The greater risk, however, lies at the level of the waiving shareholder. Although income does not flow directly to them, the actual possibility of disposal leads to a fictitious inflow of wages. In the opinion of the BFH, this inflow is to be treated as disbursed remuneration and therefore taxable as income from employment at the full rate at the level of the managing shareholder. The rescue of the company thus rapidly leads to an enormous financial burden on the shareholder.

The court rulings only recognise limited exceptions to this basic principle and only in serious crises, which do not necessarily include every instance of reorganisation. The precise requirements are often in dispute and can lead to costly and time-consuming lawsuits.

Attention should be paid to these stated risks and corresponding contractual regulations stipulated when agreeing on pension commitments. However, this topic must be addressed and included in the reorganisation considerations, at the latest in the considerations regarding a waiver of the pension commitment.

Note

Always touch upon the existence of any pension commitments when being advised on reorganisation and insolvency cases. Before a separate rescue measure is considered here, you should always obtain specialist advice from a tax consultant or legal advisor.

Note

1 IX ZR 32/12, DStR 2013, p 926.

Bankruptcy law, corporate capital and duties of directors: new perspectives of Italian legal system

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Further to the recent reformation of the Italian Bankruptcy Law, the rules concerning the mandatory reduction of the corporate capital are 'frozen' in the case that a company decides to trigger a reorganisation procedure (ie, an arrangement with creditors before bankruptcy or restructuring agreement pursuant to section 182-*bis* of the Italian Bankruptcy Law). Furthermore, for the entire duration of this procedure, the general rule which obliges the directors to manage a company in a conservative manner (ie, with the aim to preserve the corporate assets to be liquidated for the satisfaction of the creditors) does not apply. Despite the critical situation, the business judgement rule shall represent the criterion to follow in the conduct of business.

The rationale of this reform, which provides for a major deviation from the general rules of corporate law as to enterprises in distress, is to encourage the management of these companies to make use of these kinds of instruments at a very early stage of the crisis, as well as in order to preserve the value of the company. Nevertheless, the risk of an abusive use of this rule cannot be ruled out; indeed, it might be misused and seen as an opportunity to gain time and maliciously defer any filing for bankruptcy (should this prove to be an unavoidable outcome of an irreversible insolvency).

To sort out of this possible predicament, the Italian government has recently proposed certain amendments (the so-called 'To do' Decree – *Decreto del fare* of 15 June 2013) which, if confirmed by the parliament, shall likely narrow down the terms and conditions for the enforcement of this exception.

Italian legal framework

Over the last ten years, the Italian Bankruptcy Law (IBL),[1] which dates back to 1942, was completely revised: the global reformations of 2005, 2006, 2007, 2010 and – finally – 2012 (so-called 'Development Decree' - *Decreto Sviluppo*)[2] have changed the main coordinates of the insolvency system.[3] If at the very beginning the system was based on the 'bankruptcy as a sanction' principle, whereby the entrepreneur declared bankrupt was seen as a kind of 'sinner' and as someone who had created a damage to the national economy, today things have totally changed.

Italian law tends to safeguard the enterprise as an economic value itself: the preliminary assumption is that should a business go into liquidation, the value to be distributed among the creditors would be – by definition – lower than the one that would be obtained through a successful restructuring or turnaround. In order to do so, several instruments are provided for by law, among which, in particular, the possibility to submit a face sheet petition for an arrangement with creditors that – as soon as filed with the court – will trigger the automatic stay. A new law decree was approved by the Italian government on 15 June 2013 (the 'To do' Decree), in order to limit the possible misuse of the face sheet petitions, in particular when it is immediately clear that no restructuring is possible and the application is aimed solely at gaining time before the bankruptcy declaration. To this end, the new rules (still to be converted into law by the Italian parliament, eventually with certain amendments) provide that the debtor must immediately file a list of its creditors in order to show immediately the extent of its indebtedness. Furthermore, also in the case of submission of face sheet petitions, the court may appoint a judiciary receiver who shall supervise the activities of the entrepreneur; in case they find out that the debtor is committing fraud (eg, they dissimulate or hide assets, claims or debts), the court may terminate the procedure. Finally, the debtor must file a monthly financial situation with the Companies' Register (so that it is accessible to anyone).

The influence of foreign legal systems, and in particular the US one, is self-evident. However, the reformation of 2012 has also introduced an important novelty which does not have any significant precedent in the international legal framework. Pursuant to the new section 182-*sexies* of the IBL, starting from the date of submission of an application for (i) an arrangement with creditors before bankruptcy (*concordato preventivo*) or (ii) a restructuring agreement pursuant to section 182-*bis* of the IBL (*accordi di ristrutturazione*), including the case of face sheet requests, the rules of the mandatory reduction of the corporate capital are 'frozen' up to the validation of the insolvency procedure by the competent court.

Evolution of the role of the corporate capital…

The novelty described above concerns the institution that has been for a long period the real North Star of the Italian corporate law: the corporate capital.

For years it has been considered as the core of the system, due to its various functions which are: (i) a general guarantee for the creditors; (ii) a fixed investment destined to remain in the company for carrying on its business, which may not and shall not be distributed to the shareholders; and (iii) a system to inform the creditors of the wealth of the company.

Furthermore, it has also represented the basis of comparison to evaluate the measure of the losses of the company, a sort of 'alarm call' with respect to the seriousness of said losses. Should losses exceed one-third of the capital, the directors must call a shareholders' meeting to adopt the appropriate resolutions and, in case the losses are not reduced to less than one-third within the following fiscal year, then the capital shall be automatically reduced for the amount of the losses (sections 2446[4] and 2482-*bis*[5] of the Italian Civil Code). Should the losses entail a reduction of the capital below the minimum threshold, then the shareholders' meeting shall be obliged to decide to either: (i) immediately recapitalise; or (ii) liquidate the company (sections 2447[6] and 2482-*ter*[7] of the Italian Civil Code).

As anticipated, section 182-*sexies* of the IBL suspends the mechanism above in case the company decides to enter into a restructuring procedure. The directors shall only to call the shareholders' meeting and inform them of the losses; then, there will be no consequences until the end of the procedure.

Certain scholars considered the principle above already applicable in cases of arrangements before the bankruptcy declaration, due to the facts that the reorganisation may have a material impact on the economic (and financial) position of the company. For instance, in case of waiver to credits, the overall amounts of the losses might be reduced to less than one-third of the capital, without any further resolution by the shareholders' meeting being required. On the other hand, the arrangement is a judiciary procedure, which is governed by the court from the very beginning through the appointment of a temporary receiver (*commissario giudiziale*) deputised to supervise the activities carried out by the management of the company. The presence of public officers was deemed as sufficient to avoid the abusive use of the procedure by the debtor and, in particular, to safeguard the creditors' interests.[8]

On the contrary, other authors tended to believe that the existence of a sound capital structure was a condition precedent for the access to any of the restructuring procedures: the economic and financial reorganisation would be possible only in the framework of a correct corporate management structure,[9] which assumes the respect of the minimum legal capital requirements.

Section 182-*sexies* of the IBL not only clearly opts for the first interpretation, but also extends its outcomes to the restructuring agreements (*accordi di ristrutturazione*). This extension represents a real revolution: unlike the arrangement before bankruptcy, in these agreements there is neither any supervision nor control by the court, and temporary receivers are not appointed. The creditors do not have any *super partes* (public) guarantor on the conduct of the business by the debtor. The control by the judge takes place only on the respect of certain requirements (minimum percentage of creditors which agree on the terms of the agreement, capability of the reorganisation plan to satisfy in full the creditors which do not enter into the agreement, ect). In any case, there is no supervision on the management of the business in the course of the procedure. The 'To do' Decree of June 2013 has not intervened on this issue.

… and its loss of importance

Legal capital has certainly lost its supremacy and centrality in Italian corporate law.

Actually, the reformation inserts in a trend characterised by the loss of importance of corporate capital. In 2012, two new kinds of limited liability company have been introduced in Italy: *Srl semplificata*[10] and *Srl a capitale ridotto*,[11] for which the minimum legal capital is only €1 (instead of €10,000, the general threshold provided for this kind of company). Also in this case, the Italian law has looked at the major foreign legislation: company types which require a capital of €1 were introduced in Germany in 2008 (*Unternehmergesellschaft*) and in Belgium in 2010 (*société privée à responabilité limitée starter*), whilst French law no longer provides a minimum capital for limited liability companies (starting from 2003) and for *sociétés par actions simplifiées* (starting from 2008).

The trend is clear, but it is somehow inconsistent with the indications which come from the EU legal system. For instance, research carried out by KPMG[12] in 2008, upon the request of the European Commission,[13] clearly points out that the abolition of the legal capital system would not entail significant advantages for the companies. Furthermore, the European Parliament[14] has recently resolved that possible reforms of the Second Company Law Directive[15] should focus on further simplification instead of introducing an alternative regime for capital formation and maintenance. And the new recast of this Directive – approved at the end of 2012 – has confirmed this intention.[16]

Duties of directors during the reorganisation procedure

Section 182-*sexies* of the IBL also provides that up to the filing with the court of the requests for a reorganisation procedure, directors shall have to manage the company in a conservative manner, that is, with the aim to preserve the corporate assets value. The assets are destined to be liquidated and the proceeds of the liquidation shall be distributed among the creditors for the satisfaction of their claims.

During the exploitation of the reorganisation procedure, this general rule will not apply: despite the fact that the corporate capital has been reduced under the legal minimum threshold, the business judgement rule shall represent the criterion to follow in the conduct of business.

The trend in the management of the company may be summarised as follows:

- company *in bonis*: business judgement rule;
- reduction of the capital below the legal minimum threshold: conservative management; and
- access to the reorganisation procedure: business judgement rule.

While in the case of arrangements with creditors the presence of a temporary receiver would/should represent a guarantee that the business will be conducted in a proper way, that is, so that the interests of the creditors are sufficiently safeguarded, in cases of restructuring agreements the possibility that the directors start new (even risky) businesses seems to be concrete. In such a case, the new potential losses would be translated once again to the creditors (both old and new ones) despite the fact that a restructuring tool had been used by the debtor.

On the other hand, it must be noted that in case of a virtuous use (and not an abusive one), the directors – since, starting from the filing of the request for a restructuring procedure, they would not liable for continuing the business activities (in a reasonable manner) – would tend to access these instruments at a very early stage of the crisis, when it may be reversible and not definitive. The new rules, in other words, might also trigger a positive trend so that the management is made responsible for starting the reorganisation when it is still possible to obtain a favourable outcome, unlike certain recent cases in which the restructuring began when the enterprise had ceased to be a going concern for many months or even years.

Conclusion

The rationale of the reform of 2012 is to encourage the use of reorganisation instruments in order to preserve the value of the company, and to push the management to make use of them at a very early stage of the crisis.

Section 182-*sexies* represents a new, important instrument for the directors in this direction: on the one hand, the rules on the mandatory reduction of the corporate capital are 'frozen', so that the reorganisation would be eased; on the other, the directors shall make use of a reasonable management of the company, without being obliged to exclusively preserve its assets.

Nevertheless, the risks of misuse are concrete, in particular in cases of restructuring agreements (*accordi di ristrutturazione*) where no judiciary supervision is present.

Notes

1 Royal Decree of 16 March 1942, No 267.
2 Law Decree of 22 June 2012, No 83.
3 For a general overview on the Italian insolvency system, see Munari, *Crisi di impresa e autonomia contrattuale nei piani attestati e negli accordi di ristrutturazione* (Giuffrè, Milan 2012).
4 It applies to joint stock companies.
5 It applies to limited liabilities companies.
6 It applies to joint stock companies.
7 It applies to limited liabilities companies.
8 Nobili-Spolidoro, *La riduzione di capitale*, in *Trattato delle società per azioni*, diretto Colombo e Portale, Vol 6* (UTET, Torino 1993), 329.
9 Università degli Studi di Firenze, CNDCEC, Assonime, *Linee-guida per il finanziamento alle imprese in crisi*, 2010, www.cndcec.it/Portal/Documenti/Dettaglio.aspx?id=964763c5-559c-40a9-a319-34a548820423 <accessed on 26 June 2013>.
10 See section 2463-*bis* of the Italian Civil Code, as inserted by Law Decree of 24 January 2012, No 1 ('Urgent measures for competition, development of infrastructures and competitiveness'), as amended.
11 See section 44 of Law Decree of 22 June 2012, No 83.
12 *Feasibility study on an alternative to the capital maintenance regime established by the Second Company Law Directive 77/91/EEC of 13 December 1976 and an examination of the impact on profit distribution of the new EU accounting regime*, KPMG, January 2008.
13 COM (2003) 284 of 21 May 2003, Communication from the Commission to the Council and the European Parliament - Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward.
14 European Parliament resolution of 14 June 2012 on the future of European company law (2012/2669(RSP).
15 Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent.
16 Directive 2012/30/EU of the European Parliament and of the Council of 25 October 2012 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 54 of the Treaty on the Functioning of the European Union, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent.