



•ALERT•

2 MARCH 2020

ADEQUATE GOVERNANCE STRUCTURES ACCORDING TO THE NEW ITALIAN CORPORATE CRISIS AND INSOLVENCY CODE

WHAT STRUCTURES

The innovations introduced by the Corporate Crisis and Insolvency Code (Legislative Decree no. 14 of 12 January 2019) concern the organizational, administrative and accounting company's structure, which encompasses the set of guidelines and procedures aimed at ensuring the efficient management of the company.

In particular:

- the organizational profile relates to the guidelines and the procedures to be adopted to ensure that the decision-making powers are granted to persons having an appropriate level of competence and are then actually exercised in an extremely aware, informed and professional manner. It will therefore be necessary that these guidelines and procedures ensure a clear and precise definition of the roles and responsibilities within the company, as well as specific and efficient **information flows within any corporate body, between the corporate bodies and between the corporate bodies and the supervisory bodies**;
- the administrative profile relates to the set of rules aimed at ensuring the orderly performance of each phase of the company activities; and, finally
- the accounting profile relates to the regular keeping of the company accounts and to the procedures and rules for recording management events.



NEW PROVISIONS AND THEIR SCOPE

The new Corporate Crisis and Insolvency Code, rewording art. 2086 of the Italian Civil Code, **has extended to all entrepreneurs operating in a corporate or collective form** the obligation to establish an organizational, administrative and accounting structure adequate to the nature and size of the company, also (but not only) aimed at the timely detection of the company crisis and the loss of business continuity.

The principle of adequacy of the organizational structure had been introduced by the Consolidated Law on Finance (Legislative Decree no. 58 of 24 February 1998) as part of the supervisory duties of the board of statutory auditors of listed companies. Subsequently, the corporate law reform of 2003 had also extended such principle to all the joint-stock companies (*Società per Azioni*), referring, also in the wordings used, specifically to the “*organizational, administrative and accounting structure*”.

The new Corporate Crisis and Insolvency Code therefore completes a path that, by means of the evolution of the legislation on joint-stock companies, passing through the legislation on the administrative liability of legal entities (Legislative Decree no. 231 of 8 June 2001) and the specific regulations of certain sectors (banks, insurance companies, publicly owned companies), has finally recognized **the adequacy of the organizational structures as a general principle of correct management**.



And, in fact, the new art. 2086 of the Italian Civil Code applies, without distinctions, to any entrepreneur operating in a corporate or collective form: therefore, the category of entities subject to the new rules include even the simplest entities, like non-commercial entities, small and agriculture enterprises, and also third sector entities.

In addition, the new Corporate Crisis and Insolvency Code also affects the individual entrepreneurs, who are required to adopt appropriate measures to timely detect the business crisis, as well as to take any actions necessary to overcome such crisis.

OBLIGATIONS AND POSSIBLE LIABILITIES OF CORPORATE BODIES

As a result of the introduced innovations, it is **essential** that all companies adjust their corporate organization for the purposes of ensuring also the timely detection of the company crisis. First of all, **the directors** shall take the necessary steps to (i) **establish or supplement the company organizational structures, taking care of** (if they are managing directors) and assessing (if they are only members of the board) **the adequacy of such structures** on an ongoing basis in light of both the company operations and its business context, as well as to (ii) **supervise the business continuity, working to overcome the crisis**. As a result of the above, the directors are directly liable in the event of omitted or inadequate establishment of the described organizational structures.

The statutory auditors and the auditing companies are instead required to carry out a **"second level" check** on the activity of the administrative body aimed at (a) assessing the adequacy of the corporate structure and maintaining the company economic-financial balance (therefore, this check will not regard the management decisions made by the administrative body), as well as at (b) reporting the emergence of well-founded signs of the company crisis

both internally to the administrative body and, in the event of inactivity or inefficiency of the directors in managing the crisis, **externally to a specific new entity (OCRI)**. In case the supervisory bodies do not timely and promptly report the emergence of the crisis pursuant to the provisions of the new Corporate Crisis and Insolvency Code, such bodies will be jointly liable with the directors.

WHAT TO DO

Since the new provisions require that the organizational structure to be adopted is **adequate** to the size of the company and the nature of the business carried out, such structure must necessarily be moulded and assessed on a case-by-case basis. It is therefore necessary that **the organizational structure is reflected and outlined in an internal procedure or regulation created and adopted *ad hoc*** based on the specificities of each company.

It will therefore be essential to define:

- the company processes, meaning the set of activities carried out with a logical order and a well-defined time sequence for the achievement of a specific goal;
- the company procedures, meaning the rules to be followed to carry out certain activities during the processes;
- the procedures securing the correct registration of the company information within the information system;
- the company duties and responsibilities;
- the existence and adequacy of the reports prepared for the various levels of responsibility;
- the roles covered by internal resources;
- the procedures to select the personnel to be entrusted with a specific role;
- the existence of measures allowing the hiring of personnel having the professional requirements and skills necessary to perform their work;

- the supervisory of the corporate Information Technology system.

With specific reference to the purpose of the corporate structure of timely detecting the crisis, it will be necessary to provide for:

- the preparation of the treasury plan, essential in order to supervise the debt sustainability on a prospective basis (*i.e.*, for the entire term of the plan);
- a system for timely updating of the accounts;
- the preparation of budgets and forecast documents;
- the preparation of assets, economic and financial monitoring systems appropriate for assessing the existence of conditions allowing the continuation of the company business.

OPERATIVE ADVICE

As a result of the innovations introduced by the new Corporate Crisis and Insolvency Code, the management of the company is subject to new organizational and reporting obligations (which cannot and shall not remain purely formal provisions), since the entrepreneur shall create a management and organizational structure not only proportionate to the size and nature of the business carried out, but also appropriate to supervise the evolution of the business.

It is therefore no longer reasonable to think that entrepreneurial activity of any size can be managed without the adequate organizational structure required by law. A radical change in our business mentality is needed, passing from a traditional kind of management, implemented

mainly according to the needs of the moment, to a programmed management based on adequate internal planning and control systems, also in the perspective of prompt identification and reporting of any business crisis. It does not seem possible, in the future, to do business other than in the ordered, planned and structured way required by the legislator, since, as previously explained, the companies not in compliance with such directives are destined to be quickly identified thanks to the external controls introduced by the Corporate Crisis and Insolvency Code.

All entrepreneurs are therefore called to adapt without delay to the new provisions, preferably by adopting internal regulations, not only because of the serious related liabilities, but especially in order to enjoy the benefits that will for sure derive from an orderly and planned organization.

CONTACTS

International Committee

comitatointernazionale@lcalex.it

Angela Petrosillo

angela.petrosillo@lcalex.it

Sara Consoli

sara.consoli@lcalex.it

