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The protection of employees in the early warning tools and preventive restructuring frameworks: the EU Directive 2019/1023 ("Insolvency Directive") and the Italian Crisis and Insolvency Code (Legislative Decree no. 14/2019)

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Abstract

The contribution focuses on recent legislative developments at both European and Italian level concerning corporate crisis (UE Insolvency Directive and Italian Code of business crisis and insolvency). It explores the issues that most directly affect employees involved in negotiated crisis resolution procedures and in preventive restructuring frameworks. The paper highlights the provisions that ensure a more effective protection of employees' rights compared to those of other creditors. It also offers some critical reflections on the issue of information and consultation rights of workers' representatives, which have not achieved significant progress under the Italian Code of Business Crisis and Insolvency.

Keywords: Crisis; Insolvency; Preventive restructuring framework; Negotiated settlement of the crisis; Employee's protection.

1. The EU Insolvency Directive and its transposition into Italian Code of business crisis and insolvency.

In recent years, the EU legislator has intensified its efforts to harmonize the regulation of corporate crisis resolution tools in the Member States. The objective is to promote the use of preventive restructuring procedures, which enable the early detection of financial distress, and thereby support business continuity and preservation of jobs. These principles were first

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expressed by the EU Commission in its Communication to the EU Parliament, the Council and the EU Economic and Social Committee COM (2012) 742, entitled "a new European approach to business failure and insolvency"[1], and reiterated in its Recommendation 2014/135/EU "on a new European approach to business failure and insolvency"[2]. On 22 November 2016 the Commission presented the proposal for a Directive "on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU" (COM (2016) 723).

In turn, since the early 2000s, the Member States have introduced reforms to the regulation of insolvency procedures, that have progressively overturned the traditional liquidation-oriented approach. Negotiated solutions to corporate crisis have gained a central role, while liquidation procedures have been relegated to an extrema ratio, to be adopted only when restructuring is no longer feasible.[3]

Recent legislative reforms enacted by the Italian legislator in the field of business crisis and insolvency have also shared the progressive overcoming of the traditional liquidation-focused model and have shown an unprecedented consideration for employment relationships.[4] Beginning with Law No. 80/2005 and Legislative Decree No. 5/2006, an increasing attention has been paid to the preservation of the positive components of the company (productive assets and employment levels). This approach has found a more systematic expression in the Crisis and Insolvency Code (Legislative Decree No. 14/2019, hereinafter CCI). In this Code the preservation of the business is the central element around which the entire new system revolves.[5] The belief is that only the early detection of the business crisis enables its effective management before it degenerates into a state of insolvency. The aim of anticipating the detection of the crisis has been regarded as the most innovative choice of the reform.[6]

This new orientation has also led to the abandonment of the previous legal framework, under which the Bankruptcy Law (Royal Decree No. 267/1942) did not devote even a single

[1] Eidenmueller H., van Zwieten K., *Restructuring the european business enterprise: the EU Commission Recommendation on a new approach to business failure and insolvency*, 18 September 2015, http://ssrn.com/abstract_id=2662213; Pacchi S., *La Raccomandazione della Commissione UE su un nuovo approccio all'insolvenza anche alla luce di una prima lettura del Regolamento UE 848/2015*, in *Giustizia civile*, 2015, 537. For an overview of the initiatives undertaken by the EU Commission in the field of insolvency law, *see* Minervini V., *Dalla legge fallimentare alla Direttiva* Insolvency. *Il diritto della crisi come strumento per la costruzione e il corretto funzionamento del mercato interno*, in *Giurisprudenza commerciale*, I, 2023, 499.

[2] Panzani L., *La proposta di direttiva della Commissione UE*: early worning, *ristrutturazione e seconda* chance, in *Il Fallimento*, 2017, 129; Stanghellini L., *La proposta di Direttiva UE in materia di insolvenza*, in *Il Fallimento*, 2017, 873.

[3] Soldati N., *La Direttiva (UE) 2019/1023 e l'evoluzione delle procedure concorsuali nell'ottica della continuità aziendale e dell'emersione tempestiva della crisi d'impresa*, in *Rivista del commercio internazionale*, 2020, 217; Wessels B., *Europe deserves a new approach to insolvency proceedings*, in *European Company Law*, 2007, 4, 6, 253, who highlights the transition "from a law of morality to a law of continuity".

[4] On this point *see* Aprile F., *Osservazioni chiaroscurali sui risvolti giuslavoristici della procedura di composizione negoziata*, in *Diritto della crisi*, 3 November 2021; Patti A., *Tutela dei diritti dei lavoratori, salvaguardia dei lavoratori e CCII*, in *Il Fallimento*, 2022, 1337.

[5] Sanzo S., *I principi generali e le disposizioni di immediata attuazione*, in Sanzo S., Burroni D. (eds.), *Il nuovo Codice della crisi di impresa e dell'insolvenza*, Zanichelli, Bologna, 2019, 3.

[6] De Acutis M., *Il Codice della crisi d'impresa e dell'insolvenza (d. legisl. 12 gennaio 2019, n. 14)*, in *Studium Iuris*, 2019, 842.

provision to the employment agreement. The particular condition of employees in the event of their employer's insolvency has become increasingly evident. Employees are not only creditors of claims, like other creditors, but also hold the further and overriding interest in preserving their jobs.

The EU legislator wanted to reinforce the culture of prevention and business recovery - or, if this is not feasible, to facilitate a fresh start through new entrepreneurial initiatives - by adopting a more effective tools than the previous soft law acts. It thus approved the Directive (EU) 2019/1023 of 20 June 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 (Directive on restructuring and insolvency)". This is the first EU Directive adopted in the field of insolvency law.

The *favor lavoratoris* that characterizes the Directive[7] already emerges from its initial recitals. The objective of the Directive "is to contribute to the proper functioning of the internal market and remove obstacles to the exercise of fundamental freedoms, such as the free movement of capital and freedom of establishment, which result from differences between national laws and procedures concerning preventive restructuring, insolvency, discharge of debt, and disqualifications" (recital 1). The same recital reads that, "without affecting workers' fundamental rights and freedoms", the European legislator aims to ensure that: "viable enterprises and entrepreneurs that are in financial difficulties have access to effective national preventive restructuring frameworks which enable them to continue operating; honest insolvent or over-indebted entrepreneurs can benefit from a full discharge of debt after a reasonable period of time, thereby allowing them a second chance"[8].

The Directive repeatedly stresses the need to preserve jobs by promoting the early restructuring of businesses in financial distress, in order to prevent insolvency and avoid liquidation. The aim is to provide entrepreneurs with the necessary tools to preserve business operations where possible, thereby avoiding the dismantling of productive assets, the destruction of value and the loss of employment (recitals 2–4, 8, 16 and 49).

Workers are included among the "affected parties", alongside other "creditors" (Art. 2 (1) no. 2).

The Directive provides for the involvement of employees and their trade union representatives in crisis situations. It repeatedly affirms the need to ensure that workers' representatives are adequately and properly informed and consulted during restructuring

[7] For this opinion *see* Vella P., *I quadri di ristrutturazione preventiva nella Direttiva UE 2019/1023 e nel diritto nazionale*, in *Il Fallimento*, 2020, 1033. *See* also Pacchi S., *La ristrutturazione dell'impresa come strumento per la continuità nella direttiva del Parlamento europeo e del Consiglio 2019/1023*, in *Il diritto fallimentare e delle società commerciali*, 2019, 1259; Ambrosini S., *Concordato preventivo e soggetti protetti nel Codice della crisi dopo la direttiva* insolvency*: i creditori e i lavoratori*, in *Ristrutturazioni Aziendali*, 1 July 2022; Renzi S., Vallauri M.L., *Crisi dell'impresa e tutela del lavoro nel diritto dell'Unione europea*, in Alvino I., Imberti L., Romei R. (eds.), *La gestione dei rapporti di lavoro nelle crisi di impresa*, Giuffrè, Milan, 2023, 57.

[8] On the need to distinguish between viable and non-viable enterprises and to reserve preventive restructuring frameworks exclusively for the former, *see* Tsioli L., *Viability assessment in corporate debt restructuring: Optimising the filtration effect of the European directive on restructuring and insolvency*, in *Norton Journal of Bankruptcy Law and Practice*, 30, 5, 2021, 397 ff.; Amatucci C., *Sul recepimento italiano della Direttiva* Insolvency *e sulla pretermissione del requisito di "impresa sana"*, in *Giurisprudenza commerciale*, I, 2023, 47.

processes (recitals 10, 23, and 60–62). In this respect, the procedures for trade union information and consultation represent an important safeguard for the protection of workers' rights.[9]

Insolvency Directive was transposed into Italian law by Legislative Decree No. 83/2022[10]. Actually, this Decree merely incorporated - albeit with some adjustments - into the CCI the provisions on negotiated settlements for the solution of the business crises already introduced by Decree-Law No. 118/2021, converted with amendments into Law No. 147/2021.

The aim of this essay is to examine the provisions that have a more direct impact on employees, contained in Title I ("General provisions") and Title II ("Preventive restructuring frameworks") of the Directive,[11] and to verify whether and how these provisions have been transposed into CCI.

In the Directive the issue of "early warning" (Article 3) precedes that of "preventive restructuring frameworks" (Articles 4–19). The CCI, by contrast, distinguishes between the "negotiated settlement of the crisis" (Articles 12–25-undecies) and the "crisis and in-solvency regulation tools" (Articles 56–120-quater), specifying that the latter "may be preceded" by the former (Article 2, letter m-bis). Since the "negotiated settlement of the crisis" constitutes a "preventive restructuring framework", its analysis will follow that of "early warning" and will precede that of the other "crisis and insolvency regulation tools".

2. Early warning and access to information.

Article 3(1) Dir. ("Early warning and access to information") requires Member States to "ensure that 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".

These tools should encourage debtors to seek early access to available frameworks (i.e., procedures) and techniques for preventive restructuring, thereby increasing the likelihood of a successful resolution of the crisis. The Directive, however, merely imposes a general obligation to introduce early warning mechanisms, without establishing detailed or

[9] Corrado A., Corrado D., *Crisi d'impresa e rapporti di lavoro*, Giuffrè, Milan, 2023; Patti A., *La tutela dall'insolvenza del datore di lavoro e le garanzie dei crediti dei lavoratori*, in Cosio R., Curcuruto F., Di Cerbo F., Mammone G. (eds), *Il diritto del lavoro nell'Unione europea*, Giuffrè, Milan, 2023, 897 ff.; Gioia G., *La tutela legislativa eurounitaria del lavoratore nella crisi d'impresa*, in De Santis A.D., Patti A. (eds.), *Lavoro e crisi d'impresa*, Cacucci, Bari, 2023, 383 ff.

[10] On the transposition of the Directive into the Italian legal system, *see*, for a general overview, Speranzin M., Marotta F., *Early warning tools and preventive restructuring following the transposition of the EU Insolvency Directive in Italy*, in *Revista general de insolvencias & reestructuraciones*, 2022, 187; Stanghellini L., *The Pandemic as a Chance to Modernise Italian Insolvency and Restructuring Law*, in *European Business Organization Law Review*, 2023, 251; Pagano A.J., Spiotta M., *The Implementation and Transposition of the European Directive 2019/1023 in the Italian Legislative Context*, in *European Business Law Review*, 35, 1, 2024, 139; Imberti L., *Il rapporto di lavoro nel codice di disciplina dell'azienda in crisi*, in Amoroso G., Di Cerbo V., Maresca A. (eds), *Il lavoro privato*, Giuffrè, Milan, 2022, 2719.

[11] Titles III ("Discharge of debt and disqualifications") and IV ("Measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt") of the Directive will therefore not be taken into consideration.

prescriptive requirements.[12]

Anyway, the Directive specifies that "early warning tools may include: (a) alert mechanisms when the debtor has not made certain types of payments; (b) advisory services pro-vided by public or private organizations; (c) incentives under national law for third parties with relevant information about the debtor, such as accountants, tax and social security authorities, to flag to the debtor a negative development" (Article 3(2)). With regard to the first of these three cases, CCI identifies specific indicators, that suggest the existence of financial distress and should therefore be monitored. The first indicator is the existence of debts for payroll overdue by at least 30 days amounting to more than half of the total monthly payroll amount (Article 3(4)(a)).

In the Italian legal system, the principal internal early warning tool is undoubtedly represented by the duty to establish and maintain an organizational, administrative and accounting structure, that is adequate also for the timely detection of a business crisis.[13] Such a duty had already been introduced for joint-stock companies under Articles 2381(3 and 5) and 2403(1) of the Civil Code (hereinafter CC), as amended by Legislative Decree No. 6/2003. It was later generalized by Art. 375(2) CCI, which added a second paragraph to Article 2086 CC. This paragraph provides that "the entrepreneur, whether operating in corporate or collective form, has the duty to establish an organizational, ad-ministrative 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." Article 3(1) CCI extended these principles to individual entrepreneur: he "must take appropriate measures to detect the state of crisis in a timely manner and take the necessary steps to address it without delay". Therefore, whether operating individually or collectively, the entrepreneur must establish appropriate governance structures, continuously monitor the performance of the business, identify early warning signs of distress and take prompt corrective action.

A second internal early warning tool concerns corporate supervisory bodies. These are required to monitor the adequacy of the organizational, administrative and accounting structures and their actual functioning and to promptly detect any signs of crisis or loss of business continuity.

Article 25-octies CCI provides that the corporate supervisory body shall report in writing

[12] Panzani L., *Il* preventive restructuring framework *nella direttiva 2019/1023 del 20 giugno 2019 ed il codice della crisi. Assonanze e dissonanze*, in *Crisi d'impresa e insolvenza*, 14 October 2019; Perrino M., *Disciplina italiana dell'allerta e Direttiva* Insolvency*: un'agenda per il legislatore*, in *Diritto della crisi*, 31 August 2021; Panzani L., *La composizione negoziata alla luce della direttiva* Insolvency, in *Ristrutturazioni Aziendali*, 31 January 2022; Minervini V., *La nuova "composizione negoziata" alla luce della direttiva "insolvency". Linee evolutive (extracodicistiche) dell'ordinamento concorsuale italiano*, in *Il diritto fallimentare e delle società commerciali*, I, 2022, 251; Ambrosini S., *Il codice della crisi dopo il d. lgs. n. 83/2022: brevi appunti su nuovi istituti, nozione di crisi, gestione dell'impresa e concordato preventivo (con una notazione di fondo)*, in *Ristrutturazioni aziendali*, 17 July 2022.

[13] Leuzzi S., *Allerta e composizione negoziata nel sistema concorsuale ridisegnato dal D.L n. 118 del 2021*, in *Diritto della crisi*, 28 September 2021; Vella P., *Le finalità della composizione negoziata e la struttura del percorso, Confronto col CCII*, in *Il Fallimento*, 2021, 1489; Pacchi S., *L'allerta tra la reticenza dell'imprenditore e l'opportunismo del creditore. Dal codice della crisi alla composizione negoziata*, in *Il diritto fallimentare e delle società commerciali*, 2022, 501; Corrado A., Corrado D., nt. (9).

to the board of directors the existence of the conditions (crisis or insolvency) for submitting a request for the negotiated settlement of the crisis. The report must be reasoned, transmitted by means that ensure proof of receipt and must specify an appropriate deadline - no longer than thirty days - within which the board of directors is required to report on the initiatives undertaken. Timely notification to the board of directors mitigates or excludes the liability of the supervisory body, as governed by Article 2407 CC.

In the CCI external early warning mechanism relates to notifications made by qualified public creditors (Article 25-nonies) and corresponds to the third prevision identified in Article 3(2) Dir. In particular, INPS (National Institute for Social Security) and INAIL (National Institute for Insurance against Accidents at Work and Occupational Diseases) are required to notify the entrepreneur - and, where existing, the statutory auditor - of any delay exceeding 90 days in the payment of social security contributions, where the outstanding amount exceeds a specified threshold (5,000.00 or 15,000.00 euros).

These notifications also include an invitation to submit a request for the negotiated settlement of the crisis, provided that the prerequisites exist.

The Italian legislature did not transpose the following provisions of the Dir.: Member States "shall ensure that debtors and employees' representatives have access to relevant and up-to-date information about the availability of early warning tools as well as of the procedures and measures concerning restructuring and discharge of debt" (Article 3(3)), and "may provide support to employees' representatives for the assessment of the economic situation of the debtor" (Article 3(5)). This omission has led to the opinion that the overall system outlined in Title II of the CCII is not fully compliant with the early warning framework of the Directive.[14] This well-reasoned view identifies an undeniable discrepancy between domestic legislation and the Directive concerning the participation of workers' representatives in corporate crisis management.

3. Negotiated settlement of the crisis.

The negotiated settlement of the crisis is a voluntary and out of court tool for the prevention or the early management of business crises, introduced by Law Decree no. 118/2021. It offers the debtor the opportunity to engage the assistance of an expert, who "is an independent third-party with respect to all parties and acts in a professional, confidential, impartial and independent manner" (Article 16(2) CCI).

A commercial and agricultural entrepreneur, who is in a state of crisis, insolvency or 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 (Article 12(1) CCI). The petition

[14] Vella P., *ibidem*; Vella P., *L'impatto della direttiva UE 2019/1023 sull'ordinamento concorsuale interno*, in *Il Fallimento*, 2020, 747; Pacchi S., *Le misure urgenti in materia di crisi d'impresa e di risanamento aziendale (ovvero: i cambi di cultura sono sempre difficili)*, in *Ristrutturazioni aziendali*, 9 August 2021; Cordella C., *Crisi d'impresa e sindacato*, Cacucci, Bari, 2024.

for appointment must be accompanied by a draft restructuring plan and the certificate of social security debts (Article 17(3)(b and g) CCI).

If the expert considers that there are concrete prospects of recovery, the negotiated settlement is the place within which the most appropriate restructuring solution may be sought to resolve the specific situation of distress affecting the business.[15] Although it does not constitute an insolvency procedure,[16] the negotiated settlement of the crisis may represent a step within a broader process aimed at reaching an agreement with at least some of the creditors.[17]

Concern for the preservation of jobs is already evident in the description of the expert's role. The expert fosters negotiations between the entrepreneur, the creditors and any other interested parties, in order to find a solution to overcome the conditions of cri-sis or insolvency, also by means of the transfer of the business or branches thereof and preserving, to the extent possible, jobs (Article 12(2) CCI.). This provision reiterates the rule applicable to the composition with creditors with business continuity (*concordato preventivo in continuità*): business continuity safeguards the interests of creditors and preserves, to the extent possible, jobs (Article 84(2) CCI).

During the negotiated settlement of the crisis, the entrepreneur retains the ordinary and extraordinary management of the business (Article 21(1) CCI) and he is not subject to any prohibition on making payments (Article 18(3) CCI).

Article 17(5) CCI also provides that during the negotiations 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 parties are bound to cooperate with each other to redetermine the content of the contract or to adapt performance to the changed conditions. Law Decree no. 118/2021 excluded the applicability of this provision to employment agreements.[18] This rule was not reintroduced by Legislative Decree no. 83/2022. The provision concerning renegotiation is therefore applicable also to employees, who, if they consider the continuation of the employment relationship to be their predominant interest, may redeterminee their working conditions downward. A similar

[15] Fabiani M., *Composizione negoziata della crisi: una "storia" di successo*?, in *Diritto della crisi*, 7 May 2025.
[16] In this regard, *see*, among others, Ambrosini S., *La nuova composizione negoziata della crisi: caratteri e presupposti*, in *Ristrutturazioni aziendali*, 23 August 2021; Ambrosini S., *La "miniriforma" del 2021: rinvio (parziale) del cci, composizione negoziata e concordato semplificato*, in *Il diritto fallimentare e delle società commerciali*, 2021, 901; Guidotti R., *La crisi d'impresa nell'era draghi: la composizione negoziata e il concordato semplificato*, in *Ristrutturazioni aziendali*, 23 August 2021; Fabiani M., Pagni I., *Introduzione alla composizione negoziata*, in *Il Fallimento*, 2021, 1477; Pagni I., Fabiani M., *La transizione dal codice della crisi alla composizione negoziata (e viceversa)*, in *Diritto della crisi*, 2 November 2021; Santangeli F., *Le finalità della composizione negoziata per le soluzioni della crisi d'impresa*, in *Diritto della crisi*, 4 January 2022; Bonfatti S., *Profili della composizione negoziata della crisi d'impresa - Natura giuridica, presupposti e valutazioni comparative*, in *Diritto della crisi*, 3 February 2022; D'Attorre G., *La concorsualità "liquida" nella composizione negoziata*, in *Il fallimento*, 2022, 301; Patti A., nt. (4); Patti A., *Le novità relative ai rapporti di lavoro*, in *Il fallimento*, 2025, 104; Pacchi S., nt. (13); Rossetti S., *Presupposti e condizioni per l'accesso alla composizione negoziata. Il valore perseguibile: il risanamento dell'impresa*, in *Diritto della crisi*, 3 April 2023.
[17] Panzani L., 2022, nt. (12).
[18] Article 10(2).

provision is also found in the composition with creditors.[19]

Particularly relevant for employees is the situation in which the restructuring of the enterprise occurs not directly - through the continuation of business operations by the debtor - but indirectly. Indeed, during the negotiated settlement of the crisis, the court, upon the debtor's request and having verified the usefulness of the transactions for ensuring business continuity and maximizing creditor satisfaction, may authorize the entrepreneur to transfer, in any form, the business or one or more of its branches without the effects referred to in Article 2560(2) CC. In this case Article 2112 CC remains unaffected (Article 22(1)(d) CCI). This enterprise transfer, which is also provided for the homologated restructuring plan (Article 64-bis CCI), is not subject to the provisions of Article 47(4-bis, 5 and 5-bis) of Law No. 428/1990, since the negotiated settlement of the crisis is not considered an insolvency procedure.[20]

Some provisions concerning the negotiated settlement of the crisis transpose the principles of the Directive.

According to Article 1(5)(a) Dir., Member States may provide that the "existing and future claims of existing or former workers" "are excluded from, or are not affected by, preventive restructuring frameworks referred to in point (a) of paragraph 1".

Article 6(1) Dir. reads that "Member States shall ensure that debtors can benefit from a stay of individual enforcement actions to support the negotiations of a restructuring plan in a preventive restructuring framework". However, this provision does not apply to workers' claims (Article 6(5). By way of derogation from this exclusion, Member States may apply the general rule to workers' claims only "if, and to the extent that, Member States ensure that the payment of such claims is guaranteed in preventive restructuring frameworks at a similar level of protection" (Article 6(5)).

According to the Directive, "a stay of individual enforcement actions in accordance with Article 6 shall suspend, for the duration of the stay, the opening, at the request of one or more creditors, of insolvency proceedings which could end in the liquidation of the debtor" (Article 7(2)).

The CCI has transposed these provisions. It has excluded workers' claims from the scope of both protective and precautionary measures in the context of the negotiated settlement of the crisis (Article 18(1)) and of the unified proceedings for access to the instruments for the regulation of the crisis and insolvency (Article 54(7)). In both cases, protective measures do not apply to workers' claims.

Pursuant to Article 18 CCI, the debtor may request, either in the petition for the appointment of the expert or in a separate petition, the adoption of protective measures. These measures may consist of a general or limited stay of individual enforcement actions on the entrepreneur's assets necessary for carrying out the activities and of a prohibition for creditors from acquiring pre-emption rights without an agreement with the entrepreneur.

[19] Article 84(3) CCI.

[20] Aprile F., nt. (4); Simoncini G.R., *Profili di diritto sindacale e del lavoro nella composizione negoziata della crisi*, in *Il lavoro nella giurisprudenza*, 2022, 353; Corrado A., Corrado D., nt. (9); Aniballi V., *La composizione negoziata della crisi: profili di diritto del lavoro*, in Alvino I., Imberti L., Romei R. (eds.), *La gestione dei rapporti di lavoro nelle crisi di impresa*, Giuffrè, Milan, 2023, 113.

Moreover, Article 18(4) CCI provides that the registration of the petition for protective measures in the Companies' Register automatically triggers a prohibition for the court to open judicial liquidation proceedings until the negotiated settlement is concluded or the protective measures are revoked.

In light of the above, employees may acquire pre-emption rights over the assets or the means by which the debtor carries out the business activity, and may initiate or continue enforcement and precautionary proceedings.

By virtue of their exclusion from the protective measures, employees also retain the right to resign.[21] The provisions addressed to creditors "against whom protective measures are effective" do not apply to them. According to these provisions, such creditors may not unilaterally refuse to perform pending contracts, cause their termination, accelerate their expiry or modify them to the detriment of the debtor solely on the grounds of non-payment of previous credits (Article 18(5)).

4. Preventive restructuring frameworks.

The entire Title II of the Directive (Articles 4–19) is devoted to "preventive restructuring frameworks". In this regard, the EU legislator provides that "Member States shall ensure that, where there is a likelihood of insolvency, debtors have access to a preventive restructuring framework that enables them to restructure, with a view to preventing insolvency and ensuring their viability, without prejudice to other solutions for avoiding insolvency, thereby protecting jobs and maintaining business activity" (Article 4(1)). Already Article 1(1)(a) identified, as the first and primary subject matter of the Directive, the "preventive restructuring frameworks available for debtors in financial difficulties when there is a likelihood of insolvency, with a view to preventing the insolvency and ensuring the viability of the debtor".

The EU legislator introduces the obligation for Member States to ensure the availability of preventive restructuring frameworks, but it did not define their structure nor did it provide procedural models. Each Member State is therefore free to design the restructuring procedures that best suit its own economic and legal system.[22]

The Directive, however, clarified that the preventive restructuring framework "may consist of one or more procedures, measures or provisions, some of which may take place out of court, without prejudice to any other restructuring frameworks under national law" (Article 4(5)). Between the options of transposing the Directive through a single instrument or through a plurality of instruments, the Italian legislator chose the latter approach.[23]

In Italy, the non-liquidation tools for the regulation of business crisis and insolvency, which may result from the negotiated settlement of the crisis, include the agreements implementing certified restructuring plans (*accordi in esecuzione di piani attestati di risanamento*:

[21] Aprile F., nt. (4).
[22] In this regard, *see* Panzani L., 2019, nt. (12); Pacchi S., nt. (7).
[23] On this point *see* Stanghellini L., *Il codice della crisi dopo il d. lgs. 83/2022: la tormentata attuazione della direttiva europea in materia di "quadri di ristrutturazione preventiva"*, in *Quaderni di Ristrutturazioni Aziendali*, 2, 2022.

Article 56 CCI), the debt restructuring agreements (*accordi di ristrutturazione dei debiti*: Articles 57–61 CCI), the moratorium agreement (*convenzione di moratoria*: Article 62 CCI); the homologated restructuring plan (*piano di ristrutturazione soggetto a omologazione*: Article 64-bis CCI), and the composition with creditors based on business continuity (*concordato preventivo in continuità*: Articles 84–120 CCI).

The failure of the negotiated settlement represents the sole and necessary path - provided that the debtor has conducted negotiations in good faith and fairness - to access the simplified composition with creditors for the liquidation of the debtor's assets (*concordato semplificato per la liquidazione del patrimonio*: Article 25-sexies CCI), which does not require a vote by creditors.

Access to one of these restructuring instruments does not entail any suspension of employment relationships - as is instead in judicial liquidation proceedings - nor does it, by itself, constitute a justified reason for dismissal by the employer. Therefore, the non-liquidation restructuring instruments do not affect the continuation of employment relationships, with the result that ordinary rules apply to both their suspension and termination. As regards the composition with creditors, the continuation of employment relationships is expressly provided for by Article 97(13) CCI.

The Directive dictates more specific rules regarding the content of the restructuring plan (Article 8(1)). It requires that the plan contains at least the following information: b) "the debtor's assets and liabilities at the time of submission of the restructuring plan, including a valuation of the assets, a description of the debtor's economic situation and the position of the workers, and an explanation of the causes and extent of the debtor's difficulties"; g) the terms of the restructuring plan, including, in particular: … (iii) arrangements regarding the information and consultation of employees' representatives in accordance with Union and national law; (iv) where applicable, the overall consequences regarding employment, such as dismissals, short-time work arrangements, or similar measures."

Among the restructuring plans that are binding on the parties only if they are confirmed by a judicial or administrative authority are those "which involve the loss of more than 25 % of the workforce, if such loss is permitted under national law" (art. 10(1)(c)).

The CCI contains further provisions that grant particular protection to employees' rights.

In the composition with creditors, the satisfaction of workers' claims is also extended to the value exceeding the liquidation value (Article 84(7) CCI).

In the composition with creditors based on business continuity, the Court may authorize, without the certification of a professional, the payment of wages due for the months preceding the petition for the appointment of the expert to the workers employed in the activity whose continuation is expected. This provision prevents the so-called crystallization of workers' claims and establishes a juris et de jure presumption of the essential nature of workers' activity "for the continuation of the business activity and functional to ensuring the best satisfaction of creditors" (Article 100(1) CCI).[24]

For the homologated restructuring plan, CCI provides that in any case claims supported by the privilege referred to in Article 2751-bis(no. 1) CC shall be satisfied in full within thirty

[24] *See* Simoncini G.R., nt. (20); Patti A., nt. (4).

days from the homologation" (Article 64-bis(1) CCI).

According to Article 18(1) Dir., "Member States shall ensure that, in the event of any subsequent insolvency of a debtor, transactions that are reasonable and immediately necessary for the negotiation of a restructuring plan are not declared void, voidable or unenforceable on the ground that such transactions are detrimental to the general body of creditors, unless other additional grounds laid down by national law are present". This provision includes among the protected transactions "the payment of workers' wages for work already carried out without prejudice to other protection provided in Union or national law" (Article 18(4)(c)). In this regard, the CCI has established that are not subject to clawback action the payments made by the debtor as consideration for work performed by his employees or other collaborators, including those not in a subordinate employment relationship (Article 166(3)(f)). The exemption from clawback action applies regardless of the inclusion of these payments in one of the crisis and insolvency regulation tools, unlike what is required for other creditors.

The Directive also establishes that "Member States may also provide that workers' claims are treated in a separate class of their own" (Article 9(4)).

It further provides that "Member States shall ensure that preventive restructuring frameworks have no impact on accrued occupational pension entitlements" (Article 1(6)). This provision has been transposed in the composition with creditors. Article 84(7) CCI requires that the proposal and the plan shall also ensure compliance with Article 2116(1) CC). According to this provision, mandatory social security and welfare benefits remain payable to the employee, even in cases where the employer has not duly fulfilled the obligation to pay the relevant contributions to the competent institutions, unless otherwise provided by law.

5. The rights to information and consultation of employees' representatives.

Within Title II of the Directive, which is dedicated to preventive restructuring frameworks, Article 13 is entirely devoted to "workers".

Its paragraph 1 provides that "Member States shall ensure that individual and collective workers' rights, under Union and national labour law, such as the following, are not affected by the preventive restructuring framework: (a) the right to collective bargaining and industrial action; (b) the right to information and consultation in accordance with Directive 2002/14/EC and Directive 2009/38/EC; (c) the rights guaranteed by Directives 98/59/EC, 2001/23/EC and 2008/94/EC". Letter (b) specifies that the right to information and consultation refers, in particular, to (i) information to employees' representatives about the recent and probable development of the undertaking's or the establishment's activities and economic situation, enabling them to communicate to the debtor concerns about the situation of the business and as regards the need to consider restructuring mechanisms; (ii) information to employees' representatives about any preventive re-structuring procedure which could have an impact on employment, such as on the ability of workers to recover their wages and any future payments, including occupational pensions; (iii) information to

and consultation of employees' representatives about restructuring plans before they are submitted for adoption (in accordance with Article 9), or for confirmation by a judicial or administrative authority (in accordance with Article 10).

The Article 13 adds that, "Where the restructuring plan includes measures leading to changes in the work organisation or in contractual relations with workers, those measures shall be approved by those workers, if national law or collective agreements provide for such approval in such cases" (Article 13(2)).

In order to transpose these provisions, CCI introduced a new procedure for trade union information and consultation (Article 4(3)).

This procedure must be observed only in absence of other procedures for information and consultation provided for by law or collective agreements referred to in Article 2(1)(g) Legislative Decree No. 25/2007.[25] According to some scholars, such procedures may also be provided by company collective agreements[26] and the consequent agreement could be classified as a proximity collective agreement (*contratto collettivo di prossimità*) pursuant to Article 8 Decree-Law No. 138/2011, converted into Law No. 148/2011.[27]

The procedure must be observed by any employer, who employs more than fifteen employees. The written communication must be addressed to the trade unions referred to in Article 47(1) Law No. 428/1990. The information must concern significant decisions taken during the negotiations of the negotiated settlement and the preparation of the plan for one of the instruments for the regulation of the business crisis and insolvency, which affect the employment relationships of a plurality of employees, even only with respect to work organization or the manners under which work is performed.

CCI establishes specific timing for carrying out the procedure[28] and a confidentiality obligation with respect to information designated as such by the employer or its representatives in the legitimate interest of the company. During the consultation carried out within the framework of the negotiated settlement, a brief report shall be drawn up solely for the purpose of determining the expert's compensation.

The reference to "a plurality of employees" suggests that, in order to obligate to activate this procedure, it is sufficient that the "relevant decisions" affect the employment relationships of two employees.

Such decisions may concern the amendment of certain clauses of the employment agreement, such as those relating to job classification, working time, transfer or posting.[29]

Scholars have criticized this procedure for several reasons,[30] including that it is not

[25] Scholars agree on the residual nature of this procedure. *See*, in particular, Aprile F., nt. (4); Simoncini G.R., nt. (20).
[26] Romani R., Calabrò G., *I rapporti di lavoro nel nuovo codice della crisi d'impresa*, in Sanzo S. (ed.), *Il codice della crisi dopo il d. lgs. 17 giugno 2022, n. 83*, Zanichelli, Bologna, 2022, 681.
[27] Aprile F., nt. (4); Simoncini G.R., nt. (20); Romani R., Calabrò G., *ibidem*; Renzi S., Vallauri M.L., nt. (7); Aniballi V., nt. (20); Corrado A., Corrado D., nt. (9).
[28] Trade unions may, within three days of receiving the informations, request a meeting with the entrepreneur. The resulting consultation must begin within five days of receipt of the request and, unless otherwise agreed by the parties, shall be deemed concluded ten days after its commencement.
[29] Aprile F., nt. (4); Simoncini G.R., nt. (20); Aniballi V., nt. (20).
[30] Aprile F., nt. (4); Aprile F., *Bella e incompiuta. La procedura di informazione (e di quasi-consultazione) sindacale ex art. 4, comma 3, del Codice della crisi di impresa e dell'insolvenza*, in *Lavoro Diritto Europa*, 2022, 3.

particularly incisive and effective.[31] This procedure would make the crisis resolution process more rigid, as it requires the expert to engage in an activity that is different from and additional to the conduct of negotiations with creditors.[32] The consultation phase would be too short to allow an agreement to be reached.[33] Since employees and trade union representatives are not considered among the number of creditors and other interested parties for the purposes of granting an increase in the expert's compensation (Article 25-ter(5)), it has been stated that this procedure is regarded as a less demanding activity.[34]

The generic provisions governing the procedure have instead been regarded as useful, as they allow the social dialogue to take place in the widest possible manner.[35]

Scholars agree that the infringement of the procedure constitutes an anti-union conduct pursuant to Article 28 of Law No. 300/1970.[36]

With regard to preventive restructuring frameworks, the Directive grants additional prerogatives to workers' representatives.

Article 4(8) reads that "Member States may also provide that preventive restructuring frameworks provided for under this Directive are available at the request of creditors and employees' representatives, subject to the agreement of the debtor. Member States may limit that requirement to obtain the debtor's agreement to cases where debtors are SMEs." According to Article 9(1), "Member States shall ensure that, irrespective of who applies for a preventive restructuring procedure in accordance with Article 4, debtors have the right to submit restructuring plans for adoption by the affected parties".

The Italian legislator has not made use of the possibility to allow parties other than the debtor to initiate a preventive restructuring framework, and it has only granted creditors the possibility of requesting the opening of judicial liquidation (Article 37 CCI), or of submitting competing proposals in composition with creditors (Article 90 CCI).

6. Final remarks.

The new institution of negotiated settlement of the crisis has been considered fully compliant with the Directive.[37] More generally, it has been stated that the Italian crisis prevention system faithfully transposes the principles and guidelines of the Insolvency Directive.[38] This conclusion can also be referred to the provisions of CCI, which protect workers' claims.[39]

If we consider the issue of workers' representatives' participation in managing the

[31] Corrado A., Corrado D., nt. (9).
[32] Panzani L., nt. (12).
[33] Simoncini G.R., nt. (20).
[34] Panzani L., nt. (12).
[35] Corrado A., Corrado D., nt. (9). For a different opinion *see* Aprile F., nt. (30).
[36] Aprile F., nt. (4); Aprile F., nt. (30); Simoncini G.R., nt. (20); Romani R., Calabrò G., nt. (26); Aniballi V., nt. (20); Corrado A., Corrado D., nt. (9); Cordella C., nt. (14).
[37] Vella P., nt. (13); Fabiani M., Pagni I., *Introduzione*…, nt. (16); Pagni I., Fabiani M., *La transizione*…, nt. (16).
[38] Speranzin M., Marotta F., nt. (10).
[39] Ferro M., *Il completamento della prima fase della riforma concorsuale: il punto tra diritto interno e diritto europeo*, in *Procedure concorsuali e crisi d'impresa*, 1, 7, 2025.

company's crisis, the assessment is less favorable. The Directive certainly assigned an active role to workers' representatives. It wanted to involve employees and their organizations in crisis management, also in order to overcome it without too many job losses.

However, the Directive relied on the traditional instruments of trade union information and consultation, through the procedural regulation of employer powers, and the rights that European labor regulations ensure if the company's crisis results in a collective dismissal, transfer of the business or part thereof or in a situation of irreversible employer insolvency. Therefore, although the connection between insolvency procedures and employment protection represents an innovation of great impact, the approach remains the classical one.[40]

It must then be underlined again that the Italian legislator has been rather timid in transposing the Directive's indications concerning workers' representatives' participation in business restructuring.[41] In particular, it has not transposed the provision allowing employees' representatives to also be granted the possibility of starting the restructuring (Article 4(8)), nor has it made use of the provision allowing Member States to "provide support to workers' representatives in assessing the debtor's economic situation" (Article 3(5)). Consequently, no significant progress can be found in the CCI regarding workers' participation in crisis management.

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[40] Nicolosi M., *Rapporti di lavoro e procedure liquidatorie dell'impresa*, ESI, Naples, 2020; Cordella C., nt. (14).
[41] Corrado A., Corrado D., nt. (9); D. Dalfino, *Continuazione dell'attività di impresa in crisi o insolvente e sorte dei rapporti di lavoro*, in De Santis A.D., Patti A. (eds.), *Lavoro e crisi d'impresa*, Cacucci, Bari, 2023, 313.

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