

When necessity is the mother of invention: new insolvency proceedings for consumers

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Introduction

The 2008 financial crisis had deep social and legal consequences in Italy and has forced the legislature to undertake long-awaited bankruptcy reform. The high rate of unemployment, increased reluctance of banks to grant new loans and rise in the cost of living affected not only companies and entrepreneurs, but also families, sole-proprietor firms, microenterprises and individuals. Further, a sharp rise in the rate of suicides for economic reasons, a consistent increase in unpaid taxes and an even larger increase in usury were all recorded during the recession.

In this context, new insolvency proceedings became a pressing need insofar as the economic problems of individuals and microenterprises became a significant social cost. The legislature responded in 2012 with Laws 3/2012 and 221/2012, which were historical reforms that finally introduced (several years after most other European countries) insolvency proceedings for subjects not involved in business (ie, a new sector of insolvency provisions known as the 'overindebted crisis agreement').

Legal tools

The reform introduced new legal tools to enable the insolvency of parties that are ineligible for ordinary insolvency proceedings, including:

- consumers;**(1)**
- agricultural entrepreneurs; and
- natural persons (ie, individuals engaged in commercial entities that do not exceed the thresholds set out in Article 1 of the Bankruptcy Law).**(2)**

In particular, the new proceedings include:

- the consumer plan, available only for consumers;
- debt restructuring agreements; and
- winding-up proceedings.

To apply for these proceedings, the debtor must be:

- ineligible for any other traditional insolvency procedures in force; and
- over-indebted.

Thanks to the consumer plan and the debt restructuring agreement, a debtor may negotiate its debt through a procedure similar to the debt restructuring arrangements under Article 182*bis* of the Bankruptcy Law.

In both debt restructuring agreements and consumer plans, debtors start the procedure by filing a debt restructuring agreement proposal. For a debt restructuring agreement, a proposal must be accepted by a certain section of creditors (ie, creditors that represent 60% of the indebtedness). For a consumer plan, creditors must be heard by the court, but the judge will decide autonomously.

Together with the proposal, the debtor must enclose, among other things, a certificate released by the crisis settlement panel, which is a new body created *ad hoc* by the legislature for this purpose. The crisis settlement panel will:

- help and supervise the debtor during the proceedings;
- examine its patrimonial situation; and
- prepare adequate debt restructuring agreement proposals.

The panel will:

- report on the causes of over-indebtedness;
- guarantee that the documentation filed is complete; and
- assess whether the debt restructuring agreement proposal is feasible.

The proposal must be based on a plan which should be able to ensure the complete fulfilment of the obligations undertaken towards the dissenting creditors that refused to enter into the agreement. The plan may provide for:

- any available form of satisfaction of creditors and debt restructuring; and
- the division of creditors into classes, as happens in other procedures under the Bankruptcy Law.

During the proceedings, the debtor is entitled to propose a payment moratorium for up to one year, on the condition that:

- the plan seems adequate to ensure payment when the moratorium expires; and
- the moratorium does not apply to payments due to holders of claims that cannot be pledged.

Once the debtor's application has been filed, the court will:

- check that the required formalities have been performed correctly; and
- hear the opinions of creditors.

On this basis, the court will decide whether to grant or deny approval of the agreement. Its decision can be challenged before the competent local court.

The winding-up proceedings are residual proceedings, thanks to which the parties that fulfil the abovementioned conditions may ask the court to appoint a liquidator to liquidate the debtor's assets. At the end of the proceedings, if the debtor has cooperated fully and has held a position that meets his or her expertise and competence within the previous four years, he or she can be freed from any outstanding liabilities.

Delegation law

A new development in this regard has been introduced into the guidelines (based on the results of the Rordorf Commission, established in January 2015 to develop draft legislation to reform the existing Insolvency Act) enacted by Parliament on October 11 2017 through a delegation law. Thanks to this law, a delegation to the government has been established for the reform of the Corporate Crisis and Insolvency Act, which draws on the guidelines provided by Parliament.**(3)**

The delegation law has recommended, among other things:

- extending the application of the new proceedings to other subjects, such as general partners with unlimited liability;
- increasing cases in which a debtor can ask to be freed from its remaining liabilities after the proceedings;

- introducing new moratorium cases to protect debtors, following the example of the deed of arrangement proceedings; and
- providing penalties for creditors found to have negligently compounded the circumstances of debtors.

The draft decrees, which were recently made public, closely follow Parliament's guidelines, thus preparing the ground for a major overhaul of the new proceedings. In particular, the reforms will introduce a clear separation between the insolvency tools available for natural persons, microenterprises and consumers.

The consumer plan will remain in force for consumers with minor amendments and under the new name 'plan for consumer debt restructuring'. However, debt restructuring agreements are set to become a new type of proceeding based on deed of arrangement proceedings, starting with a name change to 'minor deed of arrangement proceedings'.

The new deed arrangement is a confirmation that the legislature has understood (at last) the economic importance of microenterprises in Italy and the need to regulate their financial difficulties, the impact of which could no longer be ignored.

Comment

The new civil insolvency proceedings look set to become increasingly important, especially considering their application to the large number of microenterprises and business entities, which operate below the thresholds set out in Article 1 of the Bankruptcy Law.

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Endnotes

- (1) According to Legislative Decree 2005/206, a 'consumer' is an individual who undertakes obligations for reasons that are not part of his or her entrepreneurial or professional activities.
- (2) According to Article 1 of the Bankruptcy Law, only debtors that respect the following thresholds may invoke the proceedings provided for by law: gross revenues of €20 million, assets of €30 million and liabilities of €50 million.
- (3) This means that the government must enact one or more legislative decrees to incorporate Law 155's principles and guidelines into the Bankruptcy Law within 12 months.

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