

A background image showing a blurred city skyline at dusk or dawn. In the foreground, a man in a dark suit and a yellow striped tie is shaking hands with a woman in a grey suit. The man is holding a dark leather briefcase. The woman is holding a blue folder. A semi-transparent grey horizontal band is overlaid across the middle of the image.

MORRI
ROSSETTI

The new code on company crisis

On February 14, 2019, the new code of company crisis and insolvency (CCII) was published in the Official Gazette (Legislative Decree no. 14/2019).

After numerous regulatory interventions over time, the Italian legislator has finally produced an organic reform of the company crisis aimed at supporting the restructuring of companies in crisis. The new Code, in fact, aims to reform in an organic and unitary way the business crisis and the crisis from over-indebtedness.

In the new text of the law, the term “bankruptcy”, is replaced by “judicial liquidation”: the negative meaning that characterized the bankrupt debtor, who should now be less hesitant to bring out the state of crisis, thus disappears (so called “second chance”).

From this perspective, the reform introduces new tools: the alert procedures and assisted composition of the crisis before the OCRI (Body of composition of the company crisis). These are instruments designed to early bring out the crisis in order to prevent the activation of procedures to regulate the crisis and insolvency, with a view to the company’s restructuring.

In other regards, existing procedures (in particular agreements implementing recovery plans, agreement with creditors, debt restructuring and bankruptcy agreements - rectius judicial liquidation -) are streamlined and adapted to the practice formed under the previous bankruptcy law, in addition to other important innovations.

Furthermore, the new code introduces a new and different approach to company management, through the adaptation of the organizational, administrative and accounting structure of the company and the empowerment of the entrepreneur and corporate bodies also in respect to the activation of the tools provided by the new rules for overcoming any crisis and the recovery of business continuity.

To whom the new code applies

The new code regulates crisis and insolvency control procedures (agreements in execution of recovery plans, debt restructuring agreements, arrangement with creditors, judicial liquidation) and over-indebtedness proceeding:

Crisis and insolvency regulation procedures	
<ul style="list-style-type: none">• Agreements in execution of recovery plans• Debt restructuring agreements• Arrangement with creditors• Judicial liquidation	<ul style="list-style-type: none">– commercial entrepreneur (sole proprietorship, corporation, partnership, limited partnership, joint-stock company, limited partnership with a share capital, limited liability company), different from the minor entrepreneur, who fulfills at least one of the following requirements: annual assets > € 300,000 in the three financial years preceding the date of filing of the petition for the opening of the judicial liquidation or from the beginning of the activity if of shorter duration; annual revenues > € 200,000 in the three financial years preceding the date of filing of the petition for the opening of the judicial liquidation or from the beginning of the activity if of shorter duration; debts, even those not yet due, > € 500,000– group of undertakings

Over-indebtedness

- consumer
- professional
- minor entrepreneur (joint possession of: annual assets \leq € 300,000 in the three financial years preceding the date of filing of the petition for the opening of the judicial liquidation or from the beginning of the activity if of shorter duration; annual revenues \leq € 200,000 in the three financial years preceding the date of filing of the petition for the opening of the judicial liquidation or from the beginning of the activity if of shorter duration; debts, even those not yet due, \leq € 500,000)
- farmer
- innovative start-up
- any other debtor who cannot be subject to judicial liquidation or administrative compulsory winding up or to other liquidation procedures provided for by the Civil Code or by special laws in the event of crisis or insolvency

The new code applies only partially to large companies (that is to say companies with possession of at least 2 of the following requirements: balance sheet total: $>$ € 20,000,000; net revenues from sales and services: $>$ € 40,000,000; average number of employees during the year: $>$ 250), as the relative special law remains unaltered (Decree Law no. 347/2003 converted into law no. 39/2004).

Moreover, the provisions of the special laws on public company crisis management are not affected.

Entry into force

The new code will come into force 18 months after the date of publication in the Official Gazette, but attention must be paid to some provisions that will come into force early/in advance.

Some articles, in fact, will take effect from the **thirtieth day** after publication (**March 16, 2019**), among them we point out some provisions that modify the Civil Code:

(i) Art. 375, Operational structures of the company

Article 375 of the CCII provides for the amendment of Article 2086 of the Italian Civil Code, which will bring the new heading "Company management" and the addition of a new paragraph under which the entrepreneur operating in corporate or collective form is obliged to put in place an organizational, administrative and accounting structure appropriate to the nature and size of the company, also in relation to the timely detection of the company's crisis and the loss of business continuity, and to take action without delay for the adoption and implementation of one of the tools provided by law for overcoming the crisis and the recovery of business continuity;

(ii) Art. 377, Organizational structures of the company

Article 377 of the CCII provides for the amendment of Articles 2257, 2380 bis, 2409 novies and 2475 of the Italian Civil Code, introducing the provision according to which the management of the company is carried out in compliance with the provisions of Article 2086, second paragraph, of the Italian Civil Code and is the exclusive responsibility of the directors who carry out the operations necessary for the implementation of the corporate purpose.

(iii) Art. 378, Responsibility of directors

Article 378 of the CCII provides for:

- the introduction in Article 2476 of the Italian Civil Code of the liability of directors towards corporate creditors for failure to comply with the obligations related to the preservation of the corporate assets' integrity, providing for the possibility for the latter to bring a liability action when the corporate assets are insufficient to satisfy their claims;
- the introduction of a presumption relating to the quantification of the indemnifiable damage, subject to proof of a different amount, in the case of directors' liability pursuant to Article 2486 of the Italian Civil Code and, specifically, "the indemnifiable damage is presumed to be equal to the difference between the shareholders' equity on the date

on which the director ceased to hold office or, in the event of the opening of bankruptcy proceedings, on the date of the opening of such proceedings and the shareholders' equity determined on the date on which a cause for dissolution as per article 2484 occurred, less the costs incurred and to be borne, according to a normal criterion, after the occurrence of the cause of dissolution and until the completion of the liquidation. If insolvency proceedings have been opened and the accounts are missing or if, due to the irregularity of the accounts or for other reasons, the net assets cannot be determined, the damage shall be settled to the extent of the difference between the assets and liabilities established in the proceedings";

(iv) Art. 379, Appointment of the supervisory bodies

Article 379 of the CCII provides for the amendment of Article 2477 of the Italian Civil Code by introducing the mandatory appointment of the supervisory body or the auditor if the company has exceeded at least one of the following limits for two consecutive financial years:

- total assets in the balance sheet: € 2,000,000;
- revenues from sales and services: € 2,000,000;
- employees employed on average during the year: 10.

The obligation to appoint the supervisory body or auditor ceases when, for three consecutive financial years, none of the aforementioned limits has been exceeded.

Within **9 months** from the date of entry into force of Article 379 CCII (**December 16, 2019**), the S.r.l. and the cooperatives already established, when the above requirements are met, must appoint the supervisory bodies or the auditor and, if necessary, to align the bylaws that must provide for the above.

**THE ANALYSIS OF THE MOST SIGNIFICANT NEW FEATURES IN THE NEW CODE:
OPERATIONAL STRUCTURES OF THE COMPANY, ARTICLE 375 CCII**

The new code provides for the obligation for the entrepreneur operating in corporate or collective form is obliged to put in place an organizational, administrative and accounting structure appropriate to the nature and size of the company. This obligation involves the implementation of the management system of the company that allows to have a "cash" forecast for at least 6 months.

ALERT PROCEDURES, ARTICLES 12 – 14 CCII

The new code introduces the **alert procedures** (i.e. the reporting obligations placed on the corporate supervisory bodies and qualified creditors, aimed at the timely detection of the indices of company crisis and the prompt adoption of the most suitable measures for its composition:

Qualified public creditors are required to report the crisis if certain thresholds are exceeded, which differ from one creditor to another as shown in the table below:

Qualified Creditor	When the obligation to report is triggered?
Italian Revenue Agency	VAT: <ul style="list-style-type: none">• $\geq 30\%$ turnover• $\geq \text{€ } 25,000$ if VAT turnover $\leq \text{€ } 2,000,000$• $\geq \text{€ } 50,000$ if VAT turnover $\leq \text{€ } 10,000,000$• $\geq \text{€ } 100,000$ if VAT turnover $> \text{€ } 10,000,000$
National Social Welfare Institution	Debt: <ul style="list-style-type: none">• > 6 months late in the payment• $> 50\%$ previous year• $> \text{€ } 50,000$ The three conditions must be fulfilled
Collection Agent	Credit (self-declared or definitively ascertained): <ul style="list-style-type: none">• > 90 days expired• $> \text{€ } 500,000$ for individual companies• $> \text{€ } 1,000,000$ for collective companies

The crisis indicators, which will be prepared at least every three years by the National Council of Chartered Accountants (CNDCEC), are indices that determine capital or financial imbalances, related to the specific characteristics of the company and entrepreneurial activity carried out by the debtor, which could also affect the sustainability of debts for the current year or for the following 6 months and on business continuity, taking into account the presence of significant and repeated delays in payments, of different duration in relation to the various categories of debts.

ASSISTED CRISIS COMPOSITION, ARTICLES 16 - 23 CCII

The debtor, at the end of the alert or even before its activation, can access the procedure of assisted settlement of the crisis, which takes place in a confidential and restricted manner before the OCRI (Body for the settlement of the company crisis).

OCRI is a body set up at each chamber of commerce which operates through a contact person and a panel of experts and has the task of:

- (i) receiving reports from the company's supervisory bodies and from qualified public creditors;
- (ii) managing the alert procedure;
- (iii) assisting the entrepreneur, at his request, in the assisted crisis resolution procedure.

ARRANGEMENT WITH CREDITORS IN CONTINUITY, ARTICLES 84 CCII

Continuity can be:

- (i) direct, to the entrepreneur who submitted the application for arrangement;
- (ii) indirect, where the management of the company in progress is envisaged or the business is taken over by a party other than the debtor. The contract or title under which this person takes up the activity shall provide for the maintenance or re-employment of a number of employees equal to at least half of the average of those in force in the two financial years preceding the filing of the appeal, for one year from the approval.

LIQUIDATION AGREEMENT WITH CREDITORS, ARTICLE 84 CCII

The plan shall provide for the introduction of external resources that increase by at least 10%, compared to the alternative of judicial liquidation, the satisfaction of unsecured creditors, which cannot be in any case less than 20% of the total amount of unsecured claim.

Conclusion

The new discipline, therefore, represents an opportunity for each company to rethink its organizational, administrative and accounting structure in order to comply with the requirements of the new code and prevent the emergence of the crisis, all in the pursuit of business continuity.



MORRI ROSSETTI

Morri Rossetti e Associati

Piazza Eleonora Duse, 2
20122 Milano (IT)
T +39 02 76 07 971
F +39 02 77 33 17 66

info@MorriRossetti.it
MorriRossetti.it

For further information, please contact:

Fabrizio Garofoli

Head of the Restructuring and Business Crisis department

Of Counsel

Tel.: +39 02 7607971

E-Mail: Fabrizio.Garofoli@MorriRossetti.it