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HAPPY BIRTHDAY

COMPOSIZIONE NEGOZIATA

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EDITED BY
Valeria Mazzoletti
Paolo Pototschnig

For many years, a discussion had been carried on about the lack of instruments in our legal system that could facilitate the **emergence of company crises** – before financial and asset difficulties lead to a state of irreversible bankruptcy of companies – and consequently make it quicker to avail of solutions that would safeguard their characteristic assets. This task was entrusted, on 15 November last year, to the 'composizione negoziata' (literally, the 'negotiated settlement'), an **instrument facilitating negotiations** between the company and its creditors aimed at an agreement leading to reorganisation, avoiding insolvency. The tool, which certainly has innovative features for this subject, is therefore one year old and it is time for an initial (though certainly not definitive) assessment of its effectiveness with respect to its scope.

The '*composizione negoziata*', now implemented by the Business Crisis and Insolvency Code – that came into force last 15 July replacing the *Legge Fallimentare* for the new insolvency procedures – finds its cornerstones in **duties of conduct** imposed on the parties, in the necessary involvement of a professional, defined as an '**expert**', with the role of facilitator both of the dialogue between the company and creditors and of the possible reorganisation, as well as in various **measures to protect negotiations**. As further aids for companies, a possibility is given to carry out an online test on the chances of reorganisation and to identify data and documents for the development of the reorganisation plan, as well as to follow some guidelines for the conduct of negotiations.

Unioncamere (the association of Italian Chambers of Commerce), which manages the online platform through which applications for the launch of 'composizione negoziata' procedures are filed, is presenting an annual report on 16 November on the functioning of the '*composizione negoziata*', but the **data progressively published** and, most recently, those released last September, already stimulate more than one reflection. The number of applications submitted throughout the country (around 400) denotes a certain prudence in using an institute that is a novelty; but the same cannot be said, especially in proportion, of the number of experts on the lists, which exceeds 3,500. Among these, accountants and lawyers represent over 98% of the total, with a clear preponderance of the former (over 80%), while business managers and labour consultants do not reach 1.5%. But the most worrying fact is that only two procedures have so far been concluded with an agreement between the company and its creditors, compared to the 60 that have ended without a positive outcome and the more than 20 that have not even been initiated due to a lack of requirements.

From the creditors' point of view, there is no doubt that these figures can give rise to understandable scepticism, because the '*composizione negoziata*' does not, at least for the time being, seem to be yielding the hoped-for results. The **lack of recovery prospects** proves to be the main cause of the failures. Especially in times of such an impactful crisis, there are many situations in which market developments and competitive shortcomings have indelibly marked the core business of many companies. And one might even be led to identify a virtuous trait of the '*composizione negoziata*' with respect to the objectives of our legislator, where it seems to favour a kind of anticipated purging effect in the context of the reference markets.

But one should also consider the tardiness with which companies face difficult situations, which renders it useless to file the '*composizione negoziata*', making such tool seem to have so far failed in its function. Also, based on the experience in other jurisdictions, more important than incentive measures with an essentially fiscal nature, are the models of **business organisation**, which companies must equip themselves with. Such models – to be more analytically outlined by sector doctrine – should be a reference point for the management and stimulate reaction against company difficulties.

However, the discipline would be incomplete if it were not accompanied by external agents, on the basis of the experience of other legal systems, to act as an incentive for the entrepreneur, also in terms of liability, in facing reorganisation. The adopted system provides for **alerts** to the entrepreneur himself by qualified subjects: the supervisory body, entrusted with precise duties of intervention and interlocution, and the so-called qualified public creditors (Agenzia delle Entrate, Agenzia delle Entrate-Riscossione, INPS and INAIL). These are duties imposed by law and much will depend on the proper functioning of this system, which today can be considered still in a running-in phase, while waiting for the applicability of the new rules on the compulsory appointment of the auditing body for the '*società a responsabilità limitata*' (limited liability companies).

Also, the large number of experts leads one to believe that there has been a "race" for qualifying registration, which may correspond to an uneven level of competence and experience of such professionals. As they are involved in the preparation of a reorganisation plan and in negotiations with creditors, a knowledge of the reference market may also be decisive. For this reason, due to its disincentive character, one should review the rule that, providing for the involvement of **professionals with knowledge of the industrial or commercial sector concerned**, burdens the expert with the costs of their work.

On a practical level, we have often witnessed proceedings in which there has been a lack of an approach with creditors inspired by a prompt and targeted selection of them, not limited to the financial ones. In the logic of an instrument facilitating negotiations, it appears essential to identify and initiate a dialogue, as quickly as possible, with the creditors on which the reorganisation may depend, avoiding unnecessarily enlarged and potentially exhausting tables of discussion. And the careful selection of **strategic creditors** is one of the pillars for the credibility of recourse to the '*composizione negoziata*', together with a prompt identification of the main structure of the recovery plan and of the agreement proposed to the creditors themselves. Otherwise, notwithstanding certain safeguards against abuses, in practice the conviction will only grow that the '*composizione negoziata*' is used not to preserve the company's values, but only as an obligatory path to resort to another new institution: the '***concordato semplificato***' (literally, 'simplified arrangement') that presents itself as a procedure with diametrically opposed purposes, since it is essentially liquidatory and for which no manifestation of consent by creditors is envisaged.

Finally, the **role of the courts** should be considered in this scenario, on paper confined to the authorisation of certain acts (financing and transfers of the company or its branches), as well as the granting or confirmation of **precautionary or protective measures** to safeguard, respectively, the company's assets and the conduct of negotiations. In fact, in the context of the relative proceedings, analytical evaluations on the concrete prospects of the reorganisation tend to emerge and are used to justify the granting of those measures to contain any abuse. This attention is certainly agreeable, but on a case-by-case basis it must be considered that an excessive rigour could hinder solutions and understandings that could be finalised, thanks to the dialogue with creditors that, in the absence of those measures, can hardly take off. It is therefore appropriate for the courts to manage this procedural phase with this perspective in mind and, therefore, always with the balance imposed by the purposes of the 'composizione negoziata', avoiding the risk of replacing the creditors' assessments in relation to the chances of reorganisation.

A final consideration deserves to be devoted to the elements that, from a regulatory point of view according to the Business Crisis and Insolvency Code, frame the economic-financial difficulties of enterprises in a graduated manner. While the concept of insolvency has been reaffirmed with the traditional notion of a current inability to meet obligations, the legislator wanted to **define the crisis** as the '*state of the debtor that makes insolvency likely and that is manifested by the inadequacy of prospective cash flows to meet obligations in the next twelve months*'.

In terms of formal prerequisites, using the 'composizione negoziata' is justified before a true state of crisis arises, but there are further relevant economic references for the preventive management of these corporate situations, including the aforementioned reports of the auditing body.

What was originally defined in the Code as the 'alert system' has been replaced by an abstract functional description of the company's organisational models, which should make it possible to detect imbalances of an equity or economic-financial nature (e.g. in terms of the ratio of equity to debt), as well as the unsustainability of debts and the absence of any prospect of business continuity within a year. But, above all, a more objective and concrete notion of '**signs**' considered prodromal to a crisis situation has been introduced: the existence of **payroll debts** overdue for at least thirty days amounting to more than half of the total monthly payroll amount; the existence of **payables to suppliers** overdue for at least ninety days amounting to more than the amount of payables not overdue; the existence of **exposures to banks and other financial intermediaries** that are past due by more than sixty days or that have exceeded the limit of credit facilities obtained in any form for at least sixty days, provided that they represent a total of at least five per cent of the total exposures; the existence of one or more exposures to the aforementioned qualified public creditors in an amount equal to the thresholds giving rise to the reporting obligation.

Creditors thus find codified indices that may be known or knowable, and that should be considered not only in the banks' assessment of their creditworthiness, but also, in general, in the management of relations with their debtors and in those possible negotiations that the '*composizione negoziata*' aims to foster.

Valeria Mazzoletti

valeria.mazzoletti@orsingher.com

Paolo Pototschnig

paolo.pototschnig@orsingher.com