Business crisis: it’s time to appoint the supervisory body of s.r.l.

With the aim of preventing business crises, the Italian legislator has widened internal controls of limited liability companies. The 2012-2014 reformations to art. 2477 of the Italian Civil Code intended to keep down corporate governance costs of small-medium size companies. Today, conversely, cost-saving instances have become less compelling. The reform aims to increase the number of companies subject to internal controls and to give more relevance and centrality to the supervisory body. What are the other new features of the business crisis and insolvency code?

On 14 February 2019, legislative decree 12 January 2019, n. 14, implementing Law 19 October 2017, no. 155, was published in the Official Gazette, enacting the new code for the business crisis and insolvency (the “Code”).

Articles 12 and followings of the Code provide for a number of early-warning instruments with which the Italian legislator hopes that the business crisis of enterprises be timely detected, so that the procedures for resolving business crisis can abandon their current emergency nature. In this perspective, companies’ supervisory bodies – being those in the form of a sole statutory auditor (“sindaco unico”) or of a board of statutory auditors (“collegio sindacale”) or an external auditor (“revisore legale dei conti”) – finds new importance. The supervisory body has now greater responsibilities to control the management activity and to report the occurrence of reasonable clues of the business crisis (article 14 of the Code).

With the aim of giving central importance to the supervisory body, the Italian legislator has – once again – reformed the structure of internal controls of limited liability companies, through the revision of article 2477. The purpose of this amendment is to increase the number of

companies subject to the mandatory appointment of a supervisory body. Based on the first statistical studies, the amendment of article 2477 will have an impact on approximately 140,000 limited liability companies that will be required to appoint a supervisory body.

The reform entailed (i) the removal from article 2477 of the reference to article 2435-bis (and, in particular, to the financial/occupational parameters that enable small-medium companies to draw up financial statements in short form) and (ii) the introduction in the body of article 2477 of new parameters – bearing far lower materiality thresholds – compelling small-medium companies to appoint a supervisory body. In this respect, pursuant to “new” article 2477, third paragraph, letter c), the appointment of the supervisory body is mandatory when companies exceeded “for two consecutive financial years, at least one of the following thresholds […]: 1) total assets of the company: Euro 2,000,000; 2) total revenues from sales and services: Euro 2,000,000, and 3) average number of employees employed during the financial year: 10”.

In the meantime, the other parameters provided for under article 2477, third paragraph, have not been amended. Therefore, companies are still required to appoint the supervisory body in the event “a) the company is required to draft consolidated financial statements; b) the company controls a company which is required by law to have its accounts audited by an auditor or auditing firm”.

Then, the most significant change to article 2477 is that, unlike in the past, letter (c) now provides for the mandatory appointment of a supervisory body in the event just one of the parameters set out under such letter is exceeded. However, the provision does not expressly state if, during the reference period of two financial years, it is the same parameter that needs to be exceeded for two years in a row or, as appear more fitting, it is enough to exceed, over the two years’ period, even two different parameters. In other words, companies may be required to appoint the supervisory body even if, for instance, in the first

year the parameter regarding the average number of employees is exceeded whereas, in the second year, the company, having less than 10 employees, exceeds one of the different parameters regarding the value of assets or the revenues from sales and services, as the case may be.

By amending article 2477, sixth paragraph, the reform has also increased from two to three consecutive years the period during which companies shall not exceed the financial/occupational parameters set out in the newly drafted letter (c) in order to be no longer required to appoint the supervisory body or the external auditor.

Furthermore, article 2477, seventh paragraph, provides that in case of non-compliance of companies with respect to the obligation to appoint the supervisory body or external auditor, the Court can appoint such body upon request by any person concerned or upon recommendation by the competent Companies’ Register.

In addition to the above, the Code has also introduced certain coordination and implementation rules.

First of all, pursuant to article 389 of the Code, article 379 (which, as said, provides the changes to article 2477) will enter into force on the thirtieth day following the publication of the Code in the Official Gazette and, therefore, the new provisions will apply from the second half of March 2019.

Within nine months from the entering into force of article 379 of the Code (hence by December 2019), companies will be required to amend their articles of association in accordance with the new provisions of law: indeed, it will be necessary to cross out any reference – if any – to Article 2435-bis, to update – if expressly specified – the thresholds or to introduce the provisions on the appointment of the supervisory body should the current

version of the articles of association not provide any provision at all in this regard.

Pursuant to article 379 of the Code, the articles of association that need to be amended

continue to apply until December 2019.

Furthermore, article 379 provides that the financial years to be taken into consideration in order to assess whether companies are indeed required to appoint a supervisory body pursuant to the new version of letter (c) of article 2477, third paragraph, are FY 2017 and FY 2018. Therefore, companies that have already exceeded the new parameters in 2017 and 2018 are required to appoint the supervisory body.

It is worth considering that the nine-month “grace” period and the consequent application of the current non-compliant provisions of the articles of association do not apply to companies whose articles of association are already in line with the newly introduced provisions.

Therefore, if the statutory clause is as follows: “the appointment of the control body is

compulsory in the cases provided for by law” or “the appointment of the control body or the auditor is compulsory if the parameters provided for by article 2477 c.c. are exceeded”, no change is required to be made to the relevant clauses, since the law has an automatic integrative effect. As a result, many companies will have to comply with the obligation to appoint a supervisory body within a few months (likely) when the financial statements as at 31 december 2018 are approved.

(Ipsoa Wolters Kluwer – March 18, 2019)