Protection measures and third-party guarantors in the crisis settlement procedure, following some recent court rulings

The crisis settlement procedure *(composizione negoziata della crisi*, the "**CNC**") has been recently introduced into the Italian legal system by the Italian Crisis and Insolvency Code (the "*CCII*", Legislative Decree 14/2019). It is an instrument chosen by an increasing number of entrepreneurs to overcome the situation of temporary difficulty or economic-financial imbalance of their business[1].

In order to facilitate the positive outcome of the recovery project, the CCII has extended to the CNC the possibility to apply for protection and precautionary measures[2] in relation to the assets of the debtor.

1. Purpose and object of asset protection measures

Within the general framework of the CCII, protection measures are aimed, *inter alia*, at preventing any conduct of creditors from frustrating the potentially positive outcome of the recovery path pursued by the crisis regulation instruments. In the context of the CNC, this purpose is contained in the provision stating that the protection measures are immediately effective, from the moment of the publication in the companies' register of the application for access to the CNC by which such measures are requested, subject to their subsequent judicial confirmation.

The Asset protection measures, which duration is set between 30 and 120 days[3], are typical (i.e. provided for by law) and entail for the entrepreneur's creditors a number of consequences: (i) the prohibition to commence and continue any enforcement or precautionary actions on the debtor's assets or on the property and rights by which the business activity is carried out[4]; (ii) the impossibility to acquire any pre-emption rights, unless agreed with the debtor; (iii) the suspension of prescriptions or forfeitures[5]; (iv) the prohibition to pronounce opening judicial liquidation judgments or confirming the insolvency *status* of the debtor; (v) the prohibition for creditors (especially banks or financial intermediaries) to adopt certain self-defence instruments based only on the non-payment of debts prior to the CNC[6].

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[1] See Unioncamere Semiannual Observatory - 6th edition. According to data contained therein, 683 applications were proposed in the first three quarters of 2024. Proportionally, instances by which the instrument leads to a positive outcome for the entrepreneur are also on the rise.

[2] See Articles 18 and 19 of the CCII. According to the mentioned Unioncamere Observatory, 77% of applicants for a CNC applied also for protection measures.

[3] The period may be extended but, in any case, the duration shall not exceed 240 days in total, as per article 19, paragraph 5 CCII.

[4] The extension of the prohibition of enforcement or precautionary actions in relation to the assets and rights with which the business activity is carried out was introduced by the so-called Correttivo-ter.

[5] Provision introduced by the so-called Correttivo-ter.

[6] Notably, as stated by Article 18 paragraph 5 CCII, creditors "may not, unilaterally, refuse to perform pending contracts, cause their termination, anticipate their expiration or modify them to the detriment of the entrepreneur, or revoke all or part of the credit lines already granted for the sole fact of non-payment of claims prior to the publication of the petition [...]." Suspension or revocation of credit lines granted to the debtor is possible only if ordered by the prudential supervision regulation applicable to banks.

2. Limits in the application of protection measures and possible solution

The case law regarding protection measures has highlighted a possible inconsistency between the CNC regulatory framework and its intended purposes: the CCII, in fact, even after Legislative Decree 136/2024 (the so-called "*Correttivo-ter*"), provides that protection measures operate only in favour of the entrepreneur and not also in favour of third parties who have set themselves up as his guarantors or have provided collateral[7]. However, it is clear that any enforcement of a guarantee or a collateral, even if granted by a third party, may adversely affect the outcome of the recovery of the enterprise. For instance, said enforcement may alter the set-up of the liabilities as a result of the occurrence of preferential claims (e.g., as a result of the enforcement of guarantees provided by the state, which are preferential by law), or may alter the number/list of creditors (e.g., as a result of the subrogation of the guarantor in the rights of the satisfied creditor), or even in the event the assets provided as collateral are necessary for the implementation of the recovery plan[8].

Considering the principle of strict typicality of the protection measures, however, case law has ruled out the applicability of such measures outside the cases expressly provided for by law. To avoid this possible inconsistency, with specific reference to the injunction against the enforcement of third-party guarantors, it has been suggested – to the extent the relevant prerequisites of *fumus boni iuris* and *periculum in mora* are met and concretely proven - to resort to precautionary measures, also provided for by the CCII in relation to the crisis settlement procedure. Since they are atypical, as a matter of fact, they are susceptible to take on any content.

3. Court confirmation

The above-mentioned suggestion has found support in certain recent Court rulings. In particular, in the case ruled by the order dated May 12, 2024, the Court of Milan was called to assess the consequences of the possible enforcement of a guarantee, issued by Medio Credito Centrale ("**MCC**") in favour of a credit institution, on the ongoing negotiations with the class of creditors, consisting almost entirely of unsecured creditors. The Court - noted that the negotiations had been positively concluded with some creditors and that, as a result of the enforcement of said guarantee, the debtor would be forced to consider MCC's "super-privilege" (ranking before the first degree) - inhibited the enforcement of the MCC guarantee by the banking institution, granting the requested precautionary measure. In fact, the judge ruled that the conditions for granting the precautionary measure were met; in a nutshell, the Court has considered the reasonable likelihood of the enterprise's rehabilitation (*fumus boni iuris*) and the danger that, in the absence of the requested measure, the ongoing negotiations might have foundered (*periculum in mora*)[9].

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[7] On the other hand, the so-called Correttivo-ter supplemented the list of protection measures, as noted above, with a ban on the initiation and continuation of enforcement or precautionary actions on assets and rights instrumental to the business activity.

[8] By way of example, reference is made to the enforcement of the shareholder/guarantor who is available to contribute new finance to support the debtor's recovery plan, or the enforcement of the pledge on the debtor's share capital collateralising its indebtedness. An injunction against the enforcement of the pledge was granted by the Court of Venice by order of August 1, 2024, not published.

Even after the Correttivo-ter, the Court of Milan confirmed its position, stating more extensively the related reasons: by the order of December 17, 2024, the Court inhibited the enforcement of two guarantees (including one insurance guarantee) issued by third parties in the interest of the debtor, considering this measure as necessary to allow the entrepreneur to complete the negotiations[10]. In the specific case, the petitioner had sought an injunction against the enforcement of the guarantees, qualifying such request as an "atypical protection measure." The Court, granting the requested injunction, expressly ruled that although "*the asset protection measures granted during negotiations [are] only the typical ones, nevertheless the requested measure may be ascribed to the genus of precautionary measures, insofar as it is requested for the protection of the debtor's assets and it is, in principle, suitable to provisionally ensure the effects of the procedures for the regulation of the crisis or insolvency that will be introduced.*" With reference to the *periculum in mora*, the Court ruled that, in the specific case, it could be found in the circumstance that the possible enforcement of the guarantees would hinder the possibility of an agreement in the context of the CNC, in light of the fact that the necessary inclusion of the enforced guarantors among the creditors participating in the settlement would destabilize "*the linearity and effectiveness of the negotiation [...] thus reducing the debtor's room for transactional manoeuvre.*"

An apparently different conclusion, justified by the peculiarities of the specific case, was reached by the Court of Genoa in a ruling dated February 17, 2025. The judge was requested to inhibit (i) the enforcement, by the debtor's suppliers, of certain bank guarantees granted in their favour, and (ii) the recovery by the enforced third-party guarantors of their recourse credit towards the debtor. The judge granted only the precautionary measure vis-à-vis the enforced third-party guarantors, considered as functional to the debtor's rehabilitation. With reference to the prohibition to enforce the bank guarantees, the Court ruled that such precautionary measure "*does not seem to be directly functional to the recovery [...]. In fact - once the prohibition for the guarantor to act against the principal debtor to recover what has been paid to the creditor has been ordered, as occurred above- the debtor's assets are in any case protected: the only change refers to the holder of the credit, but such a change appears substantially neutral for the principal debtor.*" This decision was motivated by the Genoese judge as, "*In view of the nature of the activities carried out by the subjects of the creditor/guarantor relationship, in fact, it does not seem inappropriate that the burden of the transaction is borne more by the guarantor, rather than by the suppliers.*"

4. Conclusions

In a nutshell, to the extent the typical protection measures provided for by law are not effective, the granting of precautionary measures may be requested to facilitate negotiations within the CNC. Due to their atypicality, they may take on the most appropriate content from time to time, depending on the case-by-case assessment of the specific interest of all the parties involved.

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[9] Injunction against the enforcement of state guarantees issued by MCC/SACE was granted by the Court of Padua, in a decision dated January 13, 2025. Similar injunction, along with the inhibition for MCC/SACE to make payments under said guarantees, was issued by the Court of Venice in the decision mentioned in note 8.

[10] The possibility of seeking an injunction against the enforcement of guarantees given by third parties is, however, a right granted only to the debtor, since there is (under Articles 18 and 19 CCII) no active legitimacy in this sense of the guarantors, who may possibly avail themselves of ordinary precautionary protection. In this sense, the Court of Milan recently expressed itself in an order dated February 8, 2025.

However, it should be recalled that the two types of measures do not perfectly overlap: protection measures, as recalled, are immediately effective from the publication of the relevant application in the Companies Register, although their precarious effect until they are confirmed by the Court. On the other hand, precautionary measures are not effective until they are granted by the Court, therefore only if the ordinary requirements for their granting - *fumus boni iuris* and *periculum in mora* – are concretely met.

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