Pratt's Journal of Bankruptcy Law

LEXISNEXIS® A.S. PRATT®

NOVEMBER-DECEMBER 2022

LexisNexis

Pratt's Journal of Bankruptcy Law

VOLUME 18 NUMBER 8 November-December 2022

LexisNexis®

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please call:

Ryan D. Kearns, J.D., at 513.257.9021
Email: .... ryan.kearns@lexisnexis.com
Outside the United States and Canada, please call . . . . (973) 820-2000

For assistance with replacement pages, shipments, billing or other customer service matters, please call:

Customer Services Department at . . . . (800) 833-9844
Outside the United States and Canada, please call . . . . (518) 487-3385
Fax Number . . . . (800) 828-8341
Customer Service Website . . . . http://www.lexisnexis.com/custserv/

For information on other Matthew Bender publications, please call
Your account manager or . . . . (800) 223-1940
Outside the United States and Canada, please call . . . . (937) 247-0293

Library of Congress Card Number: 80-68780

ISBN: 978-0-7698-7846-1 (print)
ISBN: 978-0-7698-7988-8 (eBook)
ISSN: 1931-6992

Cite this publication as:

[author name], [*article title*], [vol. no.] PRATT'S JOURNAL OF BANKRUPTCY LAW [page number] ([year])

Example: Patrick E. Mears, *The Winds of Change Intensify over Europe: Recent European Union Actions Firmly Embrace the "Rescue and Recovery" Culture for Business Recovery*, 10 PRATT'S JOURNAL OF BANKRUPTCY LAW 349 (2022)

Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
www.lexisnexis.com

MATTHEW BENDER

(2022–Pub.4789)

Editor-in-Chief, Editor & Board of Editors

POSTMASTER: Send address changes to *Pratt's Journal of Bankruptcy Law*, LexisNexis Matthew Bender, 230 Park Ave. 7th Floor, New York NY 10169.

Italy's New (and Amended) Insolvency and Restructuring Code Enters into Force

By Carlo de Vito Piscicelli, Giuseppe Scassellati-Sforzolini, Francesco Iodice and Mattia Paglierini*

In this article, the authors examine Italy's new insolvency and restructuring code, which has recently entered into force.

Italy's new insolvency and restructuring code (the "Code") has entered into force, replacing large swaths of Italy's insolvency legislation dating back to 1942.

The Code was first enacted in January 2019 and was meant to enter into force 18 months later. However, this was postponed several times due to the COVID-19 pandemic.

Meanwhile, on June 20, 2019, the European Union adopted Directive 2019/1023 (the "EU Directive"), seeking to harmonize the restructuring and insolvency legislations of Member States, including Italy, which was required to implement it by July 17, 2022.

As a result, on June 15, 2022, the government adopted a decree (the "Amendment Decree") amending the Code in order to, among other things, give effect to the EU Directive, and set July 15 as the date of entry into force.

The Code, as amended by the Amendment Decree, entails a major overhaul of Italy's insolvency and restructuring framework, including by:

- Replacing the alert measures envisaged in the original version of the Code with an out-of-court composition tool (*composizione negoziata*);
- Substantially reforming the judicial composition with creditors (*concordato preventivo*);
- Introducing new restructuring tools (such as the court-ratified restructuring plans); and

* Carlo de Vito Piscicelli, a partner in the Milan and London offices of Cleary Gottlieb Steen & Hamilton LLP, focuses his practice on leveraged finance and restructuring matters. Giuseppe Scassellati-Sforzolini, a partner in the firm's Rome office, is active in public and private mergers and acquisitions, financial services regulation, European Union state aid law, enforcement and litigation matters. Francesco Iodice, a senior attorney in the firm's Rome office, focuses his practice on corporate and financial transactions. Mattia Paglierini, an associate in the firm's office in Rome, focuses his practice on corporate matters. The authors may be contacted at cpiscicelli@cgsh.com, gscassellati@cgsh.com, fiodice@cgsh.com and mpaglierini@cgsh.com, respectively.

- Reforming the role of shareholders in these proceedings.[1]

OUT-OF-COURT COMPOSITION (*COMPOSIZIONE NEGOZIATA*)

The original version of the Code envisaged a system that appeared to be inspired by the so-called "alert measures" (contemplated in other jurisdictions, such as France), imposing an active obligation upon the debtor's corporate bodies (not just the board of directors) to take the necessary actions to address a situation of distress at a time when insolvency could still be avoided.

These alert measures immediately raised significant concerns and criticism among practitioners such that the Amendment Decree replaced them with a voluntary, out-of-court composition (*composizione negoziata*)[2] facilitated by third party experts.

Debtor's Initiative

A debtor in distress[3] may request the appointment of a third party expert to the local chamber of commerce, if a recovery appears reasonably possible. The debtor's request must enclose, among other things, its proposed recovery plan,[4] its accounts for the latest 3 years, and a list of its creditors.

The main mission of such experts is to facilitate the negotiations between the debtor, creditors and other stakeholders with a view to addressing the above situation of distress and reaching a consensual solution within 6 months[5] of their appointment.

During the composition process, among other things, if so required by the debtor (through a statement to be published on the Companies' Register), the

---

[1] Other key features (substantially untouched by the Amendment Decree) are, among others:

- The introduction of mechanisms to facilitate corporate group restructurings;
- New rules on debtor-in-possession financings; and
- The introduction of a single judicial process to start any insolvency or restructuring proceeding.

[2] In fact, this out-of-court composition was first introduced in August 2021 by a separate decree (Law Decree No. 118 of August 24, 2021). The Amendment Decree has confirmed such measure by moving it into the Code *in lieu* of the alert measures.

[3] The law refers to "a situation of economic or financial imbalance which is likely to result in a situation of distress or insolvency."

[4] To this end, debtors will be able to use an online platform at the local chamber of commerce's website.

[5] This term may be extended by up to 6 months if "all" parties (i.e., arguably, the debtor and the creditors and other stakeholders involved in the negotiation) so request (and the expert agrees), or the debtor applies to the court for protective measures or for an authorization related to interim financing or other actions exceeding the ordinary course.

corporate rules relating to minimum statutory capital of companies (including the requirement that a company with negative capital be recapitalized or liquidated) are suspended.

Court Involvement

Although the composition is an out-of-court process, in certain cases, and upon request of the debtor, a court may also be involved (primarily when the debtor seeks to take steps that would affect the rights of third parties). More specifically:

- The debtor may apply to the court for the adoption of protective measures (*i.e.*, a moratorium) if appropriate to enable a successful outcome of the negotiations. The moratorium is effective from the date on which the request is published on the Companies' Register and must be later confirmed by the court. Its effects may last between 30 and 120 days, but may be further extended, reduced, revised or even revoked by the Court depending on how the composition process unfolds; and
- Pending the composition, the debtor remains entirely in control of its business and assets, but is required to manage them so as to avoid any harm to the economic/financial sustainability of the business. However, the debtor may seek court authorization to borrow super-priority interim financings or dispose of its business free and clear of existing debts.[6] This authorization ensures that, among other things, the relevant transaction cannot be reversed even if the debtor is subsequently placed into judicial liquidation (or extraordinary administration) or applies for any other restructuring tool envisaged under the Code.

Pending the moratorium, creditors may not take enforcement actions or obtain judgment or other involuntary liens. Payment of existing debts, however, is not restricted, nor, in principle, the granting of liens to secure new (or, possibly, existing) financings. Further, while the moratorium is in effect, judicial liquidation proceedings may not be initiated by creditors.

---

[6] In any event, the debtor must inform the expert of any action exceeding the ordinary course or payment not consistent with the negotiations or the recovery perspectives. Should the expert disagree with the proposed action, it must so inform the debtor (and its corporate supervisory body). If nevertheless the debtor takes such action, the expert may (or shall, if the action is prejudicial to the creditors) publish its disagreement with the Companies' Register. Further, if a moratorium is pending, the expert must inform the court, which may then decide to revise or revoke such protective measure.

Mandatory Reporting

The Code requires the debtor, certain creditors and other entities to take an active role in reporting a situation that may justify the debtor's recourse to the out-of-court composition.

In particular:

- The debtor's supervisory body (typically, the board of statutory auditors (*collegio sindacale*)) must report to the management body that the debtor is in a situation of imbalance or distress. The latter must promptly address such report by indicating which actions it is proposing to take; and
- Certain public creditors (such as the tax administration and the social security organizations) must inform the debtor when their exposure to it has exceeded certain thresholds.

Outcome of the Composition

At the end of the composition process, the expert must issue a report on the negotiations and their outcome.

The composition process may end with:

- An agreement with one or more creditors, producing certain beneficial effects by operation of law;[7]
- A standstill agreement; or
- If neither of the above agreements can be reached, the debtor may:
    - Prepare a certified recovery plan (*piano di risanamento attestato*);
    - Apply for a court-ratified restructuring agreement (*accordo di ristrutturazione*);[8]
    - Apply to the court for a simplified judicial composition (*concor-*

[7] Specifically: a reduction in the interest accruing on tax claims to the minimum statutory rate (provided that the expert's final report states that the agreement can ensure the business continuity for at least 2 years); or, if the agreement is also signed by the expert, the actions and transactions envisaged under such agreement cannot be subject to a claw-back action in case of subsequent admission of the debtor to a judicial liquidation nor give rise to criminal liability in connection with certain bankruptcy crimes.

[8] These agreements generally require the participation of consenting creditors holding at least 60% of the outstanding debt. Non-participating/dissenting creditors can be bound by the terms of the agreement only if they are placed in a class of creditors of the same kind and consenting creditors in that class hold at least 75% of the debt of that class. However, the Code now provides that if the expert's report states that the agreement has been reached as a result of the composition, such latter percentage is reduced to 60%.

dato semplificato), or

- ○ Apply to the court for admission to any other applicable restructuring or insolvency proceedings.

Simplified Judicial Composition with Creditors (*Concordato Semplificato*)

If the expert's final report states that the parties have negotiated in good faith but an agreement was not viable, within 60 days thereafter the debtor may submit a court petition for judicial composition (*concordato preventivo*) envisaging the sale of its assets (piecemeal or as a going concern).

Admission to such proceedings is only conditional on the court verifying that the applicable procedural rules have been complied with, and receipt of an opinion from the expert regarding the presumable outcome of the liquidation.

Unlike a standard *concordato*, the proposal does not need to be approved by the creditors. However, creditors may object to the court ratification of the *concordato*. The court shall ratify the *concordato* if:

- It is satisfied that the proposed plan of liquidation is feasible;
- It provides for payments to creditors in accordance with their legal priorities;
- It is no less favorable to creditors than the judicial liquidation alternative; and
- It grants some benefit to each creditor.

Following admission to the proceedings, the Court appoints a liquidator to liquidate the debtor's assets. The proposal may identify an acquirer for all or a portion of the assets. In that case, the liquidator is required to verify that there are no better "solutions" in the market.[9]

Incentives

With a view to incentivizing the access to the out-of-court composition, the Code grants certain benefits to the debtor resorting to such composition, mainly consisting in: the reduction of interest accruing on tax claims to the minimum statutory rate, the reduction of tax fines to the statutory minimum, and the ability to reschedule the payment of certain tax obligations.

---

[9] The law does not clarify whether an auction process needs to be conducted.

CHANGES TO THE JUDICIAL COMPOSITION WITH CREDITORS (*CONCORDATO PREVENTIVO*)

Judicial composition with creditors (*concordato preventivo*) can be used either to effect a piecemeal liquidation of the debtor's assets or to allow the continuation of the debtor's business as a going concern ("Business Continuity").[10]

As in the original version of the Code, the availability of *concordato preventivo* to effect a piecemeal liquidation has been curtailed. This will be permitted only if (i) the shareholders or other third parties contribute resources in an amount sufficient to increase the value of the debtor's assets by at least 10%, and (ii) unsecured creditors are set to recover at least 20% of their claims.

By contrast, the Code facilitates *concordato* plans envisaging Business Continuity. In such respect, the Amendment Decree has, among other things, modified the very definition of Business Continuity to include any plan under which creditors would be satisfied, at least in part, from the value of the going concern.[11]

Rescheduling of Secured Creditors

Prior to the Code, a Business Continuity *concordato* could provide for a rescheduling of the claims of secured creditors for up to 1 year (from the date of the court ratification of the *concordato*), in which case these creditors were not entitled to cast their vote on the plan, provided they were paid in full. However, it used to be debated whether a more extensive rescheduling of the claims of secured creditors was permitted so long as the plan was submitted to their vote (and, if so, which amount of their claim should carry a vote).

In this respect, the revised version of the Code confirms that the claims of secured creditors may be rescheduled without a specific time limit,[12] except in the case of employees (whose claims cannot be rescheduled for longer than 6 months).

However, unless the plan provides that they are paid off in cash within 180 days[13] of the court ratification of the *concordato*, secured creditors are entitled to vote on the plan.

---

[10] Whether directly by the debtor entity or indirectly by another entity to which the debtor's business has been sold, contributed or even leased pending the proceedings or pursuant to the *concordato* plan.

[11] By contrast, the Code no longer requires that at least 50% of the debtor's employees will continue to be employed in the business for a certain period after the court ratification of the plan.

[12] The original version of the Code provided that the rescheduling could not exceed 2 years.

[13] 30 days in case of employee claims.

Cross-Class Cram-Down

Before the Code was adopted, a *concordato* required the favorable vote of the majority (by value) of creditors and, in addition, in case of multiple classes, the majority (by value) of creditors in the majority of such classes. If the required majorities were met, the court would then ratify the *concordato* unless creditors objected to it, in which case the court could cram-down such dissenting creditors if it were satisfied that they were treated no worse than in the practical alternative (most often, a bankruptcy liquidation).

The Code has overhauled the approval mechanism for Business Continuity *concordato* proceedings. As a default rule, a *concordato* must still be approved by the majority (by value) of creditors admitted to vote,[14] but it also requires that all classes approve it.[15]

However, where there is one or more dissenting classes, the court may nonetheless ratify the *concordato* if the following conditions are met (so-called "cross-class cram-down"):

- The "relative priority rule" (below) is complied with; and
- The proposal is approved by the majority of classes, provided that (i) at least one class of secured creditors has approved it, or (ii), absent approval by any such class, a class of creditors which, based on the ordinary ranking of claims, would be satisfied, at least in part, with the restructuring proceeds in excess of the liquidation value (based on a valuation of the debtor as a going concern) approves the *concordato*.

In addition, in case an individual creditor objects to the ratification on grounds of convenience, the court may cram-down such creditor if is treated no worse than in case of a judicial liquidation.

Absolute Versus Relative Priority Rule

The EU Directive granted Member States the option to adopt either an "absolute priority rule" or a "relative priority rule."

Except with respect to claims of employees,[16] Italy has opted for the latter, in the following form:

---

[14] If a single creditor holds the majority of claims, then the Code also requires the favorable vote of the majority of voting creditors (regardless of the value of their claims).

[15] A class is deemed to have approved the *concordato* if the majority (by value) of creditors in that class voted in favor or, alternatively, 2/3 (by value) of creditors who actually voted cast a favorable vote.

[16] In respect of whom the absolute priority applies and whose claims must be satisfied with priority over junior creditors from both the liquidation value of their collateral and any potential excess over it.

- The liquidation value must be distributed to creditors in accordance with their priority (i.e., junior creditors can be satisfied only to the extent that senior creditors have been satisfied in full); whereas
- Any excess (i.e., the value of the restructured business in excess of the liquidation value) may be distributed to unsecured creditors as well, provided however that the treatment of creditors in a dissenting class as a whole (i) is at as favorable as that of creditors in equally ranking classes, and (ii) more favorable than that of more junior classes.

COURT-RATIFIED RESTRUCTURING PLANS

The Code also introduces a new restructuring tool, which can be described as a cross between existing court-ratified restructuring agreements (*accordi di ristrutturazione omologati*) and judicial composition with creditors (*concordato preventivo*).

These new proceedings have been labelled court-ratified restructuring plans (*piani di ristrutturazione soggetti a omologazione*) and, in essence,[17] enable the debtor to propose a plan that is unfettered by any priority rule *provided that* a majority of creditors in each class consent.[18]

If such majorities are not met, the Code permits the debtor to convert the proceedings to a *concordato* and thereby seek the court to ratify it pursuant to the mentioned cross-class cram-down principles.

ROLE OF SHAREHOLDERS

Before the Code went into effect, shareholders were not recognized as a potential class of claims in restructuring proceedings and, therefore, could not be called to vote on a plan. To the extent shareholder action or consent would have been required to implement a plan of *concordato* under general corporate law,[19] however, the court had the power to dispense of such action.

The Code changed this approach. First, a *concordato* or restructuring agreement/plan may now contemplate the shareholders' vote and, if their rights

[17] Pending these proceedings, the debtor remains in control of its business, including by maintain the power to take actions outside of the ordinary course of business. However, the debtor must inform the judicial commissioner of any action proposed to be taken outside of the ordinary course and, if the commissioner believes that such action is prejudicial to creditors, they must inform the court, which may revoke the proceedings.

[18] Although not expressly indicated, consenting or dissenting classes are determined pursuant to the same rules applicable to classes in a *concordato* (see footnote 15).

[19] *E.g.*, the issuance of new shares or a merger.

are proposed to be affected (or if the debtor is a listed entity), they must be placed in a specific class and admitted to vote. Each shareholder is granted voting rights within this class in proportion to its participation in the equity of the debtor.

Moreover, the relevant plan may also envisage that the shareholders share in[20] the restructuring value, provided that:

- All classes have approved the plan; or
- If one or more classes of creditors dissent, the treatment of such classes is at least as favorable as that of equally ranking classes and more favorable than that of more junior classes assuming, for this purpose, that such more junior classes were allocated the value proposed to be attributed to the shareholders' class (or, in case there are no classes more junior than the dissenting class, if the dissenting class is treated more favorably than that of the shareholders).

On the other hand, shareholders are deprived of any control on the process. Specifically, the Code clarifies that the decision to resort to a restructuring proceeding lies exclusively with the board and that the shareholders cannot revoke or replace the board once the relevant corporate resolution has been published on the Companies' Register, except for just cause and provided that such action is ratified by the court. In addition, the implementation of the plan lies exclusively with the board, even in case it entails actions that normally would require the shareholders' cooperation (e.g., resolving a share capital increase), subject to the rights of shareholders to vote on the plan as described above.

Further, if the implementation of the plan would trigger change of control or similar provisions in third party agreements, the Code prevents the relevant counterparty from exercising them.

---

[20] *E.g.*, by maintaining or being assigned an equity or other in the debtor that is of value.