, S. (2021), "La nuova finanza bancaria", in *dirittodellacrisi.it*.

[112] This provision is intended to affect in particular financial institutions, which are also prohibited from revoking or suspending existing credit facilities on account of the entrepreneur's access to the negotiated settlement.

[113] See PANZANI, L. (2021), "Gli esiti possibili delle trattative e gli effetti in caso di insuccesso", in *Fall*., p. 1593.

[114] ZANICHELLI, V. (2021), "Gli esiti possibili della composizione negoziata", in *dirittodellacrisi*.it.

[115] Cf. PANZANI, L. (2021), "Gli esiti possibili delle trattative", cit. p. 1593 ff.

of the debt by means of instalments for a maximum duration of seventy-two months, provided that the agreement is registered with the Companies Register. This is a new provision that, however, does not present such strong incentive, since no significant benefits are envisaged for creditors, such as, for example, the right to priority payment of claims arising from the implementation of the agreement itself in a subsequent bankruptcy procedure[116].

— A moratorium agreement (*convenzione di moratoria*): this is regulated in Article 62 of the Code and consists of an agreement with creditors aimed at temporarily settling the difficulties experienced by the company[117]. In particular, the rule provides that the agreement concerning the deferral of payments, or the suspension of enforcement actions may be effective vis-à-vis all creditors belonging to the same class if it is signed by at least 75% of the creditors belonging to that class. This is, however, a temporary solution which is aimed at the implementation of those restructuring measures agreed with the entrepreneur and which the expert must therefore necessarily account for in the final report[118].

— An agreement entered by creditors, the entrepreneur, and the expert executing the restructuring plan, aimed at the settlement of the crisis or insolvency. The advantage provided by the measure mainly consists in the exemption from claw-back of the acts carried out in implementation of the agreement and the entrepreneur's exemption from criminal liability regarding offences of simple and fraudulent bankruptcy. Here again, we are faced with a new, albeit hybrid, measure, in that it is halfway between the agreement referred to in Article 23(1)(a) CCI and the certified restructuring plan referred to in Article 56 CCI, which has the same effects. The difference with respect to the former lies in the fact that in this case the agreement must also be executed by the expert, who will certify the feasibility of the underlying restructuring plan and the accuracy of the data on the basis of which it was drawn up[119]. At the same time, it is not necessary to prove that the underlying plan ensures business continuity for at least two years, but simply that it is capable of turning around the state of (actual or probable) crisis or insolvency. With respect to the certified recovery plan, on the other hand, the figure of the professional called upon to certify the accuracy of the company data and the feasibility of the recovery is missing. Moreover, it is not clear whether the reference to 'creditors' implies that all creditors must enter to the agreement, since in the latter case there would be a very hard limit for the

[116] See ZANICHELLI, V. (2021), "Gli esiti possibili della composizione negoziata".

[117] On this point see DALLE MONACHE, S. (2020), "La convenzione di moratoria nel Codice della crisi d'impresa", in *Giur. comm.*, I, p. 1207 ff.

[118] It should be noted that the independent professional must certify that the moratorium agreement is functional to overcoming the crisis and, above all, that it allows dissenting creditors to be paid no less than they would be paid in the judicial liquidation.

[119] See ZANICHELLI, V. (2021), "Gli esiti possibili della composizione negoziata",cit.

entrepreneur to overcome in order to take advantage of the aforementioned benefits[120].

— The petition for the homologation of a debt restructuring agreement under Articles 57, 60 and 61 CCI (*accordi di ristrutturazione dei debiti*). The debt restructuring agreement is an out-of-court contractual tool, even though case law has qualified it as a bankruptcy procedure, emphasizing the fact that its effectiveness is subject to Court approval and drawing the consequence that it must also ensure the respect of *par condicio creditorum*[121]. Restructuring agreement, if approved, allows the debtor to reach an arrangement with the majority of creditors, set at a minimum of 60%, providing for the postponement or reduction of claims subject of the agreement and, at the same time, a moratorium of one hundred and twenty days for the payment of overdue debts owned by parties outside the agreement. In addition, the debtor will be able to request the stay on enforcement and precautionary actions since the commencement of the negotiations. In this case too, the judge's intervention will only be subsequent and aimed at confirming or revoking measures that are already effective[122]. The regulatory framework has been substantially renewed on this point by the Code, aiming at favoring its use, which until now has been extremely limited. In particular, the Code provides for the possibility that the percentage of adhesion required by Article 57 CCI is by 30% lower, where, however, the debtor waives the payment deferral of creditors not entered into the agreement and does not request the stay on enforcement actions (*accordi di ristrutturazione agevolati*). A rather innovative measure lies in the possibility of proposing an agreement that is also effective vis-à-vis dissenting creditors belonging to the same class, provided that at least 75% of the creditors belonging to that class have adhered to it (*accordi di ristrutturazione ad efficacia estesa*)[123]. With reference to the latter type of ADR, an important facilitation is provided for, since the percentage of adhering creditors must be 60%, provided that the relevant agreement has matured during the negotiations and is therefore apparent from the final report of the expert[124].

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[120] See PANZANI, L. (2021), "Gli esiti possibili delle trattative", cit. p. 1595

[121] See Cass. 18 January 2018, no. 1182; Cass. 12 April 2018, no. 9087; Cass. 21 June 2018, no. 16347.

[122] Article 55 ff. CCI

[123] On the new discipline of debt restructuring agreements see NARDECCHIA, G. B. (2020),"Gli accordi di ristrutturazione dei debiti nel Codice della Crisi e dell'Insolvenza", in *Fall*., p. 1045 ff.; ZORZI, A. (2019), "Piano di risanamento e accordi di ristrutturazione nel codice della crisi", in *Fall*., p. 993 ff.; MACARIO, F. (2019), "Il contratto e gli strumenti stragiudiziali negoziali nel Codice della Crisi d'Impresa e dell'Insolvenza", in *Contratti*, p. 369 ff. In particular, on the issues related to "extended" agreements see NOCERA, I. L. (2021), "L'efficacia estesa degli accordi di ristrutturazione tra principio di conservazione, conflitto d'interessi e contrasto d'interessi", in *Fall*., p. 2437 ff.

[124] ZANICHELLI, V. (2021), "Gli esiti possibili della composizione negoziata",cit.

Should the negotiations result in the adoption of one of these instruments, Article 25-bis CCI provides for the reduction to the legal minimum of the interest accrued on tax debts and, at the same time, the reduction to the minimum amount of the tax penalties falling due after the filing of the petition for the expert's appointment. In addition, only in the event that the contract referred to in subparagraph (a) and the agreement referred to in subparagraph (c) of Article 23 CCI are filed with the Companies' Register, the regulatory provision grants the entrepreneur the possibility of submitting a request to the Tax Authority to pay the due sums in instalments for a maximum of seventy-two instalments, provided that the expert has signed it, and set forth the irrelevance for tax purposes of the contingent assets deriving from the debt restructuring, even for the debtor who has concluded a debt restructuring agreement[125].

9. Negative outcomes of the negotiations

Should negotiations fail, the possible solutions provided for by the Code might be:

The certified restructuring plan (*piano attestato di risanamento)* pursuant to Article 56 CCI. Actually, this cannot be considered as a bankruptcy procedure nor procedure at all, but a private agreement drawn up by the entrepreneur, describing *(i)* the economic and financial situation of the company, *(ii)* the causes of the crisis, *(iii)* the intervention strategies and the restructuring phases scheduling, *(iv)* the creditors and the amount of the claims whose settlement is proposed, *(v)* the creditors not involved and the amount of the resources allocated as to their satisfaction, *(vi)* the business plan and the effects on the financial plan as well as the scheduling of the actions to be taken. The feasibility of the plan and the accuracy of the company's data must necessarily be certified by a professional for the acts and payments made in compliance with the agreements provided for by the plan to be exempted from revocation in a subsequent bankruptcy procedure[126].

The "simplified" composition with creditors for the debtor's assets liquidation (*concordato semplificato per la liquidazione dei beni*). It constitutes one of the main innovations included in the Code and originally introduced by Decree-Law No. 118/2021, being it a measure that can only be pursued by the entrepreneur who has initiated the crisis settlement without achieving any positive outcome. More specifically, as it has been stated by the scholars[127], this simplified variant of the composition with creditors shall be deemed as *sui generis* bankruptcy proceedings and autonomous with respect to the or-

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[125] On fiscal incentives see in depth RANDAZZO, F. (2022), "Le misure premiali nella composizione negoziata", in *Dir. prat. Trib*., p. 83 ff.

[126] On the "certified restructuring plan" see NARDECCHIA, G. B. (2020), Il piano attestato di risanamento nel codice, in *Fall*., p. 5 ff.

[127] In this regard, see the considerations on the nature of the "simplified" composition with creditors made by D'ATTORRE, G. (2021), "Il concordato semplificato per la liquidazione del patrimonio", in *Fall*., p. 1603 ff. See BOZZA, G. (2021), "Il concordato semplificato introdotto dal d.l. 118 del 2021", in *dirittodellacrisi.it*.

dinary procedure; thus, in the event of regulatory loopholes, the rules governing the latter procedure cannot be applied by analogy. With regard to the prerequisites, the regulatory provision merely specifies that the expert must certify in his report that the negotiations have not been unsuccessful and, at the same time, that the only feasible solution is to liquidate the debtor's assets. Code's reference to 'liquidation of assets' does not seem to take into account the difference between the disposal of individual assets and the disposal of the enterprise as a whole; so that both types of liquidation plans will be admissible. On this point, however, there has been much criticism from the scholars[128], both because the introduction of such a procedure was in no way required by the adoption of the Insolvency Directive*,* which focuses on instruments that favor business continuity, and because the significant amount of advantages and benefits enjoyed by the debtor entering into the simplified procedure could only be justified if the plan provides for the sale of the going concern. If, on the other hand, the plan envisages the liquidation of individual assets, it is hard to see the reason for eliminating those guarantees that the law places in place to protect the interests of creditors[129]. In fact, it must be recalled that by implementation of the Code, the legislator clearly wished to favor those agreed solutions that allow the business continuity and, at the same time, placed further limitations on the use of the composition with creditors for the purpose of assets' liquidation. Among these limitations are the obligation to provide for a satisfaction of unsecured claims of at least 20 per cent and the obligation to ensure that the proposal is in any case convenient with respect to the judicial liquidation of assets and thus provides for external finances, able to increase the resources to be allocated to creditors by at least 10 per cent[130]. Moreover, from a procedural standpoint, the arrangement with creditors shall be identified both by the role attributed to the Court — which is called upon to verify, first and foremost, the admissibility of the petition for the opening of the procedure and the economic and legal feasibility of the plan submitted — and by the role of creditors — who are called upon to cast their vote on the debtor's proposal, especially in light of the fact that they may be divided into 'classes' and whose claims can be differently handled. In the simplified variant no such requirements that limit the admissibility of a normal liquidation plan are envisaged and which only allow for procedures that are truly convenient compared to judicial liquidation[131]. Similarly, the Code has introduced some important procedural simplifying measures, which, however, might give rise to unfair behavior on the part of the debtor[132]. First, there is no provision for an admission phase and, therefore, a preliminary

[128] LAMANNA, F. (2022), "Il concordato semplificato: incentivo per la composizione negoziata o arma "sleale" letale?", in *ilfallimentarista.it*.

[129] See also GALLETTI, D. (2021), "Breve storia", cit. Even if, as observed by D'ATTORRE, G. (2021), "Il concordato semplificato", cit., p. 1604, the Court's review on the proposal submitted by the debtor ensures a certain form of protection to creditors.

[130] Article 84 (3) CCI.

[131] See ABRIANI, N. (2022), "Concordato preventivo e ristrutturazione dell'impresa dopo il decreto legge n. 118/2021: *Que reste-t-il*?", in *dirittodellacrisi*.it, who emphasised the "unfair competition" between ordinary composition with creditors and its simplified variant.

[132] LAMANNA, F. (2022), "Il concordato semplificato", cit.

phase as to verifying the feasibility of the liquidation plan[133]. Secondly, and this is perhaps the most worrying feature, there is no provision for the intervention and vote of creditors, in the belief that they are in any event made participants in the solutions identified by the expert and the debtor during the previous negotiations. The Court's intervention is essentially limited to the homologation phase of the proposal filed by the debtor, to which the liquidation plan, the expert's opinion and the opinion of an auxiliary appointed by the Court must necessarily be attached (Article 68 CCI). In fact, Article 25, sexies CCI provides that the Court, upon receiving the petition, must only assess its formal regularity and immediately appoint a judicial commissioner. The Court, after verifying the admissibility of the petition, the reliability of the liquidation plan and the absence of prejudice for creditors — i.e. the convenience with respect to the judicial liquidation[134] and the correctness thereof — will subsequently homologate the composition agreement and the approval will therefore result in the debtor's discharge.

The homologated restructuring plan (*piano di ristrutturazione soggetto ad omologazione*): Article 64-bis of the CCI provides that an entrepreneur in a state of crisis or insolvency, specifically only that entrepreneur who is above the size thresholds set forth in Article 2 CCI, may submit for the Court's homologation a debt's restructuring plan, even if the proposal doesn't ensure compliance with the principle of *par condicio creditorum* and, therefore, respect for the order of the pre-emption rights. The condition laid down by law for the plan to be homologated, despite the fact that it violates a fundamental principle of bankruptcy and pre-bankruptcy proceedings, is that all classes of creditors vote in favor of its adoption and that it allows business continuity safeguard.[135].

The "ordinary" composition with creditors procedure (*concordato preventivo*). The discipline of this procedure has been significantly changed by the reform, so as to favour its more widespread and effective use. The main regulatory changes concern in particular the position of shareholders in the plan and the "distribution problem". Under the former profile it should be noted that Article 120-bis (2) CCI, as amended, provides that recourse to a crisis and insolvency regulation instrument is decided, exclusively, by the directors together with the content of the proposal and the terms of the plan[136]. On the other hand, Article 120-quinquies (1) CCI provides that the judicial approval of the arrangement results in the reduction or increase of share capital and other changes in the scope of the plan. Against such regulatory background, not surprisingly, the protection of shareholders — in light of the possibility that the company still retains a positive value — is envisaged *ex latere creditoris*, along with the mandatory formation (a rather innovative

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[133] See BOZZA, G. (2021), "Il concordato semplificato", cit. On this point see also ROSSI, A. (2022), "Le condizioni di ammissibilità del concordato semplificato", *Fall.*, p. 745 ff. who observed that the Court must still verify the conditions of admissibility of the plan and proposal.

[134] See D'ATTORRE, G. (2021), "Il concordato semplificato", cit., p. 1605.

[135] For an in-depth study on the new tool see BOZZA, G. (2022), "Il piano di ristrutturazione", cit. and FABIANI, M.-PAGNI, I. (2022), "Il piano di ristrutturazione soggetto ad omologazione", in *Fall.*, p. 1025 ff.

[136] The rule implements Article 12 of the EU Directive.

provision under Italian Law) of a class of shareholders (or several classes, in the presence of different rights) with voting rights, if the plan envisages changes that directly affect the shareholders' rights[137]. With regard to the second issue, it shall be point out that even before the EU Directive, the so-called distribution problem and the alternative between APR and RPR were discussed in Italy. As a matter of fact, in Italy — contrary to many other European states that have transposed the Directive (e.g., Germany, the Netherlands) — the choice has been made to adopt the RPR[138]. Article 84 CCI lays down two principles to be observed in the value distribution, which depend on the nature of the resources. It provides, in particular, that: *(i)* the liquidation value of the business is to be distributed in full compliance with the priorities order set forth by Articles 2740-2741 of the Italian Civil Code (and therefore according to the absolute priority rule); *(ii)* the value obtained from the business — the so-called continuity "surplus" — may be distributed to the junior creditor even in the absence of full satisfaction of the senior creditor. Even though this is a choice capable of facilitating the approval of the plan and increasing the cooperation of shareholders, some scholars have argued that the problem with the RPR does not lie so much in the result of deviating from the pre-bankruptcy priorities, but in the technique used to achieve such a result[139]. The very core problem of the RPR seems to lie in that the decision on the alteration of the pre-existing priorities entirely lies in the hands of the creditors' classes (self-regulation), according to the majority rule. In this way, the risk of opportunistic behavior is exaggerated, because parties are allowed to exchange value.

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[137] On this issue see NIGRO, A. (2022), "Codice della crisi, secondo correttivo e diritto societario della crisi", in *Dir. banca mercati fin*., II, p. 97 ff; ROSSI, A. (2022), "I soci nella regolazione della crisi della società debitrice", in *Società*, p. 945 ff.; BROGI, R. (2022), I soci e gli strumenti di regolazione della crisi, in Fall., p. 1290 ff.; PINTO, V. (2021), "Diritto delle società e procedure concorsuali nel codice della crisi", in *Riv. dir. comm*., I, p. 261 ff.; MICHIELI, N. (2021), "Il ruolo dei soci nelle procedure di composizione della crisi e dell'insolvenza", in *Riv. soc*, p. 830 ff.; STANGHELLINI, L. (2020), "Verso uno statuto dei diritti dei soci in società in crisi", in *RDS*, p. 295; FERRI JR., G. (2018), "Il ruolo dei soci nella ristrutturazione finanziaria dell'impresa alla luce di una recente proposta di direttiva europea", in *Dir. fall*., I, 531.

[138] On the solution provided to the problem see D'ATTORRE, G. (2022), "Le regole di distribuzione del valore", in *Fall*., p. 1223 ff. Before the transposition of the EU Directive see LENER, G. (2021), "Considerazioni intorno al "plusvalore" da continuità e alla "distribuzione" del patrimonio", in *dirittodellacrisi.it*; BALLERINI, G. (2021), "La distribuzione del (plus)valore ricavabile dal piano di ristrutturazione nella Direttiva (UE) 2019/1023 e l'alternativa fra *absolute priority rule* e *relative priority rule*", in *Riv. dir. comm*., I, p. 367 ff.; VIOLA, F. (2020), "Rapporti tra creditori e tra soci e creditori nella distribuzione del patrimonio della società in concordato preventivo, tra priorità assoluta e relativa", in *Rivista ODC*, p. 841 ss.; VATTERMOLI, D. (2014), "Concordato con continuità aziendale, *Absolute priority rule* e *new value exception*", in *Riv. dir. comm*., p. 331 ff.

[139] See Ballerini, G. (2021), "La distribuzione del (plus)valore ricavabile dal piano di ristrutturazione nella Direttiva (UE) 2019/1023 e l'alternativa fra *absolute priority rule* e *relative priority rule*", in *Riv. dir. comm*., I, p. 367 ff.

VI. CONCLUSIONS

The crisis prevention system and the new insolvency proceedings designed by the legislator are certainly worthy of appreciation and faithfully transpose the principles and guidelines of the Insolvency Directive. In fact, the Code goes far beyond what was provided for in the Directive, putting together different preventive instruments previously unknown in our legal system, aiming at favoring the early treatment of business difficulties.

However, the effectiveness and resilience of the system will depend first and foremost on the way in which courts will be able to transpose and apply the rules contained in the Code, which should not be interpreted individually but in connection with each other and always bearing in mind the inspiring principles.

Above all, concerning directors' liability, the reform seems to be sufficiently clear in providing for the standard of conduct required of company directors with reference to the monitoring of warning signs and the early management of the crisis. An extreme interpretation, either by keeping the scope of application of the business judgement rule unchanged or of excessively broadening the directors' liability, runs the risk of causing the entire system to collapse in any case, given that in the first case the directors would continue to disregard their oversight duties and in the second case there would be an excess of prudence detrimental to the business itself.

Secondly, it must be pointed out that the attempt to steadily bring "out of court" the preventive proceedings and the marked favoring of spontaneous initiatives by entrepreneurs leave open some questions as to the overall effectiveness of the preventive instruments, given that their proper functioning requires first and foremost a change in the approach on the part of small and medium-sized entrepreneurs themselves, who are now fostered to monitor the state of health of their business in perspective and to turn to experienced professionals should they deem it necessary to take corrective action or renegotiate certain debt positions.