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ITALY'S NEW RESTRUCTURING LAW: IMPLEMENTING THE EU DIRECTIVE N. 1023/2019

Niccolò Usai

University of Florence - Department of Law

Ph.D. Candidate

Research Fellow

LL.M. - University of Berkeley

Email: niccolo.usai@unifi.it

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The new Italian Insolvency Code «Codice della crisi d'impresa e dell'insolvenza» (CCI)

➤ The timeline



- Three main restructuring procedures envisaged by the CCI

Concordato Preventivo

- *Judicial composition with creditors*

Accordi di ristrutturazione dei debiti

- *Debt restructuring agreement*

Accordi di ristrutturazione dei debiti ad efficacia estesa

- *Debt restructuring agreement binding on dissenting creditors*

➤ Key features of the main Italian restructuring procedures

Concordato Preventivo

- temporary stay upon request by the debtor
- new financing priority
- termination of executory contracts, upon request by the debtor and authorization by the court;
- intra- and cross-class cram-down;
- stay on recapitalization obligations

Accordi di ristrutturazione dei debiti

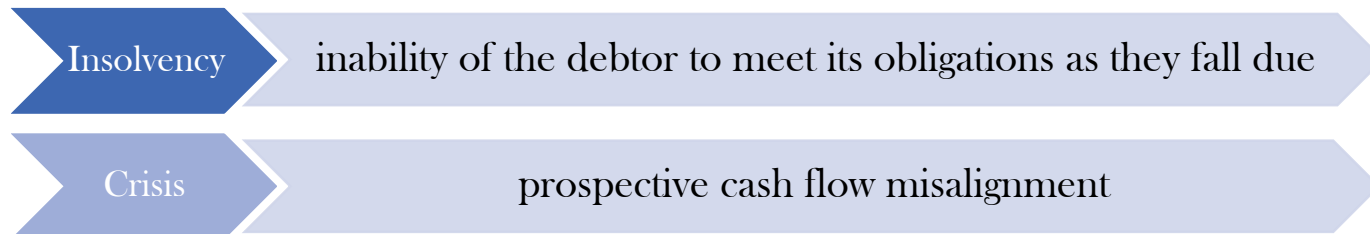
- temporary stay (both during negotiations and confirmation procedure) upon request by the debtor
- new financing priority
- stay on recapitalization obligations

Accordi di ristrutturazione dei debiti ad efficacia estesa

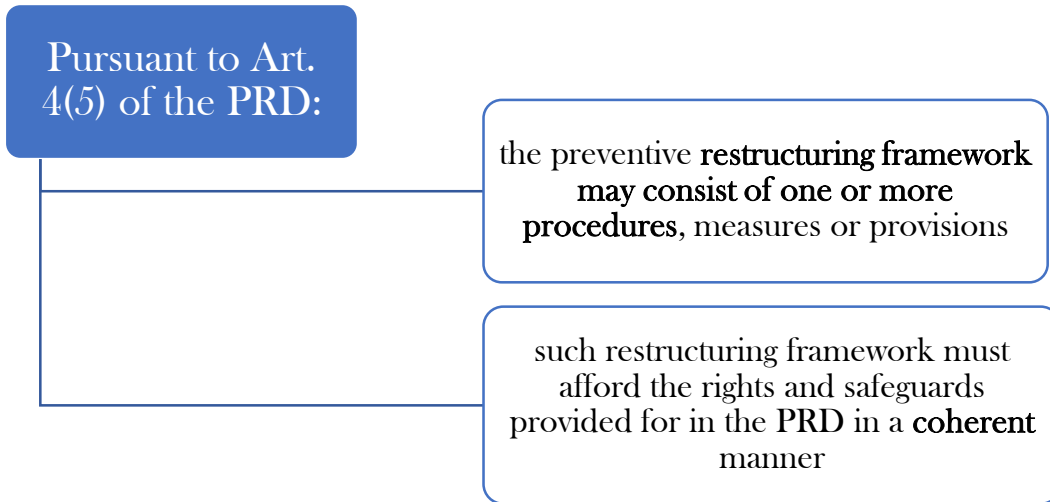
- temporary stay (both during negotiations and confirmation procedure) upon request by the debtor;
- new financing priority
- intra-class cram down (no cross-class cram-down)
- stay on recapitalization obligations

➤ Eligibility criteria and the three main Italian restructuring procedures

- ❖ The judicial composition with creditors (*concordato preventivo*) and the two types of debt restructuring agreement (binding and non-binding on dissenting creditors) are available to debtors that are either in ‘crisis’ or insolvent
- ❖ Art. 2 of the CCI describes such situations as follow

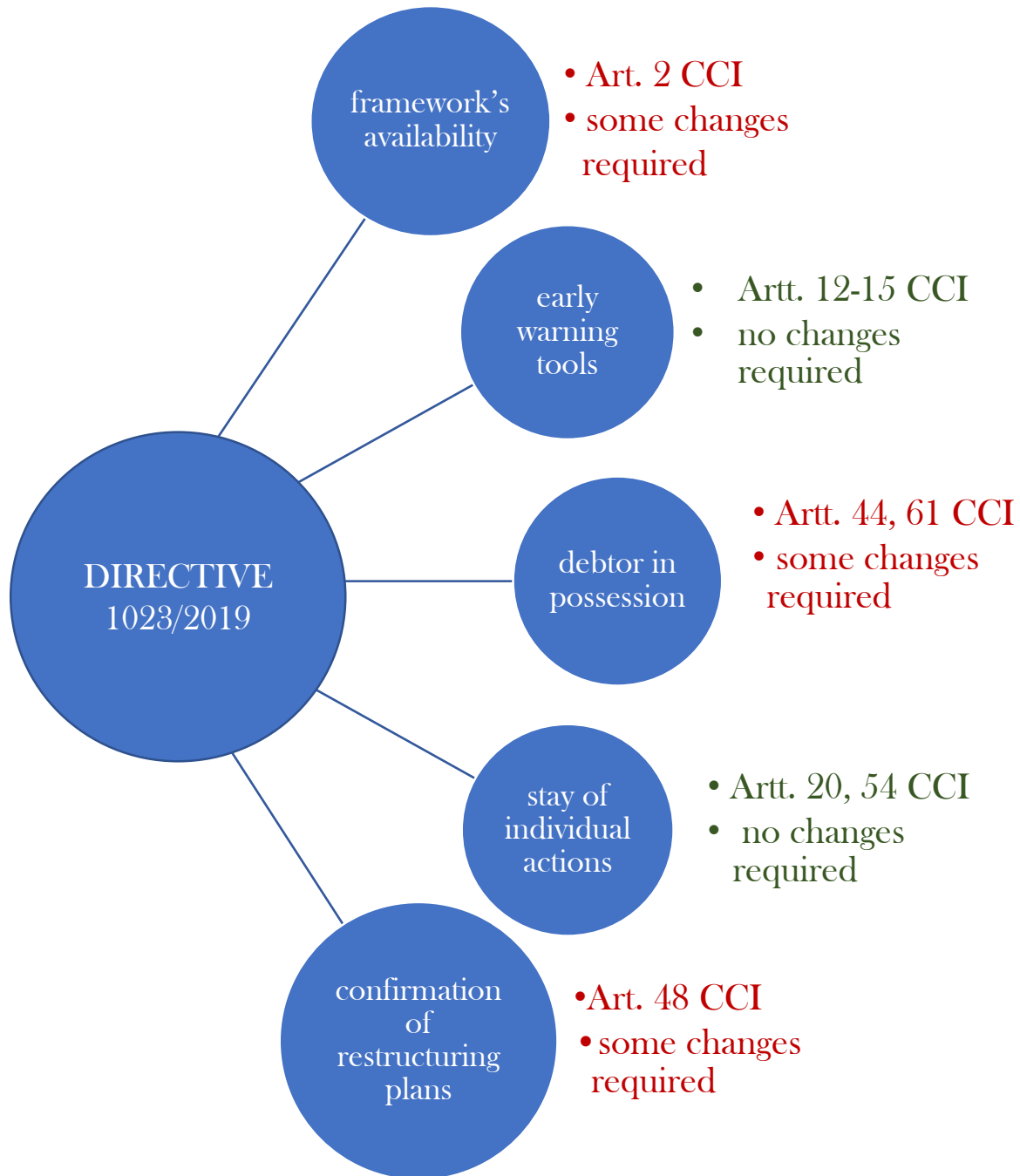


➤ Choice about how to transpose the PRD's provisions



- ❖ The judicial composition with creditors procedure (*concordato preventivo*) seems to be the natural candidate to transpose the PRD provisions in the Italian jurisdiction and, at the same time, maintain a coherent system

➤ The Preventive Restructuring Directive and the new Italian Insolvency Code



➤ Some foreseeable amendments to the Italian restructuring law

❖ Availability of the preventive restructuring framework

Art. 1(1)(a) of the PRD

«This Directive lays down rules on [...] preventive restructuring frameworks available for debtors in financial difficulties when there is a likelihood of insolvency [...]»

Some debtors are exempted under Art. 1(2)

(e.g. no credit institutions, insurance undertakings, etc.)

Art. 1(1) of the CCI

excludes, due to historical (and outdated) reasons, agricultural entrepreneurs from the scope of the major restructuring procedures

need to make available to such category a restructuring framework that is compliant with the PRD

➤ Some foreseeable amendments to the Italian restructuring law

❖ Debtor in possession and the role of the IP

Art. 5(3) of the PRD

«Member States shall provide for the appointment of a practitioner in the field of restructuring, **to assist the debtor and creditors** in negotiating and drafting the plan, at least in the following cases [..]»

Art. 92 of the CCI

always assigns to the IP an **oversight** role on behalf of the court and requires to provide an independent assessment on the proposal(s) to creditors

The role of the insolvency practitioner, as envisaged by the PRD, is not fully in line with the role of the IP in the Italian Insolvency Code

➤ Some foreseeable amendments to the Italian restructuring law

- ❖ Majorities for the adoption of the restructuring plan: 75% limit in each class

Art. 9(6) of the PRD

«Member States shall lay down the majorities required for the adoption of a restructuring plan . Those **majorities shall not be higher than 75%** of the amount of claims or interests in each class or, where applicable, of the number of affected parties in each class»

Art. 109(1) of the CCI

if one single creditor holds a claim representing the majority by value of all the claims included in a certain class, it is required both a majority by value and by number of the creditors of such class

The rule set by Art. 109(1) CCI, without adjustments, might have the effect to set the approval threshold higher than 75% by value

➤ Some foreseeable amendments to the Italian restructuring law

❖ Confirmation of the restructuring plan

Art. 10(3) of the PRD

«Member States shall ensure that judicial or administrative authorities are able to **refuse to confirm a restructuring plan where that plan would not have a reasonable prospect of preventing the insolvency of the debtor or ensuring the viability of the business**»

Art. 48(3) of the CCI

requires the judge to positively verify the economic feasibility of the restructuring plan

Conditions for confirmation set forth by Art. 48, par. 3, CCI appear to be too vague and wider in scope than in the PRD

➤ Some foreseeable amendments to the Italian restructuring law

❖ Judicial involvement during the restructuring process

Recital 29 of the PRD

«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**»

Art. 48(3) of the CCI

requires the judge to positively verify the economic feasibility of the restructuring plan

need to reconsider and reduce the judicial involvement during the restructuring process

➤ Some foreseeable amendments to the Italian restructuring law

❖ Best interests of creditors test

Art. 10(2)(d) of the PRD

«[...] where there are dissenting creditors, the restructuring plan satisfies the best-interest-of-creditors test»

Art. 112 of the CCI

allows only dissenting creditors included in a dissenting class or, when no class are formed, holding at least 20% by amount of voting creditors to object to confirmation invoking the BIOCT

need for the Italian legislator to extend the availability of the best interest of creditors test to all dissenting creditors

➤ Some foreseeable amendments to the Italian restructuring law

❖ Choice between APR and RPR

Art. 11(1)(c)-(d) of the PRD

Member States can choose between two different distribution regimes by applying the Relative Priority Rule or the Absolute Priority Rule

Art. 85(3) of the CCI

does not provide a clear rule in this regard and, often, the decision is taken by the judicial authority on a case-by-case basis

need for the Italian legislator to take a position and to amend the CCI