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Introduction

The principal restructuring and insolvency regimes for companies under Italian law are:

- bankruptcy (*fallimento*);
- composition agreement with creditors (*concordato preventivo*);
- compulsory administrative winding-up (*liquidazione coatta amministrativa*);
- extraordinary administration (*amministrazione straordinaria*);
- post-bankruptcy restructuring plan with creditors (*concordato fallimentare*);
- debt restructuring agreement (*accordo di ristrutturazione dei debiti*);
- out-of-court reorganization plan (*piano attestato di risanamento*);
- negotiated composition proceeding (*composizione negoziata della crisi*); and
- composition of the over-indebtedness crisis (*sovraindebitamento*).

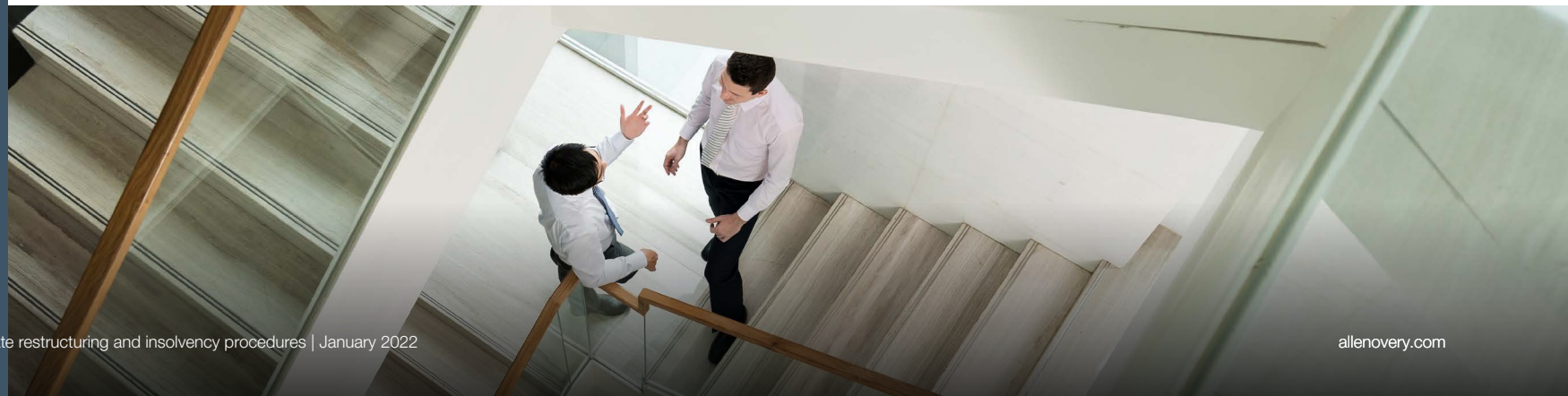
It should be noted that the Italian Bankruptcy Law (as defined below) will be replaced, in a thorough systematic reform, by an "Italian crisis and insolvency code" effective as of 16 May 2022 (the **Italian Crisis and Insolvency Code**).

The main features of the reform include: (i) the introduction of a notion of group insolvency, which is not currently provided for under Italian insolvency law; (ii) an "early warning" system aimed at anticipating and preventing the occurrence of insolvency situations; (iii) several amendments to the rules governing composition agreements with creditors, debt restructuring agreements and the bankruptcy proceedings (that shall be re-named as judicial liquidation in compliance with European legislation); and, in general (iv) the introduction of a coherent and uniform framework and regulation of the insolvency phenomenon.

The Italian Crisis and Insolvency Code was approved by the Italian Parliament at the beginning of 2019 and has been subsequently amended by the Legislative Decree No. 147 dated 26 October 2020 (the so-called **Corrective Decree**) which aims at clarifying and coordinating the content of certain controversial provisions. The entry into force of the Italian Crisis and Insolvency Code has been postponed multiple times and it is currently scheduled for 16 May 2022 (except for the "early warning" system, which will come into force on 31 December 2023).

While the entry into force of the reform has been postponed, certain innovations provided therein have been extrapolated and enacted by the Law Decree No. 118 dated 24 August 2021 (the **Law Decree 118/2021**), as converted by Law No. 147 dated 21 October 2021, and are therefore already in force. The Law Decree 118/2021 also introduced the negotiated composition proceeding (*composizione negoziata della crisi*), a brand-new proceeding aimed at facing the very first stage of a crisis, and a new kind of composition agreement with creditors (*concordato preventivo*) for the pursuit of a liquidation strategy (*concordato semplificato per la liquidazione del patrimonio*), which constitutes one of the possible outcomes of the *composizione negoziata della crisi*.

Below you will find a short description of the restructuring and insolvency regimes for companies under the Italian Bankruptcy Law, together with a brief overview of the main amendments/features/innovations that have been introduced by the Law Decree 118/2021 and that will be introduced by the Italian Crisis and Insolvency Code effective as of 16 May 2022 (in addition to a brief description of the "early warning procedure", which will enter into force on 31 December 2023).



Bankruptcy (Fallimento)

Bankruptcy proceedings are governed by Royal Decree No. 267 of March 16, 1942, as amended (the **Italian Bankruptcy Law**). The fundamental goal of bankruptcy in Italy is to liquidate an insolvent debtor. Bankruptcy proceedings involve the appointment of a bankruptcy trustee (*curatore*), who will collect, sell and distribute the proceeds deriving from the disposal of the bankrupt estate to the creditors in accordance with the order of priority as provided for by law.

The effect of bankruptcy is that, from the date on which the debtor is declared bankrupt:

– the debtor loses control over its assets;

– the bankruptcy trustee, appointed by the bankruptcy court, will assume the management of and the responsibility over the bankrupt estate and, protect the interests of creditors;

– all of the bankrupt's debts become due and payable;

– interest continues to accrue on secured debts (with certain legal limitations), but it ceases to accrue on unsecured debts until the bankruptcy case is closed;

– all creditors must be treated equally, unless a legal privilege exists that allows them to be paid in priority (*cause legittime di prelazione*); and

– there is a general ban on enforcement measures by creditors.

Following the bankruptcy order, the bankruptcy court assumes jurisdiction over a bankruptcy case or a particular proceeding relating to the bankruptcy. The bankruptcy judgment records the appointment of the designated judge (*giudice delegato*) and the bankruptcy trustee (*curatore*).

The designated judge will appoint a creditors' committee, consisting of three or five creditors. The members of the creditors' committee are normally the debtor's major creditors. The creditors' committee approves the liquidation plan and has, in some cases, the power to authorize the receiver to perform certain acts and/or transactions, while the designated judge authorises the bankruptcy trustee to carry out acts in accordance with such plan.

The Italian Crisis and Insolvency Code will introduce some amendments that will simplify the bankruptcy procedure, speed up the liquidation process (by speeding up the drafting of the statement of liabilities (*stato passivo*)), and strengthen the role of the bankruptcy trustee. Moreover, with effect from the entry into force of the Italian Crisis and Insolvency Code, bankruptcy proceedings (*fallimento*) will be renamed judicial liquidation proceedings (*liquidazione giudiziale*).

Composition agreement with creditors (Concordato preventivo)

A composition agreement with creditors (*concordato preventivo*) involves an arrangement between a debtor in financial difficulties (*stato di crisi*) and its creditors, subject to court supervision. The aim is to restructure the business and/or the indebtedness and thus avoid a declaration of bankruptcy.

There is no legal definition of "*stato di crisi*", but the term is interpreted broadly to accommodate reversible and irreversible insolvency. However, a state of insolvency (where the debtor is unable to regularly satisfy its obligations) is specified as falling within the term "*stato di crisi*".

The *concordato preventivo* plan may provide for, inter alia: (i) the restructuring of debts and the satisfaction of creditors' claims, in any manner (including, for instance, extraordinary transactions such as the granting to creditors of shares, bonds (also convertibles), or other financial instruments and debt securities); (ii) the transfer to a receiver (*assuntore*) of the operations of the business involved in the plan; (iii) the partial payment of the secured creditors (subject to the condition that said partial payment is not lower than the amount that could be recovered through the quick sale of the secured asset in a bankruptcy scenario, (such amount to be determined on the basis of the value estimated by an independent expert); and (iv) the placing of creditors into different classes and different treatments for creditors belonging to different classes.

The application to a court for a composition agreement with creditors (*concordato preventivo*) must be accompanied, among others, by a report drafted by an eligible professional (*attestatore*) that certifies the truthfulness of the data on which the plan is grounded and its feasibility.

A company may also file (mainly in order to have the necessary time, essentially free from any enforcement proceeding or challenge by its pre-existing creditors, to arrange the proposal and all the required legal documentation) a "simplified request" for admission to the *concordato preventivo* pursuant to article 161, para. 6, of the Italian Bankruptcy Law, provided that the debtor shall file the proposal, the plan and the other necessary documents within the time-frame established by the judge. The time-frame is from 60 up to 120 days (extendible for a maximum of a further

Composition agreement with creditors (Concordato preventivo) (cont.)

60 days), generally calculated from the date of the publication of the simplified request. However, in the event that a procedure of bankruptcy declaration is pending, the judge can only establish a 60 day maximum term (extendable for a maximum of a further 60 days). As an alternative, and within the aforementioned time-frame, the debtor is also entitled to file a request for approval of a debt restructuring agreement (please refer to the "Debt restructuring agreement" section below).

The effect of entering into both a composition agreement with creditors (*concordato preventivo*) proceedings and a "simplified request" is the implementation of a "temporary stay", during which the creditors are prevented from recovering their credits or foreclosing on the debtor's assets. The stay takes effect on the date on which the petition for the composition agreement or the "simplified request" is published with the relevant Companies Register, and continues until the date of final sanctioning (*decreto di omologazione*) of the composition agreement by the court. In addition, during this time, pre-existing creditors cannot obtain security interests (unless authorised by the court) and judicial mortgages registered within 90 days preceding the date on which the petition for the composition agreement with creditors or the "simplified request" was published in the Italian companies' register are ineffective against such pre-existing creditors.

While the composition agreement is being implemented, the debtor's management continues to manage the company, supervised by one or more court-appointed officeholder(s) (*commissario giudiziale*) and under the control of a designated judge (*giudice delegato*). Certain acts and transactions, which are outside the debtor's ordinary course of business (extraordinary activities), must be authorised by the designated judge.

A distinction can be made between (i) *concordato preventivo* "with the continuation of business" (*concordato con continuità aziendale*) (under article 186-*bis* of the Italian Bankruptcy Law) and (ii) *concordato preventivo* "with liquidation purposes" (*concordato liquidatorio*). As highlighted further below, the distinction is relevant especially in terms of the minimum satisfaction to be offered to creditors (e.g. at least 20% of the debt vis-à-vis unsecured creditors needs to be satisfied in a *concordato preventivo* "with liquidation purposes"). However, in the Italian Bankruptcy Law there remain uncertainties as to whether the *concordato preventivo* can be classified one way or another.

The rules governing the *concordato preventivo* "with the continuation of business" will apply, broadly speaking, when the plan provides for the continuation of the debtor's business, the businesses' sale to a third party or the businesses' merger with another company (including a newco).

In such a case, and considering that the plan may also provide for the liquidation of certain assets that are not instrumental to the continuation of the business as a going concern, the following conditions must be satisfied: (i) the documents to be attached to the request for admission to the composition with creditors proceedings should contain a detailed forecast of the costs and proceeds arising from the continuation of the business activity provided for by the plan, together with a specific indication of the financial resources and of their respective coverage; and (ii) the *attestatore* (ie, the eligible professional that certifies the truthfulness of the data on which the plan is grounded and its feasibility) shall certify, in his certification (*asseverazione*), that the continuation of the business activity is instrumental in providing the best resolution for the creditors *(il miglior soddisfacimento dei creditori*).

Pursuant to article 182-*quinques*, para. 5, of the Italian Bankruptcy Law, the debtor, in the context of a *concordato preventivo* "with the continuation of business", may obtain the authorisation to pay pre-existing and already-payable debts deriving from the supply of services or goods, provided that the expert declares that such payments are essential for the company to continue to operate and are made in the best interests of the company's creditors as a whole. In this respect, the Law Decree 118/2021 introduces a provision stating that the court may authorize the payment of pre-existing debts for wages due to employees working in the business for so long as it continues to trade as a going concern.

Composition agreement with creditors (Concordato preventivo) (cont.)

As for the *concordato preventivo* "with liquidation purposes", it should be noted that the debtor's proposal must envisage the repayment of at least 20 per cent of the unsecured claims. After the final sanctioning (*decreto di omologazione*) of the composition agreement by the court, a judicial liquidator (*liquidatore giudiziale*) and a creditors' committee will be appointed by the court.

In the recent past, two different tools have been introduced by the Italian legislature to facilitate competition among investors that are interested in buying a debtor's assets, or the debtor's business as a going concern. Such legal tools are known as the competing offers (*offerte concorrenti*) and the competing proposals (*proposte concorrenti*).

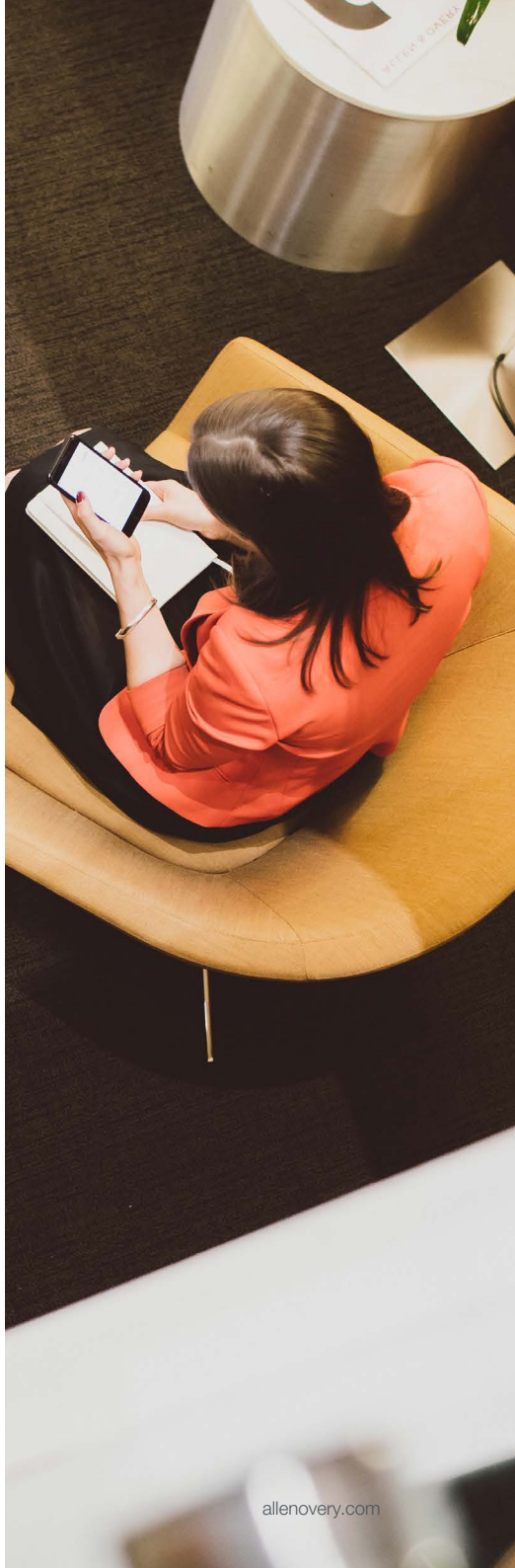
As for the competing offers, where the workout plan is based on an offer by an identified third party, and such offer contemplates the transfer of the business (or one or more business units or assets of the company), the court shall open a competitive tender process, pursuant to article 163-bis of the Italian Bankruptcy Law. Such provisions also apply in the event that the debtor has entered into: (i) a lease agreement having as its object the debtor's business; or (ii) a purchase agreement which provides for a non-immediate transfer of the business (or one or more business units or assets of the company).

As for the competing proposals, one or more creditors, representing at least 10% of the claims by value, may file a proposal competing with the debtor's proposal, in the event that the debtor's proposal (as certified by an independent expert's report) does not envisage the repayment of at least: (a) 40% of the unsecured claims in a *concordato preventivo* with liquidation purposes; or (b) 30% of the unsecured claims in a *concordato preventivo* "with the continuation of the business".

Other noteworthy features of composition proceedings are:

(a) as a matter of principle, all third-party claims which may arise from acts legally performed by the debtor during the proceedings and from new financial resources granted to the insolvent company (if duly authorised and compliant to certain legal requirements pursuant to article 182-*quinquies* of the Italian Bankruptcy Law) will be deemed super-senior (*crediti prededucibili*) and will be priority claims in the event of a subsequent bankruptcy of the debtor;

(b) following the filing of an application for a composition agreement with creditors (concordato preventivo) or of the "simplified request" certain corporate law provisions relating to: (i) the reduction of share capital under the minimum threshold required by law as a result of losses; and (ii) the mandatory winding-up of the company in the case of a reduction of share capital under the minimum threshold required by law, do not apply; and



Composition agreement with creditors (Concordato preventivo) (cont.)

(c) a composition agreement with creditors may also contain a proposed tax settlement for the partial or deferred payment of certain overdue taxes, as provided in article 182 ter of the Italian Bankruptcy Law.

The main amendments/features/innovations introduced by the Italian Crisis and Insolvency Code (as amended by the Corrective Decree) are as follows:

– introduction of a definition of "crisis", which indicates the state of economic and financial distress that makes the debtor's insolvency probable, and which for businesses manifests itself as inadequate prospective cash flows to meet planned obligations on a regular basis;

– reduction by half of the initial terms currently set by the Italian Bankruptcy Law in relation to the "simplified request": 30 to 60 days, extendible for a maximum of a further 60 days if no bankruptcy petition is filed;

– introduction of a "stay on demand": the stay from enforcement actions is no longer automatic, but needs to be requested by the debtor;

– introduction of criteria to be used to distinguish between the *concordato preventivo* "with going concern" and "with liquidation purposes", with the purpose of providing legal certainty (the distinction is relevant especially in terms of the minimum satisfaction to be offered to creditors (ie 20%), since such threshold is not applicable to the *concordato preventivo* "with going concern");

– flexibility and introduction of rules supporting the *concordato preventivo* "with going concern";

– in order to qualify the proceeding as a *concordato preventivo* "with going concern" creditors have to be satisfied mainly with the proceeds deriving from the going concern and a certain number of employees have to be maintained;

– the court will admit a *concordato preventivo* "with liquidation purposes" only to the extent it provides for external financings increasing the satisfaction of unsecured creditors by at least 10% compared to the judicial liquidation (without prejudice to the minimum threshold of 20%);

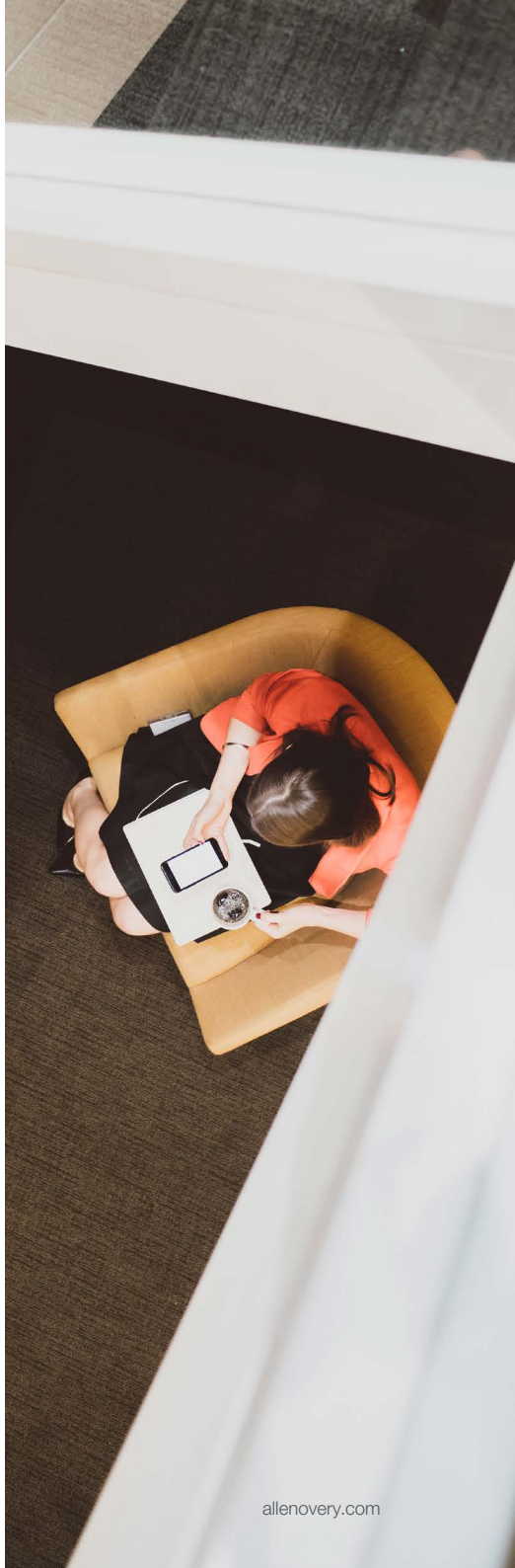
– the possibility, under some circumstances, to continue to pay claims secured by mortgage (*credito fondiario*);

– reduction of the threshold by which competing proposals are inadmissible (ie 30% or, in some cases, 20%);

– revision of the majority calculation for the approval of the *concordato preventivo*: in some cases, a majority has to be reached not only by value, but also by number of creditors;

– revision of the voting mechanism for a composition agreement in order to avoid any conflict of interest; and

– introduction of a *concordato preventivo* for corporate groups, whereby companies in a state of crisis belonging to the same group and each having the centre of main interest in Italy may submit a single consolidated certified plan or several separated, but interconnected certified plans underlying the composition agreement with creditors.



Compulsory administrative winding-up (Liquidazione coatta amministrativa)

A compulsory administrative winding-up (*liquidazione coatta amministrativa*) is the alternative to bankruptcy and is reserved for cooperative companies (if certain legal requirements are met) and for companies which are involved in state controlled businesses or industries with a strong public interest, such as insurance companies, credit institutions or state-owned companies. It is irrelevant whether these companies belong to the public or the private sector. The winding-up is ordered by the relevant administrative authority that oversees the industry in which the debtor is active. Unlike bankruptcy proceedings, the primary purpose of this proceeding is to withdraw the debtor from the market in which it is active. The sale and distribution of the debtor's assets to satisfy creditors' claims comes secondary to this purpose.

The result of this procedure is that the debtor loses control over its assets.

The effect of the compulsory administrative winding-up on creditors is largely the same as under bankruptcy proceedings and includes, for example, a ban on enforcement measures.

In the event that the compulsory administrative winding-up proceedings involve banks or other financial institutions, special legislation (Legislative Decree No. 58 dated 1 February 1998 – Consolidated Financial Act and Legislative Decree No. 385 dated 1 September 1993 – Consolidated Banking Act) will be applied.

The Italian Crisis and Insolvency Code does not significantly amend the rules provided for in the Italian Bankruptcy Law.

Extraordinary administration (Amministrazione straordinaria)

Italian law provides for special bankruptcy proceedings applying only to large corporations (*amministrazione straordinaria*): (A) Legislative Decree No. 270 dated 8 July 1999 (*Amministrazione Straordinaria delle grandi imprese in stato di insolvenza*, so-called *Prodi Bis*) provides for a special insolvency proceeding for insolvent companies meeting the following requirements: (i) number of employees equalling at least 200 in the year prior to the commencement of the procedure; and (ii) debt equal to at least (x) two-thirds of the entity's total assets; and (y) two-thirds of the entity's total income generated by sales and services from the last fiscal year (the **Extraordinary Administration**); (B) Law Decree No. 347 dated 23 December 2003, as converted into Law No. 39 dated 18 February 2004 (*Misure urgenti per la ristrutturazione industriale di grandi imprese in stato di insolvenza, so-called Legge Marzano*) provides for a special insolvency proceeding for insolvent companies having more than 500 employees in the year prior to the commencement of the procedure as well as debt (including those from outstanding guarantees) equalling at least €300 million (the **Special Extraordinary Administration**). These proceedings are not only court-supervised but also government-supervised.

As for the Prodi-*bis*, the procedure consists of two phases.

The "judiciary phase" commences with the court assessing the debtor's inability to pay its debts. With the declaration of insolvency, the court will take such action as it considers appropriate in the context of the debtor's financial distress. It will appoint:

– a designated judge (*giudice delegato*), responsible for all further judicial control over the procedure; and

– one or three court commissioner(s) (*commissario giudiziale*), each acting as a public official and possibly nominated by the Ministry of Industrial Affairs (*Ministro delle Attività Produttive*).

The Ministry, which oversees the debtor's activities, must always be informed of the commencement of the procedure.

Extraordinary administration (Amministrazione straordinaria) (cont.)

If the debtor shows that there is a substantive prospect of financial recovery, the company enters the "administrative phase". Such recovery may be realised through the following two alternative proceedings:

– the transfer of the business as a going concern under a disposal plan (which must not exceed one year) (*amministrazione straordinaria con programma di cessione dei complessi aziendali*); or

– an economic and financial restructuring under a rescue plan (which must not exceed two years) where the specific assets of the company are sold (*amministrazione straordinaria con programma di ristrutturazione*).

The procedure ends if the debtor has successfully complied with the recovery plan. If this cannot be completed, the company will be declared bankrupt.

The *Legge Marzano* (which introduced the Special Extraordinary Administration) was adopted by the Italian government as a direct response to the high profile insolvency of the Italian multinational Parmalat S.p.A. The Special Extraordinary Administration procedure was amended as a reaction to the financial problems that faced Alitalia Linee aeree italiane S.p.A. (**Alitalia**), Alitalia Servizi S.p.A. and their subsidiaries in 2008. These amendments provide specific rules for major companies that provide essential public services and the main objective is to guarantee the continued supply of these services if such a major company goes into administration.

A key feature of the Special Extraordinary Administration procedure is that large insolvent companies are promptly admitted to an economic and financial restructuring plan (the **Rescue Programme**), following an administrative order. This measure seeks to avoid any interruption to the business of large insolvent companies, which would be harmful to the company and its creditors. As an alternative to the Rescue Programme it is possible to initiate a disposal programme for the sale of the company's assets (the **Disposal Programme**).

The order of the two phases of the Extraordin ary Administration is reversed in a Special Extraordinary Administration.

The "administrative phase" starts when the insolvent company applies for an order to be admitted to the Special Extraordinary Administration procedure from the Ministry of Industrial Affairs. The Ministry, after having considered the company's inability to pay its debts, will appoint an extraordinary commissioner (*commissario straordinario*) who will have certain powers and carry out certain tasks, including the preparation of a Rescue Programme or Disposal Programme. If the Ministry does not approve the Rescue or Disposal Programme, the bankruptcy court will order the conversion from Extraordinary Administration to bankruptcy.

The "judiciary phase" starts when the competent court is notified of the company's application and the Ministry's order together with the petition for the declaration of insolvency. The court will: (i) verify the company's inability to pay its debts on the basis of the commissioner's report, issuing a declaration of insolvency; and (ii) take such action as it considers appropriate in the context of the debtor's financial distress.

Major companies which provide essential public services will be placed into the Special Extraordinary Administration procedure by order of the Prime Minister or the Minister of economic development (Ministro dello svilupp economico). The Prime Minister or Ministry of economic development will appoint an extraordinary commissioner. The extraordinary commissioner can sell the company's assets without consulting with the company's creditors.

Major companies which provide essential public services that are placed into the special extraordinary administration procedure do not need authorisation under Italian competition law for any transaction provided for in the Rescue or Disposal Programme that leads to a concentration of the type of service provided for by that company. However, the Italian Antitrust Authority must make sure that the relevant transaction complies with European Community competition law.

Post-bankruptcy restructuring plan with creditors (Concordato fallimentare)

A bankruptcy proceeding can be terminated prior to the liquidation of the bankruptcy estate's assets, by way of a post-bankruptcy restructuring plan with creditors (*concordato fallimentare*). The proposal – which may be filed by creditors or third parties and, under certain circumstances, by the bankrupt entity – may provide for:

- the division of the creditors into different classes, in accordance with their similar legal position and economic interests;
- treating classes of creditors differently, substantiating the reasons for such separate treatment with evidence;
- the restructuring of the debt and the satisfaction of the creditors by specific technical or legal means, including the assumption of the debt, merger or any other corporate transaction;
- the partial payment of the secured creditors (subject to the condition that said partial payment is not to be lower than the amount that could be recovered through the sale of the secured asset, on the basis of the value estimated by an independent expert); and
- the transfer to a third party of the assets of the debtor and of actions (including the claw-back and indemnity actions, under certain circumstances) filed by the receiver in the interest of the procedure.

The proposal is deemed approved if it receives the favourable vote of the creditors which represent the majority in value of the claims admitted to vote. In this regard it has to be noted that, exceptionally, the laws provide that should the creditors not express their dissent on the proposal within the term set forth by the deputy judge, they are considered as being favourable to such proposal. If there are different classes of creditors, approval of the proposal requires also the favourable vote of creditors representing the majority in value of debts admitted to each class and the approval by the majority in number of classes. In this regard, it should be noted that transferees or assignees (other than banks or financial intermediaries) which have purchased claims against the bankrupt entity after the declaration of bankruptcy will not be entitled to vote.

The bankruptcy restructuring plan is effective with respect to all creditors, which were creditors for title, fact, reason or cause prior to the opening of the bankruptcy procedure, including those who have not filed a request of participation in the procedure.

The main amendments/features/innovations introduced by the Italian Crisis and Insolvency Code are as follows:

- the debtor can propose a *concordato fallimentare* only if the external financings increase the value of the assets (to be liquidated by the receiver in the interest of creditors) by at least 10%; and
- revision of the voting mechanism in order to avoid any conflict of interest.

Debt restructuring agreement (Accordo di ristrutturazione dei debiti)

A debt restructuring agreement (*accordo di ristrutturazione dei debiti*) is defined as an agreement, between a debtor in financial difficulties (*stato di crisi*) and its creditors representing at least 60% in value of the outstanding claims, for the reduction or reorganisation of the debtor's debts. This agreement must be sanctioned (*omologazione*) by the court. It is an alternative to a composition agreement, debt enforcement actions and ultimately bankruptcy. The purpose of a debt restructuring agreement is to satisfy the claims of creditors that adhere to the debt restructuring agreement in the agreed proportions and, to satisfy (save for certain exceptions, see below) 100% of the claims of non-adhering creditors.

The debt restructuring agreement must be accompanied by a report from an expert (such expert to be registered with the accounting auditors' register and, eligible to be appointed as bankruptcy trustee) on the feasibility of the debt restructuring agreement and, in particular, on the debtor's ability to pay creditors that do not adhere to the debt restructuring agreement. The report must comply with specific requirements set out in the Italian Bankruptcy Law.

The debt restructuring agreement must be filed with and published in the Companies' Register. No enforcement and/or seizure procedures available to creditors are permitted to be brought against the debtor or pre-emption rights exercised in the 60 days following publication of the debt restructuring agreement.

Within 30 days of the publication, creditors may file an objection (*opposizione*) to the debt restructuring agreement. The outcome for any objection will be decided by the court. The court must confirm the agreement with a sanctioning decree (*decreto di omologazione*).

A debt restructuring agreement: (i) may provide for a stay on payments to creditors who are not participating in the debt restructuring agreement (for debts which are due and payable before the date of the court ratification, the period of stay is 120 days from the date of the court ratification and for debts that become due and payable after the date of the court ratification, the period of the stay is 120 days from the date when the debt becomes due and payable); and (ii) may contain a proposed tax settlement for the partial or deferred payment of certain overdue taxes as provided for by article 182-*ter* of the Italian Bankruptcy Law.

Pursuant to article 182 bis, para. 4, of the Italian Bankruptcy Law, as amended by the Law Decree 118/2021, the court can sanction the debt restructuring agreement even if the Italian Tax Authority and/or the Italian Social Security Authority do not adhere to such debt restructuring agreement (ie, the court can cram-down

Debt restructuring agreement (Accordo di ristrutturazione dei debiti) (cont.)

the Italian Tax Authority and/or the Italian Social Security Authority). Such cram-down is allowed only if (i) because of the value of their claims, the adherence of the Italian Tax Authority and/or the Italian Social Security Authority would have been essential in order to reach the percentage of 60% required by the law, and (ii) the debt restructuring agreement provides for a satisfaction of the claims of the Italian Tax Authority and Italian Social Security Authority greater than what it would be in bankruptcy. The adherence of the Italian Tax Authority and of the Italian Social Security Authority must occur within 90 days from the filing of the recovery proposal pursuant to the debt restructuring agreement.

Italian Bankruptcy Law also provides that, should these debt restructuring agreements fail and the debtor be declared bankrupt, payments and/or acts carried out for, and/or security interest granted for, the implementation of the debt restructuring agreement, subject to certain conditions: (i) are not subject to claw-back actions; and (ii) are exempted from the application of certain criminal sanctions.

Pursuant to article 182-*bis*, para. 6 and 7, of the Italian Bankruptcy Law, a debtor intending to request the sanctioning (*omologazione*) of a debt restructuring agreement may submit a request to obtain a "stay" on creditors' action during the negotiation process and therefore, prior to the publication in the Companies' Register of the debt restructuring agreement. The application for such a "stay" must be published in the Companies' Register and, as from the date of the application's publication, it provides for a temporary stay on the commencement or continuation of any enforcement or precautionary actions, as well as any action to obtain pre-emption rights (*diritti di prelazione*), if not agreed, against the debtor. Following the verification of the completeness of the documentation filed by the debtor, the competent court shall, within 30 days from the date of the application, set a hearing date. If, during the hearing, it finds the existence of the conditions necessary to reach a debt restructuring agreement (with the approval of the majorities set out above) and to procure the full payment of those creditors with whom no negotiations are pending or which have denied their availability to engage in negotiations, the court will issue an order preventing the commencement or continuation of any enforcement or precautionary action, as well as any action to obtain pre-emption rights (*diritti di prelazione*), if not agreed, against the debtor. The court will set a term (no longer than 60 days) to file the debt restructuring agreement and the expert report under the terms set out above. Such order may be opposed under certain terms.

The Law Decree 118/2021 has anticipated certain provisions set forth under the Italian Crisis and Insolvency Code. In particular, the new article 182-*bis*, para. 8, of the Italian Bankruptcy Law sets the rule for substantial amendments to the plan. In this case:

- if substantial amendments are made prior to the court's sanctioning (*omologazione*), (i) the independent expert carries out a new assessment on the truthfulness of the business and accounting data, the feasibility of the debt restructuring agreement and its attitude to allow payment of the non-adhering creditors, and (ii) the debtor requests the adhering creditors to confirm their adherence to the debt restructuring agreement even in light of the substantial amendments. The independent expert carries out a new assessment also in case of substantial amendments to the debt restructuring agreement;
- if substantial amendments to the plan become necessary after the court's sanctioning (*omologazione*), the debtor amends the plan in order to ensure the performance of the obligations provided under the debt restructuring agreement, and requests the independent expert to carry out a new assessment. In this case, the new plan and the new assessment of the independent expert are published in the Companies' Register and notice of such publication is given to the creditors by means of certified letter (*lettera raccomandata*) or certified email. Any creditor may oppose the new plan within 30 days from the notice of the publication.

Pursuant to article 182-*quater* of the Italian Bankruptcy Law, financings granted to a debtor "in execution of" (*in esecuzione di*) a debt restructuring agreement (as well as of a *concordato preventivo*) benefit from a preferred status (*prededuzione*) and, as a consequence, they rank super-senior in the event of a subsequent *concordato preventivo* proceeding or bankruptcy of the debtor. The same provisions apply to financings granted by shareholders (up to 80% of their amount).

Debt restructuring agreement (Accordo di ristrutturazione dei debiti) (cont.)

Moreover, pursuant to article 182-*quinquies*, para. 1, of the Italian Bankruptcy Law, the court may authorise the debtor to obtain interim preferred (*prededucibili*) credit facilities (i) pending the sanctioning (*omologazione*) of a debt restructuring agreement pursuant to article 182-*bis*, (ii) pending the sanctioning (*omologazione*) of a *concordato preventivo* proposal, (iii) during the automatic stay following the filing pursuant to article 182-*bis*, para. 6, or (iv) during the automatic stay following the filing of a "simplified request" pursuant to article 161, para. 6, of Italian Bankruptcy Law. In any of such cases, it is necessary that the expert – appointed by the debtor - verifies the company's financial needs up until the court's sanctioning (*omologazione*) and certifies that the requested facilities are aimed at the best resolution for the creditors (*la migliore soddisfazione dei creditori*).

Pursuant to article 182-*quinquies*, para. 3, of Italian Bankruptcy Law, the debtor may also obtain urgent interim preferred credit facilities in order to fund its current business activity for the period set by the court to file the full petition for sanctioning of a debt restructuring agreement or a *concordato preventivo* proposal. The court may authorise such interim financings in the absence of the professional report. To mitigate the risks connected with the absence of the professional report, the court must accept summary statements regarding the plan and the financing proposal based on evidence presented by the court commissioner (*commissario giudiziale*), if appointed, and the creditors having the main claims by value. These provisions also apply in circumstances where the debtor's request relates to the maintenance of an existing revolving credit line.

The Law Decree 118/2021 significantly amended article 182-*septies* of the Italian Bankruptcy Law and introduced into the Italian Bankruptcy Law the new article 182-*octies*, article 182-*novies* and article 182-*decies*, thus anticipating some of the provisions of the Italian Crisis and Insolvency Code.

Pursuant to new article 182-*septies* of the Italian Bankruptcy Law, debtors are entitled to enter into a debt restructuring agreement by obtaining approval of creditors representing at least 75% in value of the claims belonging to the same category (with respect to the homogeneity of their legal status and economic interests), and can request the court to declare that the debt restructuring agreement is binding on non-adhering creditors of the same category (the so-called "cram-down"), provided that certain conditions are met, including that non-adhering creditors are not treated worse than how they would be treated in the context of liquidation. In addition:

– the debt restructuring agreement must be of a non-liquidating nature;

– the debt restructuring agreement must contemplate the direct or indirect continuation of the business activity as a going concern; and

– all the creditors belonging to the relevant category must be duly notified of the beginning of the negotiations, shall be kept informed and must be notified the debt restructuring agreement and the sanctioning decree (*decreto di omologa*).

Debt restructuring agreement (Accordo di ristrutturazione dei debiti) (cont.)

If these conditions are met, the remaining 25% of non-adhering creditors belonging to the same category of creditors may be crammed down. However, non-adhering crammed-down creditors can challenge the debt restructuring agreement and refuse to be forced into it.

The percentage of adhering creditors that allows the court to declare the debt restructuring agreement binding on non-adhering creditors belonging to the same category is lowered from 75% to 60% if the conclusion of the debt restructuring agreement results from the Final Report issued by the Expert at the end of the negotiations pertaining to the *composizione negoziata della crisi* (please refer to the "*Composizione negoziata della crisi*" section below).

A special provision is set forth for debtors whose financial indebtedness is at least 50% of their total indebtedness: in this situation the debt restructuring agreement may identify one or more categories of creditors which are banks and financial intermediaries and have a homogeneous legal position and economic interests and extend the effects of the debt restructuring agreement to non-adhering creditors who are part of the same category. In such instance, the debt restructuring agreement is valid even if it does not contemplate the direct or indirect continuation of the business as a going concern.

Pursuant to the new article 182-*octies* of the Italian Bankruptcy Law, a standstill agreement (*convenzione di moratoria*) entered into by creditors representing at least 75% in value of the same category could also bind non-adhering creditors, provided that:

– an independent expert (meeting the requirements provided under article 67, para. 3(d) of the Italian Bankruptcy Law) certifies (i) the truthfulness of the business data, (ii) the attitude of the standstill agreement to temporarily regulate the effects of the crisis and (iii) the fact that the non-adhering creditors suffered a prejudice that is proportionate and consistent with the recovery strategies undertaken by the debtor; and

– certain further conditions are met (eg, all the creditors belonging to the relevant category have been duly notified of the beginning of the negotiations and have been kept informed).

Non-adhering crammed-down creditors can challenge the standstill agreement within 30 days after having been notified of the same.

The debt restructuring agreement provided under article 182-*septies* of the Italian Bankruptcy Law and the standstill agreement provided under article 182-*octies* of the Italian Bankruptcy Law must not impose new obligations, the granting of new overdraft facilities, the maintenance of the possibility to utilize existing facilities or the utilization of new facilities on non-adhering creditors.

Pursuant to the new article 182-*novies* of the Italian Bankruptcy Law, the percentage of 60% provided under article 182-*bis*, para. 1, of the Italian Bankruptcy Law is reduced to the 30% if the debtor (a) waives the 120-day term for the satisfaction of its creditors (provided for under article 182-*bis*, para. 1, letters (a) and (b) of the Italian Bankruptcy Law); (b) does not previously file a "simplified request" for admission to the *concordato preventivo* (pursuant to article 161, para. 6, of the Italian Bankruptcy Law), and does not request the 60-days moratorium (pursuant to article 182-*bis*, para. 6 of the Italian Bankruptcy Law).

Pursuant to the new article 182-*decies* of the Italian Bankruptcy Law, article 1239 of the Italian Civil Code applies to the creditors that have adhered to the debt restructuring agreements. Non-adhering creditors maintain their claims towards (i) those who are jointly and severally liable with the debtor, (ii) the debtor's guarantors and (iii) debtors by way of right of recourse (*regresso*). If not expressly agreed otherwise, debt restructuring agreements entered by a company produce their effect also *vis-à-vis* the shareholders with non-limited liability, provided that, if such shareholders have granted guarantees, they will remain liable as guarantors.

Out-of-court reorganization plan (Piano attestato di risanamento)

The purpose of a voluntary composition agreement through an out-of-court reorganization plan (*piano di risanamento*) is to re-establish the financial soundness of the debtor and restructure its debts. It is not sufficient to merely overcome the insolvency.

The terms and conditions of the out-of-court reorganization plan are freely negotiable. Unlike in *concordato preventivo* and debt restructuring agreement proceedings, an out-of-court reorganization plan does not offer the debtor any protection against enforcement proceedings and/or precautionary actions of third party creditors.

However, pursuant to article 67, para. 3, letter d) of the Italian Bankruptcy Law, the procedure provides a safe harbour for transactions, payments and guarantees on the debtor's assets carried out or put in place in execution of an out-of-court reorganization plan that appears capable of restructuring debts and re establishing the debtor's sound financial position.

Italian Bankruptcy Law provides that, should these plans fail and the debtor be declared bankrupt, payments and/or acts carried out for, and/or security interest granted for, the implementation of an out-of-court reorganization plan, subject to certain conditions: (i) are not subject to claw-back actions; and (ii) are exempted from the application of certain criminal sanctions.

Such an out-of-court reorganization plan must be found reasonable by an independent expert (generally an external auditor or audit firm). In practice, this means that a report is required from an external auditor or audit firm certifying the feasibility of the out-of-court reorganization plan together with the truthfulness of the debtor's accounting data.

The Italian Bankruptcy Law ensures that the external auditor (or audit firm) is independent. In particular, it is required that the external auditor (or audit firm):

– is not linked and does not have any kind of relationship (personal and/or professional) with the debtor or any subject that has a material interest in the out-of-court reorganization plan;

Out-of-court reorganization plan (Piano attestato di risanamento) (cont.)

– complies with the requirements set out in the Italian Civil Code (independence of statutory auditors); and

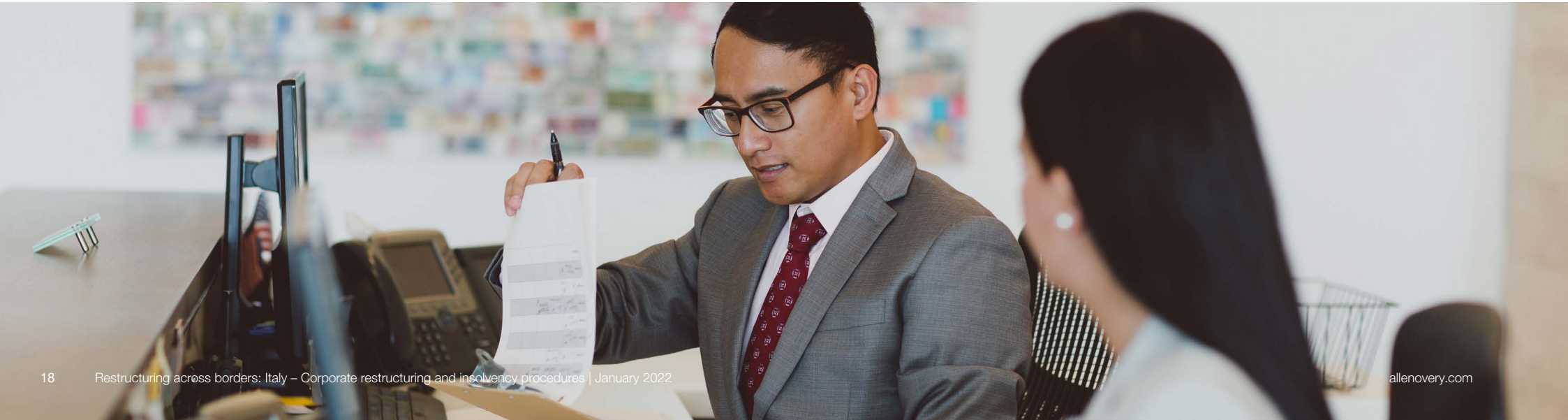
– did not perform, directly or indirectly, any working activity and/or did not perform the roles of director and/or statutory auditor for the debtor during the previous five years.

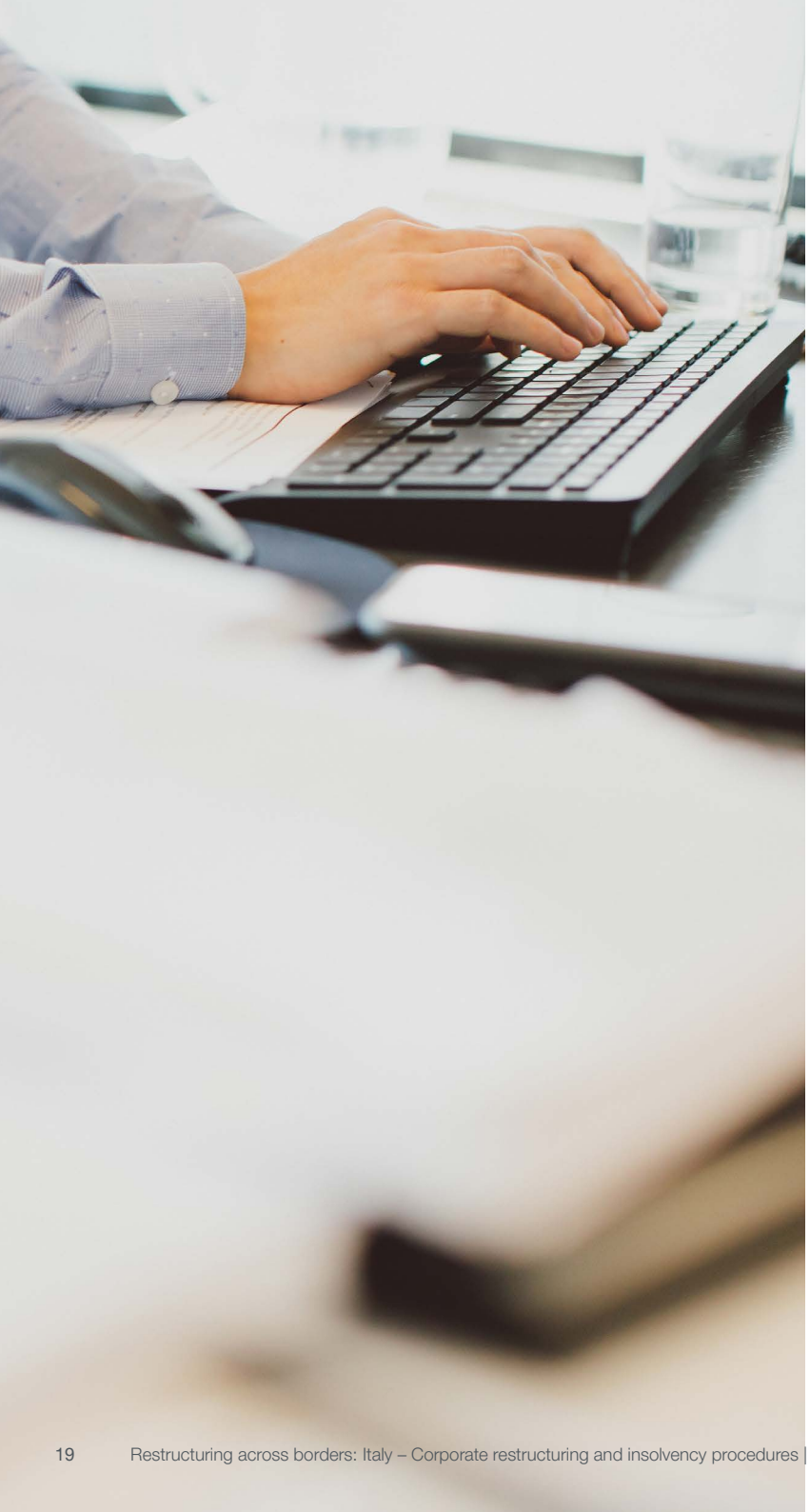
Neither ratification by the court nor publication in the Companies' Register are needed (although, upon request of the debtor, an out-of-court reorganization plan can be published in the relevant Companies' Register and such publication may trigger, in specific circumstances, certain tax implications).

The main amendments/features/innovations introduced by the Italian Crisis and Insolvency Code are the following:

– revision of the provision regarding the exemption from claw-back actions, providing that such exemption applies only in the event that the creditor was not aware of the willful misconduct (*dolo*) or gross negligence (*colpa grave*) of the independent expert and/or the debtor; and

– introduction of an out-of-court reorganization plan for corporate groups, whereby companies in a "state of crisis" (ie, a financial and economic distress such that an insolvency is likely to follow, because the perspective cash flows does not allow the debtor to repay its debts as they become due) belonging to the same group and each having the centre of main interest in Italy may submit a single consolidated certified plan or several separated, but interconnected certified plans underlying the voluntary composition agreement.





Negotiated composition proceeding (Composizione negoziata della crisi)

The *composizione negoziata della crisi* can be pursued by enterprises, either commercial (*imprenditore commerciale*) and agricultural (*imprenditore agricolo*), which are in a distressed situation with reference to their assets, their business and/or their finances, such that it is likely that a crisis or insolvency will follow, notwithstanding the general thresholds for the application of Italian Bankruptcy Law are not met.

The *composizione negoziata della crisi* is an out-of-court proceeding, but the court can be involved in the two following circumstances: *(i)* when the entrepreneur files a petition requesting the court to confirm or modify the protective measures (the **Protective Measures**), and, if necessary, to enact the interim measures necessary to complete the negotiations (the **Interim Measures**), and *(ii)* when the entrepreneur files a petition asking the court to authorize certain acts, or to modify the conditions of certain contracts if, as a consequence of the COVID-19 pandemic, such contracts pose an excessive burden on the entrepreneur.

The *composizione negoziata della crisi* is commenced by the enterprise (on a voluntary basis only) with the filing of a petition for the appointment of an independent expert (the **Expert**). Together with the petition, the enterprises must file certain documents collectively aimed at giving a clear representation of their financial status and indebtedness.

If the Expert finds that there are concrete chances of recovery (*risanamento*), he/she starts negotiations with the parties involved in the entrepreneur's recovery process. Banks and financial intermediaries, their agents, and (in case of credit assignment and/or transfer) their assignees or transferees, must take active part in the negotiations, and the access to the *composizione negoziata della crisi* does not, by itself, constitute grounds for withdrawal of overdraft facilities.

If the Expert finds that there are no concrete chances of recovery (*risanamento*), the entrepreneur's petition is dismissed.

Negotiated composition proceeding (Composizione negoziata della crisi) (cont.)

Together with the petition for appointment of the Expert, or with a subsequent petition, the entrepreneur can request the application of the Protective Measures, i.e. a ban for preexisting creditors from obtaining preemption rights (*diritti di prelazione*) (unless agreed upon by the entrepreneur) and a stay on all enforcement and interim actions. However, as opposed to what happens in the *concordato preventivo*, payment of pre-existing creditors is not forbidden.

From the date of publication of the petition requesting the application of the Protective Measures, until the date of conclusion of the negotiations or dismissal of the petition for appointment of the Expert, the entrepreneur cannot be declared bankrupt nor insolvent.

The entrepreneur shall request the court to confirm or amend of the Protective Measures, and, if necessary, to enact the Interim Measures – otherwise, the Protective Measures become ineffective.

The duration of the Protective Measures and, if necessary, the Interim Measures, is established by a court order in a range between 30 and 120 days, and, upon request of the parties and after obtaining the opinion of the Expert, can be extended for the time required to positively finalize the negotiations up to a maximum of 240 days.

Upon request of the entrepreneur or one or more creditors, or upon report of the Expert, the Protective Measures and the Interim Measures can be revoked, or their duration can be reduced, if they do not satisfy the purpose of a positive finalization of the negotiations, or appear to be disproportionate compared to the prejudice caused to the creditors that file the relevant request.

Pending the negotiations, the entrepreneur may carry out acts pertaining to its ordinary business, and, upon written notice to the Expert, carry out acts pertaining to extraordinary activity or make payments inconsistent with the negotiations or the prospects of recovery.

If the Expert believes that a certain act causes prejudice to the creditors, to the negotiations or to the prospects of recovery, the Expert may report it in writing to the entrepreneur and to the enterprise's control body. If, notwithstanding the Expert's report, the entrepreneur carries out the relevant act, the entrepreneur gives immediate notice to the Expert, who may file their dissent for the registration in the Companies' Register. When Protective Measures and/or Interim Measures have been granted, the Expert also reports to the court, which has the power to revoke such measures or reduce their duration.

The court, upon the entrepreneur's request and to the extent that this is consistent with the continuation of the business as a going concern and with the maximization of the creditors' recovery, may authorize:

– the entrepreneur or one or more companies belonging to the same corporate group to incur new super-senior (*prededucibile*) indebtedness;

– the entrepreneur to incur new super-senior (*prededucibile*) indebtedness via shareholders' financing; and / or

– the entrepreneur to transfer its business, or certain business branches, without the effects provided under article 2560, para. 2, of the Italian Civil Code.

The Expert may invite the parties to renegotiate in good faith the conditions of certain contracts (other than employment contracts) if, as a consequence of the COVID pandemic, such contracts pose an excessive burden on the entrepreneur. If the parties do not agree, the entrepreneur can file a petition asking the court to amend the conditions of such contracts. The court hears the Expert and takes into account the interests of the relevant contractual counterparty, and, if it decides to grant the amendments, ensures the balance between the mutual obligations, if necessary providing for the payment of an indemnity.

At the end of their appointment the Expert issues a final report (the **Final Report**), and notifies it to the entrepreneur and to the court that has granted the Protective Measures and Interim Measures (if any).

The *composizione negoziata della crisi* can terminate as follows:

– execution of an agreement between the entrepreneur and one or more creditors, which constitutes cause for application of certain reward measures if, according to the Expert's Final Report, such contract ensures the continuation of the business for at least 2 years;

– execution of a standstill agreement (*convenzione di moratoria*) pursuant to article 182 *octies* of the Italian Bankruptcy Law; or

Negotiated composition proceeding (Composizione negoziata della crisi) (cont.)

– execution of an agreement signed by the entrepreneur, by the creditors and by the Expert, with the effects provided under article 67, para. 3, letter d) of the Italian Bankruptcy Law without the need for the independent expert's report (*attestazione*) provided thereby.

At the end of the negotiations, the entrepreneur can also file a petition requesting the sanctioning of a debt restructuring agreement.

Alternatively, the entrepreneur may:

– arrange an out-of-court reorganization plan (*piano attestato di risanamento*) pursuant to article 67, para. 3, letter d) of the Italian Bankruptcy Law;

– file a petition for admission to the *concordato semplificato per la liquidazione del patrimonio*; or

– enter into one of the insolvency proceedings provided under the Italian Bankruptcy Law or in the so-called *Prodi-bis* procedure or *Marzano* procedure.

As a consequence of the *composizione negoziata*:

– acts authorized by the court maintain their effects in the event of a subsequently-sanctioned debt restructuring agreement, a sanctioned composition agreement with creditors (*concordato preventivo omologato*), bankruptcy (*fallimento*), compulsory administrative winding-up (*liquidazione coatta amministrativa*), extraordinary administration or special extraordinary administration (*amministrazione straordinaria*) or *concordato semplificato per la liquidazione del patrimonio*;

– payments of debts that are immediately due and payable, any onerous transactions and the granting of security interests made after the Expert accepted its appointment, are exempted from claw-back actions if they are consistent with the development and the status of the negotiations and with the prospects of recovery in place at the time the payment/transaction/granting of security interest was made (however, acts pertaining to the entrepreneur's extraordinary activity and payment made after the Expert accepted its appointment are subject to claw-back actions if the Expert has registered their dissent in the Companies' Register or if the court has denied its authorization); and

– payment and transactions, made after the Expert accepted its appointment, which the Expert assesses to be consistent with the development of the negotiations and with the prospects of recovery of the enterprise, or which have been authorized by the court, benefit of exemptions from the potential application of certain criminal sanctions.

If, in its Final Report, the Expert states that, even though the negotiations were carried out with fairness and in good faith, such negotiations did not have a positive outcome, and no other option is feasible, within 60 days following the notification of the Final Report the entrepreneur may file a petition for admission to the *concordato semplificato per la liquidazione del patrimonio*, together with a liquidation plan.

The petition for *concordato semplificato per la liquidazione del patrimonio* is then published in the companies' register, and from the date of such publication, certain effects provided for the composition agreement with creditors (*concordato preventive*) apply.

The court may issue a decree sanctioning the *concordato semplificato per la liquidazione del patrimonio* if it finds that (i) the proceeding has been carried out in accordance with the relevant laws and regulations and the adversarial principle among the parties (*contraddittorio*); (ii) the proposal is compliant with the statutory priority and the liquidation plan is feasible, and (iii) the proposal does not cause a prejudice to the creditors compared to what they would receive in case of insolvent liquidation of the entrepreneur, and in any case ensures that each creditor receives a certain recovery.

Unlike in the *concordato preventivo* procedure, creditors do not vote on the proposal. In this respect, creditors are allowed to file an objection (*opposizione*) to the above-mentioned sanctioning decree within 30 days after having been notified of the same.

The sanctioning decree is immediately effective and contains the appointment of a liquidator designated to deal with the actual implementation of the plan.

Composition of the over-indebtedness crisis (Composizione delle crisi da sovraindebitamento)

By virtue of Law No. 3 dated 27 January 2012 (the **Restructuring Law**), the crisis of enterprises and physical persons who are in a situation of over-indebtedness (*sovraindebitamento*) can be dealt through either: (i) a settlement (*accordo*); or (ii) liquidation of the debtor's assets; or (iii) in the event the debtor is a consumer, a consumer plan.

Only individuals or companies not eligible for adjudication in bankruptcy (*fallimento*) pursuant to the Italian Bankruptcy Law may resort to these procedures and for this reason the procedures have had very limited use in practice so far. The aim of the procedures was to create restructuring and insolvency procedures to fill in the limited gaps that existed for debtors who were not eligible to utilise bankruptcy proceedings.

Principally, over-indebtedness is defined as the "continuing imbalance between the obligations undertaken by the debtor and the assets that can be promptly liquidated in order to fulfil them, thus the debtor being definitively unable to duly fulfil its obligations".

In general terms:

– the crisis settlement agreement (*accordo di composizione della crisi*) consists of a restructuring agreement, based on a "business" plan, whereby the over-indebted debtor can renegotiate its indebtedness with its creditors. The crisis settlement agreement is similar to a *concordato preventivo* from a procedural point of view. The effects of both a *concordato preventivo* and a crisis settlement agreement are also similar;

– the liquidation of the estate procedure (*liquidazione del patrimonio*) consists, similar to the bankruptcy proceeding, of the liquidation of all the over-indebted debtor's assets in order to satisfy its creditors and starts with: (a) an application by the debtor; or (b) conversion of a crisis settlement agreement procedure (upon application by a creditor and if certain conditions are met) into a liquidation; and

– the consumer plan (*piano del consumatore*) consists of a restructuring plan through which consumers who are over-indebted can renegotiate their debts. The plan is ratified by the court once it has established that the legal requirements have been met, and does not require a vote by creditors. A judge can ratify a plan despite challenge from the creditors or by any other interested party, if they deem that the claims can be satisfied to an extent no less than the liquidation alternative.

The Italian Crisis and Insolvency Code will introduce some amendments in relation to the definition of "over-indebtedness" and the names of the procedures. Moreover, the rules governing the commencement of the procedures will be simplified.

Early warning procedure

The Italian Crisis and Insolvency Code introduces a new restructuring instrument known as an "early warning" procedure, aimed at detecting deterioration in a business at an early stage and thereby signalling to the debtor the need to act as a matter of urgency in order to: (i) avoid insolvency; and (ii) continue its business activities.

The early warning procedure will be available basically to non-listed small and medium companies (**SME**s) as defined under the European legislation.

From a procedural perspective, the early warning procedure consists of a two phase procedure that may be activated: (i) in the event of repeated current and/or prospective breaches such as to constitute a crisis situation (*stato di crisi*), defined as the likelihood of insolvency; (ii) by the statutory board (*collegio sindacale*) or auditors (*revisori*); (iii) by certain public creditors (tax authority (*Agenzia delle Entrate*), national pension fund (*INPS*) and collection agents (*agente della riscossione*)); or (iv) voluntarily by the SME itself, if it wishes to benefit from certain reward measures granted to entities intending to address a potential situation of crisis at an early stage. Once the process is activated, the SME will be lead to a panel of three independent professionals, who will advise it in on the restructuring of its debt and attempt to solve its financial difficulties. If the situation of crisis should be confirmed after appropriate verifications by such panel of professionals, the panel will support the SME in identifying the most appropriate measures to overcome the crisis. In the event of failure, the SME will initiate a procedure during which the panel of professionals will actively assist the SME in negotiations with its creditors and, eventually, seek rapid access to an alternative restructuring procedure or a bankruptcy procedure.

In general terms, the early warning procedure is an out-of-court procedure characterised by privacy and confidentiality. However, the SME can apply to the court to obtain certain protective measures such as a stay from enforcement actions by the SME's creditors for a period of up to six months.

The agreement entered into at the end of the early warning procedure has the same effect as a recovery plan underlying a voluntary composition agreement, thus exempting restructuring related transactions from insolvency avoidance actions.

The Law Decree 118/2021 has postponed the entry into force of the "early warning" procedure to 31 December 2023.

European Insolvency Regulation

The EU Regulation on Insolvency Proceedings 2015 (Regulation (EU) 2015/848) (the **Recast Regulation**) applies to all proceedings opened on or after 26 June 2017. Its predecessor, the EC Regulation on Insolvency Proceedings 2000 (Regulation (EC) 1346/2000) (the **Original Regulation**) continues to apply to all proceedings opened before 26 June 2017. One of the key changes in the Recast Regulation is that it brings into scope certain pre-insolvency "rescue" proceedings and these are now listed alongside the traditional insolvency procedures in Annex A to the Recast Regulation. The Recast Regulation retains the split between main and secondary/territorial proceedings but secondary proceedings are no longer restricted to a separate list of winding up proceedings - secondary proceedings can now be any of those listed in Annex A. By contrast, the Original Regulation listed main proceedings in Annex A and secondary proceedings (which were confined to terminal proceedings) in Annex B. Of the above restructuring and insolvency regimes, bankruptcy (*fallimento*), composition agreement with creditors (*concordato preventivo*), compulsory administrative winding-up (*liquidazione coatta amministrativa*) and extraordinary administration (*amministrazione straordinaria*) were available as both main and secondary proceedings under the Original Regulation.

Under the Recast Regulation, bankruptcy (*fallimento*), composition agreement with creditors (*concordato preventivo*), compulsory administrative winding-up (*liquidazione coatta amministrativa*), extraordinary administration (*amministrazione straordinaria*), debt restructuring agreement (*accordo di ristrutturazione dei debiti*) and composition of the over-indebtedness crisis (*sovraindebitamento*) are listed in Annex A.

Annex A (which lists insolvency proceedings in the various jurisdictions) and Annex B (which lists insolvency practitioners in the various jurisdictions) of the Recast Regulation have been amended, effective as of 16 May 2022, in order to reflect the provisions of the Italian Crisis and Insolvency Code.

In relation to Annex A:

– the term *fallimento* is replaced by the term *liquidazione giudiziale* (but this is a formal change while the bankruptcy proceeding remains the same), and

– the composition of the over-indebtedness crisis (*procedura di composizione della crisi da sovraindebitamento del consumatore*) and the liquidation of the debtor's assets (*liquidazione dei beni*) are replaced by the debt restructuring agreement of the over-indebted debtor (*ristrutturazione dei debiti del consumatore*), the "minor" composition agreement with creditors of the over-indebted debtor (*concordato minore*) and the liquidation of the over-indebted debtor (*liquidazione controllata del sovraindebitato*).

In relation to Annex B, the *organismo di composizione ella crisi nella procedura di composizione della crisi da sovraindebitamento del consumatore* is replaced by the *organismo di composizione della crisi da sovraindebitamento*.

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