The Italian Criminal Law Perspective on Bankruptcy Cases

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Abstract

Nowdays the important reform of the penal system is underway in Italy to address and solve the problems of companies in crisis in a global context.

Firstly, the recent delegation to the Government for the reform of the disciplines of the business crisis and insolvency introduced by Law 19 October 2017, n. 155 entered into force 14.11.2017, pursuant to which we note in the matter of bankruptcy the c.d. Rerdorf reform currently being approved, on the discipline of the criminal profiles of bankruptcy proceedings of companies in crisis.

Among the general principles of the delegated law we note the following:

1. To replace the term «bankruptcy» and its derivatives with the term «judicial liquidation», to introduce a definition of the state of crisis, understood as probabilities of future insolvency, also taking into account the elaborations of the corporate science.

2. Adopt a single procedural model to ascertain the state of crisis or insolvency of the debtor, with particularly rapid characteristics.

3. Provide that the notification to the debtor, who is a professional or an entrepreneur, of the documents of the insolvency proceedings and, in particular, of the deed that initiates the crisis assessment procedure is obligatory of the electronic service of certified qualified delivery or certified electronic mail of the debtor resulting from the register of companies or from the national index of certified e-mail addresses of companies and professionals.

4. Ensuring the specialization of the judges involved in the insolvency proceedings, with adjustment of the staff of the judicial offices whose competence is extended.

In the outlined context, with regard to the profiles of criminal investigation, the Code of criminal procedure has also changed following the reform introduced by art. 1, 52 ° co., Law 23.06.2017 n. 103 on the motivation of the criminal sentence on civil liability from crime.

The damages deriving from the crime of bankruptcy are fully part of the new dictation of art. 546, lett. d), cn. 4, c.p.p. with specific reference to «*civil liability arising from a crime*» provides for a new constraint of the judge to ascertain the facts of civil liability from a crime.

This with the clear aim of making the decision as faithful as possible to the process and of offering transparency to the motivational path of the judge made in reference - in addition to what already provided for in the previous version - to the decision to ascertain the facts and circumstances the imputation, punishment and determination of the sentence and security measures, the profiles relating to civil liability from crime, and the aspects on which depends the application of procedural rules that now, therefore, can not be considered absorbed in the decision as a whole.

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The current regulation of insolvency proceedings pending the definitive launch of the c.d. Rordorf reform, is the consequence of a progressive development of legal theories as well as the change in the way of understanding bankruptcy law itself, an ever clearer distinction between guilty and innocent failures, taking hold of the concept of the «*honest but unfortunate*» entrepreneur.

In the outlined context an epochal reform concerns the institution of the «*exemption from bankruptcy crimes*» ex art. 217 bis introduced by the Law of 30 July 2010, n. 122.

This is a change aimed at increasing the appeal of recourse to crisis resolution tools how to get away from bankruptcy which has similar institutions in all countries of advanced legal civilization.

It is important to underline that the c.d. Reform Rordof has strengthened the concept of exemption from bankruptcy crimes introducing a wide cause of exclusion of criminal punishment in the presence of contractual instruments to resolve the business crisis.

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