COMPANIES IN CRISIS BETWEEN VIRUSES AND NEW REGULATIONS

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The economic fallout on SMEs from the pandemic needs to be carefully scrutinized. In this context, are the alert systems set out in Legislative Decree 14/2019 still valid and effective? It is necessary to analyze well the post-virus effects on small and medium-sized enterprises and understand how to intervene normatively also reformulating, where necessary, the code of crisis and insolvency. Most of the countries affected by the Coronavirus have modified or are modifying their insolvency legislation to take into account the difficulties linked to the pandemic. It should be borne in mind that the ordinary insolvency framework is not particularly efficient in dealing with the Covid - 19 crisis, both in the case of insolvent companies that should be liquidated and in the case where there are opportunities for agreements with creditors to proceed with restructuring. Reflections on new regulatory strategies for recovery.

***Key words**: Pandemic, Enterprises, Insovency Directive, Crisis Code, New Strategies.*

JEL classification: **L10, L20, L51**

Introduction

Starting in December 2019, a Coronavirus (Covid-19) epidemic developed in China, which from the end of February spread first to Italy and then to Europe and the rest of the world, producing unprecedented consequences on the social and economic life of all the territories involved. The present investigation has been addressed to the impact suffered by small and medium-sized enterprises identifying the sectors and geographical areas most affected trying to draw strategic lines of recovery.

1. Pandemic and impact on SMEs until May 2020

SMEs have had to suffer the economic and structural repercussions of the pandemic: in particular, they have found themselves having to deal with situations of liquidity and capitalization, decisive for the evaluation of creditworthiness and relative sustainability, which are not adequate. At the end of May 2020, the majority of SMEs found themselves in a shaky financial situation. Approximately 60% had suffered a slowdown and ~30% of small and medium-sized companies found themselves having to suspend operations during the lock-down period and only 10% were able to take advantage of new management opportunities arising from the conversion of plants to produce "essential" products (e.g. personal protective equipment).

Specifically, in the Report on Competitiveness 2021, ISTAT certifies that the real collapse of added value recorded especially in the first half of 2020: it decreased by 11.1% in industry in the strict sense, 8.1% in services, 6.3% in construction and 6.0% in agriculture. Among services, trade, transport, hotels and restaurants (-16%) paid the highest bill; and in manufacturing, the textile, clothing and footwear sector suffered the most severe slump (-23%), followed by machinery and transport equipment (-15%). Food and pharmaceuticals were the only sectors to register increases in added value (+2 and +3.5% respectively). Moreover, in the period between March 9 and May 4, 45.0% of companies with 3 and more employees (458 thousand, which absorb 27.5% of employees and realize 18.0% of turnover) even suspended activity. For 38.3% (390 thousand companies) the decision was taken following government decrees, while 6.7% (68 thousand) did so on their own initiative. More

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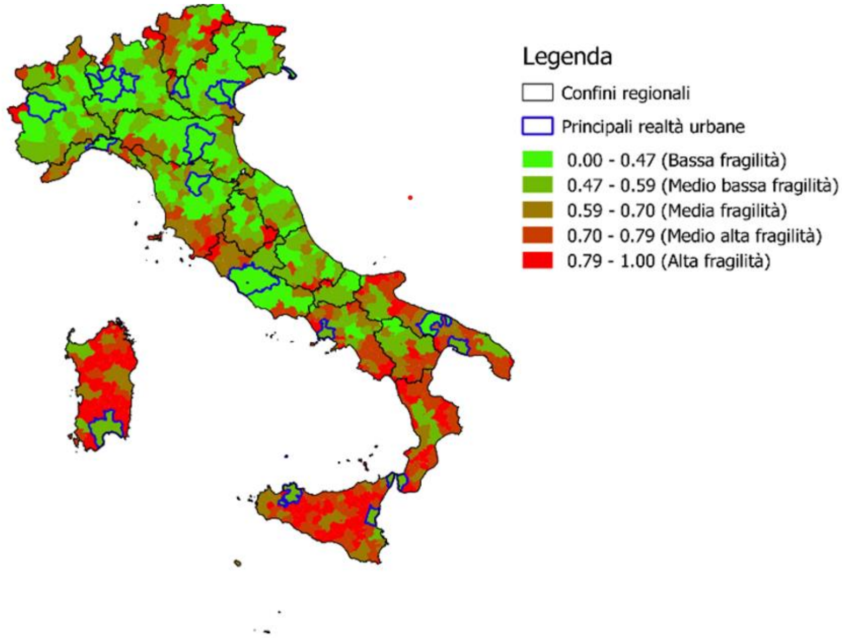
than 70% of companies (representing 73.7% of employment) declared a reduction in turnover in the two-month period March-April 2020 compared to the same period in 2019: in 41.4% of cases, turnover more than halved, in 27.1% it fell between 10% and 50% and in 3% of cases less than 10%; in 8.9% of companies, on the other hand, the value of turnover remained stable

In the following Graph 1, the geographical areas which have been more fragile are also indicated.

Graph 1. 2020 Territorial Risk Index



Fonte: Elaborazioni su dati Istat

2. Economic situation after May 2020

In the period after May 2020, companies realized that in order to survive, they would have to focus on three points:

1. Ability to innovate: innovation is a fundamental "driver" of productivity and therefore of competitiveness.

2. Internationalization and diversification: knowing how to diversify allows companies to be more resilient to market dynamics and to develop a greater ability to adapt to change

3. Capital strength: The right balance between debt and equity and the liquidity on the balance sheet allows companies to suffer less from poor cash flow.

In fact, companies with a strong vocation for export do not experience financial difficulties in the future, as do those that are more digitalized. The ability to intercept foreign demand represents, for Italian companies, a valid element of resilience in periods of stagnation or cyclical contraction. On the other hand, micro enterprises, with between one and nine employees and with an insufficient level of liquidity, are more affected by the pandemic crisis.

Italian companies with at least three employees could be classified into four risk classes: "Solid", "Resistant", "Fragile" and "At risk". Only 11% of the units are solid (but generate 46.3% of employment and 68.8% of total value added); 19% are resistant, around 25% are fragile and 45% (to which 20.6% of employees and 6.9% of total value added belong) are at risk. In order to limit the risks of illiquidity linked to the crisis, the Government intervened, not only with non-repayable subsidies, but also by increasing loan guarantees (through the SME Guarantee Fund and "Guarantee Italy") and introducing moratoria on loan repayments and related interest. Then the "Cura Italia" decree (d.l. 18/2020) facilitated access to loan guarantees, establishing the gratuitousness of the operations of the Guarantee Fund for SMEs and the extension of the maximum guaranteed amount for each company from 2.5 to 5 million euros and the "Liquidity" decree (d.l. 23/2020) allowed the automatic disbursement for loans up to 30,000 euros and an expansion of the target audience. Guarantee Italy" was also set up, a second guarantee fund managed by SACE S.p.A. with a ceiling of 200 billion lire, authorized to provide guarantees also to large companies. The guarantees actually disbursed to date have amounted to 22.8 billion lire.

The "Cura Italia" decree also introduced moratoria, sanctioning the suspension of maturities relating to various types of debt exposure until September 30, 2020. This deadline was then extended with the "August" decree (article 65 of Legislative Decree 104/2020) and with the 2021 Budget Law, which set the deadline at June 30, 2021. According to the Liquidity Task Force, as of April 2021, 158 billion in moratoria (loan and interest installments that should have been paid and remain outstanding) remain active.

As a result of government measures and the ECB's accommodative monetary policy, in contrast to what has been observed in previous recessions, bank lending increased during 2020 (by 37 billion, or 5.8 percent, for nonfinancial corporations). In 2020, borrowing was greatest for firms in sectors that experienced the worst cash flows and thus had the greatest liquidity needs.

3. Pandemic: effectiveness of the Insolvency Directive and the new Crisis Code. Food for thought

In this critical picture painted during the pandemic period, the so-called Insolvency Directive can be a double-edged sword. The Directive introduces the obligation for Member States to ensure a regime, defined as preventive restructuring frameworks, aimed at facilitating the restructuring of the company where there is a likelihood of insolvency. This scheme, reserved for debtors in financial difficulty, in order to prevent insolvency and ensure the economic viability of the debtor (art. 1, par. 1, letter a) is not defined in its structure, with art. 4 limiting itself to specifying that it must allow the debtor to restructure his debts or his business, restore the company's viability and avoid insolvency. The European legislator does not tell us what this preventive discipline may concretely consist of. It may take the form of one or more procedures or even only appropriate measures or provisions. It is not exclusive because the member states may provide for other provisions aimed at avoiding insolvency and furthermore, pursuant to Art. 4 par. 5, other restructuring frameworks provided for by national law are not affected.

It can be accessed by debtors or even creditors and employee representatives, but with the consent of the debtor. The involvement of the judge or administrative authority may be limited by the member states to cases where it is necessary and proportionate, so that the rights of all parties involved are guaranteed.

If the content of the restructuring framework is broad and generic, in reality the Directive establishes some stricter rules which concern the adoption of a restructuring plan, its content and approval, the formation of classes of creditors for the purpose of voting on the plan, the intervention - in certain cases obligatory - of the judge, the appointment of a professional to assist the debtor and creditors or to supervise or manage the restructuring, the suspension of enforcement actions which may concern all or only some of the creditors. In addition, the Directive regulates the regime of prededuction and stability of new finance, the non-subjection to action for nullity, annulment and revocation of contracts entered into by the entrepreneur during the period of the plan, and the duties of managers when there is a likelihood of insolvency.

In order to better understand the scope of the Directive, it should be added that the European legislator understood the term restructuring in very broad terms. In fact, the definition offered by Art. 2(a) makes it clear that "restructuring" means measures that "aim at restructuring the debtor's assets which include changes to the composition, conditions or structure of the debtor's assets and liabilities or any other part of the debtor's capital structure, such as the sale of assets or parts of the undertaking, and, if provided for by national law, the sale of the undertaking on a going concern basis, as well as any necessary operational changes, or a combination of these elements".

The Commission stresses that the restructuring scheme must be available before the debtor becomes insolvent under national law where insolvency normally involves the appointment of a liquidator and the total divestiture of the debtor. In order to avoid abuse of restructuring frameworks, it is added that it is appropriate that the financial difficulties of the debtor present a probability of insolvency and that the restructuring plan is such as to prevent insolvency and ensure the economic viability of the company. It is therefore sufficient that there is a probability of insolvency as an objective condition for access. It should be pointed out that the crisis code is in line with this clarification by the European legislator, because it maintains the state of crisis as a condition for entry into the arrangement with creditors and takes care to offer a definition as the state of economic and financial difficulty that makes insolvency probable" (art. 2, letter a). It should also be added that, after much uncertainty during the preparatory work phase, art. 2, par. 2, of the Directive leaves the definitions of insolvency and probability of insolvency to the national law of the member states.

The EU Directive 2019/1023 on preventive restructuring frameworks, in fact, was conceived and designed before the economic backlash generated by Covid-19, as well as the alert systems provided by the new Code of Business Crisis and Insolvency (Decree 14/2019, CCIi). The recent postponement to December 31, 2023 - provided for by Decree-Law No. 118 of August 24, 2021, art. 1 letter b) - of the entry into force of the alert regulations, so far contained in the Code of Business Crisis and Insolvency (CCII) set forth in Legislative Decree No. 14 of January 12, 2019, together with the purely recent legislative delegation (see art. 1, paragraph 1, and All. A, no. 22, l. April 22, 2021, no. 53) for the transposition of the Directive June 20, 2019, no. 2019/1023/EU (so-called Insolvency Directive), offers, therefore, the opportunity for an albeit quick inventory of the issues that require further intervention on the reform of crisis law in itinere, in order to fully implement the relevant forecasts of change in the economic fabric.

The 'inventory to be drawn up - as a matter of course - coordinated prominence to both "recitals" and "provisions" of the cited Directive no. 1023/2019 must take into account the effectiveness of the restructuring, insolvency and exdebitation procedures, with the awareness that this European discipline will necessarily have to take into account a significant review of the national discipline of the alert, before its final entry into force and taking advantage of the aforementioned postponement that has been arranged not so much for reasons related to the need to conform to EU law, but rather expressly to be attributed to the criticality of the continuing pandemic situation.

The Directive pursues five main objectives that are distinct from each other, even though they are linked, namely, the provision of:

(i) warning tools that allow entrepreneurs to become aware of their worsening financial situation and the

(i) Alert tools that enable entrepreneurs to become aware of the worsening of their financial situation and the existence of potential crisis/insolvency situations;

(ii) preventive restructuring frameworks that enable entrepreneurs in a state of crisis to restructure their debt promptly, rapidly and effectively;

(iii) specific duties of conduct on the part of managers of companies in crisis

(iv) rapid and effective debt relief procedures; and

(v) tools to improve the efficiency of insolvency proceedings.

insolvency proceedings.

It does not introduce full harmonization of European business .The Directive does not introduce a complete harmonization of European corporate crisis law, insofar as the notion of restructuring contained in the Directive (see Art. 1(1) of the Directive) clearly refers to restructuring operations that aim at the continuity of the business.

It should be noted that the notion of "restructuring" provided for in the Directive mentions, among the measures that may be measures that may be envisaged in the plan include the "sale of assets or parts of the company", whereas of the company", whereas the CCI (art. 84 CCI) makes a distinction between procedures based on continuity and liquidation procedures on the basis of a quantitative" criterion (based on the fact that the satisfaction of the creditors satisfaction of creditors is achieved "mainly from the proceeds of direct or indirect business continuity").

The main provisions of the Directive are analyzed below, also attempting to provide a preliminary assessment of the conformity of the Code of Corporate of the recently adopted Corporate Crisis and Insolvency Code (CCI) with the principles and (CCI) with the principles and provisions set out in the Directive itself.

Even the G30 recommendations suggest an adjustment of regulations to the post-Covid system in order to avoid boomerang effects on the economy and this because they are too punitive compared to the early warning tools sought by the directive itself. Rescue systems and restructuring procedures must be changed to allow the market, investors and banks to assess whether or not companies have the capacity for profitability and whether they deserve to be helped. It is necessary to focus attention on the deserving companies, that is, to choose those that will be profitable after the pandemic, monitoring the medium-small companies that have less bargaining power towards governments but that are decisive on the productive level of the Italian economy. Directive 1023/2019 on preventive restructuring frameworks (preventive restructuring frameworks) aims to strengthen in Europe the culture of recovery of the company in crisis. In particular, it aims to facilitate the restructuring of companies in financial difficulty. In this way, the directive introduces the obligation for member states to ensure a regime aimed at facilitating the preventive restructuring of the company where there is an insolvency likelihood. In order to achieve this aim, the directive does not provide for complete regulation of the restructuring procedure, but regulates only certain aspects: the provision of early warning tools, the possibility of granting and revoking the suspension of executive actions, the content and discipline of the restructuring plan, the system of formation, in some respects obligatory, of classes of creditors with homogeneous legal and economic rights, including equity holders, the interventions, on the one hand limited and on the other obligatory, of the judge and the administrative authority that in some systems exercises the functions (in Italy the Ministry of Development in the case of extraordinary administration). In view of the changed requirements, it is necessary to move to a system of forward looking for the solvency of companies and systemic credit and not limit oneself to the mere insolvency of the company, the isolated verification of which could be either excessively penalising or sometimes even inappropriate for understanding the real riskiness of the company in the long term. The criticalities produced by Covid change the reading pre reform brought by the Code of business crisis and insolvency (dlgs 14/2019, Ccii). The Ccii would seem not to be the appropriate tool to manage the tsunami of bankruptcies expected as a result of the spread of the virus. It is necessary to rethink the rules on business crisis, facilitating out-of-court agreements between debtor and creditors, avoiding that judicial slowness and the automatic intrusion of the public prosecutor in risk situations lead to increase the possible failure of reorganizations. Procedures need to be simplified. Even the rules of the CCIi arrangement with creditors, aimed at preserving employment, are incompatible with the post-Covid-19 scenario, just as the minimum threshold guaranteed to creditors would merit reflection. On the contrary, it would be opportune to anticipate the rules on exdebitration foreseen by the ICC. The warning measures must be reconsidered as they are today too onerous and punitive and, in any case, not even in line with the early warning system foreseen by the Insolvency Directive. It is necessary to focus on the need to redevelop more efficient tools that are adequate to the new pandemic reality. The watchword must be speed! However, it must not be forgotten that all State interventions in favour of the business system involve a transfer to future generations of an increase in public debt and, therefore, require careful reflection on their actual necessity. We must necessarily rule out the possibility of creating a system that allows the collectivization of current losses and the privatization of future profits, and, therefore, think of selective "public equity" instruments to be activated with the help of specialized subjects and, if necessary, also of a private nature. A suggestion that comes from the world of finance is that of conferring in dedicated investment funds both the public shareholdings assumed in the capital of the companies, as well as the credits of revenge deriving from the future enforcement of state guarantees, taking care to offer the relative quotas also to private investors and banks.

Perhaps it would be possible to ensure a professional management of the shareholdings assumed (and of the credits granted thanks to the guarantees provided) by the State and to multiply the effects generated by the financial interventions immediately weighing on the public budget, in a desirable virtuous circle.

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