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Criminal Sanctions and Reward-Based Measures in the Efficient Management of Corporate Crisis

Abstract

The dissertation investigates the relationship between criminal sanctions, reward-based measures and the efficient management of corporate crisis within the framework of the Italian Codice della crisi d'impresa e dell'insolvenza (CCII). The central research question is whether, and to what extent, criminal law can move beyond a purely repressive and ex post function, in order to perform a genuinely promotional and incentive-based role with respect to the early emergence of financial distress and the use of restructuring tools made available by insolvency law. In particular, the thesis asks whether the criminal reward mechanisms introduced or envisaged by the CCII can effectively steer entrepreneurs towards virtuous behaviour and contribute to an efficient allocation of firms in crisis between liquidation and preservation.

The starting point is the well-known paradox of Italian insolvency criminal law. On the one hand, the traditional offences of bankruptcy, codified in 1942, are still largely in force and continue to operate mainly as instruments of ex post sanctioning, once the crisis has already degenerated into insolvency. On the other hand, the CCII – inspired by European trends in favour of early warning, restructuring and going-concern preservation – has begun to graft onto this old penal framework some reward provisions, in particular article 24, paragraph 5, and article 324, which promise reductions or exclusions of punishment for debtors who promptly resort to crisis procedures and cooperate with the authorities. However, empirical experience and doctrinal analysis suggest a surprisingly low rate of recourse to such measures, which seems to contradict the basic assumptions of economic rationality that underlie most theories of deterrence and incentives in criminal law.

In order to address this puzzle, the thesis adopts an explicitly interdisciplinary and mixed methodology. First, it reconstructs the legal and dogmatic framework of insolvency-related criminal law, highlighting the continuity of the penal system from 1942 to the present day and the limits of a model centred on the protection of creditors through repressive instruments that intervene too late to preserve value. The CCII is analysed as an attempt to reorient the system towards a preventive paradigm, in which criminal law should contribute to the timely emergence of the crisis and to the preservation of going-concern value, rather than merely sanctioning past misconduct. Particular

attention is devoted to the principle of meritevolezza as a guiding criterion for the access to rewards, and to the reform proposals drafted by the Bricchetti Commission, which, although still not enacted, outline a more coherent and articulated set of criminal incentives.

Secondly, the research places this dogmatic analysis within the broader framework of the economic analysis of law, both in its classical and behavioural variants. Building on the Chicago-school tradition inaugurated by Becker, criminal law is interpreted as a policy instrument that shapes the opportunity set of potential offenders by adjusting the expected costs and benefits of different courses of action. The standard model of the rational criminal, who compares the expected utility of crime with that of lawful behaviour by considering the probability of detection and the severity of sanctions, is then confronted with its well-known critiques: the tension between efficiency and justice, the role of transaction costs and informational imperfections, and above all the limited rationality of real decision-makers.

On this basis, the thesis develops a specific economic reading of insolvency criminal law and of the CCII reward provisions. The decision of an entrepreneur in financial distress to conceal the crisis, to commit bankruptcy offences or to activate in due time the restructuring tools provided by the CCII is modelled as a choice under risk between alternative states of the world, each associated with different payoffs in terms of personal criminal exposure and residual value for creditors. The concept of efficient allocation – understood as the maximisation of preserved value for the creditor body and for the productive system – becomes the normative benchmark for assessing whether and how criminal incentives can help correct the “common pool problem” and the collective action failures that characterise insolvency scenarios. In this perspective, the thesis draws on the creditors’ bargain theory and on the idea of insolvency law as a mechanism of collective and compulsory coordination among dispersed claimants.

Thirdly, the work proposes an original simulation model inspired by the Allingham–Sandmo framework, traditionally used to analyse tax evasion. The model is adapted to the context of corporate crisis, replacing declared income with relevant firm value, tax evasion with the concealment of distress and fraudulent conduct, and tax penalties with the combined costs of criminal sanctions and value destruction due to late, disorderly liquidations. The reward parameters introduced by article 24, paragraph 5, article 324 CCII and by the Bricchetti Commission proposals are incorporated as reductions in expected sanction costs for entrepreneurs who opt for timely emergence and full cooperation. In formal terms, the expected utility of compliant and non-compliant strategies is calculated as a function of the probability of detection, the severity of sanctions and the magnitude of the reward.

However, the thesis goes beyond the assumption of a fully rational homo oeconomicus and systematically integrates insights from behavioural law and economics. Drawing on Prospect Theory and on the psychological literature on risk perception, loss aversion, overconfidence and status-quo bias, the model distinguishes between different behavioural clusters of entrepreneurs: “rational”, “emotional” and “opportunistic” agents. Each cluster is characterised by specific value and probability weighting functions, which reflect heterogeneous attitudes towards risk and losses. In this way, the simulation can capture systematic deviations from classical rationality, such as the tendency to underestimate low-probability but high-impact events (e.g. criminal conviction), to overweight short-term gains from concealment, or to cling to the status quo in order to avoid acknowledging failure.

The empirical backbone of the simulation is provided by aggregate data on Italian insolvency proceedings and corporate failures, drawn from public sources such as the Cerved Observatory and official statistics. These data, although not referring to individual cases, allow the calibration of key parameters such as the frequency and distribution of crises across sectors and firm sizes, the relative weight of liquidation versus restructuring procedures, and the typical recovery rates associated with early versus late interventions. By anchoring the model to this empirical landscape, the thesis avoids the pitfalls of purely abstract formalisation and ensures that its normative conclusions remain sensitive to the structural features of the Italian productive system, marked by the predominance of small and medium-sized enterprises and by a persistent reluctance to resort to formal crisis procedures.

The results of the simulated model point to several significant findings. From a strictly rational perspective, in which entrepreneurs correctly perceive probabilities and evaluate gains and losses in a linear way, the existing reward mechanisms of the CCII – especially if complemented by the measures envisaged in the Bricchetti proposals – are capable of altering the cost–benefit calculus in favour of timely emergence and cooperative behaviour. In other words, under the assumptions of the traditional economic analysis of criminal law, a sufficiently generous and credible reward scheme should make adherence to legal procedures the dominant strategy for a wide range of agents, thereby reducing opportunistic conduct and enhancing allocative efficiency.

Once behavioural factors are introduced, however, the picture becomes more nuanced and, in some respects, more problematic. The simulations show that for “emotional” and “opportunistic” clusters, characterised by strong loss aversion with respect to status and control, by overconfidence in their own ability to “manage” the crisis informally and by a tendency to discount distant risks, the attractiveness of reward options is significantly dampened. Even when the expected value of

cooperation is higher in purely monetary terms, psychological barriers and distorted risk perceptions can lead a substantial share of entrepreneurs to persist in concealment and to postpone the activation of formal procedures beyond the socially optimal threshold. This helps to explain the empirical anomaly of the under-utilisation of criminal rewards in Italy, despite their apparent rational convenience.

From a policy perspective, these findings support several normative recommendations. First, the effectiveness of reward-based criminal measures in the field of corporate crisis cannot be assessed solely in terms of formal legal design or nominal generosity of benefits. It crucially depends on the credibility of enforcement, on the clarity and stability of eligibility criteria and on the way in which information about risks and rewards is communicated to potential beneficiaries. Second, the design of such measures should take into account the heterogeneous behavioural profiles of entrepreneurs, possibly differentiating the structure of incentives and the accompanying informational and advisory tools according to firm size, sector and exposure to cognitive biases.

Third, the thesis argues that criminal rewards should be integrated within a broader architecture of insolvency governance, which combines early-warning mechanisms, out-of-court restructuring instruments and corporate governance reforms. Only in such an integrated setting can criminal law play a genuinely supportive role in the efficient allocation of distressed firms, rather than operating as an isolated and often symbolic threat hovering over entrepreneurs already overwhelmed by crisis dynamics. In this sense, the work endorses the idea of a “second-generation” economic criminal law, capable of reconciling the constitutional principles of legality and proportionality with the functional demands of market economies and with the behavioural complexity of real agents.

In conclusion, the dissertation offers a threefold contribution. On the dogmatic level, it reinterprets Italian insolvency criminal law in the light of the preventive and allocative paradigm introduced by the CCII and by the Bricchetti Commission, highlighting the centrality of meritevolezza as a selection criterion for rewards. On the methodological level, it proposes an original integration between economic analysis of law and behavioural insights, operationalised through a simulation model specifically tailored to the context of corporate crisis. On the policy level, it formulates concrete suggestions for improving the design and implementation of criminal reward schemes in order to enhance their real capacity to promote early emergence of distress and to maximise the preservation of value for creditors and for the economic system as a whole.