Department of Business and Management

Master's Degree Thesis in Corporate Finance

Chair of Cases in Business Law

Negotiated Crisis Resolution and the going concern assumption: the U.C. Sampdoria Case

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Academic Year 2022/2023

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Introduction

Over the past years, the Italian Bankruptcy Law has experienced a continuous process of reform and renewal, given the significant political and economic changes, which culminated in the introduction of the new Code of Business Crisis and Insolvency.

All the interventions and modifications made by the legislator have been inspired by the same underlying logic: the use of alternative mechanisms to bankruptcy when there are still concrete prospects for the reconstruction of the company.

In this scenario, the negotiated settlement procedure, introduced by the Law Decree 118/2021, represents an innovative tool, designed to provide a flexible and cost-effective alternative to formal insolvency proceedings, allowing companies to avoid the stigma and costs associated with bankruptcy while preserving their going concerns status.

The going concern assumption is a fundamental accounting principle that assumes a company will continue to operate in a foreseeable future. This assumption is a key element in financial reporting, as it affects the valuation of assets and liabilities, the recognition of revenue and expenses, and the overall financial health of the company.

In the context of the negotiates settlement, the going concern assumption is particularly relevant, since it determines whether a company can successful negotiate a settlement with its creditors and avoid bankruptcy.

The objective of this work is to understand the relationship between the negotiated settlement and the going concern principle, and to examine their role in the context of a case study of a company, U.C. Sampdoria S.p.a., that is currently undergoing such a procedure.

The analysis of the case study will provide insights into the challenges faced by distressed companies, through the lens of the balance sheet, and a possible outcome to the negotiated settlement will be proposed. By analyzing such case, this thesis aims to contribute to the understanding of the effectiveness of the negotiated settlement in resolving economic and financial distress and maintaining the viability of companies in the long run.

Thus, this thesis focuses on the analysis of the negotiated settlement in the context of business law, with particular attention to its introduction, nature, and characteristics.

The first chapter will examine the origins and purposes of this instrument, as well as its regulatory framework. An overview of the functioning of the procedure and its possible outcomes will also be provided. In this context, a focus will be on the two fundamental pillars on which this new mechanism is based: the presence of an independent expert entrusted to assist the entrepreneur, mediate and facilitate negotiations with creditors and other interested parties, and the creation of a national telematic platform with information and activation functions.

In the second chapter, the principle of the going concern, which is the objective of the negotiated settlement, will be analyzed. This will first be discussed within the framework of business economics, and in particular in civil law doctrine, national and international accounting and auditing standards. Then, it will be provided its framing in the context of the Crisis Code, as a rule of good corporate governance and finally, its relationship with the negotiated settlement. Prospective business continuity is in fact the objective of such mechanism, which takes the form of verifying the reasonable prospects of business reorganization.

In the third chapter, a case study on Sampdoria, a company operating in the professional football industry, will be proposed to verify the effectiveness of the negotiated settlement in managing company crises, and to predict the possible outcome on the basis of the data and the evidence collected and analyzed.

CHAPTER 1: THE NEGOTIATED SETTLEMENT PROCEDURE FOR THE SOLUTION OF BUSINESS CRISIS

SUMMARY

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1.1 The Law Decree 118/2021: the referral of the Italian Code of Business Crisis and Insolvency and modifications to the Bankruptcy Law

Over the past two decades, the Italian Bankruptcy Law has experienced a continuous process of reform and renewal as a result of the increasing national and supranational thrusts. Such regulatory “restyling” has become necessary, given the significant political and economic changes. All the interventions and modifications made by the legislator have been inspired by the same underlying logic: the use of alternative mechanisms to bankruptcy when there are still concrete perspectives for the business reconstruction, by inducing operators to cooperation in order to preserve business continuity. The new mechanisms modified the

Bankruptcy Law and abrogated some fundamental principles including the absolute prevalence of the *par condicio creditorum* principle, the centrality of the bankruptcy proceedings, the exclusive relevance of the state of insolvency and the irreversible liquidation outcome.

Thus, since the 2000s, the legislator enacted a series of modifying measures representing the starting point for the organic reform introduced with the new Code of Business Crisis and Insolvency in 2019. On 24 August 2021 the Law Decree No. 118[1] (DL 118/2021) was published in the Official Gazette with the main objective of supporting enterprises to deal with the economic and financial crisis caused by the Covid-19 pandemic, by introducing "*urgent measures concerning company crisis and business reorganization as well as further urgent measures on justice*".

Art 1 of such Decree, by modifying Art. 389 of the Legislative decree No. 14 of the 12 January 2019[2], provides the postponement of the code of Business Crisis and Insolvency's (from now on called CCII) implementation date to May 16, 2022, and to 31 December 2023 regarding the "Early Warning System" regulation; and, at the same time, it anticipates the entry into force of some provisions made by the new CCII.

The highlight of the DL 118/2021 is the introduction of a new procedure, the so-called "*negotiated settlement procedure",* which enables any failing individual or group of businesses to request, exclusively on a voluntary basis, the appointment of an independent expert to mediate the negotiations between the debtor and the stakeholders, in order to facilitate the business reconstruction.

The implementation of such Procedure is inspired and lead by the European Directive 2019/1023[3] which require member states to establish early warning systems to incentivize debtors to take immediate action when a potential crisis situation arises, with the support of public and private professionals, as well as to increase and simplify the information to access restructuring initiatives, including telematic tools. Thus, the main objective of the negotiated

[1] Converted into Law No. 147 of October 21, 2021 and included in the new Code of Business Crisis and Insolvency by the Legislative Decree No. 83/2022.

[2] The new bankruptcy code, known as The Code of Business crisis and insolvency (CCII) was approved by the Legislative Decree 19/01/2019 No. 19, published in the Official Gazette No. 6 of 14/02/2019 to pursue the implementation of the principles contained in the law 19/10/2017 No. 155 regarding the "*Delegation of powers to the Government for the reforms of the disciplines of the business crisis and insolvency";* subsequently modified with the so-called corrective Legislative Decree 26/10/2020 No. 147.

[3] The European Directive 2019/1023 of the European Parliament and of the Council, published on June 2019 concerns "*preventive restructuring frameworks, discharge of debt and disqualifications, and measures to increase the efficiency of procedures concerning restructuring, insolvency, and discharge of debt, and amending Directive (EU) 2017/1132*. It is aimed at increasing the well-functioning of the internal market and at eliminating barriers to the exercise of fundamental freedoms, such as the free movement of capital and freedom of establishment, that arise from disparities in national laws and procedures.

settlement procedure is to overcome the business crisis before it leads to an irreversible situation of insolvency (Art. 2-19).

Furthermore, according to Articles 18 and 19 of the Law Decree, a new form of simplified arrangement, with liquidation purposes, the so called "*simplified arrangement for the liquidation of assets"* may be adopted as a result of the procedure, in case of the absence of a proper solution for the business crisis, as proven by the expert's report submitted at the conclusion of the negotiation process. In this scenario, the entrepreneur may submit, within 60 days after the report's publication, a proposal for an arrangement involving the assignment of assets and a liquidation plan, demanding the approval of the deal. After evaluating the proposal's feasibility and the expert's final report with specific regard to the expected outcomes of the liquidation and the warranties provided, the Court appoint an auxiliary in place of a commissioner. Then, the proposal will be sent to the creditors, which, as opposed to the ordinary discipline, do not have any decision-making power. Finally, once the procedure's consistency and the liquidation plan have been verified, the Court will only approve the agreement if the proposal is beneficial to all creditors when compared to the alternative of bankruptcy liquidation.

Some relevant amendments are made to the Bankruptcy Law, concerning mainly the composition with creditors and the debt restructuring agreement regulation by Art. 20 and following, in the context of the governance of the bankruptcy proceedings during the Covid-19 Pandemic crisis. The first relevant change is related to Art. 180, paragraph 4, of the Bankruptcy Law, which enables the Court to approve the composition with creditors even in the absence of acceptance (and no longer of failure to vote) by the tax authorities or the provident societies or charities, the so called "qualified public creditors ". The latter parties are now given 90 days from the proposal's submission, to file their potential consent. This applies especially when the acceptance is necessary to achieve the majorities stated in Art. 177 and when the proposed arrangement is more viable than the liquidation option.

In order to incorporate the new rules, set forth in the first and the second paragraphs of Art.100 of the Business Crisis Code into the Bankruptcy Law, two provisions are added to Article 182-*quinquies*[4]. These changes aim at ensuring the protection of workers by favoring

[4] After the fifth paragraph, Art. 20 of the DL 118/2021 provides that "*the Court may authorize the payment of wages due for the months prior to the filing of the appeal to workers employed in the business whose continuation is contemplated".* Furthermore, a new paragraph states that "*when the continuation of the business activity is expected, the rules referred to in the fifth paragraph shall apply, notwithstanding the provisions of Art. 55 ph.2, to the repayment, on the agreed due date, of the instalments due on the loan agreement with collateral encumbering assets instrumental to the business operation, if the debtor, on the date of the filing of the application for the admission to the arrangement, has fulfilled his obligations or if the court authorizes him to pay the debt for principal and interest due on that date. The professional meeting the requirements of Art. 63,*

the payment of unpaid wages and wages due prior to the application for an arrangement with business continuity; and, on the other hand, they seek to guarantee financial intermediaries for the reimbursement of overdue loan installments related to debts secured by assets owned by the company. In the latter case, the intervention of a professional is required to certify that the secured claim may be fully satisfied with the proceeds obtained from the assets' sale and that the repayment of the installments does not affect other creditors' rights.

Art. 20 of the DL 118/2021 also entirely amends Art. 182-*Septies* with regards to restructuring agreements with extended effectiveness, by broadening the subjective requirement of the procedure to include creditors other than banks and financial intermediaries, provided that the debtor groups the creditors into categories in terms of legal position and economic interests[5], at the occurrence of specific conditions regulated by the Decree. After that, the following provisions are introduced:

i. Art. 182-*octies* disciplines the *moratorium agreement* that can be concluded between an entrepreneur, including non-commercial entrepreneurs, and his creditors. Its purpose is to temporarily regulate the effects of the crisis, since it may involve other actions besides the waiver of claims, including suspending executive or conservative actions or delaying the due dates for claims. The effects of such provision are extended also to non-adhering creditors who belong to the same category if certain requirements are met.

ii. Art. 182-*novies* governing facilitated restructuring agreements, which reduces the percentage of adhering creditors required for the conclusion of a debt restructuring agreement (Art. 182-*bis* CCII) from 60% to 30%, under specific circumstances[6] .

iii. Art. 182-*decies* provides the extension of the effects of the restructuring agreements to shareholders with unlimited liability as well as the preservation of the rights of non-adhering

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ph.3 letter d, also certifies that the secured claim could be satisfied in full with the proceeds from the liquidation of the asset carried out at market value and the repayments of installments due does not affect the other creditors' rights".

[5] The homogeneity of the legal position of clams is defined as the objective nature of the claim and concerns the intrinsic qualities of the creditor's claim, considering the legal features, the unsecured or preferential character of the claim, the potential existence of disputes with regard to the extent or the quality, and the presence of any provisional enforcement title. The homogeneity of economic interests considers both the peculiar interest the creditor is claiming as well as the source and the socioeconomic nature of the credit (banks, suppliers, employees, etc.). Within each category, the proposed treatment should be the same for all creditors composing it.

[6] *According to Art. 182-novies of the bankruptcy law, the percentage of adhering creditors provided by law is halved when the debtor when the debtor "has waived the moratorium referred to in Art. 182-bis, first paragraph, letters (a) and (b)" and "has not filed the appeal provided for in Art.161, sixth paragraph, and he has not requested the suspension established by Art. 182-bis, sixth paragraph."*

creditors, to whom the effectiveness of the agreement is extended, in addition to co-obligors, guarantors of the debtor, and recourse obligors.

Articles 21 and 22 of the Law Decree 118/2021 provide some amendments to the composition with creditors' agreement. More specifically, Art. 21 grants debtors, who have obtained access -by December 31, 2022- to the so called "*concordato in bianco*" or to the debt restructuring agreement, with the right to file, within the terms set by the judge, a renunciation of the procedure stating that a recovery plan has been filed.

Furthermore, in the composition with creditors' process, Art. 22 provides a specific time limit given by the Court to the distressed entrepreneur for the submission, after the filing of the appeal, of the required documents, this is valid even when bankruptcy proceedings are ongoing, and it is extendable, if there are justified reasons, until the end of the Covid-19 emergency. Art. 23 of the Decree specifies that, until December 31, 2021, no petitions to terminate a composition with creditors' agreement and no appeals filed for the declaration of bankruptcy are allowed.

Finally, the second section of the Law Decree 118/2021 establishes urgent provisions on justice. More precisely, the most relevant measures:

iv. Provide for an increase in the organic function of the ordinary judiciary body, within the introduction of the figure of the "*European Deputy Prosecutor*", to ensure the application of the European legislation concerning the European Prosecutor's Office.

v. Enact measures to speed up and simplify the procedures for the payment of the compensation for equitable reparation, in case of violation of the reasonable term of the trial and other amounts due based on judicial titles.

vi. Introduces a derogatory discipline, valid only for 2021, regarding the reallocation of the resources of the "Single Justice Fund".

1.1.1 Objectives of the Law Decree 118/2021: preliminary considerations

The publication of the Law Decree 118/2021 established the concretization of the proposals formulated by the Commission appointed by Minister Cartabia with the Ministerial Decree 22/04/2021, with the aim of: deferring the entry into force of the new Code of Business Crisis and Insolvency; making corrective proposals and implement the European Directive 1023/2019; and of adapting the normative text of the Code to cope with the effects of the Covid-19 emergency.

Considering the measures implemented in response to the economic crisis caused by the Covid-19 Pandemic, the DL 118/2021 represents the second stage of intervention. A first response was already given by the Liquidity Decree No.23 of April 8, 2020, with regard to bankruptcy legislation, which provides the temporary ineligibility of bankruptcy appeals, the augmentation of the deadlines for the fulfilling of business reorganization plans, and their review in the context of the composition proceedings or the restructuring agreements. Thus, assisting businesses in the challenging pandemic crisis framework, the DL 23/2020 represents a fundamental component of the "National Recovery and Resilience Plan" (PNRR).

The deferral of the entry into force of the CCII, which has already been done several times, is due to the fact that the multiple mechanisms and provisions contained therein were intended for a stable business and economic scenario, which would instead impact a dramatically different situation.

The Covid-19 pandemic hardly challenged the resilience of small and medium enterprises that form the Italian productive structure which, reducing their resources, represented a threat to their survival. In this difficult context, the DL 118/2021, introduces crisis prevention, rehabilitation, and restructuring mechanisms, thus indirectly discouraging the entrepreneur from resorting to judicial procedures, with the final aim of ensuring the survival of distressed companies and the satisfaction of creditors.

The introduction of the main features and changes to the Bankruptcy Law is led by the need, clearly expressed in the explanatory report to such Decree, to "*provide distressed companies with new tools to prevent the outbreak of crisis situations or to address and solve all of those situations of economic and financial imbalance that, while revealing the existence of a crisis or state of insolvency, appear to be reversible".* Therefore, the new legislative body completes the framework of mechanisms aimed at regulating business crisis, as many of them,

if faced timely and at an early stage, may find a solution without necessarily resorting to costly judicial proceedings, such as an arrangement with creditors. The latter, in fact, is intended to continue for several months, significantly increasing costs for the entrepreneur, and to severely limit or block the business activity.

However, the new tools and mechanisms provided by the CCII and the Decree, did not allow for a certain gradualness required by the economic situation caused by the pandemic. In fact, the immediate entry into force of a new legal framework caused some application uncertainties to the detriment of the recovery path of distressed companies.

1.1.2 Introduction to the Negotiated Settlement Procedure

The main highlight of the Law Decree 118/2021 is the introduction of a new tool, the so-called Negotiated Crisis Resolution, as a new solution for all the cases of economic and financial imbalance that can lead companies in a situation of crisis or insolvency, regulated by Art. 2 of such decree and following. The main goal of this new mechanism, introduced in a challenging economic and social framework characterized by the pandemic crisis, is supporting distressed companies to face and resolve economic and financial difficulties that appear reversible, to preserve the productive and industrial fabric, eventually through the sale of the company or a branch of it[7], by preserving the business continuity. In this context, the legislator intended to provide a business recovery mechanism more structured and less costly with respect to the procedures regulated by the previous bankruptcy code. For this purpose, the access to such procedure does not involve any business size requirement, thus, it can be used by all enterprises listed in the business register, including agricultural companies, and it can be activated only by the entrepreneur in crisis. The reward measures and the expert's prohibition from disclosing debtor's information to third parties or testifying in negotiations proceedings incentivize such voluntary nature of the procedure. To access the negotiated settlement procedure, the entrepreneur is required to apply through a national telematic

[7] "*In many cases, the early disposal of the business proves to be the only solutions that allows for the restructuring since the time required for the negotiations and for the bankruptcy proceedings may be detrimental for the entrepreneur, who, by managing a distressed company, ends up enlarging the overall amount of the debt".*
L. De Simone, "Le autorizzazioni giudiziali", Diritto della Crisi.it, 2021.

platform, which allows him to self-assess the health of the company and determine whether there are any chances for rehabilitation.

In this process the expert, whose characteristics will be analyzed and discusses in the following paragraphs, represents the primary character. The latter is placed by the legislator alongside the entrepreneur in order to facilitate negotiations with creditors and other stakeholders, and to identify the most suitable solution to address the crisis. The law decree also specifies the requirements and the procedures for the appointment of the expert, as well as its compensation scheme.

The procedure, as a non-judicial and negotiable tool, does not require the entrepreneur to appeal the court, since negotiations take place between the debtor and the stakeholders. In case asset protection measures are required, it is sufficient that the debtor ask for their application and simultaneously request the access to the negotiated settlement procedure. Moreover, the publication of the latter does not allow for any request of bankruptcy declaration, or for the determination of the state of insolvency. Thus, creditors are not involved, and they cannot attack the entrepreneur's assets, allowing him to continue the management of the company and to make payments, except for actions of extraordinary administration. Moreover, the characteristic of negotiability does not focus on the opposition of creditors and debtors, but rather on the cooperative research of a proper solution to the business crisis, pursuing the preservation of the interests of all stakeholders. In this way, the treatment of crisis is anticipated at the time in which it does not actually affect the company, while the warning systems provided by the former bankruptcy law operate in a situation of mature crisis, forcing the entrepreneur to disclose its existence to third parties, including creditors.

In addition, the legislator allows access to that procedure not only distressed companies, but also to insolvent companies, to the extent that there are concrete possibilities of rehabilitation, to business groups and small companies. Regarding the outcomes of the negotiations with creditors, the debtor can use the tools provided by the new Code of Crisis, in addition to the new type of liquidation arrangement and the restructuring plan subject to approval.

The Law Decree 118/2021 introduces also the "simplified arrangement for the liquidation of assets" as a possible outcome of the negotiated settlement procedure, providing a new form of arrangement with liquidation purposes in which the adherence and vote phase is omitted, and it does not ensure any threshold of satisfaction for creditors. These two mechanisms are connected and are aimed at incentivizing the entrepreneur to identify viable options for the business restructuring or the dispose of it and the assets' liquidation.

1.1.3 Negotiated vs Assisted Settlement

The original text of the Legislative Decree No. 14/2019 (Code of Business Crisis and Insolvency) provided for the instrument, which has never entered into force, of the assisted settlement of business crisis: a non-judicial procedure that can be activated at the request of the debtor or on the recommendation of the corporate supervisory bodies and/or qualified public creditors. Such mechanism was aimed at reaching an agreement between the entrepreneur and his creditors with the support of the OCRI[8], which was entrusted to assist the debtor in conducting negotiations in order to overcome the crisis situation.

Specifically, the body appointed to support the entrepreneur consisted of a committee of three experts, chosen among those listed in the Register of individuals entrusted by the judicial authority with the function of management and control in the procedures referred to in the CCII, of which:

vii. one designated by the President of the specialized business section of the Court or his delegate;

viii. one appointed by the President of the Chamber of Commerce or his delegate;

ix. one nominated by the referent, after a consultation with the debtor, who had to belong to the association representing the entrepreneur's relevant industry.

The legislator's decision to include in such procedure the debtor was intended to consider the peculiarities of the company and to ensure that the OCRI was perceived by the entrepreneur as a "friendly" entity, whose task was to assist and facilitate him in the management of the crisis.

The procedure provided, in the case of a warning from qualified public creditors, the granting for the debtor of a 90-days period to repay the debt or to apply for the assisted settlement, or to access a crisis or bankruptcy procedure. On the receipt of the debtor's notification or petition, the OCRI representative would notify the company's internal supervisory body, and, within 15 days, he would summon the debtor. At the conclusion of such meeting, as well as before and regardless of it, the debtor may choose to request the assisted settlement procedure.

The agreement with creditors had to be reached within 90 days, and it had to be in written form, filed with the OCRI and was not extendable to parties other than those who had signed

[8] Namely: "*Organismo di gestione delle crisi di impresa".*

it. In the case of a negative outcome, the supervisory body was entitled to encourage the debtor to file a petition for crisis or insolvency regulation proceedings within a period of thirty days, under penalty of being reported to the Public Prosecutor's Office for the possible *ex-officio* initiative to open a judicial liquidation. Such warning was also provided in the event that the entrepreneur failed to appear for the hearing in front of the OCRI or, while appearing, he failed to apply for the initiation of the procedure or to comply with the directions given to him.

Due to the aforementioned mechanism, which could have easily led the entrepreneur towards a judicial liquidation (even in the event of a lack of creditors' petitions), the assisted settlement procedure had immediately raised concerns, to the extent that the legislator, at first, postponed its entry into force until December 31, 2023, and, subsequently, ordered its abrogation with Art. 6 of the Legislative Decree 83/2022, which fully replaced Title II of the Crisis Code. In this way, the assisted settlement was replaced, before even enter into force, by the negotiated settlement procedure, introduced by the so-called "Pagni Decree" (i.e., DL 118/2021).

In this context, the most important novelty of the negotiated settlement consists in the presence of a single and not a collegial subject, also externally appointed, characterized by a strong independence with respect to the entrepreneur and the other parties, whose function is no longer to assist the debtor, but to mediate negotiations with creditors; the entrepreneur therefore continues to rely on the assistance of his trusted professionals, while the expert acts as a negotiator only. Thus, there is a substantial difference between the expert and the OCRI: both perform a facilitative function; the OCRI has a more publicist approach, while, on the other hand, the expert is a professional appointed by a commission composed of public subjects, but he is still a private professional responsible for the mediation of negotiations rather than on the assistance of the entrepreneur.

The provision of the specific figure of the expert, as opposed to the three members of the OCRI, represents a strong boost of the legislator oriented to simplification and cost reduction.

Furthermore, the negotiated settlement, contrary to the assisted settlement, can be activated only on the voluntary and spontaneous initiative of the distressed company; while external reporting by qualified creditors is eliminated, and crisis indicators are no longer relevant, as was the case of the assisted settlement.

This new approach gives the negotiated settlement procedure a more private feature, with the aim of solving the crisis at an early stage, to avoid congestions of the court systems and the resulting costs for the community.

The negotiated settlement is characterized by the regulation of the activities carried out by the independent expert and the parties, and the standardization of the procedure; it relies on certain elements which are:

i. a specific training of the expert, including in the field of facilitation;
ii. the clarification of the expert's role as a third party, with respect to all parties, and the special attention to the criteria of transparency and rotation;
iii. a greater articulation, compared to the CCII, of the duties of the parties and the expert;
iv. the implementation of a syndicate information and consultation procedure in addition to those required by law or by collective agreements, where the entrepreneur indents to carry out reorganization or changes in the business model that affect the relations with a plurality of workers;
v. the establishment of a telematics platform for the appointment of the expert and to monitor the conduct of negotiations;
vi. the provision of a test that provide a preliminary assessment of the complexity of rehabilitation;
vii. the institution of a checklist containing a series of questions, addressed to the entrepreneur and to the expert, the answers to which provide operational indications for the drafting g the business recovery plan and for the analysis of its consistency (indications that should be considered as a transposition of best practices and not as absolute prescriptions);
viii. the drafting of a protocol for the conduct of the negotiated settlement by the expert, which provides for the operational declination of the regulatory requirements set forth in the Law Decree.

1.2 The new mechanism of the negotiated settlement of business crisis.

This section presents the negotiated settlement of business crisis, which introduces a private path between the entrepreneur and his creditors, and not a bankruptcy procedure.
To better understand the nature, the functions, and the purposes of the negotiated settlement procedure, it is necessary to consider the broader framework of the corporate crisis and bankruptcy. In this context, the business crisis is treated as a reversible phase that precedes the risk of insolvency. Thus, the main purpose of the following paragraph is to introduce these concepts, which emerge from Art. 12 of the Code of Business Crisis and Insolvency, regarding the prerequisites for accessing the procedure.

1.2.1 The Business Crisis and the definition of the state of insolvency.

Art. 2, paragraph 1, of the new Code of Business Crisis and Insolvency defines the business crisis as the situation of "*economic and financial imbalance that can lead to the insolvency of the debtor, which represents for companies the inadequacy of the prospective cash-flows and the inability to regularly meet scheduled obligations."*[9] The same Article also provides a definition of insolvency, which is defined as "*the situation of the debtor manifested by defaults or other external facts, which shows that the debtor is no longer able to regularly meet his obligations".*[10]Although these two definitions have similar features, they refer to different time stages: the business crisis is the previous phase and is the basic prerequisite for the determination of the state of insolvency; while insolvency denotes the final stage, *i.e.*, the expression of the financial bankruptcy. Crisis is therefore defined prospectively, as the probability of future insolvency.
Given the above, a central theme in defining the idea of crisis is the one related to the probability of default, which occurs when there are, and yet non-prevailing, viable alternatives

[9] Article 2, paragraph 1, of the Legislative Decree of January 12, 2019, No. 14, subsequently modified by the Legislative Decree of June 17, 2022, No. 83.
[10] Article 2, paragraph 2, of the Legislative Decree of January 12, 2019, No. 14, subsequently modified by the Legislative Decree of June 17, 2022, No. 83.

that might change the crisis' outcome and avoid insolvency. In fact, when insolvency is only plausible there are at least two possible scenarios for the distressed company, while in the case of bankruptcy there are no alternative consequences.

The concept of business crisis, which has several explanations and features, was already contained in Art. 2086 of the Italian Civil Code, in which its timely detection represents one of the main purposes of the organizational, administrative, and accounting structure of a company.[11] Therefore, this interpretation influences the direction and the definition of the business plan, and the duties of the management, at least from the moment the crisis was detected.

According to the economic and business doctrine, which considers a definition of insolvency based on the *equity test* (cash imbalance), the crisis is represented by the situation in which the company, in the absence of corrective actions or renegotiations of its debts, is not able to meet its obligations with a maturity over 12 months, neither using its own resources nor with new financing. In this context, the central theme is the unfavorable trend of the prospective cash-flows that exposes the company to the risk of default, considering the financial perspective of the business crisis.

The transposition, on a juridical regulatory level, of such financial feature does not constitute an innovative element: the concept of crisis, including financial crisis, was already mentioned by Art. 160 paragraph 1 of the former Bankruptcy Law[12], to denote the broader condition of insolvency, defined as the inability to regularly meet contracted obligations.

The new CCII established a paradigm shift, moving from a capital to a financial perspective and focusing on the dynamic feature of the business management. The rationale behind such approach, as was previously mentioned in this paragraph, relates to the idea that a company's ability to compete in the market is related to the production of adequate cash-inflows with respect to outflows. Thus, the capacity to synchronize financial flows represents the core element around which the notion of insolvency is structured. In this way the concept of business crisis does not constitute only a prerequisite to legitimize the state of insolvency, but, at the same time, a condition for imposing the timely use, prior to insolvency, of measures and procedures functional to the re-establishment of the business continuity.

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[11] According to Art. 2086 of the Italian Civil Code, "*the entrepreneur, whether operating in corporate or collective form, has the duty to establish an organizational, administrative, and accounting structure that is appropriate to the nature and the size of the enterprise, including the timely detection of the business crisis and the loss of the business continuity, and to take actions for the adoption and the implementation of the instruments provided by the law to overcome the crisis and preserve the business continuity",* paragraph introduced by the Legislative Decree January 12, 2019 No. 14.

[12] Art. 160 of the Italian Bankruptcy Law (R.D. March 16, 1942, n. 267) regarding the prerequisites for the admission to the arrangement with creditors, *i.e.*, the so called *"concordato preventivo".*

From the time of its emergence, five stages of corporate crisis[13] can be identified:

1. Crisis incubation, which can occur in any company, even ones that are unquestionably healthy, is a physiological phase characterized by managerial or productive inefficiencies. However, with a proper corrective plan it can be easily overcome.
2. Maturation of the crisis. In the absence of appropriate strategies to overcome the previous stage, the enterprise may experience this phase, in which it is necessary to strengthen the control systems.
3. Reversible declared crisis, in which there are concrete signs of economic, patrimonial, and financial imbalances. Therefore, the entrepreneur must consider whether to start a bankruptcy proceeding or begin a business reconstruction process.
4. Reversible insolvency, which involves the use of crisis and insolvency regulation procedures. With the emergence of the state of insolvency, the resolution of the crisis is no longer a responsibility of the entrepreneur, but it is provided by law.
5. Asserted insolvency and subsequent petition for judicial liquidation. The latter stage has as its ultimate goal the liquidation of the company.

1.2.2 Negotiated Settlement for the solution of business crisis.

The "*Urgent Measures on Business Crisis and Corporate Reorganization"* introduced with the Law Decree 118/2021, later converted into Law No. 147/2021, and incorporated into the new Code of Business Crisis and Insolvency by the Legislative Decree No. 83/2022, introduced the negotiated settlement procedure as a new solution for all those situations of economic and financial imbalance that can lead companies to a state of irreversible financial bankruptcy.

Such Decree is placed in a difficult economic and social context, characterized by the Covid pandemic crisis, which resulted in the closure of the national production fabric and in an arduous challenge for all companies. Therefore, the objective of the Law Decree is to provide distressed companies with new tools to timely prevent the outbreak of a crisis and, at the same time, to address and resolve reversible economic and financial imbalances, through the reaching of agreements between the entrepreneur and his creditors.

[13] Danovi, Riva, Le cinque fasi della crisi e dell'allerta, Il Fallimentarista, 20 agosto 2018.

In this framework, small and medium-sized enterprises, that form the national production system, lack adequate mechanisms to analyze and assess their economic and financial situation, nor to prevent the crisis from degenerating into an irreversible bankruptcy. Thus, the purpose of the legislator was to intervene by providing distressed companies with more effective and less onerous additional mechanisms for the restructuring of business activities. It is clear the desire to impart a "change of path": the Decree and the subsequent conversion law represent the will of the legislator in the adoption of a forward-looking approach, structuring a lasting regulatory reconstruction activity, with the aim of favoring the revitalization of the national productive and economic system. Such revolutionary approach is therefore aimed at safeguarding the production complex and the occupancy, to the extent that the continuation and the preservation of the economic activity is subject to the presence of certain conditions that favor the effective recovery.

For these reasons, the Law Decree introduced a new negotiable and extrajudicial instrument called the "Negotiated Crisis Resolution", representing a crucial point in this process, since, as mentioned before, it is accessible to all types of businesses, and it provides new and concrete possibility for business reconstruction. For these purposes, it is fundamental to verify the subsistence, through certain indicators, of the situation of crisis, considered as a reversible stage preceding insolvency, and, if the objective to be achieved is the business reorganization, the different hypotheses provided by the law should be considered, in the light of a correct assessment of the state of the company. Only the timely intervention allows the effective recovery of the business, through the economic and financial restructuring, and a conversion and reorganization process.

The regulatory intervention is placed in a shifted socioeconomic context, in which the economic goal is no longer the mere assets' liquidation, but the preservation of the company and, as far as possible, the maintenance of the occupancy levels. For these purposes, the proper identification of crisis factors is a crucial preliminary phase as it is necessary to assess the intervention programs aimed at the business recovery or, alternatively, to the futility of any recovery in cases the company's future is permanently compromised.

It is precisely in the so-called "*twilight zone*"[14] that the chances of the business reconstruction are the greatest, to the benefit of all the stakeholders involved, through the provision of an efficient system of restructuring for distressed companies, based on the voluntariness of the entrepreneur, on the autonomy of its negotiability, and on its extrajudicial nature. Contrary to the alert thresholds provided by the former Crisis Code, operating in a situation in which the

[14] The "*twilight zone*" is defined as the time period preceding the situation of insolvency of a company and the entry in a formal insolvency procedure (administration or liquidation).

crisis had already matured in the company, in the negotiated settlement the treatment of the business crisis is anticipated to the time when it does not yet affect the business, in order to incentivize the entrepreneur to promote the agreement with his creditors before the business value is irretrievably lost.

The negotiated settlement, despite its voluntary and extrajudicial nature, still allows the entrepreneur to request the intervention of the court during the most critical phases, such as those of asset protection and of application for predeductible financing.

1.2.3 Main features of the Negotiated Settlement Procedure: extrajudiciality, confidentiality and voluntariness.

The negotiated settlement procedure presents significant peculiarities with respect to the bankruptcy procedures under the current bankruptcy law, and to the alert mechanisms regulated by the Crisis Code which are focused only on the goal of the timely emergence of the business crisis itself, rather than on the effective long-term recovery of still viable enterprises, even if in a condition of asserted crisis. In fact, according to Art. 12 of the CCII, the entrepreneur in conditions of patrimonial or economic and financial imbalance that make probable the insurgence of a crisis or insolvency, can request the general secretary of the chamber of commerce located in the place where the company has its registered office, the appointment of an independent expert, when there are concrete reconstruction prospects. The second paragraph[15] introduces the fundamental role of the expert, who mediates negotiations between the entrepreneur and his stakeholders, in order to find a solution to face the aforementioned conditions of imbalance. Such expert must meet specific requirements of professionalism and independence introduced by article 16 of the CCII, and since he has the role of a "facilitator" he works together with the entrepreneur, without replacing him, to identify the most effective response to the crisis.

The negotiated settlement procedure, introduced to support distressed companies to face economic and financial imbalances, is inspired by the following principles:

[15] According to Art. 12, paragraph 2, of the CCII, "*the expert facilitates negotiations between the entrepreneur, creditors and any other interested parties, in order to identify a solution to overcoming the conditions referred to in paragraph 1, including though the disposal of the business or branches of it".*

x. Simplification, since it involves the presence of a single professional, the so called "independent expert", whose task is to mediate relations between the entrepreneur and his creditors. In this way, the procedure is streamlined, unfolding in an informal and flexible manner.

xi. Voluntariness, providing for a gradual and voluntary approach by the entrepreneur.

xii. Confidentiality, although establishing specific obligations regarding active participation and information.

xiii. Professionalism of the expert, entitled to find a solution to overcome the condition of economic and financial imbalance that affects the company.

xiv. Extrajudiciality nature of this mechanism.

xv. Balanced protection of the parties, with the introduction of *check and balances* mechanisms aimed at ensuring a fair balance of the interests of debtors and creditors, who may receive red alerts concerning bad conducts or acts of the debtor. Furthermore, the negotiated settlement also focuses on the role of the parties' advisors, ensuing professionalism and skills necessary to deal with even the most intricate situations.

xvi. Allocation, while limited, of intervention powers to the Court.

More specifically, the most remarkable feature is the extrajudiciality of the negotiated settlement, according to which the entrepreneur is not required to apply to the Court, except in cases of the application of the protective measures under Art. 18, predeductible financing or contracts renegotiations under Art. 22 of the Code of Business Crisis and Insolvency.

From this standpoint, the negotiated settlement falls between the restructuring agreement, which requires the court approval and allows the interruption of the enforcement and precautionary actions, as well as the authorization to obtain predeductible financing, and the certified plan of reconstruction, which does not contemplate the external engagement of any figure, but rather the simple appointment, by the entrepreneur himself, of an "independent expert" as a certifier and a facilitator.

Unless requested otherwise, the negotiated settlement is covered by confidentiality. Art. 16, ph. 6 of the CCII, states that "*all parties involved in the negotiations have a duty to cooperate loyally and promptly with the entrepreneur and must act respecting the non-disclosure obligations concerning the situation of the entrepreneur, the initiatives taken or planned by the entrepreneur, and the information acquired during the negotiations".*

As in the cases of the creditors' composition and of the other negotiated crisis solutions, such tool can be activated by the entrepreneur on a voluntary basis only. However, the corporate

supervisory body is entitled to notify in writing the management, also providing the motivations, of the existence of the prerequisites for the admission to the Procedure, the administrative body has 30 days to report on the initiatives taken.

Given its main features, the negotiated settlement overcome the rigid approach of the warning mechanisms regulated in the Crisis Code, providing distressed companies with a new agile procedure, according to the attempt of the legislator of removing the structural and bureaucratic burdens that characterized the alert mechanisms and the composition plans regulated by the Bankruptcy Code. Consistent with such purposes and features, the explanatory report clarifies that the petition for the appointment of the expert does not involve the competition of creditors and it does not result in any dispossession of the entrepreneur's assets. The latter, while obliged to manage the company without damaging the creditors' interests and according to the duties set forth in Article 2086 of the Italian Civil Code, continues the ordinary and extraordinary management of the company and he is allowed to make spontaneous payments.

As a result, the Procedure does not have any of the effects of bankruptcy or of the composition with creditors since it applies to all types of companies the duty to set adequate corporate structures and mechanisms in order to run the business without harming the stakeholders' interests.

1.2.4 Subjective, Objective and Procedural Prerequisites

Art. 12, paragraph 1, of the Code of Business Crisis and Insolvency introduces the eligibility requirements for the negotiated settlement procedure, stating that it is addressed to the commercial and agricultural entrepreneur that is "*in a condition of economic and financial imbalance that makes plausible its crisis or insolvency"*. Therefore, no subjective size limits or prerequisites are set for accessing this institution, as also stated in the explanatory report. Thus, it is not preclusive the joint possession of the non-bankruptcy requirements set forth in Art. 1 of the Bankruptcy Law: The Procedure can be initiated by all types of companies, including the so-called sub-threshold enterprises[16] and business groups. In this way, the

[16] "Sub-threshold enterprises" is a term referred to all non-bankruptcy entities that meet the parameters set by Art. 1 of the bankruptcy Law: total annual assets not exceeding 300.000 euros; total annual gross revenues not exceeding 200.000 euros; total debts not exceeding 500.000 euros. In such a case, the application is submitted to

legislator grants all entrepreneurs with the possibility to timely intervene if there are signs of crisis, in order to facilitate its overcoming, and, at the same time, the role of the entrepreneur in such process is strengthened since, once he has assessed the situation of the company, he may apply for the initiation of a business reorganization process, with the support of an independent expert. To ensure a successful outcome of such process, it is essential for the entrepreneur the promptness of his intervention: it is precisely at the time preceding the crisis or insolvency that the prospects of recovery and successful negotiations with creditors are the greatest.

Furthermore, Art. 13 of the CCII, concerning the access to the negotiated settlement, provides for the establishment of "*a national telematic platform accessible to all entrepreneurs listed in the business register through the institutional website of each chamber of commerce, industry, handicrafts and agriculture".* Such article introduces the second subjective prerequisite, which is the listing in the business register, thus excluding *de-facto* companies.

The objective prerequisites to access the negotiated settlement, stated in Art. 12 of the CCII, are:

i. the existence of a situation of patrimonial or economic and financial imbalance that make plausible the crisis or insolvency of the debtor;

ii. the subsistence of concrete business reconstruction prospects.

Although it might seem that the first requirement is related to the concept of insolvency defined in the Crisis Code, the negotiated settlement refers to the time prior to the probability of insolvency, also including the situation in which it is probable, but not yet in place, the occurrence of a business crisis. However, on the other hand, the rule does not exclude firms that are already in a state of crisis or even insolvency, as long as it is reasonable to obtain a successful reorganization outcome[17]. Confirming that, Art. 18 of the Code of Business Crisis, regarding protective measures, precludes the declaration of bankruptcy from the publication of the negotiated settlement petition[18] and, in addition, Art. 25-*quinquies* establishes the inadmissibility of such petition whenever there are pending proceedings for the approval of a restructuring agreement, for the admission to the arrangement with creditors or for the

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the Crisis resolution Body or to the general Secretary of the relevant Chamber of Commerce, as provided for in Art. 17, paragraph 2, of the Law Decree 118/2021.

[17] Consider, for example, the closure of the business as a result of an emergency legislation.

[18] Art. 18 of the Code of Business Crisis and Insolvency, paragraph 4, states that: "*from the day of the publication of the petition referred to in paragraph 1 and until the conclusion of the negotiations or the filing of the application for the negotiated settlement procedure, the judgement opening the judicial liquidation or the declaration of the state of insolvency, cannot be pronounced, unless the court orders the revocation of the protective measures".*

concession at the end of the so-called reservation phase[19]. Such provisions would be meaningless if the objective requirement did not also include companies in a state of crisis or insolvency.[20] However, only the situation of reversible insolvency characterized by "concrete prospects of rehabilitation", is contemplated, and it must persist for the entire duration of the negotiated settlement procedure.

The state of insolvency is instead regulated in Art. 21 of the CCII, according to which when in course of the negotiated settlement procedure the entrepreneur is insolvent but there are concrete prospects of rehabilitation, the latter manages the enterprise in the prevalent interest of creditors, while concerning the situation in which the procedure is already in progress.

In a nutshell, the objective prerequisite includes not only the temporary distressed situation of the company, but also crisis and insolvency, provided that it is reversible.

Regarding the subsistence of concrete prospects of business' reconstruction, the Law Decree 118/2021 has established a national telematics platform, available to the entrepreneur and his advisers, through which a practical test can be conducted in order to assess the probability of rehabilitation and the evaluation of its complexity. Such test involves a comparison between the amount of debt to be restructured and the annual inflows to debt service, resulting in a preliminary indication of the chances of corporate restructuring. Specifically, the lower is such ratio, the greater is the feasibility of rehabilitation since the shorter is the time required to repay the debt. On the other hand, if the ratio is negative, the company is in a situation of economic imbalance that could result in the disposal of nonoperating assets, divestments, or business mergers.

Art. 17, paragraph 3, of the CCII, introduces a third type of prerequisite, that is, the procedural one. Such article states that the petition to access the negotiated settlement cannot be submitted if the entrepreneur is already involved in the initiation of the judicial liquidation (*i.e.,* bankruptcy) or in the determination of insolvency proceedings.[21] On the occurrence of this conditions, the application petition is inadmissible and, if proposed, it is dismissed. For

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[19] According to Art. 25-*quinquies* of the Code of Business Crisis and Insolvency, regarding the limits of access to the negotiated settlement, "*the application referred to in Article 17, cannot be filled by the entrepreneur pending the proceedings introduced by an appeal filed pursuant to Art. 40, including in the cases referred to in Articles 44, paragraph 1 (a), 54, paragraph 3, and 74. The petition cannot also be filed in the event that the entrepreneur, in the four months prior such petitions, has renounced to the applications mentioned in the first period."*

20 Ambrosini, La nuova Composizione Negoziata della crisi: Caratteri e Presupposti, Ristrutturazioni Aziendali August 23, 2021.

[21] Art. 17, paragraph 3, letter *d*, establishes that the entrepreneur must attach to the application for accessing the negotiated settlement procedure "*a declaration pursuant Art. 46 of the Decree of the Present of the Republic No. 445 of 2000 on the pendency of his appeals for the opening of judicial liquidation or for the determination of the state of insolvency, and a declaration that he has not filed appeals pursuant to Art. 40 including in the cases referred to in Articles 44, paragraph 1(a), and 54, paragraph 3"*

this purpose, a self-declaration is requested to the entrepreneur concerning the non-pending, in any court, of the above-mentioned proceedings.

1.3 Description and functioning of the procedure.

As discussed in previous sections, the negotiated settlement allows the entrepreneur, including the sub-threshold one, to request the appointment of an expert responsible for mediating negotiations with creditors, shareholders, and other stakeholders, and for restoring the patrimonial or economic and financial equilibrium. Therefore, the entrepreneur who is in a condition of patrimonial or economic and financial imbalance that makes probable its crisis or insolvency, can apply to the general Secretary of the Chamber of commerce for the appointment of an independent professional, to the extent that the business reconstruction is reasonably pursuable. This highlights the legislator's interest in incentivizing the use of this tool in a pre-crisis stage, where there is a significantly higher probability of reaching a satisfactory agreement. Therefore, on the occurrence of the subjective, objective, and processual prerequisites explained in section *1.2.4*, the entrepreneur can access the negotiated settlement through the national telematic platform. The following sections will provide an overview of the access and the functioning of the negotiated settlement for the solution of business crisis.

1.3.1 The national telematics platform and the application submission

To access the negotiated settlement procedure, entrepreneurs must submit the application petition through the national telematics platform provided and regulated by Article 13 of the CCII. Such platform is managed by the chamber of commerce system, through Unioncamere, under the supervision of the Ministry of Justice and the Ministry of the Economic Development, and it is accessible to entrepreneurs listed in the Business Register via the institutional website of each chamber of commerce, industry, handcraft, and agriculture.

Specifically, the telematics platform provides:

iii. a detailed checklist, adjusted for the special needs of the small and medium enterprises, which contains operating instructions regarding the drafting of the reconstruction plan.

iv. a practical test, to assess the reasonable pursuance of the business resolution.

v. a protocol for the conduct of the negotiated settlement procedure, available to the entrepreneur and the appointed professionals.

The platform, available online since November 12, 2021, consists of two different sections. The public area, accessible for all, allows the entrepreneur to conduct the practical test, through which it is possible to understand the feasibility of the business recovery plan and the degree of interventions required. Through the restricted area, companies can submit the application for the negotiated settlement, receive the support of an appointed professional, and preserve, under specific rules, the business continuity. Such section provides for the filing of the checklist, in order to draft a business recovery plan, and therefore enables the access petition to be submitted. Specifically, the restricted area is accessible to the entrepreneur and his consultants, the supervisory body and the auditor, the general Secretary of the relevant chamber of commerce, the members of the commission appointing the expert, the creditors, and any other authorized party.

Art. 17 of the CCII, which sets the procedure to access the negotiated settlement and its implementation, establishes that "*the application petition for the appointment of the independent expert must be submitted through the telematics platform referred to in Article 13, by filing a form containing the information relevant for the purpose of the appointment and the conduct of the mandate of the appointed expert".* The third paragraph of the same Article provides a list of documents the entrepreneur must include at the time of the submission of the application, namely:

vi. the financial statements for the last three fiscal years or, for companies that are not required to file financial statements, the income and VAT declarations for the last three tax periods;

vii. the updated patrimonial and financial situation (no more than sixty days prior the application submission date);

viii. a corporate restructuring project, drafted in accordance with the checklist referred to in Art. 13;

ix. a report concerning the core business of the company, including a financial plan for the next six months and the initiatives to be adopted;

x. the list of creditors, including a detail of their overdue and maturing claims, as well as the existence of rights in rem and personal guarantees;

xi. a self-declaration on the pendency of appeals for the declaration of insolvency or its determination;

xii. the certification of tax debts[22] and the overall debt situation;

xiii. the certificate of contribution debts and for premium insurance;

xiv. a recent excerpt of information from the Central Risks managed by the Bank of Italy.

Therefore, the national telematics platform manages all the various stages of the negotiated settlement and the corporate restructuring process.

Upon the application's receipt, the general Secretary of the relevant chamber of commerce accesses the platform to assess the validity and the accuracy of all attached documents and their contents. In the absence of irregularities[23], the general Secretary refers with the competent territorial commission, briefly reporting the volume of the business, the number of employees, and the industry in which the company operates. Within five working days the Commission appoints the expert, whose role and functions will be discussed in the next sections.

1.3.2 The Practical Test for the reasonable prosecution of corporate restructuring

In the public section of the national telematics platform described in the previous section, the entrepreneur, before submitting the application, can perform the so-called practical test to verify the reasonable feasibility of corporate restructuring. According to the executive Decree of the Ministry of Justice of September 28, 2021, Section 1, such test is aimed at the preliminary assessment of the complexity of the business restructuring, by comparing the amount of debt to be restructured to the amount of free cash-flows that can be used to repay it. Furthermore, for this purpose, such Decree provides that in the absence of a business plan, it is sufficient to consider the leverage of a firm and the current economic performance, depurating it from the effect of extraordinary events (such as the pandemic lockdown effect or non-recurring losses).

The test provides a preliminary indication on the degree of complexity the entrepreneur will face, and the extent to which the recovery plan will depend on the ability to adopt discontinuity initiatives and their intensity.

[22] The so-called "certificato unico dei debiti tributari" referred to in Article 364, paragraph 1.

[23] In the event that the general Secretary of the chamber of commerce finds irregularities in the attached documentation on the telematics platform, the entrepreneur has 30 days to complete and correct the documents, at the end of which, if the latter does not provide for any adjustment, the application is not considered, and it may be resubmitted.

The result, expressed in years, provides the amount of time required for the business recovery, through the following ratio:

$$\frac{Debt\ to\ be\ restructured}{Annal\ free\ cashflows\ to\ repay\ the\ debt}$$

Specifically, the amount of debt to be restructured is computed as follows:

Overdue Debt
+ debt rescheduled or subject to moratorium
+ bank credit lines without renewal
+ mortgage and loan payments due in the next two months
+ investments related to industrial plans to be pursued
- amount of resources from the disposability of assets or branches of the company
- new planned contributions and funding
- estimated negative operating margin (if any) in the first year, including non-recurring items

Furthermore, it is provided that, in the event it is reasonable to obtain a reduction in the debt to be restructured, it can be reduced only for the purpose of the practical test.

The annual cash-flows to repay the debt is computed in the same way as a simplified Cash Flow from Operations, subtracting from the prospective normalized annual gross operating margin, maintenance investments and annual income taxes. The comparison between these two components results in a preliminary indication of the time required to repay the outstanding debt and of the amount of debt to be restructured[24].

[24] The underlying assumption behind the practical test is that if the firm is in a situation of prospective economic equilibrium, *i.e.*, it has annual cash flows greater than zero from at least the second year, and they are stable over time, the degree of difficulty of business reconstruction is determined as the ratio between the debt to be restructured and the annual amount of flows to repay the debt.

Specifically:

xv. a ratio lower than 1 is indicative of a moderate degree of the business restructuring difficulties; in such a case, the debt to be restructured can be covered using the prospective cash flows;

xvi. a ratio between 1 and 2 reflects a situation of contained degree of distress, in which the debt to be restructured can be repaid in about two years. In this scenario, the business recovery plan can be identified on the basis of the current performance of the company;

xvii. a ratio between 2 and 3 represents the circumstance in which the business recovery depends on the effectiveness and the outcome of the planned industrial initiatives;

xviii. exceeding a further level, where the ratio may be greater than 4/5, a positive EBITDA is not sufficient to reach the business reconstruction, it is therefore necessary to consider whether the business continuity can only be indirectly pursued, that is, through the sale of the company or of branches of it. Only in the event that the proceeds from the disposal of the business are sufficient to repay the total amount of debt, the negotiated settlement can be initiated.

Generally, in order to identify the proposals to be presented to creditors and other stakeholders, to finalize agreements that enable debt reduction, and to evaluate remedial actions, with the final aim of preserving business continuity, it is necessary to consider specific features of the case. For example, the concentration of debt in the hands of a few creditors might make it easier to arrange negotiations, while, on the other hand, the necessity of significant extraordinary investments could make them more complex.

1.3.3 Role and functions of the independent expert

The negotiated settlement procedure revolves around the role of the independent expert, who is the driving force behind the whole process, whose function is to facilitate and mediate negotiations with creditors and all interested parties, in order to identify, in cooperation with the entrepreneur, a solution for the reconstruction of the business.

Art. 13, paragraph 3, of the Crisis Code[25] establishes the experiential requirements for the appointment of the expert. According to such Article, the inscription to the register of experts is reserved only to professionals with a proven managerial or bankruptcy expertise in business continuity procedures, as well as other individuals with specific competencies. Specifically, may be included in the list:

xix. those who have been registered for at least five years in the Institute of Certified Accountants, Bookkeepers, and lawyers, who demonstrate previous experience in the field of corporate restructuring and business crisis[26];

xx. those who have been listed in the register of labor consultants for at least five years, with a proven experience in at least three successfully completed procedures;

xxi. all other individuals who document that "*they have carried out administrative, managerial and control functions in companies involved in restructuring operations concluded with attested reconstruction plans, debt restructuring agreements and approved arrangements in business continuity, in respect of which a judgement declaring judicial liquidation or insolvency has not been subsequently pronounced"*[27].

In addition, the inscription in such register is also conditional to the possession of a specific training set forth in the Executive Decree of the Ministry of Justice of September 28, 2021.

After the submission of the application in the telematics platform, the general Secretary of the chamber of commerce informs the relevant territorial commission, which is called to appoint the professional within 5 working days after such communication.

The expert is appointed from the above-mentioned list, according to criteria that ensure rotation and transparency, by nomination committees, established at each chamber of commerce, subject to the obligation to publish on the telematics platform the mandates conferred to each professional, and their resumes, ensuring that each expert does not receive more than two nominations at the same time. The commission is composed of two magistrates designated by the President of the specialized business section; two members appointed by

[25] According to Article 13, paragraph 3, of the CCII, a list of professionals is formed "at the chamber of commerce, industry, handcrafts and agriculture of each regional capital and autonomous provinces of Trento and Bolzano, in the manner set forth in paragraph 5".

[26] The ministry of Justice, in the Note dated December 29, 2021, clarified that the requirement of "*previous experience in the field of corporate restructuring and business crisis"* includes the only activities that, in the bankruptcy proceedings field, lead to the preservation of the corporate value, thus excluding the figure of the bankruptcy receiver, and including instead the judicial commissioner and the special commissioner of large insolvent companies, whose activity is not aimed at the judicial liquidation of the company but at the preservation of the corporate value.

[27] Art. 13, paragraph 3 of the CCII.

the President of the relevant Chamber of commerce; and two members designated by the Prefect of the regional capital of the Chamber of commerce[28].

The professional thus selected must meet the independence requirements set forth in Article 2399 of the Italian Civil Code, for the appointment as statutory auditor, according to which he cannot be related to the company or other parties involved in the corporate restructuring process, by personal or professional relationships[29]. Furthermore, the expert and those with whom he is joined in partnership, must not have been employed for the entrepreneur in the past five years, or have been members of the administrative or supervisory bodies of the company or have owned shares of it.

In order to ensure the independence and neutrality of such figure, it is not allowed to have subsequent professional relationships with the entrepreneur in the two years following the filing of the negotiated settlement.[30]Art. 16 of the CCII also establishes that the expert is independent to all parties involved in the procedure and he must act according to criteria of professionalism, confidentiality and impartiality.

Verified these preconditions of independence, and that the expert has the time to conduct the mandate, he notifies the acceptance of the mandate to the entrepreneur within 2 working days from the receipt of the nomination and submit the acceptance statement into the telematics platform. Such acceptance is inscribed in the Business Register.

It is provided for the possibility to rely on professionals with specific expertise or on the assistance of statutory auditors during the conduction of the mandate if the expert considers it appropriate. In this way, the legislator intends to fill any professional and experiential gap to facilitate the proper conduct of the proceeding.

In the negotiated settlement procedure, the role of the independent expert is to "*facilitate negotiations between the entrepreneur, his creditors and any other interested parties"*[31] in order to overcome the crisis situation affecting the company, which still requires the synergic activity of all parties involved, and it is not the sole prerogative of the professional.

[28] Art. 13, paragraph 6 of the CCII.

[29] According to Art. 2399 of the Italian Civil Code "*The following cannot be elected to the office of statutory auditor and, if elected, they lose their office: (a) those who are in the conditions set forth in Article 2382; (b) the spouse, relatives and kin within the fourth degree of the directors of the company, and the directors, spouse, relatives and kin within the fourth degree of kin of the directors of the companies controlled by it, of the companies that control it and those under common control; c) those who are related to the company or companies controlled by it or companies controlling it or those under common control by an employment relationship or an ongoing consulting or paid work relationship, or by other relationships of a financial nature that compromise their independence*."

[30] Art. 16 of the CCII, regarding independence requirements and duties of the expert and of the parties.

[31] Art. 12, paragraph 2 of the CCII.

Therefore, he is an impartial facilitator of negotiations, and he operates not by replacing the parties, but prompting agreements, assisting the parties in the communication and comprehension of each other's interests, with no power to manage the company. Thus, in such facilitation and mediation activity, the expert does not act on behalf of the entrepreneur, but he supports him, by conciliating and balancing the conflicting interests of the company and the creditors, stimulating dialogue between the parties to reach a successful agreement.

The negotiation activity is for the entire duration of the procedure, a prerogative of the entrepreneur, who conducts them personally, eventually with the assistance of his consultants.

The presence of the expert is intended to strengthen the company's position and reassure creditors and other interested parties, and, finally, to confer a higher level of security on the conduction of deals, eliminating any doubts about the existence of dilatory or negligent behavior.

After the acceptance of the mandate, the expert convenes the entrepreneur to assess the existence of concrete prospects of corporate restructuring that require the beginning of negotiations. At this stage, it is necessary an objective evaluation of the feasibility of agreements with creditors, or a sale of the company or branches of it, whose proceeds ensure the repayment of the debt. In any case, the entrepreneur participates personally in negotiations with creditors. If the expert, after the first consultation with the entrepreneur, considers that the prospects for rehabilitation are viable, he meets the other parties involved in the procedure and he begins to plan possible intervention strategies, while scheduling follow-up meetings on a periodic basis. On the other hand, if he does not recognize any concrete prospect for restoration, at the conclusion of the convocation with the entrepreneur or at a later stage, the professional notifies the entrepreneur and the general Secretary of the chamber of commerce who subsequently orders the dismissal of the negotiated settlement petition[32]. The independent professional must therefore monitor that the concrete prospects for rehabilitation persist for the entire duration of the procedure.

Furthermore, it is of relevant importance the expert's role in identifying the proper timing of creditors' involvement, they must be informed of the initiation of negotiations, and they must be enabled to participate in good faith. Regarding the information used by the professional, it is provided that, with the authorization of the entrepreneur, he accesses the company's databases, from which he extracts all information necessary for the initiation and conduction of the negotiations with creditors and other interested parties.[33]

[33] Art. 14, paragraph 2 of the CCII.

The expert analyzes the recovery plan formulated by the entrepreneur on the basis of a checklist. Specifically, he checks the initial accounting situation of the company verifying the accuracy and fairness of the data and requesting the entrepreneur to correct any discrepancies; evaluates the total amount of cash-flows to repay the debt; monitors the management, taking into account any initiative of extraordinary administration launched by the entrepreneur or any inconsistent payment, warning the parties about the prejudice that might result from these conducts; and he examines possible intervention plans, encouraging the entrepreneur and the parties to formulate concrete and feasible proposals.

The mandate of the independent professional is considered concluded if, in the 180 days after the acceptance, the parties have not identified a proper solution to overcome the business crisis. In any case, the expert's office may continue with an appeal to the court of the entrepreneur, or at the request of all parties and with his approval.

At the end of his office, the professional prepares a final report to be uploaded into the telematics platform and to be reported to the entrepreneur or, if protective and precautionary measures are issued, to the court that pronounces their effects ceased.

More specifically, such report must include:

xxii. Activities and transactions conducted by the expert and certified by the relevant documentation;

xxiii. the activation of any capital protection measures;

xxiv. the status of precautionary and/or enforcement measures, if any, previously disposed by the court, and of appeals for the declaration of bankruptcy or the determination of the state of insolvency;

xxv. any issued and requested authorization regarding actions of extraordinary administration;

xxvi. the suitability and feasibility of the solution identified for the business reconstruction, or, in the event of a negative outcome of negotiations, the declaration that the parties, who acted according to criteria of fairness and good faith, did not approve the proposed strategies and consider their individual positions incompatible with those of the company and the entrepreneur.

1.3.4 Role and duties of the entrepreneur and the other parties

The negotiated settlement procedure requires a proactive involvement of the entrepreneur, who must actively cooperate with the independent expert to ensure a successful outcome of negotiations. The entrepreneur has the duty to report the company's situation to the expert, creditors, and other interested parties, providing all necessary documentation and information, as established in Art. 16, paragraph 4 of the CCII. It is essential that, during negotiations and for the entire duration of the procedure, there is a clear and truthful representation of the company's situation in order to avoid information asymmetries and guarantee a beneficial confrontation between the parties. Such information obligation of the debtor towards the expert refers both to the *ex-ante* situation, preceding the act the entrepreneur intends to commit, and to the *ex-post* one, where, despite the professional's warning, the debtor has carried out the action. Furthermore, the legislator provided that the distressed entrepreneur manages the company without harming the economic and financial sustainability, and in compliance with the duties set forth in Art. 2086 c.c.[34], to safeguard the interests of all parties involved and avoid opportunistic behaviors. For these purposes, it is provided that, when, during negotiations, the debtor is insolvent but there are concrete prospects for rehabilitation, he must manage the company in the prevailing interest of creditors. Thus, he must act in a conservative manner, as it was already provided for in the presence of a cause for the dissolution of the company.[35]

In this regard, Art. 7 of the executive Decree of March 21, 2023, regarding the management of the enterprise in the pendency of the negotiated settlement, regulates situations that do not constitute a prejudice to the economic and financial sustainability of the company. More specifically, it refers to cases in which "*a positive EBITDA is expected, net of extraordinary items, or when, in the presence of a negative EBITDA, this is offset by the benefits to creditors, resulting, according to a reasonable prognostic valuation, from business continuity"*[36].

With regard to actions of extraordinary administration[37] and the execution of payments that are inconsistent with the negotiations or the prospects for rehabilitation[38], the entrepreneur is

[34] Please refer to reference *No. 10.*

[35] Please refer to Articles 2446, 2447, 2482-bis, 2482-ter, 2484 of the Italian Civil Code.

[36] Art. 7.5, Executive Decree of March 21, 2023.

[37] For this purpose, the protocol for the conduct of the negotiated settlement procedure lists some acts of extraordinary administration, such as: transactions involving share capital or the company; issuance of warranties; sales of non-recourse receivable; issuance of funding to third and related parties; the consent for the discharge of guarantees; execution of significant investments; repayments of loans to shareholders or related parties; dispositive acts in general.

obliged to inform the expert in writing, who, in the event that the act is considered detrimental to creditors or negotiations, notifies the supervisory body[39].

Art 21 of the CCII provides for the liabilities of the entrepreneur for actions taken. It involves civil liability with regard to the disclosure obligation, and the violation of the more general duties to act according to good faith and fairness and to manage the company's assets without harming the creditors' interests. The damage triggered by such omissions will be proportional to the prejudice brought to creditors or other parties.

Article 16 of the CCII also outlines the duties of all parties involved in the negotiated settlement. They are expected to act, during negotiations, according to good faith and fairness, and in accordance with the non-disclosure obligation. In fact, all the individuals are required not to reveal any news and information about the company gained during negotiations, and to cooperate to ensure the regular and correct conduct of them.

Given the substantial bank indebtedness of Italian companies, which are undercapitalized and characterized by a limited use of alternative forms of financing, any attempt at business reconstruction aimed at debt restructuring implies the involvement of baking institutions. For this purpose, the legislator provides specific rules concerning negotiations with banks and financial intermediaries. In the consultation phase, these are required to participate in an active and informed manner. Moreover, it is stipulated that the access to the negotiated settlement by the entrepreneur, does not imply that they must suspend or withdraw the bank credit provided. Any suspension may be ordered in the cases provided by the prudential regulatory framework, with notification justifying the grounds.

1.3.5 Protective and precautionary measures

In the context of business crisis situations, protective measures are designed to prevent creditors from jeopardizing the resolution of the crisis: pursuant Article 2, letter *p*, of the CCII, protective measures are defined as temporary provisions issued by the competent court,

[38] The protocol for the conduct of the negotiated settlement procedure specifies non-conforming payments, which are: payments of wages and salaries to employees; payments related to commissions to agents and remuneration to coordinated and continuous collaborators; tax payments and social security debts; payments of trade debts, to those who are not related parties, and in any case within the terms of use or if aimed at not jeopardizing the cycle of procurement of goods or services; all cases in which non-payment results in the loss of the benefit of the term in the case of installment payments.

[39] It is also provided that if, despite the warning, the act is committed, the entrepreneur must immediately notify the expert, who within the next 10 days, may enter his dissent in the Business Register. Registration of such dissent is mandatory when the act undertaken by the entrepreneur jeopardizes the interests of creditors.

at the request of the debtor, aimed at inhibiting certain actions of creditors from impairing, since the early phase of negotiations, the successful outcome of the initiatives adopted to face the business crisis or bankruptcy.

On the other hand, letter *q* of the same Article identifies precautionary measures as those measures enacted by the competent court to protect the assets of the company or the debtor, in order to temporarily ensure the effects of the procedures for the regulation of the crisis or insolvency. Therefore, it is provided that, in the pendency of the proceedings for the opening of the judicial liquidation, arrangement with creditors, or restructuring agreements, at the request of the interested party, the court can issue such precautionary orders, including the appointment of a keeper of the company or its assets, which are aimed, considering the circumstances of the case, at securing the effects of the judgement declaring the opening of the liquidation, or approving the arrangement with creditors or the agreements debts restructuring.

The legislator, on the contrary, establishes that the debtor, at the time of the application for the access to an arranged crisis resolution procedure, can be granted with special precautionary measures, as a result of which from the date of the publication of the application petition in the business register, creditors cannot, under penalty of invalidity, initiate or pursue executive and precautionary actions over the assets of the company.

As part of the negotiated settlement procedure, Art. 18 of the CCII is based on the abovementioned notions set forth by Art. 2, and provides that the entrepreneur can request, with the application for the appointment of the independent expert or by a subsequent application submitted on the telematics platform, the enforcement of asset protection measures. These measures can be limited to specific actions of creditors, to identified creditors or to categories of them. The application for their request is published in the business register in conjunction with the expert's acceptance and, from the day of the publication, creditors cannot acquire preemptive rights, other than those arranged with the debtor, initiate, or prosecute enforcement or precautionary actions, on the property and rights through which the business activity is pursued. It is also stipulated that creditors cannot unilaterally refuse to fulfill pending contracts, cause their termination, anticipate their maturity, or modify them to the detriment of the entrepreneur only because of unpaid antecedent claims.

While according to the literal interpretation of Art. 18, paragraph 3, of the CCII, the application for the enforcement of protective measures is addressed, as well as the one regarding the appointment of the independent expert, to the general Secretary of the competent chamber of commerce, the following article clarifies that such measures are subject

to confirmation, revocation, or modification by the competent court, upon appeal filed on the same day as the submission of the application to the chamber of commerce through the telematics platform. This implies that such "protective effect", while arising immediately by virtue of a mere expression of the entrepreneur's will, externalized though the chamber of commerce, has a temporary nature, since it is expected to terminate in the absence of the jurisdictional authority's intervention.

Furthermore, the entrepreneur is required to submit into the telematics platform a declaration on the existence of any enforcement or precautionary measure, and an update on the appeals regarding the declaration of bankruptcy or the determination of insolvency.

Art. 19, paragraph 1, of the CCII also provides that, with the submission of the application for the appointment of the expert, or even with subsequent application, the debtor can request the adoption of precautionary measures "*necessary to conduct negotiations"*. However, it is a generic rule of difficult interpretation, which does not specify what measures can be requested, and in any case, residual compared to protective measures that represents the primary mechanism for the protection of the proper conduct of negotiations.

In the bankruptcy law prior to the Law Decree 118/2021, while protective measures are intended to protect the debtor's attempt at a mutual solution to business crisis, precautionary measures are aimed at neutralizing the risk of dispersion of the debtor's assets during bankruptcy proceedings initiated by creditors: since different are the interests to act, different are the parties entitled to request such measures.

With the introduction of the DL 118/2021 and its implementation in the Code of Business Crisis and Insolvency, protective measures maintain the same purpose, while protective measures have been modified in terms of interest to act: it is indeed in the debtor's interests to request them to effectively conclude negotiations.

1.3.6 Court interventions and authorizations

The negotiated settlement for the resolution of business crisis is not comparable to bankruptcy proceedings, but it is identified more as a path since the Court's intervention is limited and restricted to specific cases related to the protection of the interests of creditors.

In addition to intervention cases related to the application of protective and precautionary measures discussed in the previous section, Article 22 of the CCII provides, for certain

decisive actions affecting creditors, for the Court's authorization at the request of the entrepreneur.

In providing that the Court may grants authorizations "*at the request of the entrepreneur"*, the rule identifies as the first essential prerequisite the existence of an express request made by the entrepreneur, the only person entitled to ask for the permissions that will be discussed below.

Specifically, the court intervenes in two areas: predeductible financing and the case of transfer, in any form, of the company, or one or more branches of it.

In this way, the legislator's focus on financing shifts to the time prior to the state of crisis or insolvency, recognizing that funding can be a decisive tool for the success of preventive restructuring plans, and its use may be necessary even when the entrepreneur is in the situation described by Art. 12 of the CCII (*i.e.*, "in conditions of patrimonial or economic and financial imbalance that probable the occurrence of crisis or insolvency).

The provision concerning predeductible financing is aimed at improving the chances of success of a business restructuring operation by allowing, under specific conditions, the entrepreneur to obtain new funding provided in any form. On the other hand, the legislator grants lenders of such financing with special protection, by recognizing the relative claims in the rank of prereduction[40], on the prospects of obtaining the repayment even in the worst-case scenario of a failure of the negotiated settlement resulting in the opening of a bankruptcy proceedings.

Thus, the entrepreneur that, in the pendency of the negotiated settlement, needs secured predeductible financing, requires special authorization of the judge, who must verify its functionality with respect to business continuity and the optimum creditors' satisfaction.

Such regulation is provided for both loans granted by third parties and those provided by shareholders, as well as those granted by one or more companies that belong to a group subject to the control of a company or a person. The funding authorized under Art. 22 of the CCII is granted with predictability pursuant ex Art. 111 of the bankruptcy law.[41]

It is important to consider that the court's authorization is not necessary for the valid stipulation of the funding contract, since it is an action of extraordinary administration that the entrepreneur can freely undertake by informing the expert in advance, but it is essential to

[40] In this way, the provisions of the *insolvency Directive* were integrated into the DL 118/2021 and then into the Code of Business Crisis and Insolvency. Such Directive required member States to properly protect new and temporary funding, granting lenders with the right of obtaining payments on a priority basis in subsequent insolvency proceedings.

[41] Article 111 of the former bankruptcy law, concerning the order of distribution of the proceeds obtained from the disposal of the assets of the company, assigns absolute priority to the payments of predeductible financing.

attribute prereduction to the lender's credit. In fact, prereduction is intended to operate only in the event that the outcome of the negotiated settlement leads to the subsequent opening of bankruptcy proceedings. On the other hand, the Court's authorization does not affect the order of payments in the context of the procedure and of the implementation of the recovery plan: creditors are not involved since it is not a bankruptcy procedure but a negotiated path in which the entrepreneur remains *in bonis*.

A further intervention of the Court is provided in the case of the transfer of the company of branches of it, without the effects set forth in Art. 2560, paragraph 2, of the Italian Civil Code.[42]

Once again, the authorization does not affect the validity and effectiveness of the sale contract (since it is, as well as the stipulation of financing contracts, an act of extraordinary administration) but it is necessary to grant the acquirer with the benefit of exemption from joint and several liability regarding debts related to operations of the transferred business, prior to the sale, that appear from the statutory accounting records. The rationale of such provision is to encourage the purchase of the company by potential interested parties, who, in the absence of it, would be induced to wait for the opening of a bankruptcy proceedings to acquire the company benefitting from the "purgative" effect of the coercive sale, thus precluding the entrepreneur from a timely sale of the company, which is sometimes crucial to preserve business continuity and to avoid further losses related to the opening of bankruptcy proceedings and to the subsequent procedure, which are strict and time-consuming for both the entrepreneur and his creditors.

1.3.7 The Conclusion of negotiations.

Art. 23 of the CCII provides as the primary assumption for a successful outcome of negotiations, the identification of a viable solution for the prosecution of business continuity and reconstruction and specifies three possible alternative results.

More specifically, the entrepreneur may either:

a) enter a contract, with one or more creditors, which according to the expert's final report is suitable to preserve business continuity for a period of at least two years, enabling

[42] According to Art. 2560, paragraph 2, of the c.c. "*in the transfer of a commercial business, the acquirer is also liable for the debts of the company, if they appear from the statutory accounting records"*.

creditors to exploit the benefits of premium measures set forth in Art. 25-*bis* of the CCII;

b) enter a moratorium agreement pursuant Art. 62 of the CCII;

c) conclude an agreement signed by the entrepreneur, the creditors, and the expert, with the effects of the certified reconstruction plan, and without the requirement of certification provided by Art. 166, paragraph 3, of the CCII.

The contract referred to in letter *(a)* is intended to preserve the business continuity for at least two years, as certified by the final expert's report. In such case, the expert was able to find an agreement between the parties such that a suitable solution to preserve the business continuity is found, without necessarily implying that the crisis or insolvency situation has been overcome.

That is because, while business continuity assumes the restoration of the company's operation, the time considered does not guarantee, for the following period, the permanent resolution of the state of crisis, which is the foundation of the concept of business restructuring.

The negotiation leading to the conclusion of such contract, which is exclusively between the entrepreneur and his creditors, may involve the discharge of even a part of the debt, usually combined with a deferral of payments, or it may only provide for a deferral of payment.

The mechanism referred to in letter *(b)* is the moratorium agreement, to which the content of Art. 62[43] of the CCII fully applies, finalized to "*temporarily regulate the effects of the crisis",* by allowing the entrepreneur to enter an agreement with creditors which may include the postponement of debt maturities, the renunciation of acts or suspension of executive and precautionary actions, and any other measure that does not involve a waiver of credit. The moratorium must be approved by creditors representing 75% of the claim of the same category and it may have extended effectiveness under certain conditions.

The third tool consists of an agreement signed by the entrepreneur, the creditors, and the independent expert, that produces the effects set forth in Articles 166 and 324 of the Bankruptcy law, that are, respectively, the non-subjectivity to revocatory action of acts for

[43] Article 62 of the CCII defines the moratorium agreement as "*an agreement concluded between an entrepreneur, including the non-commercial one, and his creditors, aimed at provisionally regulating the effects of the crisis and having as its object the deferral the credits' maturity, the waiver of acts or the suspension of executive and conservative actions, and any other measure not involving waiver of claims".* It is further provided that such agreement "*is also effective against non-adherent creditors who belong to the same category",* under specific conditions: they must be adequately informed of the initiation of negotiations or they have been enabled to participate, and they have received complete and updated information on the debtor's financial and economic situation; it is also necessary that non-adherent creditors suffer a proportional and consistent harm with the crisis or insolvency resolution actions concretely pursued.

consideration, and the non-prosecution of certain bankruptcy offenses performed in execution of the agreement.

Such agreement, unlike the previous ones, is characterized by the active participation of the debtor, the creditors, and the expert, whose intervention is decisive since he must certify the consistency of the business recovery plan with respect to the solution to the crisis or insolvency, thus assuring credibility to the prospect of rehabilitation of the debtor in crisis.

Article 23, paragraph 2, also regulates the cases in which at the end of negotiations a viable solution among those listed above has not been identified. In such a case the entrepreneur can opt for one of the following alternatives:

i. the approval of a debt restructuring agreement, pursuant articles 57, 60 and 61 of the CCII; respectively "*debt restructuring agreements", "facilitated restructuring agreements",* and *"externally effective restructuring agreements";*

ii. a certified recovery plan, according to art. 56 of the CCII;

iii. application for the simplified arrangement for assets' liquidation, under art. 25-*sexies* and 25-septies;

iv. access other crisis resolution procedures.

The first alternative available to the entrepreneur is the debt restructuring agreement, provided in three forms, originally characterized (Art. 182-*bis* of the bankruptcy law) by the fact that non-adherent creditors were expected to be paid in full, within a very short time, thus making such instrument not easy to implement in practice. With the introduction of Art. 182-*septies* (referred to in Section 1.1) restructuring agreements are extended to all creditors, and not only to banks, as originally established, which affects also non-adherent parties (the so-called agreements with extended effectiveness).

The main advantage of such procedure is that it is possible to implement tax transaction under Art. 63, with the application of the so-called *cram down* in case of non-adherence of the tax authorities or of the social security institutions. In this way, the intervention area is expanded with the possibility of credit reduction and the consequent positive impact on business continuity and corporate recovery.

The certified recovery plan must include all the necessary information to enable the creditor to acquire a proper understanding of the company's economic and financial situation, with an explanation of the main causes of the crisis and intervention strategies, as well as an indication of the timing required to ensure the financial rebalancing, a business plan, and a

declaration drafted by the expert on the accuracy of business data and the economic viability of such plan.

The debtor is required to publish the aforementioned documents in the Business Register.

Another possible outcome of the negotiated settlement procedure is the simplified arrangement for the liquidation of assets, introduced by the Law Decree 118/2021 and regulated by Art. 25-*sexies* of the CCII. Thus, the legislator introduces a new autonomous and alternative bankruptcy procedure with respect to those already provided by the bankruptcy law, which cannot be accessed directly, but only in the event that negotiations have failed to reach one of the previous positive outcomes[44] and there are therefore no possible solutions for the prosecution of the business (the requirement of business continuity is no longer met).

Such mechanism has all the characteristics of a bankruptcy procedure, as proven by the competition of creditors, the compliance of the *par condicio creditorum*, and the intervention of the Court that governs its functioning and outcomes.

In the 60 days following the notification of the expert's final report, the entrepreneur is entitled to submit a proposal for an arrangement for the assets' sale, in conjunction with the liquidation plan, a report on the current economic and financial situation, a detailed and estimative statement of assets, and a list of creditors with an indication of any cause of preemption. Such proposal must be filed at the Court where the company has its main center of interests, and it is then communicated to the Public Prosecutor and published in the Business Register. Then, the Court evaluates the validity of the proposal, obtains the expert's final report, and request an opinion from the latter concerning the expected results of the liquidation and the warranties provided.

The proposal, on the Court's order, is communicated by the debtor to the creditors resulting from the abovementioned list, and the date of the homologation hearing is set.

Once the regularity of the proceedings, the feasibility of the liquidation plan and the creditor's opposition have been verified, and if the conditions provided by the law are met, the court will proceed to approve the proposal with an executive decree.

At this stage, as in the case of the other bankruptcy proceedings, a receiver is appointed, to which the provisions for the composition with creditors contained in Art. 114 of the CCII apply.

[44] Specifically, the access to the simplified arrangement procedure is possible only if the expert in the final report declares that negotiations were conducted in accordance with fairness and good faith, that they were unsuccessful and the solutions suitable for to overcome the crisis or insolvency referred to in Art. 23 of the CCII (contract, moratorium agreement, agreement with creditors or restructuring agreement) were not possible.

The last option available to the entrepreneur in the event of unsuccessful negotiations involves accessing to other crisis regulation mechanisms (such as the composition with creditors), or, due to the size of the company, to extraordinary administration procedures.

The direct recourse to crisis resolution or insolvency procedures set forth by the CCII continues to be granted; but it is not the only possible path for the entrepreneur. The legislator wanted to incentivize the prior recourse to the negotiated settlement, in the belief that from the use of such compensatory tool a greater range of hypotheses and better extrajudicial possibilities for crisis resolution can be offered to the distressed company, including through the prosecution of the business activity, even in the hands of a third party (indirect continuity) as a result of the transfer of the company or of branches of it.

CHAPTER 2: THE PRINCIPLE OF GOING CONCERN AND THE "REASONABLE PROSPECTS FOR CORPORATE RESTRUCTURING".

SUMMARY

2.1 Introduction to the principle of "going concern", 2.1.1 The principle of going concern in the Italian Civil Code, 2.1.2 The going concern assumption in the National and International Accounting Standards, 2.1.3 Auditing procedures for the verification of the going concern assumption: ISA Italia 570, 2.2. The going concern principle as the main pillar of the new Business Crisis and Insolvency Code, 2.2.1 Going concern and corporate structures, *2.2.1.1 Duties of the directors: adequacy of the organizational, administrative, and accounting structures, 2.2.1.2 Duties of the directors: timely implementation of crisis management tools, 2.2.1.3 Directors and Auditors' responsibilities for the inadequacy of corporate structures and ineffectiveness of the measures implemented,* 2.2.2 Reporting obligations and early warning mechanisms, 2.3 The going concern assumption and the negotiated settlement procedure, 2.3.1 Going concern and business crisis: stages of corporate distress, 2.3.2 Prospective going concern: prerequisite or purpose of the negotiated settlement procedure?, 2.4 The verification of the company's prospects for rehabilitation, 2.4.1 The practical test for the preliminary verification of the reasonable prospects of corporate restructuring, 2.4.2 The checklist for the drafting of the business recovery plan, 2.4.3 The recovery plan and the Principles for its drafting.

2.1 Introduction to the principle of "going concern".

In recent decades, especially in the context of reform measures affecting bankruptcy proceedings, the so-called *rescue culture* and *early warning systems* have become increasingly important. These phenomena can be identified in the tendency of the legislator to react to a situation of economic and financial imbalance through the timely implementation of specific tools and measures aimed at safeguarding the business complex, avoiding its disruption, and preserving, as a long-term goal, business continuity. In fact, the liquidation of

the company is no longer the primary purpose of the Crisis Code, but it is only implemented in the cases in which it is a forced path, as the continuation of the business activity is no longer possible.

As discussed in the first chapter, the primary objective of the new Code of Business Crisis and Insolvency is the early emergence of the crisis, which must be achieved thorough rehabilitation solutions alternative to bankruptcy, such as the negotiated crisis resolution, to be adopted at the first signals of economic and financial difficulties, in order to preserve the business activity and corporate values.

To implement and highlight the early emergence of the crisis, the legislator has, on one hand, given strong emphasis to the principle of business continuity, and on the other hand, introduced a warning system that provides new duties for the administrative and supervisory bodies, establishing new form of responsibilities.

Generally, the concept of business continuity refers to the ability of a company to maintain a viable operativeness in the implementation of its organizational and production processes, even in the event that it is assaulted by unpredictable events, that expose it to a condition of crisis.[45]

On the other hand, business continuity can also be defined as an articulated set of procedures designed to ensure that necessary precautions are adopted by the company to determine the gravity of potential losses, in case of a crisis situation, and to implement the best strategies to enable a timely and complete restoration of the business operations.

In light of the above, the principle of the so-called "going concern", provided by the Italian Civil Code, National and International Accounting Standards, and auditing standards, has assumed an increasingly important role and it has become a central theme of the new Code of Business Crisis and Insolvency.

2.1.1 The principle of going concern in the Italian Civil Code.

The principle of going concern is of central importance especially in the accounting law, representing a core assumption in the preparation of financial statements. Article 2423-*bis* of the Italian Civil Code provides for the financial reporting standards to be respected by

[45] P. Rausei, M. Barbizzi, "Management, Business Continuity, Going Concern: Fare crescere l'impresa oltre la crisi.", Wolters Kluwer, 2017.

directors. This refers to the general rules on valuations concerning the principle of prudence, the company's operating perspective, the competence and continuity of valuation criteria.

In this framework, the key postulate is the business continuity, *i.e.*, the primary assumption of the ordinary functioning of the enterprise, intended to endure over time, as explicated in the first paragraph of Art. 2423-*bis* of the c.c., according to which "*the valuation of items in the financial statements must be carried out in accordance with prudence and in the prospect of business continuation"*. Such principle is therefore a necessary postulate for the application of ordinary accounting rules, in the absence of which all the other principles would be meaningless. It defines the regularity of financials reporting and the truthful and accurate representation of the company's patrimonial, economic, and financial situation.

Generally, a company is in a condition of "going concern" if it is considered capable of continuing its business operation in a foreseeable future, with no occurrence of a liquidation or bankruptcy proceedings.

In brief, under the assumption of business continuity, a company is assumed to be able to meet its obligations contracted in the ordinary business operations: the cash-flow generated, including available funds, is sufficient to repay outstanding debts and obligations.

Such definition affects the valuation of the balance sheet components since they must be determined by applying criteria consistent with the purpose of recognizing the utility that each item can provide to the operating company. Thus, in the event it is no longer reasonable to assume the perspective of business continuity, the values on the financial statements will be based on different consideration and purposes compared to the assumption of continuity. Specifically, assets that are intended to be used over time for the conduct of the business are valued considering their useful life and therefore their usage value must emerge; while in case of bankruptcy, it is considered their liquidation value.

Although the Italian Civil Code outline the centrality and the importance of the principle of going concern, it does not provide a specific definition of such concept, nor a guidance on the assessment of its existence and on its monitoring. For this purpose, international accounting standards provide that, in assessing the existence of the business continuity assumption, the management body must consider all available information about the future of the company, considering a forecast time horizon of at least 12 months.

2.1.2 The going concern assumption in the National and International Accounting Standards.

The principle of going concern is mentioned not only by the Civil Code, but also by the National and International Accounting Standards.

The OIC 11, in paragraphs 21 and 22, referring to Art. 2423-*bis* of the Italian Civil Code, provides a definition of the principle of going concern. Specifically, it establishes that the corporate management, at the preparation phase of the financial statements, is required to perform a prospective valuation on the company's ability to "*constitute a functioning economic complex intended to generate income",* considering a forecast time horizon of at least 12 months. If such valuation results in the emergence of uncertainties concerning the existence of the business continuity, the management must provide explanatory information in the note to the financial statements, detailing identified uncertainties, future risks, and the company's future plans to deal with the moment of distress. In the event that the assessment leads to the conclusion that there are no reasonable alternatives to the termination of the business activity, but no causes for corporate dissolution have been established[46], the financials must be prepared on a going concern basis, considering the residual time horizon. Even in this circumstance, the notes to the financial statements must adequately describe this situation and the effects on the balance sheet and on the income statement.[47]

The OIC11 and the ISA 570[48], with regard to the assessment about the existence of the going concern assumption, identify three different scenarios:[49]

1. Non-significant uncertainties about business continuity.

   In this case, the directors must explain in the notes to the financials the information concerning the drivers of the risks, the relative assessment and the uncertainties that have emerged, as well as the initiatives that the management has implemented. They also must

[46] Causes for corporate dissolution are regulated by Art. 2484 of the Italian Civil Code and 2485, concerning directors' obligations. The first paragraph of such article provides that "*directors must, without hesitation, establish the occurrence of a cause of dissolution and undertake the actions required by Art. 2484. In case of delay or omission, they are personally, jointly, and severally liable for the damages caused to the company, shareholders, corporate creditors and third parties."*

[47] OIC 11, paragraph 21.

[48] International Standards of Accounting (ISA Italy) No. 570 concerning Business Continuity.

[49] P. Rinaldi: "OIC 11 e Continuità Aziendale: un contributo fondamentale alla salvezza dell'impresa", Il Fallimentarista, 24 agosto 2018.

include the reasons that led directors to consider such uncertainties surmountable, and that the going concern assumption is still to be considered valid.

2. Significant uncertainties about business continuity.

This is the case in which since there is no reasonable alternative to the termination of the business, but still no cause for the dissolution of the company has been established, the directors must act in the perspective of the continuation of the business. In doing so, they must consider the remaining limited time horizon, thus affecting the application of the accounting standards related to the various items in the financial statements.

3. Establishment of a cause for dissolution under Article 2484 of the c.c.

In such a case, directors, pursuant Art. 2485 of the c.c., must prepare the financial statements without the prospect of continuation of the business activity, applying instead the operational criteria, considering the even shorter residual time horizon.

In the framework of the International Accounting Standards, the IAS1, concerning the presentation of financial statements, provides a specific definition of the concept of business continuity. According to paragraph 23, the directors, in the preparation of the financials, must assess the company's ability to continue to operate as a *"functioning entity"*. The management body is in fact the most appropriate entity to perform such a valuation since it has all the information required to establish the subsistence of this principle.

The financial statement must therefore be prepared on the basis of the going concern principle, unless the management intends to liquidate the company, discontinue operations, or if there is no other viable alternative. In the event that directors are aware of the existence of significant uncertainties regarding events or circumstances that may result in the interruption or termination of the business continuity, they must report it in the notes to the financials.

The assessment that directors are required to perform does not involve only accounting records, but a combination of information from various qualitative and quantitative sources. They can, for example, rely on business plans, debt renegotiation contracts, funding programs, or even on the company's history and reputation.

On the other hand, when the financial statements are not prepared on a going concern basis, the notes must explain the reason for the termination of operations. In addition, in determining the applicability of the going concern principle, all the available information on the future, covering at least 12 months after the end of the fiscal year, must be considered.

Consequently, when the company's business is steadily profitable and it has easy access to financial resources, the going concern assumption can be considered suitable without the necessity to conduct detailed analysis. In other cases, a wide range of factors concerning the

current and the expected profitability, debt repayment schedules, and potential alternative sources of financing must be considered for the purpose of the analysis.

2.1.3 Auditing procedures for the verification of the going concern assumption: ISA Italia 570.

The going concern assumption is a central theme in National and International Standards of Auditing, affecting not only those who are required to prepare financial statements, but also everyone involved in a consultation or auditing activity. The International Auditing Standard (ISA Italia) No. 570[50] of 2016, regulates the responsibilities of the auditor of financial statements with respect to the going concern principle and the relative implications for the auditors' report.

In previous sections, it is provided an overview of the provisions set forth by the Italian Civil Code and the National and International Accounting Standards concerning the director's duty to assess the existence of the going concern assumption. According to the ISA 570 principle, the evaluation of the prospect of business continuity must necessarily involve the statutory auditors as well. In such regulatory framework, it is provided that the financial statements must be prepared on a going concern basis, unless it is actually determined that the state of business continuity has ceased to exist, thus resulting in the initiation of the disposal or liquidation phase. Given the going concern assumption, assets and liabilities are accounted considering that "*the company will be able to realize its assets and meet its liabilities during the ordinary course of business operation."*[51]

With respect to financial information, it is stipulated that the corporate management body is entitled to assess the future company's ability to operate as a functioning entity, establishing consequent principles, rules and responsibilities, and the information to be provided on business continuity.[52] In conducting such evaluation, alongside the figure of directors, the ISA 570 standard also includes that of statutory auditors, who are required to conduct a second assessment, subsequent to the directors' one.

This is because statutory auditors have at their disposal all the information and probatory documents that, in compliance with the directors' evaluation, are complete and exhaustive to

[50] ISA Italia No. 570 is inspired by the International Standard of Accounting No. 570 *Going Concern,* of January 2015, issued by the International Auditing and Assurance Standards Board. (IAASB).

[51] ISA Italia No. 570, paragraph 2.

[52] Paragraph 3 of ISA Italia No. 570, establishes that, even in the cases where it is not explicitly required by law, where the going concern assumption is a fundamental principle for the preparation of financial statements, the directors must in any case assess the existence of the business continuity assumption.

express an adequate opinion regarding the existence of the going concern assumption, concluding whether or not relevant uncertainties subsist about it. For this purpose, paragraph 5 of the principle under consideration, lists the relevant factors to be considered:

1. "*the degree of uncertainty associated with the outcome of an event or a circumstance",* which increases significantly if these lie in a distant future, thus the requirement to specify the time horizon of the assessment;
2. *"the size and complexity of the enterprise, the nature and circumstances of its business, and the extent to which it is affected by external factors"* have a significant influence on the evaluation;[53]
3. any assessment about the future is based on current information: the assessment regarding business continuity is contingent, so subsequent events may change the assessments made earlier.

In performing his risk assessment duties, the statutory auditor is required to monitor the existence of possible situations that may raise significant uncertainties on the company's ability to continue its business operations. In this context, the first task of statutory auditors is ensuring that directors have performed a preliminary evaluation, verifying whether circumstances that could lead to significant uncertainties have been identified, such that the going concern assumption is jeopardized, and, if this occurs, considering action plans drafted to deal with such situations.[54] In the event that a preliminary assessment has not been conducted, the auditor, after discussing with the directors on the identification of the conditions for the existence of the going concern assumption, is required to investigate any potential situation that may question the existence of such condition.

In case the auditor identifies possible threats to the continuity assumption, he must enhance the evaluation by implementing some additional procedures, set forth by paragraph 16 of the ISA Italia No. 570.

Specifically, the auditors must request directors to conduct an objective investigation of the company's adequacy to continue its operations on a going concern basis, they must evaluate

[53] Specifically, paragraphs A5 and A6 of ISA Italia 570, provides that "*the size of an enterprise can affect its ability to face adverse conditions. Small enterprises may be able to react quickly in order to take advantage of opportunities, but they may lack funds to finance activities. Particularly significant conditions for smaller firms include the risk that banks and other lenders may cease to provide funding, as well as the possible loss of an important supplier or customer, a key figure within the workforce, or the right to conduct business guaranteed by a concession, distribution agreement, or other contract."*

[54] ISA Italia No. 570, paragraph 10.

future action plans, and determine the accuracy of the data and of the assumptions considered in estimating future cash flows.

Paragraph A3 of the document is particularly relevant, since it provides a list of indicators to be considered in assessing possible circumstances or events that may trigger the "significant uncertainty" regarding the going concern assumption[55]. These are financial, managerial, and other indicators. Among the financial ratios, some, such as capital deficit, operating losses, or negative cash-flows, must be evaluated considering historical trends, while others result from a prospective evaluation and consider the company's difficulties in meeting its liabilities (inability to repay debts, difficulties in paying overdue dividends). Other financial indicators, such as signs of termination of the creditors' financial support or any change in payment terms, evidence warning signals that could lead to temporary difficulties.

The second class of indicators is that relating to managerial ones, which detect possible failures of the management in running the business adequately. This may occur as a result of the loss of key figure within the workforce of the company, whose roles strategically relevant for the success of the business cannot be replaced; in case of the loss of significant market share in strategic geographic areas; or due to a deterioration of the supply chain conditions.

In this specific context, the statutory auditor has a fundamental role and responsibility since he can investigate the cause of the "significant uncertainty" from the inside, by using its extensive knowledge of the endogenous dynamics of the company.

The other non-numerical indicators consider additional management and financial factors together, such as significant undercapitalization, catastrophic events, or changes in laws or regulations or government policies with negative effects on the company.

At the end of the auditing process, the auditor establishes whether all the necessary information on the proper use of the going concern assumption have been acquired clearly and accurately by directors in the preparation of the financial statements, and expresses a final opinion.[56] He must therefore determine whether significant uncertainties[57] exists on the basis of the evidence collected, by expressing a professional judgement through the preparation of the relevant report.

[55] For this purpose, the ISA Italia No.570, paragraph A3, clarifies that the list of indicators "*is not exhaustive and the presence of one or some of them does not necessarily imply the existence of a significant uncertainty."*

[56] ISA Italia No. 570, paragraph 17.

[57] A significant uncertainty exists when the magnitude of the potential impact of events or circumstances and the probability of their occurrence are such that, in the statutory auditor's judgement, it is necessary a proper and complete investigation of the nature and implications of that uncertainty.

In the event that the financial statement reveals a significant uncertainty, the auditor expresses an opinion without modification, and the audit report will include a separate section in which such uncertainty is justified and detailed.
On the other hand, if non-significant uncertainties arise from the financial statements, the statutory auditor expresses a qualified or adverse judgement, depending on the specific circumstances of the case, and, in the specific section of the report, states that the financials do not provide adequate information about that uncertainty.
It may also happen that, in the circumstance in which there are multiple significant uncertainties, the statutory auditor declares the impossibility of expressing a final opinion.
In summary, it is up to the management to formulate forecasts and assess the existence of the going concern principle, the auditor is instead required to assess such valuation in order to ensure that accounting measures are consistent with the perspective of continuity.

2.2 The going concern principle as the main pillar of the new Business Crisis and Insolvency Code.

The Legislative Decree No. 14 of January 12, 2019, amended by subsequent reform interventions, know as the Business Crisis and Insolvency Code (CCII) radically reshaped the structure of the Italian bankruptcy law, by introducing several modifications and adjustments both in the field of business law and of bankruptcy proceedings. In this context, the primary objective of the legislator was to promote the timely emergence of the business crisis in order to encourage distressed companies to adopt restructuring solutions at an early stage, before the insolvency condition is deemed to be irreversible.
For these purposes, as discussed in the first chapter, the CCII favors a more favorable perspective to procedures that allow the entrepreneur to continue his business operation, under the going concern assumption, thus adopting a forward-looking approach that prioritizes the preservation of business continuity, as opposed to the mere liquidation of the company, as was the case under the previous bankruptcy law. In this way, the concept of going concern, and in particular the loss of such assumption, becomes a true cornerstone of the Crisis Code, and the ultimate goal of the crisis resolution measures introduced by the legislator.
In this context, the Legislative Decree 83/2022 modifies the notion of business crisis by broadening it, in order to also include the situation of probability of crisis. In this way, a new

schematization of the stages of a firm's difficulties is defined: the probability of crisis, the actual crisis and insolvency.

As previously discussed in the first chapter, crisis is defined as the state of the debtor that makes probable the situation of insolvency, and it is manifested by the inadequacy of prospective cash flows to meet the company's obligations, considering a time horizon of at least 12 months. On the other hand, in the previous section, the concept of business continuity (and the principle of going concern) was defined as the ability of a company to continue its business operations for a period of at least 12 months from the last fiscal year.[58] In addition, according to ISA Italia principle No. 570, the assessment about the existence of this assumption involves the formulation of future and therefore uncertain events and circumstances based on financial, managerial and other indicators.

In light of the above, although the two definitions consider the same prospective time period, they differ in the elements that ground the occurrence of these situations: while the notion of crisis refers to quantitative and purely financial data, business continuity considers also qualitative elements such as those of managerial nature. The notion of business continuity thus broadens the concept of crisis, as it considers that risk factors of managerial nature, and in general other than those of merely financial nature, which may not be directly revealed in prospective cash-flows.

Before the introduction of the CCII, business continuity was governed solely within the framework of the financial statements' regulation[59]: only in such field the legislator explicitly refers to this notion. In addition, there was no provision in the regulatory complex that, in case of the loss of the going concern assumption, recognized a managerial obligation for the directors. Therefore, these latter were not formally required to react in the presence of such situation in order to deal with the business crisis. On the basis of the interpretation of Art. 2423-*bis*[60] of the c.c., it could at most be recognized, in case of loss of business continuity, the duty of the administrative body to report such situation in the notes to the financial statements. In the absence of the going concern assumption, directors were required to prepare financial statements according to liquidation criteria, thus leaving the perspective of continuity.

[58] OIC 11, paragraph 22, ISA Italia principle No. 570.

[59] Please refer to sections 2.1.1, 2.1.2 and 2.1.3, regarding the concept of business continuity in the Italian Civil Code, the National and the International Accounting Standards and its verification in the ISA Italia document No. 570.

[60] According to Art. 2423-*bis*, paragraph 1, of the Italian Civil Code, regarding the preparation of the financial statements, "*the valuation of items must be made prudently and in the perspective of the continuation of the business."*

Nevertheless, even in the absence of regulatory provisions that provided for specific obligations for directors in the absence of the business continuity assumption, there was the tendency in jurisprudential doctrine to recognize duties of non-strictly accounting nature on the management body, in particular that of immediately ascertaining the occurrence of an insolvency condition and continuing business operation pursuant to Articles 2485 and 2486 of the Italian Civil Code[61] (the so-called conservative management). Such obligation originated from a thesis supported by a part of the doctrine, according to which the absence of the going concern assumption constitutes one of the cases of supervening impossibility of achieving the corporate object, as set forth in the former Art. 2484.[62] However, such theory was rapidly discarded since the impossibility of achieving the corporate object concerns the occurrence of obstacles such that the company is permanently and irreversibly unable to continue its business operations. Therefore, a transitory impediment or the emergence of distressed situations, such as the temporary loss of business continuity, do not result in the impossibility of achieving the corporate object and thus do not legitimize the dissolution of the company.

A possible solution to such regulatory gap was based on the provisions of the bankruptcy law and on Articles 2394, 2380-*bis* and 2497 of the c.c.[63], according to which there were recognized a series of obligations for directors, including the duty to deal with situations of economic and financial distress and to notify them to shareholders and creditors, not expressly providing for the recovery of business continuity. With regard to the obligation to deal with such distressed situation, it was considered satisfied following the proposal, addressed to shareholders, to liquidate the company or alternatively, through a recovery plan.

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[61] Article 2485 of the c.c., regarding directors' duties, establishes the functions and responsibilities of the administrative body from the time when a cause for dissolution has occurred to the time of the registration in the business register of the appointment of receivers, and it provides that "*in the event of delay or omission, they are personally and jointly liable for the damages suffered by the company, shareholders, corporate creditors and third parties".* Article 2486, paragraph 1, of the c.c., regarding directors' powers and responsibility, establishes that "*upon the occurrence of a cause of dissolution (…) the directors retain the power to manage the company, for the sole purpose of preserving the integrity and value of the company's assets",* thus the so-called conservative management. Paragraph 2 provides that *"the directors are personally and jointly liable for the damages caused to the company, shareholders, corporate creditors, and third parties, for acts or omissions committed in violation of the preceding paragraph."*

[62] Art. 2484 of the c.c., regarding the causes of dissolution of a company, lists among these the dissolution "*for the achievement of the corporate object of for the supervening impossibility of achieving it."*

[63] Art. 2394, paragraph 1, of the c.c., governing the liability to corporate creditors, provides that *"directors are liable to corporate creditors for the failure to meet their obligations to preserve the integrity of the company's assets."* Art. 2380-*bis* of the c.c., regarding the administration of the company, establishes that the management of the company and all that flows from it pertains exclusively to directors. Art. 2497 of the c.c., regarding the responsibilities of the subjects exercising management or coordination activities, is directed at the protection of shareholders and creditors.

The introduction of the CCII established the centrality of the concept of going concern, which has no longer a merely accounting significance, but especially a managerial one, thereby becoming the main focus of corporate governance.

2.2.1 Going concern and corporate structures.

In order to prevent business crisis and facilitate their early recognition, a set of regulation provisions were introduced in the Crisis Code and in the Italian Civil Code concerning corporate responsibilities related to the implementation of adequate organizational, administrative and accounting measures, according to the size and the nature of the company.
In this new scenario, budget and industrial planning become key factors, enabling companies to timely recognize situations of financial distress, to evaluate debt sustainability and the going concern prospects.
Before introducing the Crisis Code's new features regarding business organizational structures, it is necessary to provide an overview of this concept. Organizational structures as intended by the Code relates to the exercise of the functions and duties of the various corporate subjects. The Standards of conduct of the board of statutory auditors provides a timely definition of this notion, according to which it refers to the "*set of guidelines and procedures established to ensure that decision-making power is allocated and exercised at an appropriate level of expertise and responsibility."*[64] The same document also states that it is defined as "adequate" when it ensures the proper conduct of business functions, given the clear allocation of responsibilities, tasks, and powers of each function, and in accordance with the size, the nature, the complexity of the company, and the corporate object.
On the other hand, the administrative structure *"identifies the set of procedures aimed at ensuring the ordinary conduct of business activities and the single phases in which they are articulated, while the accounting arrangement refers to the system of reporting operating events."*[65] This therefore identifies a duty of the management and control body that is derived from the precept of due diligence and proper management.
In the context of the new Crisis Code, some of the most interesting new features are related to Art. 375, concerning organizational structures of the company, which not only amends the

[64] Norme di Comportamento del Collegio Sindacale, Verbali e Procedure, Caratteri Generali dell'"Assetto Organizzativo", pp 8 and following.
[65] G. Verna, "Assetto Or.Am.Co. Strumento di gestione dell'impresa e non solo premonitore della crisi", in Le Società, 12/2019.

title of Art. 2086 of the c.c., but also integrates it with a second paragraph, according to which *"the entrepreneur, whether operating in corporate or collective form, has the duty to establish an organizational, administrative and accounting structure, adequate to the nature and size of the enterprise, and also in the light of the timely detection of the business' crisis and of the loss of business continuity, as well as to promptly act for the adoption and implementation of one of the instruments provided by the law for the resolution of the crisis and the restoration of business continuity."*[66] Thus, Article 2086 represents the "bridge" between two apparently separate fields of law: that of business crisis and that of preventive risk management.

From a preliminary interpretation, Article 2086, which applies to the *"entrepreneur operating in a corporate or collective form",* seems to exclude from such duty the individual entrepreneur. For this purpose, Article 3 of the CCII, concerning the adequacy of measures and structures for the timely detection of the business crisis, specifies the obligation for the individual entrepreneur to *"adopt adequate measures to promptly detect the state of crisis and implement the necessary actions to deal with it."*[67]

In this way, the legislator establishes the obligation for the company to adopt an organizational configuration functional to the identification of the most appropriate crisis management tools, and for the management body a specific duty to monitor the going concern assumption, to forecasts future scenarios and to intervene even in the pre-crisis phase.

Given the principle of adequacy of organizational structures, intended to monitor business continuity, as a paradigm for the proper management of every type of company, the total lack of organization or its ineffectiveness to achieve the goals of anticipating the business crisis results in managerial responsibilities.

As will be discussed later on, these organizational obligations represent under Art. 12 of the CCII "internal warning tools", and their failure denotes a serious management irregularity, which triggers the alert obligation set forth by Art. 14 of the CCII (the so-called mechanism of external alert).

[66] Art. 2086, paragraph 2, of the Italian Civil Code.

[67] Art. 3, paragraph 1 of the CCII.

2.2.1.1 Duties of the directors: adequacy of the organizational, administrative, and accounting structure.

The CCII provides for the entrepreneur a plurality of duties of protection, to be complied even in the pre-crisis stage, which is no longer considered as an exogenous and accidental adverse event, but as a physiological phase in the firm's lifecycle.
Specifically, Art. 3 of the CCII provides that the entrepreneur is required to:

1. adopt appropriate measures to promptly detect the business crisis;
2. timely implement the necessary initiatives to deal with it;
3. if organized collectively, adopt adequate organizational, administrative, and accounting structures pursuant to Art. 2086 of the c.c.

However, the principle of adequacy is not a novelty in the Italian legal framework: this had been introduced with the business law reform implemented by the Legislative Decree No. 6/2003, albeit pertaining only joint stock companies. These regulations were in fact already provided by Art, 2381 of the c.c., which stipulates that the board of directors must assess the adequacy of the company's organization, according to the nature and the size of the firm. Moreover, the same article provides that the delegated bodies that verify the organizational, administrative, and accounting adequacy, are required to periodically report to the board and to statutory auditors on the general operating performance and its expected development. Nevertheless, the new provisions set forth in the Crisis Code, do not only concern the administrative and supervisory bodies, but the whole corporate structure, affecting not only the company's organization and the decision-making processes, but also the operational activities, in order to preserve business continuity.
Firstly, the abovementioned obligations refer to two consecutive stages: the obligation to establish adequate structures (or, for the individual entrepreneur, to adopt appropriate measures) is a "preventive" duty, which must be accomplished before the emergence of a possible state of distress, as a general rule of good corporate governance; while the obligation to timely implement crisis management tools denotes the later stage, in which the situation of crisis or the loss of business continuity occurs.
The entire system under this Article is aimed at the preventive management of the crisis risk, ensuring adequate protection to all stakeholders, and at safeguarding business continuity. In fact, according to such regulation, directors are required to constantly assess the company's health, which involves the periodical review of the adequacy of the organizational,

administrative, and accounting structure, the verification of the economic and financial equilibrium, and the formulation of forecast scenarios to verify the subsistence of the going concern assumption.

To properly understand the duties of the entrepreneur, it is necessary to analyze the features that a company's structure must have in order to be defined as "adequate" for the purposes outlined by Art.3.

The three types of structures mentioned in such provision, namely the organizational, administrative, and accounting structure, as defined in the previous section, are intended as a set of rules and procedures aimed at ensuring a proper and sound management of the company, according to its nature, size and corporate object, but especially to the perspective of continuity. Article 3, for this purpose, specifies the characteristics that the abovementioned measures and structures must have in order to be "adequate" for the timely detection of the crisis. These must enable the entrepreneur to identify situations of patrimonial or economic and financial distress, to assess the sustainability of the debt and the prospect of business continuity for a period of at least 12 months, and to obtain the information required for the use of the checklist and for the execution of the practical test referred to in Art. 13.

Specifically, a company has an adequate organizational structure where it has an articulated system of corporate governance, consisting of a clear and efficient allocation of functions and responsibilities of the management and supervisory bodies, according to the operational complexity of the company, that is, the nature, the size, and the corporate object. Such configuration must therefore ensure a structured management of the enterprise, based on the implementation of strategies and goals that result from a deep current and prospective analysis of the directors, and a proper supervision of their activities by the statutory auditors. An adequate organizational arrangement must also provide a clear and accurate indication of the main corporate risk factors and enable their proper management and constant monitoring.

Regarding administrative structures, defined in the previous paragraph as the set of procedures aimed at ensuring the correct and ordinary course of the business, these are defined as adequate when they are developed in a clear and planned processes for the conduct of business activities and the phases in which they are articulated. Furthermore, it is necessary that reporting, budgeting, and planning systems allow for the development of a pool of useful indicators that enable the management to forecast the evolution of the business' situation; to focus on the relevant variables and drivers; and to monitor *ex post* possible deviations between forecasts and actual results. In this way, it is possible to reduce management risks, to intercept threats and to timely implement crisis response mechanisms.

An adequate accounting structure must ensure the comprehensiveness, timeliness, and reliability of corporate reporting, resulting in the regular and proper bookkeeping activity, in accordance with statutory and fiscal provisions. In fact, the company's financial records constitute a database for the implementation of planning and internal control mechanisms, and its timely updating activity allows a day-by-day monitoring of business performance, thereby facilitating the detection of early signs of crisis, the preparation of prospective analysis, as well as the constant screening of the company's health.

Finally, Art. 2086 of the c.c., further specifies that the aforementioned arrangements must be appropriate "*to the nature and size of the company",* thus concerning their appropriateness with respect to the business activity, including a dimensional perspective, considering, for example, the volume of business generated and the number of employees.

In this context, it is necessary to consider that such obligation does not only affect the entrepreneur, but also involves the board of statutory auditors, which is required to supervise the adequacy of the organizational, administrative, and accounting structure and its effectiveness. Finally, shareholders also play a relevant role, as they are entitled to monitor the actions of directors, and to choose the most appropriate mechanism to manage the distressed situation.

2.2.1.2 Duties of the directors: timely implementation of crisis management tools.

In the predisposition of adequate corporate structures for the timely detection of the crisis discussed in the previous section, which must allow for a continuous monitoring activity, it is crucial the situation of the loss of business continuity, which generally consists of the inability to generate positive results and adequate cash-flows, but it can also emerge in different forms according to the specific features of the economic activity.

In general, from a combined interpretation of Art. 2086 of the c.c. and Art. 3 of the CCII, it is clear that the earliest signs of the loss of the going concern assumption trigger the second type of obligation for the entrepreneur, concerning the decisions aimed at managing the crisis in its embryonic stage, possibly activating one of the mechanisms provided by the legislator, to avoid the ultimate outcome of the liquidation. Such obligation is strictly connected with the early detection of the crisis, which is in fact complementary to the activation of a crisis management tool.

The purpose of the provision, that is "*to deal with the crisis",* does not necessarily imply that the crisis situation must be overcome; it remains the legitimacy of the decision to liquidate the

business, in accordance with Art. 41 of the c.c., according to which the private economic initiative is freely conducted by the entrepreneur. Moreover, to comply with the obligations under Article 3 of the CCII, the entrepreneur must implement the necessary actions; at this point, the legislator does not specify which tools should be used, as these depend on the specific circumstances of the concrete situation.

In this context, the most relevant issue concerns the fact that the obligations and remedies provided for the entrepreneur differ depending on whether a situation of loss of business continuity occurs or the first signs of crisis have already been detected.

In fact, the loss the going concerns assumption represents the first stage of difficulty of a company; with the result that, upon the occurrence of such loss, the specific tools introduced by the Crisis Code will not be immediately and directly employed, but rather the ordinary remedies provided by the Italian Civil Code (*e.g.,* capital increase, asset sale…) or the negotiated settlement procedure. When the crisis occurs, the directors face a situation in which they have already taken, even if with a negative result, all the possible measures offered by the Civil Code in order to prevent the loss of the continuity condition and to avoid the worsening of the distress.

Therefore, in a crisis situation or even in its early stage, the entrepreneur must choose *"without delay"* whether to use a judicial or extrajudicial tool, such as the negotiated settlement. The objective condition to access this instrument is in fact related to the patrimonial, economic, and financial imbalance which makes the crisis of the bankruptcy probable.

2.2.1.3 Directors and Auditors' responsibilities for the inadequacy of corporate structures and ineffectiveness of the measures implemented.

The introduction of the obligations discussed above is strictly functional to the purposes of the Crisis Code, which are the early diagnosis of business crisis and the preservation of business continuity, given the lateness of intervention reported in corporate recovery paths.

The violation of the obligations under Art. 3 of the Crisis Code and Art. 2086 of the c.c., i.e. the establishment of organizational, administrative and accounting structure, and the adoption of effective crisis response measures could result in civil liabilities on the part of the directors. This may be the result of:

i. the lack of an organizational structure;

ii. the establishment of inadequate organizational arrangements;

iii. the late implementation of crisis and pre-crisis response measures.

Specifically, the lack of an organizational structure for the purposes listed in the abovementioned articles, is considered as a form of serious irregularity[68] in a company's management, governed by art. 2409 of the c.c., which provides a form of judicial authority intervention aimed at restoring the legitimacy of the management. In this view, business judgement rule applies to organizational decisions, since the organizational structure decision is a reasonability of the business management, and it is not objectionable to the extent that it is rational, well-grounded, and supported by adequate verifications (according to the managerial autonomy set forth in Art. 41 of the constitution).

Therefore, in general, the absence of any type of organizational structure constitutes itself a responsibility of the management body, and, in addition, the structure arranged may be subject to judicial review, according to the criteria of proportionality and effectiveness, and based on an ex-ante valuation considering known and knowable information, regardless of the outcome.

Notwithstanding the fact that the establishment of adequate organizational arrangement is a general obligation included in the rules of proper administration, the specific indication of the objectives it is required to achieve, clearly defines the content of the obligation and the responsibilities arising from its violation. The judgement of the directors' liability must consider on one hand the appropriateness of the choices of the possible instruments with respect to the abovementioned purposes, and on the other hand the adequacy in terms of the proportionality of the corporate arrangement with respect to the nature, the size, and the corporate object.

Similarly, the board of statutory auditors is also responsible for an ex-ante supervision of the adequacy and the effective functioning of the corporate arrangements[69], and it can report a complaint of irregularities in the corporate management to the court. Such duty of supervision also covers situations of economic distress of the company, for which the Crisis Code provides specific reporting duties to the administrative body in order to access the negotiated settlement procedure, as set forth in Art. 21-octies of the CCII. Therefore, the authors are required to verify that the structure is defined on the basis of a proper identification of the risks and measures, according to the nature and the size of the company, analyzing the relative

[68] As established by the Court of Cagliari (January 19, 2022).

[69] Art. 2403 of the c.c., regarding the duties of the board of statutory auditors, provides that "*the board of statutory auditors monitors the compliance with the law and the by-laws, the observance of the principles of proper administration and, in particular, the adequacy of the organizational, administrative and accounting structure implemented by the company, and its effective functioning."*

costs and benefits, in order to allow an efficient and proper perception of the symptoms of distress.

2.2.2 Reporting obligations and early warning mechanisms.

As discussed in the first chapter, the main objective of the new Code of Business Crisis and Insolvency is to provide companies with the necessary tools for the timely detection of the state of crisis in order promptly deal with it and enable the continuation of business operation, in the light of the preservation of the going concern assumption.

For these purposes, the Code provides for specific reporting requirements on the part of the supervisory body and auditors, as well as qualified public entities. At the outcome of the alert or even before its activation, the entrepreneur can access the negotiated crisis resolution procedure.

The negotiated settlement, with the Legislative Decree No. 83/2022, replaces the alert and assisted crisis settlement procedures provided in the original text of the Crisis Code[70],since these were considered inflexible and capable of leading to significant implementation difficulties. Specifically, Art. 25-*octies* of the CCII provides for the supervisory body's duty to promptly report, in writing, to the management the existence of the prerequisites for the submission of the application to access the negotiated settlement, i.e., the existence of patrimonial or economic and financial imbalances that may result in a situation of crisis or insolvency, without prejudice to the subsistence of concrete prospects of rehabilitation (which constitutes the second objective requirement to access this mechanism). Such warning must be adequately and exhaustively justified, and it must contain the establishment of a reasonable deadline, in any case not exceeding 30 days, within which the management must refer to the supervisory body on the actions implemented, according to the obligation of timely activation discussed in the previous sections. The timeliness of the reporting enables to define a precise time horizon beyond which any administrators' inaction is an indication of potential responsibility, while for the supervisory body the timeliness of the warning is judged in accordance with Art. 2407 of the c.c., in the context of the joint and several liability of

[70] Please refer to section 1.1.3 for further considerations.

auditors.[71] Such obligation can be considered as a part of the more general duty to supervise the conduct of directors set forth in Art. 2403 of the c.c., and configures a company internal crisis and pre-crisis monitoring and management system, relegating to the discretion of the directors the choices of the intervention for the resolution of the distressed situation, and, on the other hand, to the supervisory body a duty for the timely activation.

The Crisis Code also provides for specific reporting obligations for qualified public creditors concerning any delays or omission in contribution and social security payments exceeding certain amounts. Such warning is addressed exclusively to the entrepreneur and (if any) to the supervisory body, with an appeal to assess whether the conditions for the opening of the negotiated settlement are met.

Specifically, Art. 25-*novies* of the CCII regulates the cases in which the National Social Security Institute, INAIL, and the Internal Revenue Service are subject to the warning duty, specifying the time limit for late and omitted payments, and the relative amounts. Following such a notification, the entrepreneur is not obliged to activate the negotiated settlement procedure, but only to verify if the reported delays constitute symptoms of crisis or a threat to the going concern assumption, to implement the most suitable remedies.

To complete the framework of external warning devices there are the obligations of banks and financial intermediaries to report to the supervisory body in case of changes, revisions and revocations of credit facilities to the company (Art. 25-*decies*).

In this way, the Code provides a warning mechanism from both the inside (supervisory body) and the outside of the company (qualified public creditors and banks), aimed at inducing the entrepreneur to continuously monitor for crisis and pre-crisis signals.

Finally, paragraph 4 of Art. 3 of the CCII provides an accurate indication of the warning signs for the timely detection of the crisis; specifically:

i. the existence of payroll debts overdue for at least 30 days and equal to more than a half of the total monthly payroll amount;
ii. the existence of payables to suppliers which are at least 90 days past due in an amount exceeding the total outstanding payables;
iii. the presence to exposures to banks and other financial intermediaries that have been past due for more than 60 days or that have exceeded the limit of credit facilities obtained in any form for at least 60 days, provided that they represent a total of at least 5 percent of the overall exposure;

[71] Art. 2407, paragraph 2, of the c.c., provides that statutory auditors are *"jointly and severally liable with the directors for their acts or omissions, when the damage would not have occurred if they had supervised in accordance with the obligations of their office."*

iv. the presence of one or more of the debt exposures to the IRS and INPS in the thresholds provided for by Art. 25-*novies*.

Thus, the Code introduced for the entrepreneur the obligation of a constant monitoring of the company's management aimed at verifying the objective circumstances and conditions that trigger the condition of crisis, intended as the state of the debtor that makes insolvency probable, reflected in the inadequacy of prospective cash-flows to meet obligations in the next 12 months.

2.3 The Going Concern assumption and the negotiated settlement procedure.

As it was widely discussed in the first chapter, the new institution of the negotiated settlement is a voluntary and extrajudicial path (rather than a procedure), intended to prevent crisis or insolvency and facilitate the reorganization of the company. It is recalled that it is based on two core pillars:[72] the presence of an appointed independent expert entrusted to assist the entrepreneur, without replacing him, and to mediate, and facilitate negotiations with creditors and other stakeholders; the establishment of a national telematics platform with information and activation functions. Through such platform the debtor can access a checklist, containing operational indications for the drafting of the recovery plan, and a practical test for the verification of the company's state of distress; as well as submit the application for the appointment of the expert. In addition, the negotiated settlement can be activated exclusively by the entrepreneur, without prejudice to the reporting obligations of the supervisory body discussed above; it does not provide any form of dispossession of the debtor, who retains the ordinary and extraordinary management of the company (thus, the so-called debtor in possession proceeding); and it is entirely extrajudicial, unless confirmations of asset protection measures or specific authorizations affecting stakeholders' rights are requested.
Art. 12 of the CCII sets the objective prerequisites to access such a procedure[73], which are: the presence of a patrimonial or economic and financial imbalance; and the existence of reasonable prospects of rehabilitation. Thus, the concept of going concern, from a prospective

[72] Assonime, "Le misure del decreto crisi per il risanamento dell'impresa", Circolare N.34 del 7 dicembre 2021.
[73] For further clarification on the prerequisites to access the negotiated settlement procedure, please refer to section *1.2.4.*

point of view, assumes central importance in the negotiated settlement path, of which, as will be explained in the following sections, it is the ultimate goal.
To explore this theme, it is necessary to first understand how the going concern assumption, and its loss, is connected to the notions of pre-crisis, crisis and insolvency provided by the code, and then analyze its connection with the negotiated settlement of business crisis.

2.3.1 Going concern and business crisis: stages of corporate distress.

As it has been widely argued throughout this work, the focus of the latest reforms, and of DL 118/2021, is the state of business crisis and the going concern assumption, around which the entire regulatory complex of solutions provided for the reorganization and its resolution is developed. In fact, in order to cope with the necessities imposed by the new economic and social context, especially after the Covid pandemic, it was necessary to identify as the objective prerequisite to access the crisis regulation mechanisms, a different concept from traditional insolvency, much more elastic and versatile. Such need to identify a broader category culminates with the introduction in the Crisis Code of the state of crisis and pre-crisis, and the private instruments established to overcome them.[74] For these reasons the going concern assumption becomes a cornerstone of the Crisis Code and its reform interventions, defining also the crisis and pre-crisis indicators.
The provision that marks the evolution of the principle of going concern is Art. 2086 of the Civil Code, which, following the amendments made by the Rordorf reform, regulates the situation of loss of continuity, attributing normative relevance to this concept, beyond the mere accounting discipline, by entrusting directors with a series of "preventive" obligations, for the prevention of distressed situations, as well as "subsequent" obligations, aimed at overcoming possible situations of crisis and restoring business continuity.[75]
Considering the aforementioned article, it is now necessary to clarify how, on one side, the situations of loss of going concern, crisis and insolvency are related and, on the other side, they represent three different stages occurring at distinct moments in a company's lifecycle.

[74] As discussed in the first chapter, the focus of the legislator is no longer the mere liquidation of the company (which, in any case, remains one of the tools available) but to intervene at an early stage, as soon as the first warning signs occur, so that the crisis does not necessarily evolve into the irreversible state of insolvency.
[75] For further considerations on directors' obligations provided by Art. 2086 of c.c., please refer to subsections *2.2.1.1* and *2.2.1.2*.

In this regard, it is recalled that Article 2 of the CCII, titled "*definitions"* denotes:

i. pre-crisis, as the situation of *"patrimonial or economic and financial imbalance that makes crisis or insolvency probable";*[76]

ii. business crisis as "*the status of the debtor that makes insolvency probable and is manifested by the inadequacy of prospective cash-flows to meet obligations over the next 12 months";*[77]

iii. insolvency as *"the state of the debtor manifested by defaults or other external facts, which prove that the debtor is no longer able to regularly meet its obligations."*[78]

However, the Code does not provide for a definition of going concern, which can be inferred[79] from Accounting Standards and ISA Document No. 570, [80] according to which such concept refers to the company's ability to operate as a functioning business complex, and thus capable of meeting its obligations and liabilities, for a period of at least 12 months. Accordingly, the loss of business continuity reflects the incapacity of the company to operate, for a period of at least 12 months, as a functioning entity.

Given the above, the going concern assumption does not have the nature of a simple index of business crisis (having a different meaning from the latter), but it gains a functional autonomy: the loss of such capacity results in a series of effects different from and independent of the crisis situation. Thus, the requirement of business continuity appears to be consistent with the textual formulation of the CCII and the Civil Code provisions, which clearly distinguish the notions of business crisis and loss of going concern, as well as with the legislator's intentions to implement a regulatory framework aimed at the early detection of corporate crisis.

In light of the aforementioned considerations, the loss of the going concern assumption represents the first stage of a company's difficulties, which is gentler and easily reversible compared to the subsequent phases (crisis and insolvency), with respect to which directors have a duty to implement the necessary actions in order to restore such a condition. Therefore, a long-term monitoring duty is provided foe directors, not only for accounting purposes, but

[76] Art. 12, paragraph 1, of the CCII.

[77] Art 2, paragraph 1, letter *a*, of the CCII.

[78] Art. 2, paragraph 1, letter *b*, of the CCII.

[79] Assonime, "Le nuove regole sull'emersione anticipata della crisi d'impresa e gli strumenti di allerta", circ. N0. 19, August 2019.

[80] For further clarifications on the going concern assumption in the National and International Accounting Standards and in the ISA Document No.570, please refer to sections *2.1.2* and *2.1.3*.

also for management ones, requiring them to recognize any loss of business continuity and to adopt appropriate actions to restore it.[81]

Considering that the moment in which a company is no longer able to regularly meet its obligations is defined as insolvency, and that business continuity has been defined previously as the company's ability to satisfy its obligations for a period of at least 12 months, this means that the directors' intervention duty is anticipated by the legislator (at least theoretically) to a minimum of one year before the insolvency occurs.

On the other hand, regarding the notions of crisis and pre-crisis contained in the Code, while having the same reference time horizon as the going concern, they refer to a more specific situation as they consider only elements of quantitative and financial nature; the notion of business continuity also refers to managerial and qualitative factors, as confirmed by the indicators provided by the document ISA Italia No. 570. All of this, consistently with the considerations on the nature of the factors that characterize the two notions, leads to the identification of the company's pre-crisis and crisis situations as respectively the second and third stage of the company's economic and financial difficulty, subsequent to the loss of business continuity and more serious than the latter, as it is closer to insolvency.

In brief, in the cases in which a company is unable to carry out the normal course of business operations for a period of at least 12 months, it is in a situation of loss of business continuity, with the resulting obligations for the directors, and the possibility for the entrepreneur to resort not only to the ordinary private remedies provided by the Civil Code or private autonomy (e.g., capital increase, new financing, conversion of debt into equity), but also to the new institution of the negotiated settlement.

In the cases of pre-crisis, crisis or insolvency, different obligations arise for the directors from those proper to the hypothesis of loss of business continuity, regulated by the Code of Business Crisis and Insolvency.

2.3.2 Prospective going concern: prerequisite or purpose of the negotiated settlement procedure?

Article 12, paragraph, 1, of the CCII sets the objective requirements for accessing the path of the negotiated settlement of the business crisis, which are: the condition of *"patrimonial or*

[81] As discussed in the previous sections, Art. 2086, paragraph 2, of the c.c., provides for the institution of adequate organizational, administrative, and accounting arrangements, thus configuring a so-called "antecedent" duty to the loss of business continuity.

economic and financial imbalance that make crisis or insolvency probable", and the existence of reasonable chances for corporate rehabilitation.

The first requirement includes a wide range of difficulties of different nature and magnitude.

First of all, the condition of imbalance described above, that makes probable the occurrence of insolvency, recalls the definition of the state of crisis provided by the Code, according to which it is defined as the state of economic and financial distress that makes the insolvency of the debtor probable, manifested by the inadequacy of prospective cash-flows to meet planned obligations on a regular basis.[82]

The Code, in delineating the objective requirements of such early warning tool, first, refers to the concept of crisis intended as the probability of insolvency, without recurring to the system of crisis' indices and indicator, but offering the entrepreneur a self-diagnosis tool to assess the existence of such condition. Second, it expressly considers, alongside the "probability of insolvency", the "probability of crisis". In this way, the possibility to access the negotiated settlement is extended to a stage before the crisis, when the chances of reaching an agreement with creditors are higher. Such extension of the scope of application is consistent with the director's duties set forth by Art. 2086 of the c.c., which requires the management to establish adequate organizational arrangements to intercept not only the crisis, but also situations and circumstances that may jeopardize the going concern assumption, as well as to take timely actions for the adoption of appropriate remedies.

As discussed in the previous section, the loss of business continuity identifies a different and antecedent situation of imbalance with respect to the crisis, which implies a prognostic assessment that considers both quantitative and qualitative factors.

Although Art. 12 of the CCII mentions only the situation of imbalance that makes crisis or insolvency probable, the access to the negotiated settlement procedure is also allowed to insolvent companies, provided that there is still a reasonable prospect of rehabilitation.

Thus, the use of such early warning tool presupposes not only the condition of pre-crisis, but also crisis and reversible insolvency, facts compatible (in the case of crisis) and coincident (in the case of insolvency) with a business discontinuity that has already occurred.[83] In other words, the condition of distress expressly mentioned by Art. 12 of the Code includes situations that do not necessarily imply the enduring existence of the going concern. Thus, the subsistence of the going concern assumption is not a necessary precondition to access the

[82] Art. 2, titled "definitions", paragraph 1, of the CCII.

[83] N. Abriani, "Continuità aziendale, avvio della composizione negoziata e giustificato ritardo nella redazione del bilancio", in dirittodellacrisi.it, ottobre 2022.

negotiated settlement.[84] Therefore, since the crisis and its probability of occurrence are set as prerequisites for the initiation of the procedure, the same applies to the situation of loss of going concern. The key for the interpretation lies in a prospective concept of the loss of business continuity, which may and may not have occurred at the time of the application in the telematics platform.

In fact, the access to such instrument is allowed not only in the presence of a circumstance that generates significant uncertainties about the company's ability to operate as functioning entity, but also when the business discontinuity has already occurred.

In this context, it is necessary to distinguish the current situation of the company that intends to access the negotiated settlement, and the situation that can be prospected for the future, as a result of the initiation of this path, which depends on the plan the entrepreneur presents to his creditors and the negotiations with them.

On the other hand, considering the second objective requirement, Art. 12, ph. 1 of the CCII establishes that at the time of the application, and for the entire duration of the path, there must be reasonable prospects for business rehabilitation. Thus, the negotiated settlement is intended to rehabilitate the company and thus, both preserving the going concern assumption, if it holds, as well as restoring it in the event that it does not subsist at the time of the initiation of the path.

The real focus of the negotiated settlement is therefore the rehabilitation of the company, which can be pursued in two ways: through the direct or indirect business continuity. In the case of direct continuity, the business continues in the hands of the entrepreneur; while in case of indirect continuity, it is provided for the intervention of a third party. Confirming this, the second paragraph of Art.12, regulating the role of the expert, provides that the process of corporate restructuring can be also achieved *"through the sale of the company or branches of it."* From the imposition of the abovementioned requirement arise the burden of proof on the company and the focus of the mandate given to the independent professional, who is immediately required, from the time of his appointment, to assess the existence of concrete prospect of rehabilitation.[85] Such prospects, if in the first instance and following the

[84] Such a conclusion, according to Abriani ("Continuità aziendale, avvio della composizione negoziata e giustificato ritardo nella redazione del bilancio", in dirittodellacrisi.it, October 2022), is justified by the *ex lege* connection between Article 2086, paragraph 2, of the c.c., according to which the adequate arrangements must be implemented by the entrepreneur for the *"timely detection of business crisis and loss of business continuity"*, and Article 3 of the Code, which attributes to corporate arrangements the primary function of timely crisis detection. In the identification of the functions of the corporate structures, the Civil Code uses the conjunction "and", which, combined with the more synthetic expression used in the Crisis Code, seems to imply that the state of crisis, and its probability, and the loss of going concern are overlapping notions in regulatory terms.

[85] Art. 17, paragraph 5, of the CCII.

preliminary assessment of the entrepreneur must be "reasonable", with the appointment and the intervention of the expert, they must be verified and confirmed, they will therefore have to be "concrete" in order to allow the initiation of the negotiated procedure. In fact, where it is unreasonable to envisage the business' recovery, the expert, in any moment, is required to order the dismissal of the negotiated settlement.

In brief, the declared absence of the going concern assumption, as well as the existence of uncertainties or risks on its subsistence, cannot be considered per se an obstacle for the access to the negotiated settlement procedure, since the latter cannot be excluded even in the case in which the company foresees in the plan at the basis of the negotiations to divest all of its assets. In this regard, the Court of Bergamo[86] stated that only a company for which it is provided, as the only option concretely viable, a purely liquidation prospect cannot benefit of the path for the lack of the procedural prerequisite on the reasonable prosecution of business rehabilitation.

Business continuity, from a prospective standpoint, is instead the goal of this procedure. Negotiations with creditors are conducted under the assumption that there is reasonable probability of achieving the reorganization of the business, which does not imply the initial certainty about it. Therefore, the company must have a reasonable prospect, intended as a probability, to restore or preserve its going concern, but not also guarantee (neither the current existence at the moment of the application, nor) the certitude of its realization.

2.4 The verification of the company's prospects of rehabilitation.

As discussed in the previous section, Article 12 of the CCII identifies as the objective requirement to access the negotiated settlement procedure the circumstance of patrimonial or economic and financial imbalance that makes the debtor's crisis or insolvency probable, when it is reasonably pursuable the rehabilitation of the company.

The purpose of such path is therefore the restructuring of the enterprise, intended as a productive organization to be preserved, where possible, by balancing the different interests of the parties and preserving business continuity both in a direct form, that is, in the hands of the entrepreneur, as well as in an indirect form, through the transfer of the company or branches of it. The verification of concrete prospects for rehabilitation and the formulation of

[86] Court of Bergamo, March 15, 2022.

an action strategy, are functional to the negotiation phase with creditors, which is followed by the implementation of the recovery plan. Therefore, the verification of the existence of prospects of rehabilitation means identifying the causes of the distressed situation and formulating strategies aimed at restoring the company's patrimonial, economic and financial equilibrium.

This condition is preliminarily verified by the entrepreneur through the practical test available on the telematics platform, and it is then confirmed by the expert, following the acceptance of the mandate. An additional tool for the verification of these perspectives is the detailed checklist containing a series of guidelines and questions, addressed to both the entrepreneur and the expert, through which the recovery plan can be drafted. Specifically, it defines five milestones for the preparation of the plan:

1. the company's self-assessment about the existence of internal organization requirements;
2. the mapping of the accounting situation and current performance;
3. the identification of intervention strategies to remove the causes of the crisis;
4. the cash-flows projections;
5. the adjustment of the debt.

In addition, the Isa Italia document No. 570 provides a set of financial, managerial, and other non-quantitative indicators for the assessment of the existence and monitoring of the going concern assumption.

Finally, the recovery plan, at the basis of the negotiation's activity with creditors, must show the possibility of reaching a patrimonial, economic, and financial equilibrium, according to the going concern perspective. Therefore, the existence of the going concern perspective should be verified by combining the above elements, and on the basis of an analysis of the financial situation and the patrimonial, economic and financial equilibrium, represented by the synchrony of income and expenditures related to the performance of business operations, combined with the qualitative analysis of related strategies.

2.4.1 The practical test for the preliminary verification of the reasonable prospects of corporate restructuring.

The first step for the verification of the corporate restructuring prospects consists of the practical test, available on the national telematics platform, regulated by Art. 13 of the Code.
The execution of such test is not mandatory; the debtor can, indeed, just file the petition for the appointment of the independent expert, while conducting the test later. However, this represents an auxiliary tool for the entrepreneur, allowing him to perform an initial prognostic analysis of the sustainability of the outstanding debt, through prospective cash flows, and to assess at an early stage the intensity of the imbalance situation and its possible reversibility.
The methods of calculation and the interpretation of the results have been discussed in section *1.3.2*, here it is sufficient to recall that such test identifies, as the only reference indicator for the assessment of the state of corporate distress and, therefore, the complexity of rehabilitation, the ratio between the debt to be restructured and the cash-flows allocated to its coverage. The firm is prospectively in economic equilibrium if it has, starting from at least the second year, annual flows to debt service greater than zero and intended to be replicated over time.
In this context, the decree of the Ministry of Justice of March 21, 2023, clarifies that the test does not have the function of identifying a crisis situation, but it first allows the entrepreneur to assess the extent to which the corporate restructuring is reasonably pursuable, and then, it helps the expert to understand whether there are concrete prospects for rehabilitation.
Furthermore, it does not require that the entrepreneur has already prepared a restructuring plan, since it is a preliminary examination intended to assess whether the conditions to access the negotiated settlement are met, while, on the other hand, the corporate restructuring plan is the document that guide the debtor during the negotiations once the path has begun. However, the practical test, imperatively requires that companies have performed, at the time of their access to the platform, a rough estimate of the future economic performance, regarding a specific, albeit short, time frame.
The starting figure is the estimated prospective normalized gross operating margin, expressed on an annual basis, net of nonrecurring items. A proper execution of the test presupposes the ability to develop a patrimonial and economic-financial plan. More specifically, is the financial plan for prospective cash flows that is the basic document on which the valuation must be based, since it is in its development that the sustainability or not of debts can be projected. The emphasis is one again placed on the issue of the establishment of adequate

corporate structures, especially the articulation and effectiveness of administrative arrangements: in the absence of an adequate planning and budgeting system the successful execution of the assessment is not possible.

The entrepreneur, given the aforementioned purposes of the test, must base the determination of the prospective GOP on historical data, on one hand, adjusted for extraordinary nonrecurring components, and, on the other hand, prospectively taking into account the effects of the concrete initiatives already planned and implemented.

The result of such ratio, which has a purely indicative nature, expresses the number of years required to repay, through operating inflows, the total corporate debt, and, at each level of the indicator corresponds a hypothetical level of rehabilitation.

With regard to the outcomes of this indicator, it is recalled that a ratio of no more than unity denotes contained difficulties; these difficulties grow as the ratio increases but remain contained up to a certain level, which, in the absence of specific features, is no more than three. In the latter case, the current performance may be sufficient to identify the recovery path. Specifically, where the ratio is greater than two, but still less than three, the degree of rehabilitation difficult clearly increases: the latter will be feasible as long as the entrepreneur adopts new industrial initiatives, assuming that the current management is unable to deal with the company's distress. In such a case, the industrial plan assumes a decisive importance, as it becomes imperative.

In the abovementioned cases, the company's difficulties can be considered mitigated where the debt is concentrated in the hands of a few creditors and/or where the company has no particular need to make new investments.

On the other hand, where the ratio grows beyond 3 and up to 5/6, the entrepreneur's "direct" business management can no longer be considered sufficient for the purpose of the business recovery process. At this point, it arises the need to divest the company or its relevant branches, remaining, as the only possible way, indirect business continuity. It will therefore be necessary to estimate the resources that can be realized from the sale of the company and compare them with the amount of debt to be covered, in order to assess the concrete possibilities of rehabilitation. Only in the case in which the resources realizable from indirect continuity are adequate to support the debt, the negotiated settlement path can be initiated and the overall exposures with creditors can be renegotiate.

2.4.2 The checklist for the drafting of the business recovery plan.

As mentioned in the previous section, when the time required for rehabilitation reaches or exceeds three years, the drafting of the recovery plan is qualified as indispensable.

For this purpose, it is available on the national telematics platform, a detailed checklist, which contains a series of questions and guidelines developed on the basis of best practices, in order to draft the recovery plan and to allow the expert to conduct the consistency analysis of the plan.

Section two of the Ministry of Justice Decree of March 21, 2023, provides that to access the negotiated settlement, the entrepreneur must have prepared a draft of the recovery plan, according to the aforementioned checklist, and a financial plan for the next six months. It is not necessary, however, that the entrepreneur has already filed the actual plan. In any case, he must timely prepare it in the course of the path since it is crucial to identify the proposals to be made to the parties and the appropriate solution for the resolution of the crisis.

The checklist is made up of a series of questions, addressed to the entrepreneur and the expert, which represent the operational indications for the drafting of the plan, provided that they are intended as the implementation of the best practices and not as absolute precepts.

The content of this checklist should enable the entrepreneur who intends to access the negotiated settlement to prepare a reliable recovery plan.

In this context, the main reference for its preparation is provided by the "Principles for the drafting of recovery plans", issued by the CNDCEC[87], while the checklist can be considered as a useful operational guide to map out the key elements that must necessarily be considered.

The recovery plan is a document containing the strategic and operational initiatives, and their economic and financial impacts, through which a company intends to exit the state of crisis or distress, and it is aimed at the restoration of the economic, financial, and patrimonial equilibrium. The process of drafting of the recovery plan assumes the presence of minimum organizational requirements and an updated financial position.

The formal preparation of such plan is easier the more articulated is the company, and therefore the more adequate[88] are:

i. corporate governance and control systems (organizational structures);

[87] CNDCEC is the National Council of Certified Public Accountants and Accounting Experts.

[88] For further clarification on the adequacy of the organizational, administrative, and accounting corporate structures, please refer to section *2.2.1.1*.

ii. general and analytical accounting systems (accounting structures);

iii. budgeting and planning, internal control, and risk management systems (administrative structures).

The absence of adequate and articulated quantitative methodologies and their unreliability does not preclude the possibility to prepare the restructuring plan, but it increases the time and cost required to achieve this goal. Indeed, data collection and processing will be much more complex as there are no suitable internal resources, skills, and organizational supports.

Specifically, such organizational requirement provided by the first section of the checklist concerns factors such as the presence of core resources (both human and technical) for the conduct of the business and of technical skills required to implement the industrial plan, the provision of a continuous monitoring of business performance, including through management KPIs, and the presence of a 6-months treasury plan for the projection of financial income and expenditures.

The second section is focused on accounting structures, which are qualified as an essential prerequisite for the preparation of the plan, since they must allow a full and fair representation of the accounting position and the current performance of the company, that is, they must ensure the periodic preparation of updated accounting statements including accrual and closing adjustments, in accordance with accounting principles. More specifically, they must enable: a complete and reliable recognition of the debt position; the monitoring of accounts receivables through the preparation of prospectuses containing the seniority of such credits and the causes of any delay in their collection; the comprehension of inventory movement times and thus to identify slower-moving items; the reconciliation of fiscal liabilities with the single certificate of tax payables and the overall debt situation; and to assess the risks of contingent liabilities.

The recovery plan must be based on the actual situation of the company and its causes; the intervention strategies must in fact be adapted to it and enable the removal of existing difficulties. Thus, the checklist requires to understand the causes of the state of crisis or patrimonial or economic and financial imbalance, in order to define the industrial strategies to remove them.[89] For this purpose it is necessary to estimate first revenues, fixed and variable costs, investments and extraordinary operations implemented, and finally taxes. Then, economic magnitudes and debt-servicing flows must be declined in financial and equity terms. It is further required, recalling the adequacy of corporate structures provided by Art.

[89] Section 2, paragraph 4, of the Decree of the Ministry of Justice, of March 2023, regarding the detailed checklist for the drafting of the recovery plan and for the analysis of its consistency.

2086 of the c.c. and Art. 3 of the CCII, that the company has an effective directional system of management and control, which enables planning, in the long run, and scheduling, in the short run, the economic activity. Such a system must also enable the business activity to be controlled with respect to the magnitude and the use of available resources.

Finally, the outstanding debt is compared with the cash-flows from business operations that can be used to repay it, also for the purpose of identifying the appropriate type of proposals for creditors and other interested parties.

2.4.3 The recovery plan and the principles for its drafting.

The last step in the verification of the concrete prospects of rehabilitation is the preparation of the actual plan, on the basis of which the restructuring proposal can be presented to creditors and a suitable solution to overcome the distressed situation can be identified.

The purpose of the recovery plan is not to extinguish the company's debt position, but to make it sustainable, restoring the patrimonial, economic, and financial equilibrium and preserving business continuity. Starting from September 2017, it is possible to prepare recovery plans by applying the guidelines provided by the document "Principles for the Preparation of Recovery Plans", published by the National Council of Certified Public Accountants and Experts (CNDCEC).

The plan is defined by the Principles as a document drafted by the delegated body and the management, with the eventual assistance of specialized advisors, in which the strategic actions, operational actions and the related economic and financial impacts are described, through which the company intends to deal with the crisis and restore the going concern status. Even when it is prepared with the support of external consultants, the responsibility for the plan lies on the administrative body, not only regarding its content, but also its compliance with the form and appropriate drafting techniques.

The preparation of a recovery plan necessarily requires an adequate organizational, administrative and accounting structure that provides the necessary actual and forecast economic and financial figures; an effective process for the acquisition and the elaboration of accounting and operational data, and the required managerial skills of technical, legal, commercial and administrative nature, in the absence of which it is provided for the appointment of relevant professionals.

Depending on the severity of the state of distress, the objectives set, and the mechanisms involved for recovery, the plan may assume different approaches.
In the context of the negotiated settlement procedure, since the objective requirement is the presence of reasonable prospect for rehabilitation, this must be prepared, if a return to business operation profitability is deemed credible, envisaging business continuity, and representing the solutions identified for the restoration of normal business conditions. Otherwise, the independent expert will order the filing of the negotiated settlement and the plan will assume a liquidation nature, by providing the timing and methods of disposal of the company's assets.

The plan must have the following requirements:

i. adequacy, intended as the identification of a balanced structure of financial sustainability, with respect to the sources of financing, the current and the structural debt capacity and the company's rating;
ii. the compatibility between strategic intentions, the action plan, the timing of interventions, the quality of current and prospective business resources and the related economic and financial projections;
iii. reliability, meaning that it must be based on realistic and verifiable assumptions.

The recovery plan is addressed to the various corporate stakeholders involved in the turnaround process[90], including shareholders not involved in the management, the corporate control bodies and external supervisory authorities, creditors and other parties whose positions are affected by the economic and financial maneuver contained in the plan, banks and financial intermediaries, and the independent professional.
Regarding the content of the plan, the abovementioned document provides that it is based on both qualitative (industrial part) and quantitative (economic and financial part) elements, and whenever the plan involves the prospective going concern assumption, the industrial results must be included in the economic and financial projections.[91]

[90] The turnaround process refers to the restructuring process implemented with a recovery plan by a company that has experienced a crisis or a distressed situation.
[91] The absence of an adequate illustration of the strategies and the Action Plan makes the economic and financial results mere numerical extrapolations of historical trends, the credibility of which can be verified only ex-post. On the other hand, in the absence of quantitative forecasts, the plan cannot be evaluated in advance, nor can its implementation be subsequently verified.

According to the guidelines provided by the Principles, the initial section of the plan should contain an overview of the baseline situation, including a brief description of the business and its main characteristics, the strategies previously formulated by the management, an historical analysis of economic-financial and equity data, the description of the company's organizational structure, and the company's market and value chain positioning.

In this context, since the turnaround process starts from the possibility of removing the causes of crisis, it is important to identify the origins of the distressed situation and the critical symptoms found in the financial, economic and asset situation, through the calculation of the main financial KPIs.

Then, starting from the causes of crisis and the baseline situation of the company, the business recovery strategy must be identified. Specifically, the presence of strategic assets on which the company's revitalization can be based, the costs for the activation of the identified legal mechanism of resolution and, more generally, the identification of any other element that can provide concrete possibilities of rehabilitation must be verified. Therefore, the document must explain the strategic assumption, the objectives, the strategies and the criticalities or benefits for each strategic business area.

In the event that the prospective going concern assumption holds, the plan must contain the strategy to be implemented through medium-term strategic actions for the definition of a sustainable structure for the company's recovery path. For this purpose, the two corporate dimensions, that are the industrial and the financial plan, must be treated separately. The industrial setup must contain the description of the corrective actions to be implemented and the resulting strategic and operational actions. On the other hand, the economic and financial framework must point out the crucial intervention for the definition of the recovery strategy.

Another key section is that concerning the financial maneuver, aimed at achieving debt sustainability and meeting the financial needs of working capital.

It is provided that capital requirements must be first covered by equity capital, and, in case of further requirements, with additional contributions from shareholders or third parties, or my debt maneuvers, in the form of its conversion and/or write-off, taking into account the fiscal impact.

The recovery plan must also contain a detailed description of the intervention program, that is the so-called Action Plan, in which the main actions to be undertaken to implement the strategy must be outlined.

The final part concerns the summary of the patrimonial, economic, and financial strategy and actions mapped through the preparation of prospective schedules supported by a description

of the underlying assumptions and by sensitivity analysis. This must begin with estimated revenues, explicating the corresponding costs, and then forecast their financial development. Finally, a section is devoted to the actual execution and the monitoring of the plan, a topic that will not be discussed since it is beyond the scope of this work.

CHAPTER 3: THE SAMPDORIA CASE STUDY AND THE VERIFICATION OF CONCRETE PROSPECTS FOR REHABILITATION: IS THE NEGOTIATED SETTLEMENT THE RIGHT CRISIS RESOLUTION TOOL?

SUMMARY

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3.1 U.C Sampdoria: Company information and essential events

3.1.1 Incorporation of the company, corporate object, ownership structure.

"Unione Calcio Sampdoria" football Club (henceforth referred to only as Sampdoria) established in 1967, is a joint stock company based in Genova, registered in the ordinary section of the Chamber of Commerce of Genova.

The corporate object is the exercise of sports activities and activities related or instrumental to them, both directly and indirectly. Specifically, the purpose of the company is the formation, preparation, and management of football teams, as well as the promotion and organization of competitions, tournaments, and any other football activities, in compliance with the rules and directives issued by the Italian Football Federation (FIGC) and its organs.

The abovementioned related or instrumental activities include the execution of promotional, advertising, commercial and merchandising activities and services, and the provision of services related and/or complementary to the management of sports facilities, buildings, and infrastructures.

For the purposes of the corporate object, the company can:

i. carry out securities, real estate and financial operations;

ii. promote and publicize the business activity and image through models, designs and symbols, directly or via third parties;

iii. acquire or hold shares in other companies offering services related to the corporate purpose;

iv. engage in radio and television transmissions and broadcasting, provided that the relevant authorizations have been obtained.

According to the most recently available data (from the last published financial statements, 2021), the company's share capital amounts to €14 million, fully subscribed, and divided into 56 million shares. The ownership structure is highly concentrated in the hands of a limited liability company, named "Sport Spettacolo Holding S.r.l.", which owns 99,96% of the entire share capital. The remaining part is divided among a large number of small investors (Figure 1).

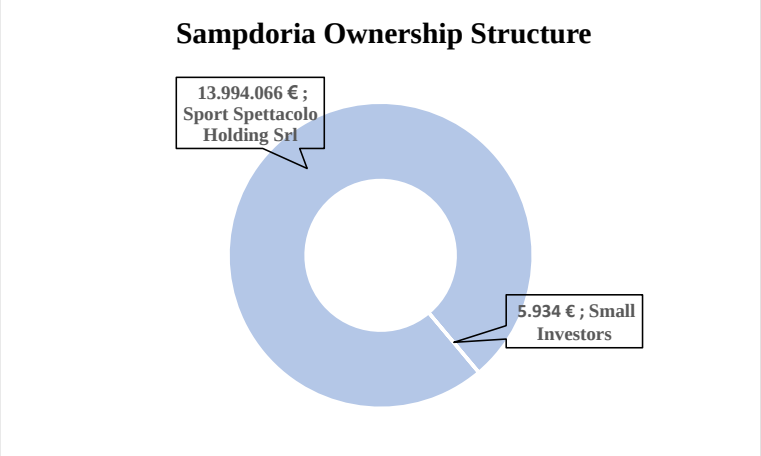


Figure 1: Ownership structure based on 2021 data.

3.1.2 Parent, investees, and affiliates companies.

The structure of the group can be summarized as follows:

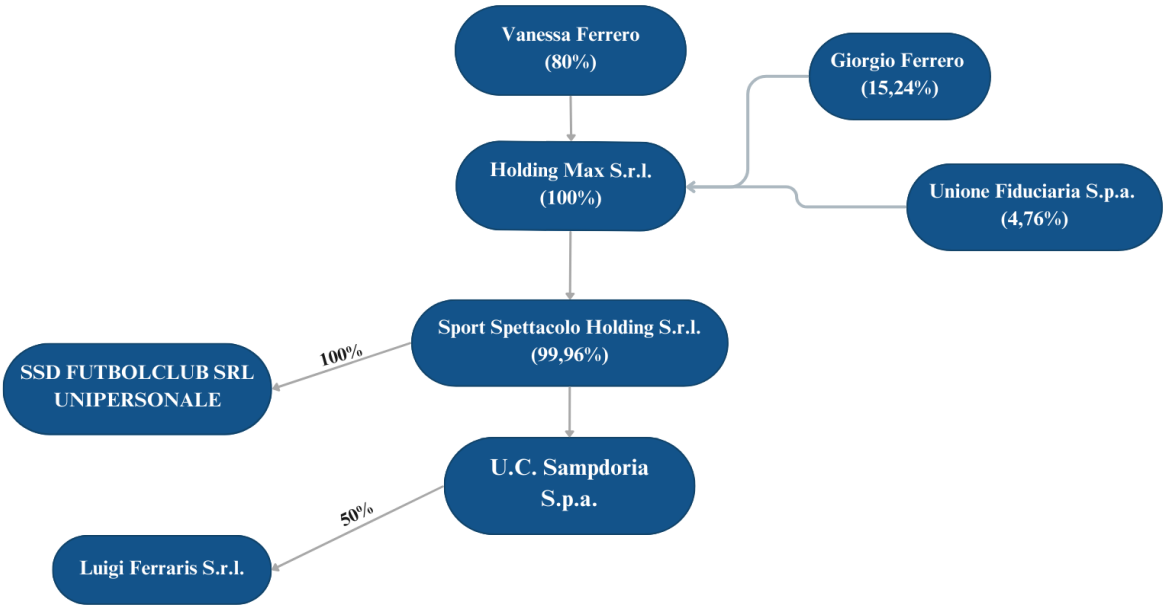


Figure 2: Group Structure

1. Sport Spettacolo Holding S.r.l.

The “Sport Spettacolo Holding S.r.l.”, according to 2021 data, is a limited liability company holding 99,96% of Sampdoria’s share capital. It leases offices and headquarters, and it receives the fiscal and accounting support services of Sampdoria in exchange for an annual fee. During 2021, the contract for the use of the “Sampdoria” brand name was renewed for the following football season, between the U.C. Sampdoria and the parent company, a fee agreed to EUR 2 million.

2. Holding Max S.r.l.

Holding Max S.r.l., which holds through the Rosan trust the entire capital of the parent company Sport Spettacolo Holding S.r.l., also owns the entire shareholding of Eleven Finance S.r.l., a company operating in the film and real estate sector. Such company acted as a general contractor, i.e., coordinating and managing the financing, design, implementation, and development of the real estate activities in the municipality of Bogliasco on the behalf of Sampdoria.

3. Luigi Ferraris S.r.l.

U.C. Sampdoria and Genoa C.F.C. jointly control at 50% the company Luigi Ferraris S.r.l., which in 2016 obtained the release of the concession for the use of the “Luigi Ferraris” stadium. The two clubs have a sub-concession contract for the facility for a respective cost of approximately EUR 1,2 million per year. The clubs also supported the affiliated Luigi Ferraris in the project to upgrade and modernize the press area, the VIP stand and the lighting system.

4. SSD FUTBOLCLUB S.r.l.

The parent company Sport Spettacolo Holding owns 100% of the shares of the amateur company SSD Futbolclub S.r.l., based in Rome. In 2019, the technical affiliation agreement with Sampdoria was renewed for the following seasons with an annual contribution of €150.000.

3.1.3 Organizational structure.

According to Article 29 of the bylaws, the company may be managed, alternatively, as determined by shareholders at the time of the appointment:

i. by a single administrator;
ii. by a board of directors consisting of a minimum of 3 to a maximum of 11 members.

The administrative form actually adopted is that of the board of directors, composed of four members:

i. a president, Mr. Marco Lanna, who is the full legal representative of the company;
ii. a vice-president, Mr. Antonio Romei;
iii. two councillors, Mr. Alberto Bosco, and Mr. Gianni Panconi.

It should be noted that the management and coordination activity of Sampdoria is exercised by the parent company Sport Spettacolo Holding S.r.l.
The activity of verifying and monitoring the general performance of the management and its foreseeable development, as well as the adequacy of the organizational, administrative, and accounting structures (set forth by Art. 2403 of the c.c.), is entrusted to the Board of Statutory Auditors, composed of 5 members.
The accounting control and auditing of the financial statements is entrusted to Crowe Bampani S.p.a. Furthermore, according to data collected at 31/12/2022, the company employs about 220 people.

3.1.4 Relevant corporate events.

Considering the reference period relating the last available budget file for 2021, the management report shows that the biennium 2020-2021 was significantly affected by the consequences of the Covid pandemic, which represents for the football industry a relevant event with negative effects on the patrimonial, economic, and financial situation of the company. Specifically, sponsorship and ticket revenues have been affected by stadium closures and seat reduction, while in the player trading market, it was observed a general decline in the value and volume of trades.

The Italian Football Federation (FIGC) ordered, in execution of the government directives issued in the field of public health, that the matches organized by the Serie A League, related to the 2020/2021 season, were played without the presence of the audience, and those of the first semester of the 2021/2022 season were played at reduced seating capacity. In addition, given the lack of liquidity in the system, the Club's player transfer campaign was characterized by a reduction in the number and the amount of transactions, not allowing the realization of capital gains in line with past years.

It should be noted that on 6 December 2021, the owner and former president of the Club, Mr. Massimo Ferrero, has been subjected to pre-trial detention measures for certain allegations made by the Public Prosecutor's office relating the administration of some companies, which are said to be unrelated with the Sampdoria Club and the management of the company. Following the resignation of the president Ferrero for the abovementioned reasons, the entire administrative body fell from office and continued to operate in prorogation, being able to perform exclusively ordinary administration operations until a new board was appointed.

The new board appointed on 27 December 2021, faced a particularly difficult context, characterized by the acceleration of the sale process of the Club, whose share capital is in the control of the Rosan Trust, set up for the purpose of implementing the aforementioned sale.

Given the facts above, the board began its mandate considering the special situation of the company and pursuing as its main objective the preservation of the value and goodwill of the Club, which is mainly constituted by the players' multi-year performance rights and their enhancement during the transfer campaigns.

In June 2021 the Club acquired the "Florentia San Gimignano" women's team, which obtains the right to participate in the Serie A for the 2021/2022 season. In the season 2020/2021 Sampdoria also finished the Serie A championship and obtained the right to participate to the following season, thus meeting the management's goal of preserving the value of the club.

Overall, the financial year 2021 ended with a loss of EUR 24 million, almost 10 million more than the previous year. During the year the company faced the difficulties generated by the pandemic and its economic and financial consequences, whose implications can be summarized as follows:

1. Reductions in revenues from sponsorships and advertising promotions due to the restrictions imposed on the conduct of matches and the resulting uncertainties related to the course of the pandemic. For these reasons, the company was not able to sign sponsorships contracts at the value originally budgeted.

2. General increase in operating costs due to the implementation of protocols to contain the spread of the virus.
3. Decrease in ticket and match-day related revenues.
4. General reduction of final purchases and sales transactions in the player trading market, due to a lack of liquidity, which favored instead loan transactions with redemption rights. This situation had a considerable negative impact on both the 2021 operating result and the company's financial flows.

It should be noted that during 2021, the company made investments worth approximately EUR 11,9 million in the acquisition of players. To finance these activities, meet its financial requirements and to cope with the scenario of persistent tension, the company, supported by its advisor EY S.p.a., requested the access to the anti-crisis financial instruments provided by the so-called "Liquidity" Decree concerning medium and long-term financing, and focused on the possibility to obtain funding backed by SACE or Central Guarantee Fund warranties. The club thus obtained a total of EUR 62 million, of which 57,7 million is still to be repaid on 31/12/2021. It is also reported that Sampdoria is seeking additional financing to fund its liabilities, mainly consisting of short-term debt to other football clubs for borrowed players, and of medium/long-term bank debt.

Consistently with previous years, part of the financing needs was covered through cash advances consisting of the assignment of claims for audiovisual rights and by activating a credit line linked to the advance payment of television rights.

Despite the team's positive sporting performance in the 2020/2021 championship, which had a considerable impact on television revenues, the revenues from the sale of TV rights were penalized by the allocation parameter linked to Auditel data[92] and by the parameter related to the number of tickets and subscriptions sold.

[92] The Auditel system represents the totality of television consumption preferences in the country. In the seasons prior to 2020/2021, Sampdoria was always placed approximately in the middle of the league table, whereas from the 2019/2020 season onwards, it was positioned at the bottom of such table, with a consequent impact on revenues from the sale of television rights.

3.2 Crisis diagnosis and the evaluation of the patrimonial, economic, and financial equilibrium.

According to ISA Italia principle No.570, the guidelines provided by the checklist, and the principles for drafting of recovery plans discussed in Chapter 2, in this section it is provided an analysis of the company's balance sheet and income statement, as well as its patrimonial solidity, liquidity, and profitability ratios, in order to assess the causes of the crisis and verify the prospect of the going concern assumption.

The time horizon considered for the analysis is 4 years, from 2018 to 2021, the last year for which financial statements are available and, where possible, the values and ratios of Sampdoria are compared with a sample of 20 Serie A teams provided by the Annual Report on Italian Football.

3.2.1 Balance sheet analysis.

Considering the composition of the company's assets, the balance sheet figures show that around 74% (in 2021) of the total assets are fixed assets, mainly intangible and financial fixed assets; while only 25% consists of current assets, as shown in figures 3 and 4 below.

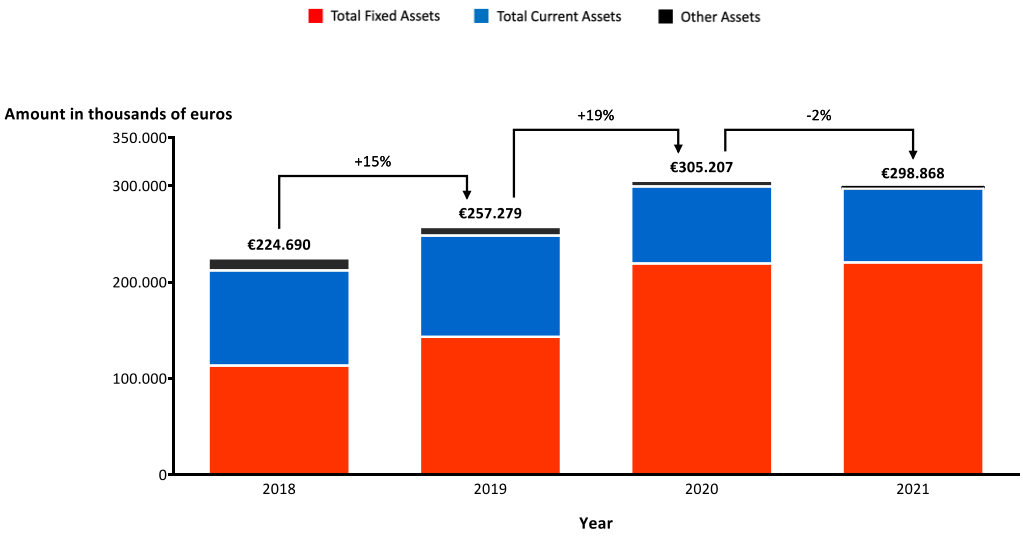
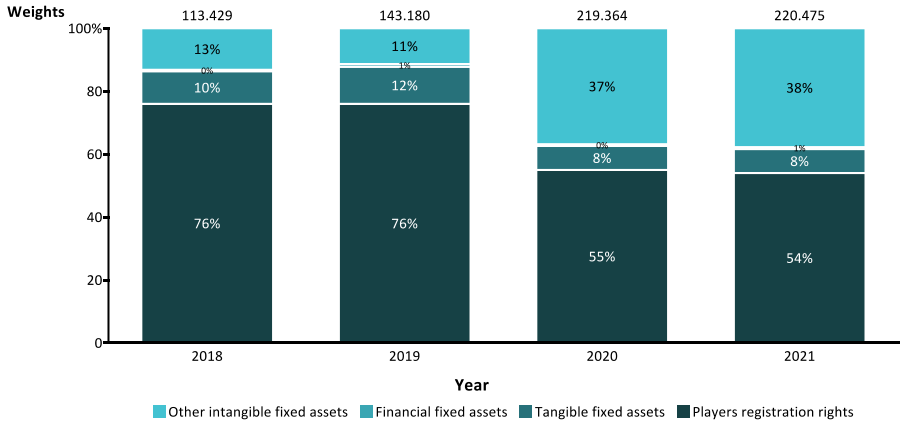


Figure 3: Total Assets Breakdown

Figure 4: Fixed Assets Breakdown



Such "imbalance" in the distribution of assets is explained by the specific features of the core business of Sampdoria, which, operating in the football industry, has the players as its main intangible assets. Thus, "players' registration rights" represents the most important item in the company's balance sheet assets, accounting for about 40% of total assets, and 54% of fixed assets in 2021. The second largest impact item in the total amount of assets is "concessions, licenses, trademarks and similar rights", which includes the concession relating to the land used by the company for the Bogliasco sports club and the historical trademark owned by the company.

The total value of the company's assets, growing from 2018 to 2020, decreased by 2,1% in 2021, mainly due to a decrease in cash and cash equivalents.

Table 1.

Average Assets Breakdown				
Year	**2018**	**2019**	**2020**	**2021**
**** data expressed in thousands of euros***				
Players registration rights	84.000 €	97.300 €	117.900 €	115.400 €
Other Fixed Assets	57.300 €	79.000 €	75.000 €	87.000 €
Current Assets	88.300 €	84.300 €	96.600 €	95.000 €
Other Assets	6.300 €	6.000 €	8.100 €	5.400 €
Average Total Assets	235.900 €	266.600 €	297.600 €	302.800 €

Sampdoria's Assets Breakdown				
Year	**2018**	**2019**	**2020**	**2021**
**** data expressed in thousands of euros***				
Players registration rights	86.192 €	108.756 €	120.619 €	119.034 €
Other Fixed Assets	27.238 €	34.424 €	98.745 €	101.441 €
Current Assets	98.770 €	105.246 €	80.036 €	76.557 €
Other Assets	12.490 €	8.853 €	5.806 €	1.835 €
Sampdoria's Total Assets	224.690 €	257.279 €	305.207 €	298.868 €

As shown in Table 1, comparing these values with the average assets' breakdown of a sample of 20 Serie A football clubs provided by the annual report on Italian Football[93], Sampdoria's total assets are slightly lower in 2018, 2019 and 2021, while they are only higher in 2020. Overall, the values of players registration rights are almost aligned with the average of the sample considered, while other fixed assets lie above the average.

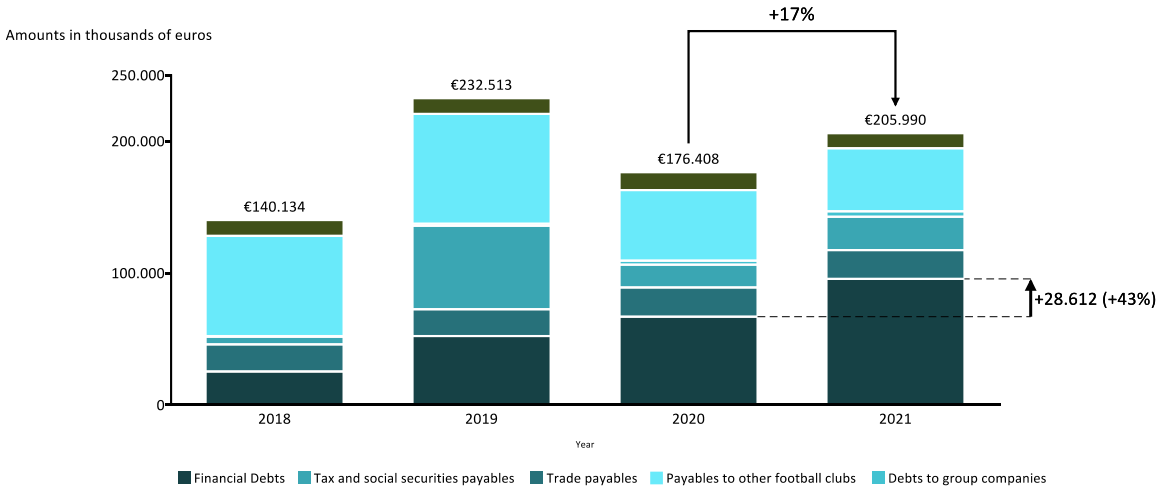
Table 2.

Liabilities Breakdown				
Year	**2018**	**2019**	**2020**	**2021**
**** data expressed in thousands of euros***				
Net Equity	45.004 €	31.940 €	73.919 €	49.504 €
Total provisions and TFR	12.978 €	17.747 €	27.436 €	27.767 €
Total Debts	140.567 €	176.218 €	176.399 €	205.989 €
Total Accruals and Deferrals	26.141 €	31.375 €	27.453 €	15.607 €
Tot Liabilities	224.690 €	257.279 €	305.207 €	298.868 €

Considering the overall amount of the balance sheet liabilities, Table 2 shows a significant increase from 2019 to 2020, and a slight decrease in 2021. This reduction is associated with a decrease in net equity and a substantial increase in total debts, which rose from about €176 million in 2019 and 2020, to €205,9 million in 2021. Sampdoria's liabilities values are almost aligned with the sample provided by the annual Report on Italian Football.

To better understand the causes of such variation, it is considered the composition of the company's debt shown in Figure 5 below.

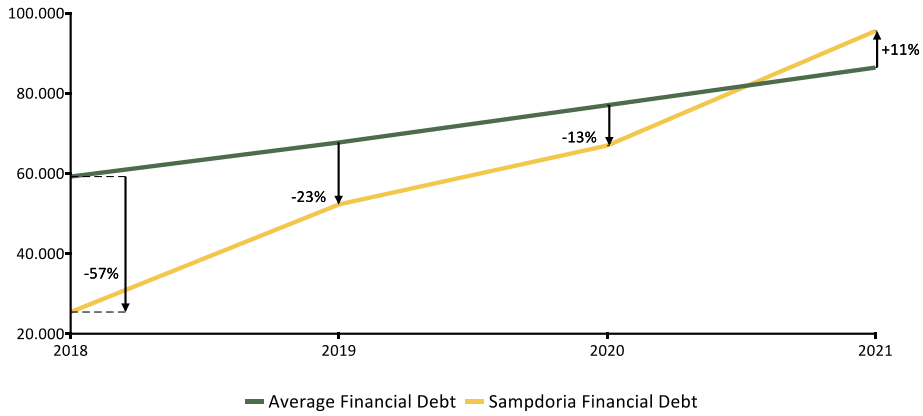
Figure 5: Composition and evolution of Sampdoria's debt



[93] Annual Report on Italian Football, developed by the FIGC Study Center in collaboration with the Research and Legislation Agency AREL and PwC.

It immediately emerges that the total amount of debt is mostly composed of financial debts and payables to other football clubs. The item that mainly contributes to 2021 is the gross financial debt, which increases from €66,9 million to €95,5 million (+43%). Considering the sample, Sampdoria's debt is lower than the average until 2020, while it is 11% higher in 2021 (Figure 6).

Figure 6: Financial Debt



Specifically, bank payables increased from €44,2 million to €71,57 million and refer to: current account overdrafts for €14,3 million, and short-term portions of loans for €55,8 million.

Long term portions of loans concern:

i. the mortgage for the residual amount of €4,9 million, issued in April 2016 by the "Istituto per il Credito Sportivo" (for €5,6 million), for the purchase of the real estate complex located in the municipality of Bogliasco, which is intended to be used as a residence of the players of the youth sectors within the "Accademia del Calcio U.C. Sampdoria S.p.a." project (the so-called "Casa Samp");

ii. the mortgage issued in February 2018 by the "Istituto per il Credito Sportivo" for approximately €3,3 million remaining for the investment in the construction of the new multi-service buildings for both the first and youth team, with a 20-year maturity, providing for the repayment of the capital and interests in 40 deferred semi-annual installments;

iii. the residual €1,5 million mortgage with Banca Carige related to the company's loan for the acquisition (on June 2018) of the buildings (flats and garages) located in Bogliasco;

iv. a mortgage loan with Banca Carige for a residual value of €2,9 million to fund Sampdoria's acquisition of the building complex located in Bogliasco ("Casa 1" and "Casa 2") to be used as new offices.

The notes to the financial statements also show that the company requested and obtained from the "Istituto per il Credito Sportivo" a deferral of the capital payment concerning the loan for the purchase of the residence.

Sampdoria obtained additional financing for a total amount of €57 million backed by SACE guarantee pursuant to Law Decree No. 23/2021, constrained by law to preserve the assets and goodwill of the company mainly consisting of players.

After the end of the fiscal year, during the first few months of 2022, Sampdoria, in order to meet the financial requirements necessary to participate in the championship and consequently preserve its assets and goodwill, obtained an additional loan issued on March 2022 of €7,5 million guaranteed by SACE.

Considering cash and cash equivalents of €5,2 million, the result is a net financial debt of €90,37 million, which is higher than both the value of net sales and the value of production.

Debts to other football clubs, mainly Juventus, Valencia CF and Empoli, slightly decreased.

3.2.1.1. Analysis of main balance sheet ratios.

Starting from the reclassification of the balance sheet with the financial criterion, it is possible to calculate ratios and compare them to average values, as follows.

1. Equity ratio.

Table 3.

Year	**2018**	**2019**	**2020**	**2021**
**** data expressed in thousands of euros***				
Net Equity	45.004 €	31.940 €	73.919 €	49.504 €
Total Assets	47.022 €	33.959 €	75.939 €	51.525 €
Equity Ratio	**20,0%**	**12,4%**	**24,2%**	**16,6%**

Equity ratio represents the portion of assets financed with shareholders' equity. In the observation period considered for the purpose of the analysis the ratio assumes an average value of about 18%, significantly decreasing in 2021. In 2021 equity finances 16,6% of the company's assets; such decrease is due to the loss for the year.

Overall, equity as a positive value complies with the requirements of UEFA's Financial Fair Play Regulations.

2. Degree of coverage of players' assets.

Table 4.

Year	2018	2019	2020	2021
** data expressed in thousands of euros*				
Net Equity	45.004 €	31.940 €	73.919 €	49.504 €
Players registration rights	86.192 €	108.756 €	120.619 €	119.034 €
Coverage of players' assets	52,2%	29,4%	61,3%	41,6%
Avg Coverage of Players assets	*25,48%*	*28,26%*	*26,89%*	*31,11%*

The degree of coverage of players' assets expresses the company's ability to cover the investment in players' registration rights using only equity. In 2021, only 41,6% of the investment in players' registration rights is financed with shareholders' equity. Therefore, the investment is mainly financed with borrowed capital. Overall, the values are higher in all years than the sample average considered.

3. Fixed to total assets ratio.

Table 5.

Year	2018	2019	2020	2021
** data expressed in thousands of euros*				
Fixed Assets	113.429 €	143.180 €	219.364 €	220.475 €
Total Assets	224.690 €	257.279 €	305.206 €	298.867 €
Fixed to total assets ratio	**50,48%**	**55,65%**	**71,87%**	**73,77%**
Average Values	*59,90%*	*66,15%*	*64,82%*	*66,84%*

The fixed to total assets ratio expresses the percentage of fixed assets in total uses of capital (i.e., the rigidity of the uses of capital). The values from 2018 to 2021 fluctuate between about 50% and 74% and denote a high level of rigidity of the activities, which has been steadily increasing since 2018, higher in the last two years than the average.

4. Treasury margin.

Table 6.

Year	2018	2019	2020	2021
** data expressed in thousands of euros*				
Cash and Cash Equivalents	3.857 €	5.004 €	8.013 €	5.173 €
Other current assets	107.404 €	109.095 €	77.829 €	73.219 €
Current liabiliies	136.165 €	160.465 €	148.865 €	174.471 €
Trasury Margin	**- 24.904 €**	**- 46.366 €**	**- 63.023 €**	**- 96.079 €**

The treasury margin is one of the structure margins used to analyze the financial and patrimonial position of a company and it is computed as the difference between, on one hand, immediate and deferred liquidity, and, on the other hand, current liabilities. It shows the extent to which immediate and deferred liquidity exceeds current liabilities, denoting the company's ability to meet future outflows associated to the repayment of short-term obligations, using cash and cash equivalents and the sale of short-term assets.

Sampdoria's treasury margin, which has been negative since 2018, is a sign of a lack of liquidity and financial distress in the short-term; in other words, it shows that the company has never had the liquid financial resources to meet its liabilities during the period of observation. Moreover, such negative value has an upward trend, reflecting an increasingly serious liquidity crisis.

5. Primary and secondary fixed asset coverage margin.

Table 7.

Year	2018	2019	2020	2021
** data expressed in thousands of euros*				
Net Equity	45.004 €	31.940 €	73.919 €	49.504 €
Fixed Assets	113.429 €	143.180 €	219.364 €	220.475 €
Primary asset coverage margin	**- 68.425,00 €**	**- 111.240,00 €**	**- 145.445,00 €**	**- 170.971,00 €**

Year	2018	2019	2020	2021
** data expressed in thousands of euros*				
Net Equity	45.004 €	31.940 €	73.919 €	49.504 €
Non-current liabilities	43.551 €	64.875 €	82.423 €	74.893 €
Fixed Assets	113.429 €	143.180 €	219.364 €	220.475 €
Secondary asset coverage margin	**- 24.874 €**	**- 46.365 €**	**- 63.022 €**	**- 96.078 €**

The primary asset coverage margin, also called "structure margin", is the difference between equity capital and fixed assets. The secondary asset coverage margin is similar to the previous one, but it also includes medium and long-term liabilities. If such margin is positive, it means that shareholders' equity covers not only fixed assets, but also a part of current assets. In other words, it shows a surplus of stable resources compared to slower-moving investments. This

surplus, representing the soundness of the financial structure, is ideally used to fund working capital of liquid assets reserves. A negative margin, such as the one of Sampdoria, shows an unbalanced financial structure since a substantial part of fixed investments is financed with short-term debt.

3.2.1.2. Liquidity analysis.

1. Current ratio.

Table 8.

Year	**2018**	**2019**	**2020**	**2021**
**** data expressed in thousands of euros***				
Current assets	111.261 €	114.099 €	85.842 €	78.392 €
Current liabilities	136.165 €	160.465 €	148.865 €	174.471 €
Current ratio	**0,82**	**0,71**	**0,58**	**0,45**

The current ratio is the ratio between current assets and liabilities, and it assess the company's ability to cover its short-term outflows generated by current liabilities, using the inflows of cash and cash equivalents and other liquid assets. Such value may be greater than, less than, or equal to one. In the first case, the company is in a good financial health, and it is able to meet its future obligations. On the other hand, the situation could be critical if this value is less than or equal to one, as liquid assets may not be sufficient to meet short-term debts.
Considering Sampdoria's current ratios, the value is always less than one, becoming particularly low in 2021, confirming the company's constant inability to meet its short-term liabilities.

2. Quick ratio.

Table 9.

Year	**2018**	**2019**	**2020**	**2021**
**** data expressed in thousands of euros***				
Current assets	111.261 €	114.099 €	85.842 €	78.392 €
Inventories	- €	- €	439 €	432 €
Current liabilities	136.165 €	160.465 €	148.865 €	174.471 €
Quick ratio	**0,82**	**0,71**	**0,57**	**0,45**

The quick ratio is an indicator of a company's short-term liquidity position, and it is computed by dividing current assets net of inventories and current liabilities. Consistently with the current ratio, the quick ratio is also always less than one, showing a lack of resources required to repay short-term obligations.

3. Cash ratio.

Table 10.

Year	2018	2019	2020	2021
** data expressed in thousands of euros*				
Cash and cash equivalents	3.857 €	5.004 €	8.013 €	5.173 €
Current liabilities	136.165 €	160.465 €	148.865 €	174.471 €
Cash ratio	**0,03**	**0,03**	**0,05**	**0,03**

The cash ratio measures the company's ability to meet its short-term obligations using only cash and cash equivalents. Sampdoria's value of cash ratio is always less than one and close to zero, revealing the company's constant and critical inability to repay its short-term liabilities with its most liquid items.

3.2.1.3. Solvency analysis.

1. Net financial position.

Table 11.

Year	2018	2019	2020	2021
** data expressed in thousands of euros*				
Cash and cash equivalents	3.857 €	5.004 €	8.013 €	5.173 €
Short term bank debt	48 €	698 €	5.633 €	15.718 €
Other short-term financial debt	13.238 €	25.712 €	15.887 €	23.966 €
Short-term NFP	***- 9.430 €***	***- 21.406 €***	***- 13.507 €***	***- 34.510 €***
Long-term bank debt	8.708 €	12.247 €	38.603 €	55.856 €
Other long-term financial debt	3.413 €	13.610 €	6.805 €	- €
Long-term NFP	***- 21.550 €***	***- 47.263 €***	***- 58.914 €***	***- 90.367 €***

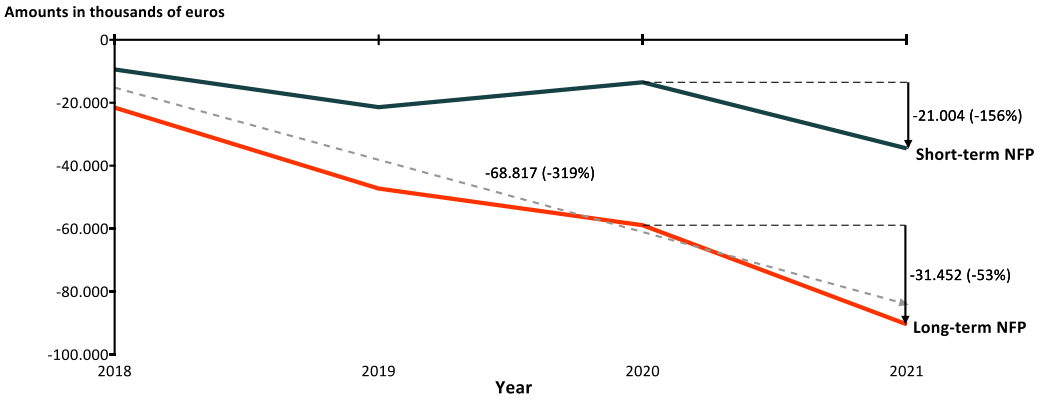


Figure 7: Evolution of Sampdoria's Net Financial Position.

The net financial position, computed as the difference between the most liquid assets, cash and cash equivalents, short-term financial debt (short-term NFP) and medium-long term financial debt (long-term NFP), expresses the company's overall level of indebtedness. A positive value indicates that the company is able to meet its short and long-term liabilities using only immediate liquidity, while a negative value, such as that of Sampdoria, shows a liquidity crisis affecting in particular 2021, when short-term NFP worsens by 156%.

2. *Debt to Equity ratio*

Table 12.

Year	**2018**	**2019**	**2020**	**2021**
**** data expressed in thousands of euros***				
Total Liabilities	224.720 €	257.280 €	305.207 €	298.868 €
Net Equity	45.004 €	31.940 €	73.919 €	49.504 €
D/E	4,99	8,06	4,13	6,04
Average D/E	*11,02*	*9,69*	*9,39*	*8,43*

Debt to equity ratio, calculated by dividing the total amount of liabilities by the shareholders equity, is a measure of a company's financial leverage. A high level of D/E means that the company is using more debt than equity financing.

Considering Sampdoria's case, the two critical years are 2019 and 2021, in which there is a considerable increase in such ratio. While the increase in 2019 is mainly due to a rise in total liabilities, the variation in 2021 is driven by a decrease in net equity, due to the loss for the year.

3.2.2. Profit and Loss statement analysis.

During the observation period, Sampdoria has achieved the following operating results, among which it is immediately visible the massive loss recorded in the financial years 2019-2020-2021, showing a deteriorating trend.

Table 13.

Year		2018		2019		2020		2021
** data expressed in thousands of euros*								
Net Income/Loss	€	12.052,43	€	(13.064,39)	€	(14.703,53)	€	(24.415,29)

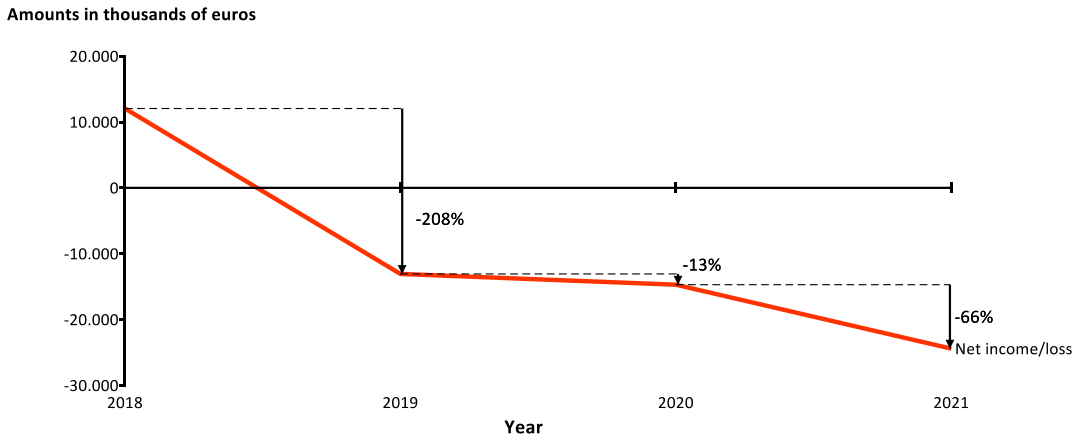


Figure 8: Sampdoria's Net Income/Loss

Particularly relevant is the loss recorded in 2019, when the financial statement approved by the shareholders' meeting reported a loss of about €13 million (208% less than 2018), revealing a change in the sign and the trend of the economic result compared to 2018, which they propose to cover entirely through the use of retained earnings from previous years (Figure 8). Equally relevant is the negative economic result recorder in the following years and especially in 2021, when there is a loss of about €24 million to be retained in full for the following year, since retained earnings reserves were already consumed in 2021.

To understand the causes of these economic results, it is necessary to analyze in detail the main items of the income statement.

In this context, the starting point, given by the difference between operating costs and revenues, is the gross operating margin (EBITDA), which shows the following trend.

Table 14.

Year		2018		2019		2020		2021
** data expressed in thousands of euros*								
Operating revenues	€	141.773	€	129.027	€	75.719	€	76.310
-Operating costs	€	90.567	€	99.649	€	85.398	€	91.223
EBITDA	***€***	*51.207*	***€***	*29.378*	***€***	*(9.680)*	***€***	*(14.914)*

Overall, EBITDA decreased gradually from 2018 onwards, becoming negative in 2020 and especially in 2021. Specifically, looking at the evolution of operating costs and revenues shown in Figure 9, it appears that operating revenues experienced a significant drop of 41% in 2020 with respect to 2019, due to the significant reduction in revenues from competitions and correlated, for the closure of stadiums, and from 2020 onwards an overall constant and considerable decrease. On the other hand, the same drop of revenues is not observed for operating costs, which fell by 14% only in 2020, with a subsequent increase of 9% in 2021. As a result, a situation of economic imbalance has arisen.

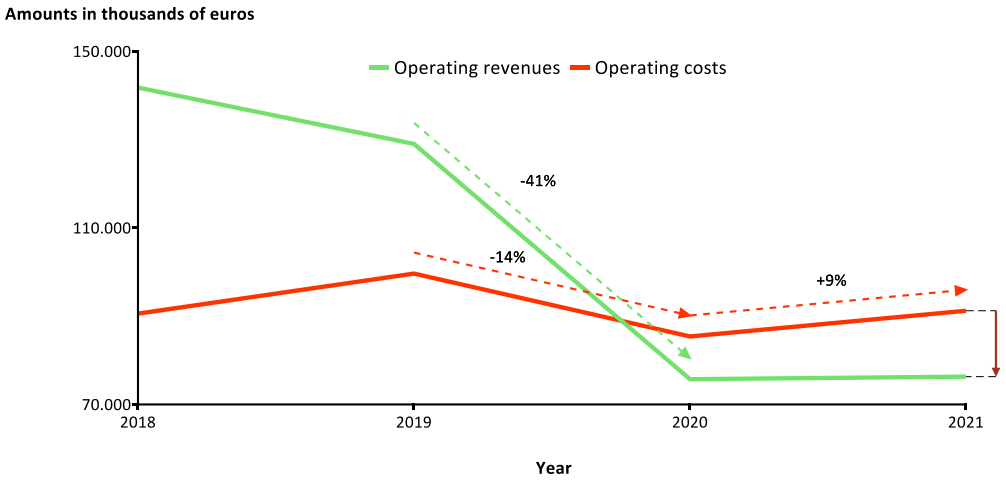
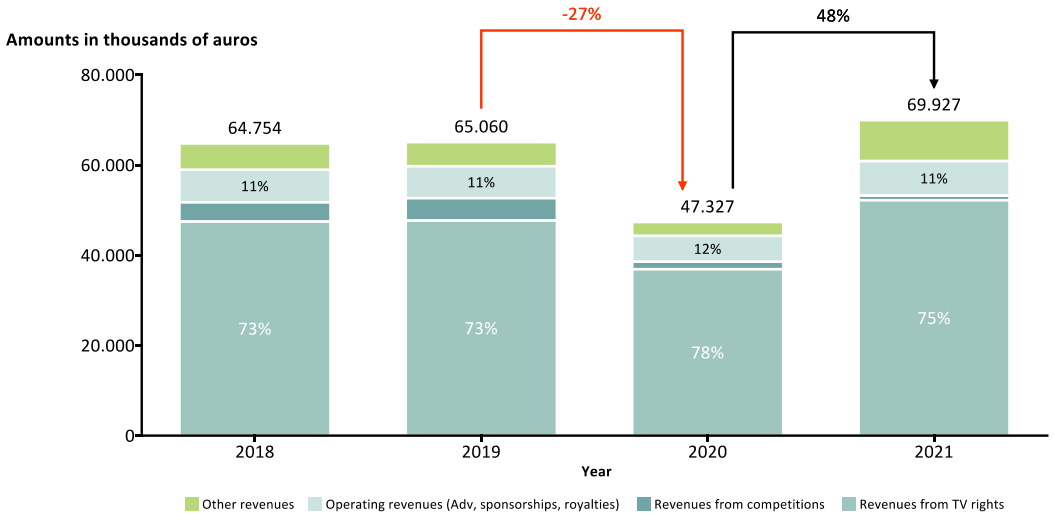


Figure 9: Operating costs and revenues

Specifically, operating revenues in 2020 and 2021 are strongly affected by the effects of the Covid pandemic, which caused a drop of about €77 million in capital gains realized on the disposal of players' registration rights (mainly attributable to the lack of liquidity in the football market), and a decrease of approximately €1,5 million in revenues from temporary disposals of players' registration rights. To better understand Sampdoria's revenue streams, it

is considered its sales composition, net of capital gains and revenues from player trading, thus relating only to its core business operations in a narrow sense.[94]

Figure 10: Net sales.



Looking at Figure 10, it immediately emerges that, despite the pandemic effect on operating revenues in 2020, in 2021 net turnover increased by 48%[95], thus showing some signs of recovery in the company's core business operations and confirming the attributability of the drop in total operating revenues to capital gains and transfer of players' registration rights.

Furthermore, since TV revenues account for 75% (in 2021) of the total turnover, Sampdoria is a "TV-dependent" company, and the Covid has increased such dependence.

Competitions' revenues were strongly affected by the pandemic, which caused stadiums closure and reduced their capacity in the 2021/2022 season.

TV revenues dropped in 2020 and increased in 2021 by 41,5%, reaching higher levels than pre-covid, due to a higher number of matches played. Specifically, the reduction of TV rights for the 2019/2020 season impacted the 2020 financial year by a total of €4,6 million (of which €1,6 million due to the positioning in the final ranking and €3 million due a drop in the audience shares parameter).

On the basis of such analysis, it is possible to establish that the negative effect on total operating revenues from 2020 onwards, with respect to the pre-pandemic situation, was due to the reduction in the amounts and volumes of capital gains from players' registration rights. In

[94] For this purpose, net revenues are obtained by summing revenues from competitions, revenues from TV rights, revenues from advertising, sponsorships and royalties and other operating revenues.

[95] This analysis does not consider revenues from subscriptions, which, in 2021 amount to zero due to the company's decision to suspend subscriptions campaign in the 2020/2021 season.

fact, considering the composition of net sales discussed above, revenues related to the core business in the narrow sense appear to be returning to pre-Covid levels.

Moreover, compared to the sample, Sampdoria highly dependent on revenues from capital gains, which in the pre-Covid period constituted an average of 40% of total revenues, accounting for a significantly greater weight than other football clubs (Table 15), thus being more sensitive to variations in player trading market transactions.

Table 15.

Sampdoria's Values.				
Year	**2018**	**2019**	**2020**	**2021**
**** data expressed in thousands of euros***				
Total revenues	€ 133.293	€ 134.217	€ 75.719	€ 76.310
Capital gains from players' rights	€ 55.528	€ 52.345	€ 14.713	€ 3.393
weight of capital gains on revenues	42%	39%	19%	4%
Delta vs PY		-6%	-72%	-77%

Average Values				
Year	**2018**	**2019**	**2020**	**2021**
**** data expressed in millions of euros***				
Total revenues	€ 3.071	€ 3.385	€ 3.038	€ 2.996
Total Capital gains from players' rights	€ 713	€ 713	€ 739	€ 356
weight of capital gains on revenues	23%	21%	24%	12%
Delta vs PY		0%	4%	-52%

On the other hand, considering the lack of liquidity that has affected the player trading market since 2020, Sampdoria has experienced a grater drop in capital gains than other Clubs.

With regard to the variation in operating costs, the items that contributed the most are raw materials costs, whose increase is due to the purchase of the company's merchandising and materials of the technical sponsor for the affiliated companies, and especially personnel costs (which represent the main cost of the company), increasing by about €5 million. Such change is mainly explained by the increase in players' salaries and individual bonuses paid for the 2020/2021 season following the sports results achieved by the team. Overall, the other cost items are consistent with the previous years. Therefore, since 2020 Sampdoria's operational management destroys resources.

The effect of depreciation and amortization, and financial income and expenses on the net loss is considered in the Table 16.

Table 16.

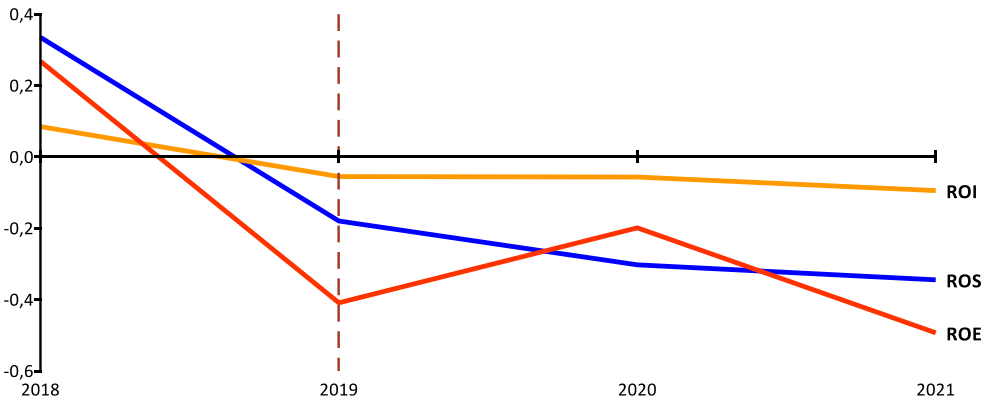
Year		2018		2019		2020		2021
** data expressed in thousands of euros*								
EBITDA	**€**	*51.207*	**€**	*29.378*	**€**	*(9.680)*	**€**	*(14.914)*
- Depreciation and amortization	€	29.514	€	41.067	€	4.633	€	9.179
EBIT (Operating profit)	€	21.693	€	(11.689)	€	(14.313)	€	(24.093)
- Net financial expenses	€	2.671	€	2.488	€	2.909	€	4.140
EBT	€	19.022	€	(14.176)	€	(17.222)	€	(28.232)
- Taxes	€	6.969	€	(1.112)	€	(2.519)	€	(3.818)
Net Income/ Loss	**€**	***12.053***	**€**	***(13.064)***	**€**	***(14.703)***	**€**	***(24.415)***

From 2020 onwards, the cost of depreciations and amortizations is affected by the Directors' decision, pursuant to emergency regulations, to opt for the suspension of amortization of players' registration rights, the capitalizations related to the costs of the youth players, and the full amount of the amortization of the brand value. Such effect results in the deferral of the relative amortization cost (€39 million) to the following financial years and raises the related issue of its future coverage. This cost reduction has the only effect of hiding and postponing a further, not negligible loss for the club.

Net financial expenses increase substantially in 2021, consistently with the increase in financial debt, mainly due to an increase in interest expenses on mortgages, thus reducing EBT and net income.

3.2.3 Profitability analysis.

Figure 11: Sampdoria's ROE, ROI, and ROS.



On the basis of the profitability analysis conducted in this section, it is clear that from 2019 onwards, all ratios assume negative values, and especially the ROE. Therefore, in the light of such negative trends, the crisis situation began in 2019, and it got progressively worse.

1. Return on equity.

Year		2018		2019		2020		2021
** data expressed in thousands of euros*								
Net income	€	12.053	€	(13.064)	€	(14.703)	€	(24.415)
Shareholders equity	€	45.004	€	31.940	€	73.919	€	49.504
ROE		**26,78%**		**-40,90%**		**-19,89%**		**-49,32%**

Return on equity is the ratio between the company's net income and equity, expressing the profitability of a company.

2. Return on investment.

Year		2018		2019		2020		2021
*** data expressed in thousands of euros**								
EBIT	€	21.693	€	(11.689)	€	(14.313)	€	(24.093)
Capital Innvested	€	224.690	€	257.279	€	305.206	€	298.867
ROI		**8,47%**		**-5,51%**		**-5,64%**		**-9,45%**

Return on investment is the ratio between the company's operating profit and the value of the capital invested, indicating the profitability and the economic efficiency of core business operations.

3. Return on sales.

Year		2018		2019		2020		2021
** data expressed in thousands of euros*								
EBIT	€	21.693	€	(11.689)	€	(14.313)	€	(24.093)
Net sales	€	64.754	€	65.060	€	47.327	€	69.927
ROS		**33,50%**		**-17,97%**		**-30,24%**		**-34,45%**

Return on sales is the ratio between operating income and total revenues, and it represents the revenue generated from sales. For the purpose of this analysis, total sales are considered net of capital gains and player trading revenues, thus referring only to core business operations in a narrow sense.

3.2.4 Conclusions of the analysis and evaluation of the going concern perspectives.

In the light of the analysis conducted in this section, it is clear that Sampdoria since 2019 is in a state of crisis, defined as the state of the debtor which makes insolvency likely, and which is manifested by the inadequacy of prospective cash flows to meet its obligations over the next twelve months (Art. 2 of the CCII). The crisis does not appear to be attributable to the structure of the balance sheet, whose values are in line with the average, it is rather caused by a structural problem due to the excessive weight of capital gains on players' registration rights on Sampdoria's total revenues, compared to other Serie A clubs.

This is because the other revenue items are not sufficient to support the total amount of costs; an insufficiency that in turn derives from the team's low performance in the championship, the size of the fan club and probably from the negative impact to the image caused by the judicial problems that have affected the former president Massimo Ferrero.

The liquidity and the solvency analysis show a serious liquidity crisis and an inability to meet both short-term and long-term obligations; the company has never had the financial resources to meet its planned liabilities. Given this situation of patrimonial, economic, and financial imbalance, it follows that a solution to the crisis must be found through one of the measures provided by the crisis code in order to avoid bankruptcy, and specifically a mechanism to restructure the debt, raise new financing, and to favor a change of ownership that would give the Club a new image.

Regarding the assessment of the going concern assumption, in 2019 directors pointed out that due to the effects of the pandemic, the financial statements had been prepared on a going concern basis, taking into account the waiver provided for in Article 7 of DL 23/2020.[96]

In the same report, the directors stated that they had assessed the going concern on the basis of the information available on 31 December 2019, so the assessment did not take into account events after that date. Furthermore, the directors updated their assessment to include the existence of significant uncertainties, which and depend on the achievement of the objectives on the basis of which the business plans were drawn up.

[96] Art. 7 of the DL 23/2020, concerning temporary provisions on the principles for the preparation of financial statements, establishes that it is possible to continue to prepare the financials by evaluating the items according to prospect of continuation of the business activity, as long as it has existed in previous financial statements.

It should be noted that in 2020 Sampdoria exploit the benefits, provided by the emergency regulations (Art. 60 of the DL 104/2020) of the suspension of the amortization of players' registration rights and of the capitalizations related to the costs of the youth team.

The civil law effect of this suspension involved the deferral to the following financial years of the amortization cost of €36 million, thus reducing the loss in 2020 and 2021, and postponed the related problem of the future coverage of these costs.

In fact, as pointed out by the auditors, Sampdoria did not generate any profits and thus it was not able to form the related reserve for suspended depreciation, thus postponing the problem to future years. The same suspension of depreciation was adopted in 2021, for approximately EUR 38 million implying the deferral to subsequent years of instalments in addition to those of 2020.

In 2021, the auditor Crowe Bompani S.p.a. expressed an opinion with significant uncertainties regarding the existence of the company's ability to continue as a going concern. These uncertainties are related to the legal problems of the former president Mr. Ferrero (which is a crisis management indicator according to the ISA Italia No. 570 document), the change of the board of directors and the possible change of ownership of the company.

Consequently, the continuity of the company is linked to the maintenance of the sporting title, the obtainment of the national license, and the consequent valorization of the players' registration rights during the player trading market. This represents the most important variable that could preserve the going concern assumption, given the relevance that capital gains have always had on Sampdoria's income statement.

In conclusion, the going concern assumption held only because of the measures issued by the Government since in 2019 (waivers and suspension of amortizations), without which, given the patrimonial, economic, and financial imbalance in which the company was already in 2019, that have worsened in following years, such condition would not have been met.

Today, its continuation in the short-run depends on the successful outcome of the negotiated crisis resolution, while in the long-run it will depend on the Club’s ability to get the promotion to the Serie A championship.

3.3 The negotiated settlement procedure and the debt restructuring agreement as its possible outcome.

3.3.1 The negotiated settlement procedure and the activation of asset protection measures.

Through a press release that appeared on the club's official website on 10 May 2023, the Board of Sampdoria informed the Fanclub about the initiation of the negotiated settlement procedure with the aim of preserving the sports title, after the unsuccessful attempt to increase capital in order to cover the operating losses, and to find new sources of internal financing.

As stated in the press release, the applicability of the Crisis Code was first verified with the NOIF regulations of the Italian Football Federation, and in particular with the recent amendments to the NOIF that have clarified which crisis regulation tools can be used to maintain the sports title. The Board of Directors announced that it had been working intensively with the independent expert, lawyer Bissocoli, and the legal and financial advisors in order to find a solution that would allow them to exit the crisis with a reduced, restructured and sustainable debt position.

The Board of Directors also announced that it had convened a shareholders' meeting on 26 and 29 May 2023 to resolve on the necessary capital transactions, which are expected to consist of covering the losses of the 2021 and 2022 with revaluation reserves in the balance sheet amounting to approximately €56 million.

Furthermore, in the absence of the identification of a solution compatible with the FIGC deadlines, the board will have to take note of the impossibility of proceeding with the restructuring process. It follows that, in the absence of a solution, the only feasible alternative would be a liquidation procedure.

The Court of Genova granted Sampdoria’s request for access to the negotiated crisis settlement procedure on 6 February 2023, after having obtained the favorable opinion of the independent expert and granted the company the protective measures against creditors for four months, i.e., until 6 June, pursuant to Art. 54 of the Crisis Code.

Creditors will therefore not be able to attack the company's assets or file petitions for the opening of compulsory liquidation, nor acquire rights of pre-emption, and initiate or continue enforcement and precautionary actions.

Under the Crisis Code rules discussed in Chapter 1, until the conclusion of negotiations or the filing of the application for a negotiated settlement, the judgment opening the judicial liquidation or verifying a state of insolvency may not be handed down unless the court orders the revocation of the protective measures.

During the same period, creditors may not refuse to perform or cause the termination of pending contracts, nor may they anticipate their expiration or modify them to the detriment of the entrepreneur due to non-payment of claims prior to the publication of the negotiated settlement request.

6 June is then a crucial date, marking a watershed between insolvency claims as they accrued prior to admission to the procedure, and claims accrued after the procedure, which will have to be satisfied regularly.

However, Sampdoria will not be able to count on the possibility allowed by the Crisis Code to obtain an extension of the protective measures up to the maximum period of 240 days (at the request of the Club and after obtaining the expert's opinion) since peremptory deadline for registration for the Serie B championship is looming; a date by which the following fulfilments, among others, must be observed, which appear to be difficult to achieve today:

i. file an application for admission to the championship;

ii. deposit a guarantee of 800,000 euros issued by leading banks or insurance companies;

iii. fulfil the payment of debts towards the FIGC, other clubs and affiliated societies, depositing documentation proving said fulfilments;

iv. settle the payment of the emoluments due up to and including the month of May 2023, to the FIGC members, employees and collaborators involved in the sports sector,

v. file a copy of the balance sheet for the fiscal year 2022.

The failure to meet the peremptory deadline of 20 June 2023 will result in the national license for the 2023/2024 championship not being granted.

3.3.2 The debt restructuring agreement and its compliance with the NOIF regulations.

Considering the analysis conducted in the previous section and the statements made by the members of the Board of Directors, it is possible to envisage that a probable outcome of the negotiated settlement procedure is a debt restructuring agreement that provides for the reduction and restructuring of the financial debt in order to make it sustainable.

The debt restructuring agreement is governed by Article 57 of the CCII, according to which the debtor may enter into an agreement with his creditors and apply to the Court for approval after obtaining the consent of creditors representing at least 60 per cent of the claims.

The agreements must also contain the elements of the business plan that allow its implementation. The independent professional must prepare a report, certifying the truthfulness of the data, the feasibility of the plan on which the agreement is based and its adequacy to ensure the full payment of non-adhering creditors. In fact, the approved agreement is not binding on non-participating creditors, who must be paid in full within 120 days of the approval in the case of claims already due on that date, or within 120 days of the due date in the case of claims not yet expired on the date of the approval.

The objective of such agreement is the restructuring of the debt, which, according to the Accounting Standard OIC 19[97], is verified when the following conditions are met:

i. the debtor is in a situation of financial distress because he cannot obtain adequate financial resources to meet its obligations;

ii. the creditor (or a group of creditors) makes a concession, i.e., a waiver of certain contractually acquired rights, in favor of the debtor with respect to the original terms of the contract, which results in an immediate or deferred benefit for the debtor and a corresponding loss for the creditor.

Restructuring agreements involve a procedure that can be divided into two main stages:

1. a first extrajudicial phase, in which the debtor negotiates its debt position with the creditors, and in which it is left to the autonomy of the parties (with the help of the independent expert) to reach an agreement regarding the reduction or renegotiation of the debts of the distressed company;

[97] National Accounting Standard OIC 19, appendix A, concerning debt restructuring operations. According to Section A1, debt restructuring is defined as an operation in which the creditor (or a group of creditors), makes a concession to the debtor in consideration of the debtor's financial distress.

2. a second judicial phase, in which the agreement eventually reached requires the Court approval in order to be productive of further legal effects: approval that may be granted on the basis of an assessment of the recovery plan's reliability, as illustrated in the expert's report.

The characteristic feature of this instrument is that, since it is not a bankruptcy procedure, it does not provide for the compliance with the *par-conditio creditorum* rule, which means that the entrepreneur can freely negotiate with creditors, regardless of the ranks of pre-emption, and nobody is appointed to represent the group of creditors, since the agreement is only binding for adhering creditors.

The crisis code provides for three different types of restructuring agreements:

1. the ordinary agreement governed by Art. 57 of the CCII, which requires at least 60 percent of the claims to be met;
2. the facilitated agreement governed by Art. 60 of the CCII, linked to the attainment of at least 30 percent of the claims (such agreement can be initiated when the debtor does not propose the moratorium of creditors outside the agreements and when he has not requested, or he has renounced, for temporary protective measures);
3. the extended effectiveness agreement governed by Art. 61 of CCII, according to which the debtor has to obtain the consensus of at least 75% of the credits of the same category; it produces its effects towards non-adhering creditors belonging to the same category.

Considering the case of Sampdoria, which requested the activation of assets protection measures, the choice of the simplified agreement does not seem viable, nor does that of the extended effectiveness agreement, since the required percentage of creditors is more difficult to achieve. Therefore, Sampdoria must achieve at least 60 per cent of favorable responses, as stipulated in Article 57 of the CCII.

In order to convince the creditors, the Club has warned them that the proposal formulated is the best practicable and that in the event of a judicial liquidation there would be the loss of the sporting title and the unsecured creditors would remain completely unsatisfied.

Attached to the creditors' proposal was the business plan, according to which the team should return to Serie A within two years at the latest. However, the success of the plan is conditional to the existence of an investor willing to underwrite the capital increase to be submitted to the capital for approval.

It is clear that there will be no investor willing to finance the operation if the debt restructuring agreement does not succeed first.

In fact, according to what has been published on the website on 19 May 2023, the company sent several hundred notices to unsecured creditors containing the proposal to pay their respective debts in an amount varying between 35 and 45 per cent of the nominal value, with payment in 3 equal annual instalments, of which the first instalment within 15 days of the decree approving the restructuring agreement becoming final.

The time given to creditors to adhere to this proposal is only five days, with a deadline of 24/05/2023, i.e., two days before the convening of the extraordinary shareholders' meeting.

In this context, given the current ownership's unwillingness to provide the necessary financial resources, the preservation of business continuity could take place in two different ways: through a share capital increase (underwritten by an external funder), or through the transfer of the company (indirect business continuity).

Through the first option, the extraordinary shareholders' meeting will have to resolve on a share capital increase in an amount sufficient to support the commitments undertaken with creditors in the restructuring agreement, as well as to provide the necessary resources to face the new championship.

On the other hand, transferring the company is an operation involving a change in the ownership structure, while retaining its identity. This may be achieved through the transfer, the lease or the usufruct of the business.

However, the only indirect business continuity consistent with the NOIF regulations is the creation of a new company into which the entire Club would be transferred.

Furthermore, the above-mentioned transfer of the company is compatible with the FIGC regulations, which have recently been amended to consider the new features of the Business Crisis and Insolvency Code.

In particular, with the official release No. 167/A, the Federal Council of the FIGC resolved to amend Articles 16 and 52 of the NOIF, concerning, respectively, the termination and revocation of affiliation, and the sporting title provisions.

The new text of Art. 16 provides for the withdrawal of a club's affiliation to the FIGC in the event of judicial liquidation and the adoption of crisis regulation procedures for liquidation purposes. The same Article also provides for the revocation of affiliation in the event of recourse to crisis or insolvency regulation institutions that presuppose indirect business continuity procedures, and thus involve the exercise of business activities by a person other than the debtor. The rule, however, is without prejudice to the provisions of Article 20 of the NOIF, according to which, in case of the transfer of a sports business into another company

wholly owned by the transferor company, the approval of the President of the FIGC may be granted on the condition that the unity of the entire sports company is preserved, and the regularity and continuation of the sporting activity is granted. Therefore, the constitution of a new company, initially owned by Sampdoria, and subsequently sold to the new investor, would allow the affiliation to be maintained through the conferral in the NewCo of the entire sports company.

In this way, there would be an indirect business continuity, in accordance with the rules of the NOIF, and the NewCo would benefit from a completely renewed corporate structure in terms of both ownership structure and debt composition.

The solution of founding a Newco is more convenient for an external financier as it allows the "bad company" (in this case Sampdoria) to be separated from the "good company" (the newly formed one). If the transfer takes place with the Court's authorization pursuant to Art. 22 of the CCII, the good company would not be responsible for the liabilities of the transferor debt (the so-called "purgative effect"), since the effects of Article 2560 of the c.c.[98] do not apply.

[98] According to Art. 2560 of the c.c., *"The transferor is not discharged from the debts, inherent in the operation of the transferred business prior to the transfer, if it is not apparent that the creditors have consented thereto. In the transfer of a business the acquirer of the business is also liable for such debts, if they are apparent from the statutory books."*

Conclusions

This thesis examines the role of the negotiated settlement procedure and the going concern assumption in the management of corporate crises.

Specifically, the first chapter provides an overview of the negotiated settlement, its functions, main features and the functioning of the procedure, as well as its regulatory framework.

The second chapter is focused on the principle of going concern, intended as the primary objective of this new mechanism, which was discussed first within the framework of business economics and then in the context of the procedure, as its prospective goal.

The third chapter provides for the analysis of a case study, highlighting the challenges faced by the companies in distress, the valuation of the going concern assumption, and the prediction of a possible outcome.

The company is U.C. Sampdoria S.p.a., operating in the professional football industry, which has experienced a series of economic and financial difficulties that have compromised its ability to operate as a going concern, manifested by a series of large losses and excessive debt levels. To deal with this situation, the Club chose to initiate the negotiated settlement path with its creditors in order to restructure the debt, making it sustainable, and ensure business continuity. The case study therefore analyzes in detail the causes that led the company to the crisis through the lenses of the financial statements, with a focus on the going concern management, with the aim of understanding whether the mechanism of the negotiated settlement is suitable to overcome the situation of distress, including envisaging a possible outcome. For this purpose, according to ISA Italia principle No.570, the guidelines provided by the checklist, and the principles for drafting of recovery plans, the business continuity perspective was assessed through a combination of both quantitative elements, i.e., the analysis of the balance sheet and its main KPIs, and qualitative elements, i.e., the Club's recent performance and main corporate events.

The financial statements analysis showed that he company has never had the liquid financial resources to meet its liabilities during the period of observation. Moreover, such negative values have an upward trend, reflecting an increasingly serious liquidity crisis and an unbalanced financial structure, as a substantial part of fixed investments is financed with short-term debt. The liquidity and the solvency analysis confirmed the company's critical

inability to repay short-term liabilities using its liquid assets and a liquidity crisis affecting 2021, when the short-term net financial position worsens by 156%.

Specifically, from the income statement, it emerged that operating revenues experienced a significant and constant decrease from 2020 onwards, due to a considerable reduction in capital gains and transfer of players' registration rights; while, on the other hand, the same drop was not observed for operating costs, thus resulting in a situation of economic imbalance.

Moreover, Sampdoria proved to be more dependent on revenues from capital gains compared to the sample provided by the Annual Report on Italian Football.

Further worsening such already complex situation, from 2020 onwards, the cost of depreciations and amortizations was affected by the Directors' decision to opt for the suspension of amortization of players' registration rights, the capitalizations related to the costs of the youth players, and the full amount of the amortization of the brand value, with the effect of reducing the loss and postponing the related problem of the future coverage of these costs.

In this framework, the profitability analysis showed that from 2019 onwards, all ratios assume negative values, and especially the ROE. Therefore, in the light of such negative trends, the crisis situation began in 2019, and it got progressively worse.

Such situation does not appear to be attributable to the structure of the balance sheet, whose values are in line with the average, but it is rather caused by a structural problem due to the excessive weight of capital gains on players' registration rights on Sampdoria's total revenues, compared to other Serie A clubs. Furthermore, the other revenue items are not adequate to support the total amount of costs; an insufficiency that in turn derives from the team's low performance in the championship, the size of the fan club and probably from the negative impact to the image caused by the judicial problems that have affected the former president Massimo Ferrero who, on 6 December 2021, has been subjected to pre-trial detention measures for certain allegations made by the Public Prosecutor's office relating the administration of some companies.

The analysis of the management of the going concern showed that it held only because of the waivers and suspension of amortizations, without which, given the situation of crisis in which the company was already in 2019, that have progressively worsened in following years, such condition would not have been met.

In this context, given the current ownership's unwillingness to provide the necessary financial resources, the preservation of business continuity could take place in two different ways: through a share capital increase (underwritten by an external funder), or through the transfer

of the company, which involves a change in the ownership structure, while retaining its identity.

The latter case, which seems the most viable, may be achieved through the transfer, the lease, or the usufruct of the business. The transfer of the company could take place after the establishment of a new company (initially owned by Sampdoria and then to be transferred to a third investor) into which the company will be transferred. This is the instrument most commonly used to achieve the so-called indirect business continuity, and it is consistent with NOIF regulations, which have recently been amended to consider the new features of the Crisis Code.

According to Art 20 of NOIF regulations, in case of the transfer of a sports business into another company fully owned by the transferor company, the approval of the President of the FIGC may be granted on the condition that the unity of the entire sports company is preserved, and the regularity and continuation of the sporting activity is granted.

Therefore, the constitution of a new company, initially owned by Sampdoria, and subsequently sold to the new investor, would allow the affiliation to be maintained through the conferral in the NewCo of the entire sports company. In this way, there would be an indirect business continuity, in accordance with the rules of the NOIF, and the Newco would benefit from a completely renewed corporate structure in terms of both ownership structure and debt composition.

Such solution is more convenient for an external financier intervening in the current corporate structure as it allows the “bad company” (in this case Sampdoria) to be separated from the “good company” (the newly formed one) and, if the transfer takes place with the Court’s authorization pursuant to Art. 22 of the CCII, the good company would not be responsible for the liabilities of the transferor debt (the so-called “purgative effect”), since the effects of Article 2560 of the c.c. do not apply.

References

- Abriani N., “Continuità aziendale, avvio della composizione negoziata e giustificato ritardo nella redazione del bilancio”, in dirittodellacrisi.it, ottobre 2022.
- Ambrosini, “La nuova composizione negoziata della crisi: caratteri e presupposti, ristrutturazioni aziendali”, 23 agosto 2021.
- Assonime, “Guida al Codice della Crisi”,14 dicembre 2022
- Assonime, “I doveri degli organi sociali per la prevenzione e gestione della crisi nel nuovo Codice della Crisi”, Circolare N. 27 del 21 novembre 2022.
- Assonime, “Le misure del decreto crisi per il risanamento dell’impresa”, Circolare N. 34 del 7 dicembre 2021.
- Assonime, “Le nuove regole societarie sull’emersione anticipata della crisi d’impresa e gli strumenti di allerta”, Circolare N. 19 del 2 agosto 2019
- Baccaglini L, Calcagno L., “Le misure protettive e cautelari nel CCII”, in dirittodellacrisi.it, Saggio del 11 ottobre 2022.
- Baccaglini L., De Santis F., “Misure protettive e provvedimenti cautelari a presidio della composizione negoziata della crisi: profili processuali”, in dirittodellacrisi.it, 12 ottobre 2021.
- Ballarin F., “Relazione di revisione”, Ipsoa, marzo 2022.
- CNDCEC, “Principi per la redazione dei piani di risanamento”, settembre 2017.
- Consiglio Nazionale dei Dottori Commercialisti e degli Esperti Contabili, Norme di Comportamento del Collegio Sindacale: Norme di Comportamento del Collegio Sindacale, verbali e procedure. https://commercialisti.it/norme-di-comportamento-del-collegio-sindacale-verbali-e-procedure
- Danovi A., Quagli A., “Gestire la crisi d’impresa. Processi e strumenti di risanamento”, Walters Kluwer, 2021.
- De Simone L., “Le autorizzazioni giudiziali”, Diritto della Crisi.it, 2021
- Della Rocca S., Grieco F., “Il Nuovo Codice della Crisi d’Impresa e dell’Insolvenza”, CEDAM, settembre 2022

- Fabiani M., Pagni I., “Introduzione alla composizione negoziata”, in “La composizione negoziata e le misure che anticipano il codice della crisi”, Wolters Kluwer, 12/2021, p. 1477
- Fazzini M., “Turnaround Management”, Walters Kluwer, giugno 2020.
- FIGC, Comunicato Ufficiale n. 167/A, 21 aprile 2023.
- FIGC, Comunicato Ufficiale n. 169/A, 21 aprile 2023.
- FIGC, Report Calcio 2022.
- Foggetta F., “La continuità aziendale nel nuovo CCII tra scansione temporale e obblighi degli amministratori.”, Le Società, n. 8-9, agosto 2020, p. 921
- Gambi L., “Il paradigma della continuità aziendale”, in ilfallimentarista.it, 11 giugno 2018.
- Gambi L., “La ratio ed il funzionamento del test pratico per l’accesso al percorso di risanamento”, in ilidirittodellacrisi.it, dicembre 2021.
- Greggio M., “L’imprenditore e l’esperto nella composizione negoziata della crisi: dicotomia o endiadi?”, Il Commercialista Veneto, N. 264/2021.
- Jorio A., “Alcune riflessioni sulle misure urgenti: un forte vento di maestrale soffia sulla riforma!”, in dirttodellacrisi.it, febbraio 2021.
- Lamanna, *Criticità del presupposto oggettivo della composizione negoziata*, in Ilfallimentarista.it, 20 aprile 2022.
- Mari D., “Perdita di continuità aziendale e impossibilità di conseguimento dell’oggetto sociale: i doveri dell’organo gestorio”,
- Marotta L., “Bilancio UC Sampdoria 2020: Perdita di 14,7 milioni, con 36,6 milioni di ammortamenti sospesi. Il Covid provoca l’allarme per il Player Trading.”, 10 giugno 2021.
- Martino M, Balestra L., “Crisi d’Impresa e Responsabilità degli Organi Sociali nelle Società di Capitali”, Giuffrè, 2022
- Minervini V., “La Composizione Negoziata nella prospettiva del recepimento della direttiva Insolvency. Prime Riflessioni.”, in Ristr. Aziendali, ottobre 2021.
- Ministero della Giustizia, Nota 29 dicembre 2021
- Monteleone M., “Gli organi nel vigente codice della crisi d’impresa. Esperto negoziatore, ausiliario, commissario giudiziale, curatore, OCC”, Walters Kluwer, Marzo 2023.
- Nastri A., “Le autorizzazioni del tribunale nella composizione negoziata della crisi” in dirittodellacrisi.it, Saggio del 23 marzo 2023.
- Organismo Italiano di Contabilità, “Principi Contabili OIC”, Wolters Kluwer, novembre 2021.
- Organismo Italiano di Contabilità, Principi Contabili, OIC 19 “Debiti”, 2017.
- Orlandi M., “Il test di auto-diagnosi per la verifica della ragionevole perseguibilità del risanamento aziendale”, Wolters Kluwer, Amministrazione & Finanza, n. 3, 1 marzo 2023.

- Pagni I., Fabiani M., “La transizione dal Codice della Crisi alla composizione negoziata (e viceversa)”, in dirittodellacrisi.it, 2 novembre 2022.
- Panizza A., Crisi e Adeguati Assetti per la Gestione D’Impresa, IPSOA, Guide Operative, giugno 2020.
- Panzani L., “Gli esiti possibili delle trattative e gli effetti in caso di insuccesso”, in La composizione negoziata e le misure che anticipano il codice della crisi”, Wolters Kluwer, 12/2021, p. 1591
- Rausei P., Barbizzi M., “Management, Business Continuity, Going Concern: Fare crescere l’impresa oltre la crisi.”, Wolters Kluwer, 2017.
- Relazione Illustrativa al d.lgs. 83/2022
- Rinaldi P., “OIC 11 e Continuità Aziendale: un contributo fondamentale alla salvezza dell’impresa”, Il Fallimentarista, 24 agosto 2018.
- Riva P., “Ruolo e Funzioni dell’esperto Facilitatore”, Ristrutturazioni Aziendali, 30 settembre 2021.
- U.C. Sampdoria S.p.a., Fascicolo di Bilancio al 31 dicembre 2019.
- U.C. Sampdoria S.p.a., Fascicolo di Bilancio al 31 dicembre 2020.
- U.C. Sampdoria S.p.a., Fascicolo di Bilancio al 31 dicembre 2021.
- Verna G., “Assetto Or.Am.Co. Strumento di gestione dell’impresa e non solo premonitore della crisi”, in Le Società, 12/2019

Executive Summary

Over the past two decades the Italian bankruptcy law has experienced a continuous reform and renewal process, culminating in the introduction of the new Code of Business Crisis and Insolvency with the Law Decree 14/2019. With the advent of the Covid pandemic and the consequent economic and social difficulties, it became necessary to shift the focus of the legislator from the mere liquidation of the company to the introduction of new prevention, rehabilitation and restructuring mechanisms intended to intercept the crisis at an early stage, thus avoiding it from evolving into the irreversible state of insolvency, with the final aim of ensuring the survival of distressed companies and the satisfaction of creditors.

In this context, particularly relevant are the amendments introduced by the Law Decree 118/2021, which, in addition to the postponement of the entry into force of the Crisis Code that has already occurred several times, provides for the establishment of the new mechanism of the Negotiated Crisis Resolution, thus replacing the assisted settlement before even entering into force. Such new mechanism is based on two core pillars: the presence of an independent expert entrusted to assist the entrepreneur, to mediate, and facilitate negotiations with creditors and other stakeholders; and the establishment of a national telematics platform with information and activation functions.

Such private and extrajudicial “path” between the entrepreneur and his creditors, represents a new solution for all the cases of patrimonial, economic, and financial imbalance that can lead companies in a situation of crisis or insolvency, more effective and less onerous compared to bankruptcy proceedings. It does not provide any form of dispossession of the debtor, who retains the ordinary and extraordinary management of the company (thus, the so-called debtor in possession proceeding); and it is entirely extrajudicial, unless confirmations of asset protection measures or specific authorizations affecting stakeholders’ rights are requested.

The main goal of this new mechanism is supporting distressed companies to face and overcome economic and financial difficulties that appear reversible, to preserve the productive and industrial fabric, eventually through the sale of the company or branches of it, from the perspective of business continuity.

For this purpose, according to Art 12, paragraph 1, of the CCII, the entrepreneur in conditions of patrimonial or economic and financial imbalance that make probable the insurgence of a crisis or insolvency, can request the general secretary of the chamber of commerce located in the place where the company has its registered office, the appointment of an independent expert, when there are concrete reconstruction prospects.

The most remarkable features of the negotiated settlement are the extrajudiciality, according to which the entrepreneur is not required to apply to the Court, except in specific cases, such as the activation of protective measures (Art. 18 CCII); its voluntariness, since it can be activated by the entrepreneur on a voluntary basis only; and, unless requested otherwise, the negotiated settlement is covered by confidentiality, although establishing specific obligations regarding active participation and information. In this context, creditors are not involved since it is not a bankruptcy procedure but a negotiated path in which the entrepreneur remains *in bonis*.

No subjective size limits or prerequisites are set for accessing such mechanism.

On the other hand, the objective prerequisites stated in Art. 12 of the CCII, are:

i. the existence of a situation of patrimonial or economic and financial imbalance that make plausible the crisis or insolvency of the debtor;

ii. the subsistence of concrete business reconstruction prospects.

The rule does not exclude firms that are already in a state of crisis or even insolvency, as long as it is reasonable to obtain a successful reorganization outcome, thus introducing the situation of reversible insolvency characterized by "concrete prospects of rehabilitation", which must persist for the entire duration of the procedure.

Art. 17, paragraph 3, of the CCII, mentions the procedural prerequisite, stating that the petition to access the negotiated settlement cannot be submitted if the entrepreneur is already involved in the initiation of the judicial liquidation (*i.e.,* bankruptcy) or in the determination of insolvency proceedings.

To access the negotiated settlement procedure, entrepreneurs must submit the application petition through the national telematics platform provided and regulated by Article 13 of the CCII, which manages all the various stages of the negotiated settlement and the corporate restructuring process. Through such platform the debtor can access a checklist, containing operational indications for the drafting of the recovery plan, and a practical test for the verification of the company's state of distress; as well as submit the application for the appointment of the expert.

Specifically, it provides for a detailed checklist which contains operating instructions regarding the drafting of the reconstruction plan; a practical test aimed at the preliminary

assessment of the complexity of the business restructuring by comparing the amount of debt to be restructured to the amount of free cash-flows that can be used to repay it; and a protocol for the conduct of the procedure.

Thus, in the restricted area of the platform, the entrepreneur can submit the application for the negotiated settlement and request the appointment of an independent expert.

Upon the application's receipt, the general Secretary of the relevant chamber of commerce accesses the platform to assess the validity and the accuracy of all attached documents and their contents and within five working days the Commission appoints the expert. Such professional is the driving force behind the whole process, entitled to facilitate and mediate negotiations with creditors and all interested parties, in order to identify, in cooperation with the entrepreneur, a solution for the reconstruction of the business. Since the expert does not replace the entrepreneur, the negotiation activity is for the entire duration of the procedure a prerogative of the entrepreneur, who conducts them personally and actively, eventually with the assistance of his consultants.

The professional must meet the independence and neutrality requirements and he must act according to criteria of professionalism, confidentiality, and impartiality. Verified these preconditions, he notifies the acceptance of the mandate to the entrepreneur within 2 working days and submit the acceptance statement into the telematics platform, which is then filed in the Business Register.

The expert convenes the entrepreneur to assess the existence of concrete prospects of corporate restructuring and, if he considers that the prospects for rehabilitation are viable, he meets the other parties involved in the procedure and he begins to plan the possible intervention strategies, while scheduling follow-up meetings on a periodic basis. On the other hand, if he does not recognize any concrete prospect for corporate recovery, at the conclusion of the convocation with the entrepreneur or at any time, the professional notifies the entrepreneur and the general Secretary of the chamber of commerce who subsequently orders the dismissal of the negotiated settlement petition.

In any case, the mandate of the independent professional is considered concluded if, in the 180 days after the acceptance, the parties have not identified a proper solution to overcome the business crisis.

At the end of his office, the professional prepares a final report to be uploaded into the telematics platform and to be reported to the entrepreneur or, if protective and precautionary measures are issued, to the court that pronounces their effects ceased.

The entrepreneur has the duty to report the company's situation to the expert, creditors, and other interested parties, providing all necessary documentation and information. The legislator

provided that the distressed entrepreneur retains the ordinary management of the company without harming its economic and financial sustainability. In the event that the entrepreneur is insolvent but there are still concrete prospects for rehabilitation, he must manage the company in the prevailing interest of creditors.

With regard to actions of extraordinary administration, the entrepreneur is obliged to inform the expert in writing, who, in the event that the act is considered detrimental to creditors or negotiations, notifies the supervisory body.

The entrepreneur, in order to prevent creditors from jeopardizing the resolution of the crisis, can request the activation of protective and precautionary measures, because of which from the date of the publication of the application petition in the business register, creditors cannot, under penalty of invalidity, initiate or pursue executive and precautionary actions over the assets of the company.

Furthermore, Art. 23 of the CCII provides as the primary assumption for a successful outcome of negotiations, the identification of a viable solution for the preservation or restoration of business continuity and specifies three possible alternative results: enter a contract, with one or more creditors, adequate to preserve business continuity for a period of at least two years, without necessarily implying that the crisis or insolvency situation has been overcome; enter a moratorium agreement pursuant to Art. 62 of the CCII; or conclude an agreement signed by the entrepreneur, the creditors, and the expert, with the effects of the certified reconstruction plan. In the event that, at the end of negotiations a viable solution among those listed above has not been identified, the entrepreneur can opt for one of the following alternatives: the approval of a debt restructuring agreement, pursuant articles 57, 60 and 61 of the CCII; a certified recovery plan, according to art. 56 of the CCII; application for the simplified arrangement for assets' liquidation, under art. 25-*sexies* and 25-septies; or access other crisis resolution procedures.

In this context, the concept of business continuity (and the so-called going concern), which can be defined as the ability of a company to continue its business operations for a period of at least 12 months from a perspective standpoint, assumes central importance since it represents the ultimate goal of the negotiated settlement.

The principle of going concern is in fact not only a central theme of the new Crisis Code, but also a core postulate in business economics, provided and by the Italian Civil Code, National and International Accounting Standards, and auditing standards.

According to the Italian accounting law, Article 2423-*bis* of the c.c. sets forth the principles of financial preparation to be complied by directors, within which the key postulate is the going concern assumption, which represents the primary assumption of the ordinary functioning of

the enterprise, intended as an economic complex meant to last over time. Generally, a company operate as a going concern if it is considered capable of continuing its business operation in a foreseeable future, without the occurrence of a liquidation or bankruptcy proceedings.

The principle of going concern is also mentioned by National and International Accounting Standards. The OIC 11, in paragraphs 21 and 22, establishes that the directors, at the preparation phase of the financial statements, are required to perform a prospective valuation on the company's ability to "*constitute a functioning economic complex intended to generate income",* considering a forecast time horizon of at least 12 months. If such valuation results in the emergence of uncertainties concerning the existence of the business continuity, the management must provide explanatory information in the notes to the financial statements, detailing identified uncertainties, future risks, and the company's plans to deal with the moment of distress.

Even under the International Accounting Standards, IAS1, states that directors, in the preparation of the financials, must assess and monitor the company's ability to continue to operate as a *"functioning entity",* and such activity concerns everyone involved in a consultation or auditing activity.

Completing this picture, the Auditing Standard ISA Italia No. 570 of 2016, regulates the responsibilities of the auditors with respect to the going concern principle and the relative implications for the auditors' report. Paragraph A3 of such document provides a list of financial, managerial, and other indicators to be considered in assessing any circumstances or events that may trigger a "significant uncertainty" about the going concern assumption. It is also provided that, at the end of the auditing process, the auditor establishes whether all the necessary information on the proper use of the going concern assumption have been clearly and accurately acquired by directors and expresses a professional judgement on the basis of the evidence collected, through the preparation of the relevant report. In the event that the financials reveal a significant uncertainty, the auditor expresses an opinion without modification, and the audit report will include a separate section in which such uncertainty is justified and detailed. On the other hand, if non-significant uncertainties arise from the financial statements, the statutory auditor expresses a qualified or adverse judgement, depending on the specific circumstances of the case, and, in the specific section of the report, states that the financials do not provide adequate information about that uncertainty.

The principle of going concern in the Crisis Code has no longer a merely accounting meaning, but especially a managerial one, thus becoming the main focus of corporate governance best practices. For this purpose, a set of regulation provisions were introduced in the Crisis Code

and in the Italian Civil Code concerning corporate responsibilities related to the implementation of adequate organizational, administrative, and accounting structures, according to the size and the nature of the company. In this scenario, budget and industrial planning become key factors, enabling companies to timely recognize situations of financial distress, to evaluate debt sustainability and the going concern prospects.

Some of the most interesting new features are related to Art. 375 of the CCII, which integrates Art. 2086 of the c.c. with a second paragraph, introducing the obligation for the entrepreneur to set up an organizational, administrative and accounting structure, adequate to the nature and size of the enterprise, and also in the light of the timely detection of the business crisis and the loss of business continuity, as well as to take timely action for the adoption and of one of the instruments provided by the law for the resolution of the crisis and the restoration of business continuity.

Such principle of adequacy of corporate structures, intended to monitor business continuity represents under Art. 12 of the CCII an "internal warning tool", not only for accounting purposes, but also for managerial ones, requiring directors to recognize any loss of business continuity, that is the first stage of a company's difficulties, and to adopt appropriate actions to restore it.

In light of the aforementioned considerations, the loss of the going concern assumption is intended as a different and antecedent situation of imbalance with respect to the crisis, which implies a prognostic assessment that considers both quantitative and qualitative factors, as the case in which a company is unable to carry out the normal course of business operations for a period of at least 12 months, with the resulting obligations for directors, and the possibility for the entrepreneur to resort not only to the ordinary private mechanisms provided by the Civil Code or private autonomy (e.g., capital increase, new financing, conversion of debt into equity), but also to the new institution of the negotiated settlement. While, on the other hand, in case of pre-crisis, crisis or insolvency, different obligations arise for the directors from those proper to the hypothesis of loss of business continuity, regulated by the Code of Business Crisis and Insolvency.

Such situations of distress, expressly mentioned by Art. 12 of the Code, do not necessarily imply the ongoing existence of business continuity; thus, the subsistence of the going concern assumption is not a necessary precondition to access the negotiated settlement. Therefore, since the crisis and its probability of occurrence are set as prerequisites for the initiation of the procedure, the same applies to the situation of loss of going concern. The key for the interpretation lies in a prospective concept of loss of business continuity, which may and may not have occurred at the time of the application in the telematics platform.

Thus, the negotiated settlement is aimed at rehabilitating the company and therefore, both preserving the going concern assumption, if it holds, as well as restoring it in the event that it does not subsist at the time of the initiation of the path.

The rehabilitation of the company can be pursued in two ways: through the direct, in which the business continues in the hands of the entrepreneur; or indirect business continuity, where a third party is involved.

In this framework, the verification of the existence of prospects of rehabilitation means identifying the causes of the distressed situation and formulating strategies aimed at restoring or preserving business continuity. This condition is preliminarily verified by the entrepreneur through the practical test available on the telematics platform, and it is then confirmed by the expert, following the acceptance of the mandate. An additional tool for the verification of these perspectives is the detailed checklist, which contains a set of guidelines and questions, addressed to both the entrepreneur and the expert, through which the recovery plan can be drafted. Such plan, at the basis of the negotiation's activity with creditors, must show the possibility of reaching a patrimonial, economic, and financial equilibrium.

Therefore, the existence of the going concern perspective should be verified by combining the above-mentioned elements, and on the basis of an analysis of the financial statements of the company and of its patrimonial, economic and financial equilibrium.

Within the framework of the analysis of the negotiated settlement as a mechanism for safeguarding and restoring business continuity, a case study of a company currently involved in this path was chosen, that is, U.C. Sampdoria S.p.a., a company operating in the professional football industry.

Sampdoria has experienced a series of economic and financial difficulties that have compromised its ability to operate as a going concern, manifested by a series of large losses and excessive debt levels. Specifically, considering the reference period relating the last available budget file for 2021, the management report shows that the biennium 2020-2021 was significantly affected by the consequences of the Covid pandemic, which represented for the football industry a relevant event with negative effects on sponsorship and ticket revenues (due to stadium closures and seat reduction); while in the player trading market, it was observed a general decline in the value and volume of trades.

To deal with this situation, the Club chose to initiate the negotiated settlement path with its creditors in order to restructure the debt, making it sustainable, and ensure business continuity.

The case study therefore analyzes in detail the causes that led the company to the crisis, with a focus on the going concern management, with the aim of understanding whether the

mechanism of the negotiated settlement is suitable to overcome the situation of distress, including envisaging a possible outcome.

For this purpose, according to ISA Italia principle No.570, the guidelines provided by the checklist, and the principles for drafting of recovery plans, the starting point of the analysis is the company's financial statements and the related KPIs.

The time horizon considered is 4 years, from 2018 to 2021, the last year for which financial statements are available and, where possible, Sampdoria's values and ratios are compared with a sample of 20 Serie A teams provided by the Annual Report on Italian Football.

The analysis of the balance sheet showed that the company's assets are mainly fixed assets (around 74% in 2021), mostly intangible and financial fixed assets, while only 25% consists of current assets. Such "imbalance" in the distribution of assets is explained by the specific features of the core business of Sampdoria, which, operating in the football industry, has the players' rights as its main intangible assets.

On the other hand, liabilities experienced a significant increase from 2019 to 2020, and a slight decrease in 2021; a reduction associated with a decrease in net equity and a substantial increase in total debts, which is mostly composed of financial debts and payables to other football clubs. The item that mainly contributes to 2021 is the gross financial debt, which increases from €66,9 million to €95,5 million (+43%).

Overall, Sampdoria's balance sheet values are almost aligned with the sample provided by the annual Report on Italian Football, while its debt is 11% higher than the average in 2021.

The analysis of the main balance sheet ratios, including equity ratios, the degree of coverage of players' assets, fixed to total assets ratio, treasury margin and structure margins showed a lack of liquidity and financial distress especially in the short-term; in other words, they revealed that the company has never had the liquid financial resources to meet its liabilities during the period of observation. Moreover, such negative values have an upward trend, reflecting an increasingly serious liquidity crisis and an unbalanced financial structure, as a substantial part of fixed investments is financed with short-term debt.

The liquidity and the solvency analysis also confirm the company's critical inability to repay short-term liabilities using its liquid assets and a liquidity crisis affecting 2021, when the short-term net financial position worsens by 156%.

From the income statement, it emerged a particularly relevant loss recorded in 2019, when the financial statement approved by the shareholders' meeting reported a loss of about €13 million (208% less than 2018), revealing a change in the sign and the trend of the economic results compared to 2018, which they propose to cover entirely with retained earnings from previous years.

Equally relevant is the negative economic result recorded in the following years and especially in 2021, when there is a loss of about €24 million.

EBITDA decreased gradually from 2018 onwards, becoming negative in 2020 and especially in 2021. Specifically, looking at the evolution of operating costs and revenues, it appeared that operating revenues experienced a significant drop (-41%) in 2020 with respect to 2019, due to the significant reduction in revenues from competitions and correlated, and from 2020 onwards an overall constant and considerable decrease. On the other hand, the same drop of revenues was not observed for operating costs, resulting in a situation of economic imbalance.

The drop in total operating revenues was mainly due to a significant reduction in capital gains and transfer of players' registration rights. Moreover, compared to the sample, Sampdoria is highly dependent on revenues from capital gains, which in the pre-Covid period constituted an average of 40% of total revenues, with a significantly higher weight than other football clubs, thus being more sensitive to changes in player trading market operations. On the other hand, considering the lack of liquidity that has affected the player trading market since 2020, Sampdoria has experienced a grater drop in capital gains than other Clubs.

Further worsening an already complex situation, from 2020 onwards, the cost of depreciations and amortizations is affected by the Directors' decision to opt for the suspension of amortization of players' registration rights, the capitalizations related to the costs of the youth players, and the full amount of the amortization of the brand value. The civil law effect of this suspension involved the deferral to the following financial years of the amortization cost of €36 million, thus reducing the loss in 2020 and 2021, and postponed the related problem of the future coverage of these costs. Furthermore, as pointed out by the auditors, Sampdoria did not generate any profits and thus it was not able to form the related reserve for suspended depreciation, thus postponing the problem to future years.

In this framework, the profitability analysis showed that from 2019 onwards, all ratios assume negative values, and especially the ROE. Therefore, in the light of such negative trends, the crisis situation began in 2019, and it got progressively worse.

Such situation does not appear to be attributable to the structure of the balance sheet, whose values are in line with the average, but it is rather caused by a structural problem due to the excessive weight of capital gains on players' registration rights on Sampdoria's total revenues, compared to other Serie A clubs.

The other revenue items are not adequate to support the total amount of costs; an insufficiency that in turn derives from the team's low performance in the championship, the size of the fan club and probably from the negative impact to the image caused by the judicial problems that have affected the former president Massimo Ferrero who, on 6 December 2021, has been

subjected to pre-trial detention measures for certain allegations made by the Public Prosecutor’s office relating the administration of some companies, which caused the entire administrative body to fell from office and continued to operate in prorogation, being able to perform exclusively ordinary administration operations until a new board was appointed.

Regarding the assessment of the going concern assumption, in 2019 directors pointed out that, because of the pandemic, the financial statements had been prepared on a going concern basis, taking into account the waiver provided for in Article 7 of DL 23/2020.

In 2021, the auditor Crowe Bompani S.p.a. expressed an opinion with significant uncertainties regarding the existence of the company's ability to continue as a going concern. These uncertainties are related to the legal problems of the former president Mr. Ferrero (which is a crisis management indicator according to the ISA Italia No. 570 document), the change of the board of directors and the possible change of ownership of the company. Therefore, the going concern assumption held only because of the measures issued by the Government since in 2019 (waivers and suspension of amortizations), without which, given the patrimonial, economic, and financial imbalance in which the company was already in 2019, that have worsened in following years, such condition would not have been met.

Consequently, the continuity of the company is linked to the maintenance of the sporting title, the obtainment of the national license, and the consequent valorization of the players' registration rights during the player trading market. This represents the most important variable that could preserve the going concern assumption, given the relevance that capital gains have always had on Sampdoria's income statement.

In this difficult scenario, the negotiated settlement may be the only alternative mechanism to bankruptcy, given the unsuccessful attempt to increase capital in order to cover the operating losses, and to find new sources of internal financing.

Furthermore, in the absence of the identification of a solution compatible with the FIGC deadlines, the board will have to take note of the impossibility of proceeding with the restructuring process, and the only viable alternative would then be a liquidation procedure.

The Court of Genova approved Sampdoria’s request to access the negotiated settlement procedure on 6 February 2023, after having obtained the favorable opinion of the independent expert and granted the company the protective measures against creditors for four months, i.e., until 6 June, pursuant to Art. 54 of the Crisis Code. Creditors will therefore not be able to attack the company's assets or file petitions for the opening of compulsory liquidation, nor acquire rights of pre-emption, and initiate or continue enforcement and precautionary actions.

Considering the analysis conducted in the previous section and the statements made by the members of the Board of Directors, it is possible to envisage that a probable outcome of the

negotiated settlement procedure is a debt restructuring agreement that provides for the reduction and restructuring of the financial debt to make it sustainable. The agreements must also contain the elements of the business plan that allow its implementation.
The independent professional must prepare a report, certifying the truthfulness of the data, the feasibility of the plan on which the agreement is based and its adequacy to ensure the full payment of non-adhering creditors.
In fact, the approved agreement is not binding on non-participating creditors, who must be paid in full within 120 days of the approval in the case of claims already due on that date, or within 120 days of the due date in the case of claims not yet expired on the date of the approval.
The objective of such agreement is the restructuring of the debt, which, according to the Accounting Standard OIC 19, is verified when the creditor (or a group of creditors) makes a concession, i.e., a waiver of certain contractually acquired rights, in favor of the debtor with respect to the original terms of the contract, which results in an immediate or deferred benefit for the debtor and a corresponding loss for the creditor.
Restructuring agreements involve a procedure that can be divided into two main stages:

1. a first extrajudicial phase, in which the debtor negotiates its debt position with the creditors, and in which it is left to the autonomy of the parties (with the help of the independent expert) to reach an agreement regarding the reduction or renegotiation of the debts of the distressed company;
2. a second judicial phase, in which the agreement eventually reached requires the Court approval in order to be productive of further legal effects: approval that may be granted on the basis of an assessment of the recovery plan’s reliability, as illustrated in the expert's report.

The characteristic feature of this instrument is that, since it is not a bankruptcy procedure, it does not provide for the compliance with the *par-conditio creditorum* rule, which means that the entrepreneur can freely negotiate with creditors, regardless of the ranks of pre-emption, and nobody is appointed to represent the group of creditors, since the agreement is only binding for adhering creditors.
The crisis code provides for three different types of restructuring agreements:

1. the ordinary agreement governed by Art. 57 of the CCII, which requires at least 60 percent of the claims to be met;

2. the facilitated agreement governed by Art. 60 of the CCII, linked to the attainment of at least 30 percent of the claims (such agreement can be initiated when the debtor does not propose the moratorium of creditors outside the agreements and when he has not requested, or he has renounced, for temporary protective measures);
3. the extended effectiveness agreement governed by Art. 61 of CCII, according to which the debtor has to obtain the consensus of at least 75% of the credits of the same category; it produces its effects towards non-adhering creditors belonging to the same category.

Considering the case of Sampdoria, which requested the activation of assets protection measures, the choice of the simplified agreement does not seem viable, nor does that of the extended effectiveness agreement, since the required percentage of creditors is more difficult to achieve. Therefore, Sampdoria must achieve at least 60 per cent of favorable responses, as stipulated in Article 57 of the CCII.

In this context, given the current ownership's unwillingness to provide the necessary financial resources, the preservation of business continuity could take place in two different ways: through a share capital increase (underwritten by an external funder), or through the transfer of the company (indirect business continuity).

Through the first option, the extraordinary shareholders' meeting will have to resolve on a share capital increase in an amount sufficient to support the commitments undertaken with creditors in the restructuring agreement, as well as to provide the necessary resources to face the new championship.

On the other hand, transferring the company is an operation involving a change in the ownership structure, while retaining its identity. This may be achieved through the transfer, the lease or the usufruct of the business. The transfer of the company could take place after the establishment of a new company (initially owned by Sampdoria and then to be transferred to a third investor) into which the company will be transferred. This is the most used instrument to achieve the so-called indirect business continuity.

The NOIF regulations have also incorporated this trend, indeed they have recently been amended to consider the new features of the Business Crisis and Insolvency Code, and to allow the creation of a new company into which the entire Club would be transferred.

In particular, with the official release No. 167/A, the Federal Council of the FIGC resolved to amend Articles 16 and 52 of the NOIF, concerning, respectively, the termination and revocation of affiliation, and the sporting title provisions.

The new text of Art. 16 provides for the withdrawal of a club's affiliation to the FIGC in the event of judicial liquidation and the adoption of crisis regulation procedures for liquidation purposes. The same Article also provides for the revocation of affiliation in the event of recourse to crisis or insolvency regulation institutions that involve indirect business continuity procedures, and thus implying the exercise of business activities by a person other than the debtor. The rule, however, is without prejudice to the provisions of Article 20 of the NOIF, according to which, in case of the transfer of a sports business into another company fully owned by the transferor company, the approval of the President of the FIGC may be granted on the condition that the unity of the entire sports company is preserved, and the regularity and continuation of the sporting activity is granted. Therefore, the constitution of a new company, initially owned by Sampdoria, and subsequently sold to the new investor, would allow the affiliation to be maintained through the conferral in the NewCo of the entire sports company.

In this way, there would be an indirect business continuity, in accordance with the rules of the NOIF, and the Newco would benefit from a completely renewed corporate structure in terms of both ownership structure and debt composition.

Such solution is more convenient for an external financier intervening in the current corporate structure as it allows the “bad company” (in this case Sampdoria) to be separated from the “good company” (the newly formed one) and, if the transfer takes place with the Court’s authorization pursuant to Art. 22 of the CCII, the good company would not be responsible for the liabilities of the transferor debt (the so-called “purgative effect”), since the effects of Article 2560 of the c.c. do not apply.