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Restructuring Across Borders

Italy:

Corporate restructuring and insolvency procedures | April 2020

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Introduction

The eight 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*);
– voluntary composition agreement (*piano di risanamento*); and
– restructuring procedure (*sovraindebitamento*).

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

The Italian Crisis and Insolvency Code was approved by the Italian Parliament at the beginning of 2019 and is expected to come fully into force on 1 September 2021(save for amendments that may be approved by the competent bodies in the near future).

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 renamed 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.

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 will be introduced by the Italian Crisis and Insolvency Code. Moreover, at the end of this factsheet you will find a brief description of the "early warning procedure", which will enter into force on 1 September 2021.

Bankruptcy (*Fallimento*)

Bankruptcy proceedings are governed by Royal Decree No. 267 of 16 March 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 authorise 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 of which 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*".

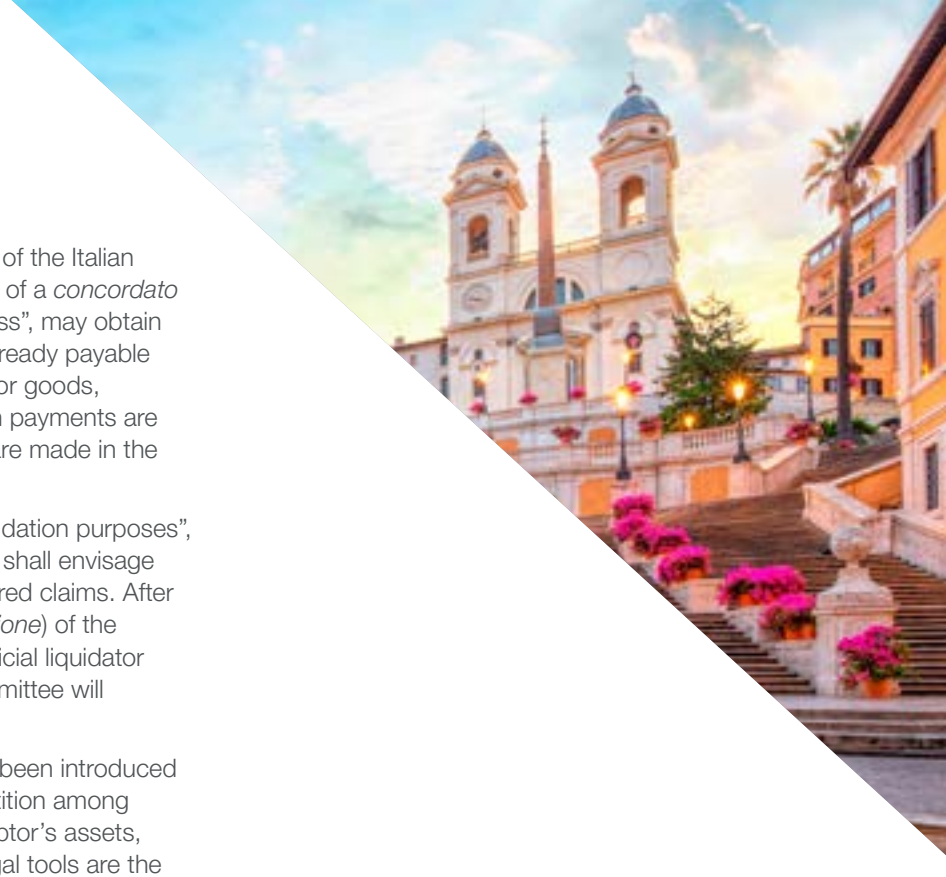
The *concordato preventivo* plan may provide for, *inter alia*: (i) the restructuring of debts and the satisfaction of creditors' claims, in any manner (including, for instance, extraordinary transactions such as the granting to creditors of shares, bonds (also convertibles), or other financial instruments 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 which shall be included within 60 to 120 days (extendible for a maximum of 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 further maximum of 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 confirmation (*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 *concordato preventivo* "with the continuation of business" (*concordato con continuità aziendale*) under Article 186-bis of the Italian Bankruptcy Law and, *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 (eg at least 20% of the debt of 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 non-instrumental assets, the following conditions should 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 expert 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-*quinquies*, para. 4, 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 operate and are made in the best interest of the company's creditors.

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

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 as a going concern. Such legal tools are 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 company's assets, 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, one business unit or company assets.

As for the competing proposals, one or more creditors, representing at least 10% of the claims by value, may file an offer 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 payment 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

(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 are as follows:

– introduction of a definition of "crisis", which indicates the state of economic and financial difficulty 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, extendable for 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 group *concordato preventivo*, 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. 58/1998 – Consolidated Financial Act and Legislative Decree No. 385/1993 – 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 of 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 of 23 December 2003, as converted into Law No. 39 of 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 EUR300 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.

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 Extraordinary 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: (i) will verify the company's inability to pay its debts on the basis of the commissioner's report, issuing a declaration of insolvency; and (ii) will 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.

The Italian Crisis and Insolvency Code does not amend and/or supplement the Prodi-*bis* or the *Legge Marzano*.

Post-bankruptcy restructuring plan with creditors (*Concordato Fallimentare*)

A bankruptcy can be terminated prior to the receiver's liquidation 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:

(i) the division of the creditors into different classes, in accordance with their similar legal position and economic interests;

(ii) treating classes of creditors differently, substantiating the reasons for such separate treatment with evidence;

(iii) 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;

(iv) 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

(v) 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 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 the favourable vote of creditors representing the majority of debts admitted to each class and the approval by the majority 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% of the outstanding claims, for the reduction or reorganisation of the debtor's debts. This agreement must be ratified (*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 by 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 by a special 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 are 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.

Italian Bankruptcy Law 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 ratification (*omologazione*) of a Debt Restructuring Agreement may submit a request to obtain a "stay" on creditor action during the negotiation process and therefore, prior to the publication by the Companies' Register of the Debt Restructuring Agreement.
The application for such a "stay" must be published by 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, it will issue an order preventing 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. The court will set a term (no longer than 60 days) to deposit the Debt Restructuring Agreement and the expert report under the terms set out above. Such an order may be opposed under certain terms.

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).

Moreover, pursuant to the Article 182-quinquies, para. 1, of the Italian Bankruptcy Law, pending the approval (*omologazione*) of the Debt Restructuring Agreement pursuant to Article 182-bis; or of a *concordato preventivo* proposal; or after the filing of the automatic stay application pursuant to Article 182-bis, para. 6; or of the above mentioned "simplified request" pursuant to Article 161, para. 6, of Italian Bankruptcy Law, the court may authorise the debtor to obtain interim preferred (*prededucibili*) credit facilities if an expert appointed by the debtor, once it has verified the company's financial needs up until the approval from the court (*omologazione*), certifies that such facilities are aimed at the best resolution for the creditors (l*a 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 approval 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 lack of the professional report, the court shall accept summary statements regarding the plan and the financing proposal based on evidence presented by the court commissioner (*commissario giudiziale*), if appointed, and the main creditors. These provisions also apply in circumstances where the debtor's request relates to the maintenance of an existing revolving credit line.

Pursuant to the Article 182-septies of the Italian Bankruptcy Law, the debtor can also ask that the effects of the Debt Restructuring Agreement be extended to banks and financial intermediaries which have not agreed to the contents of the Debt Restructuring Agreement, provided that the following conditions are met:

(a) at least 50% of the overall indebtedness of the debtor is represented by debts vis-à-vis banks and financial intermediaries;

(b) the Debt Restructuring Agreement provides for the division of such creditors in one or more categories having similar legal status and economic interests, and the non-consenting creditors belong to the same category of creditors;

(c) the claims of the banks and financial intermediaries belonging to one category which have agreed to the Debt Restructuring Agreement represent at least 75% of the debtor's overall indebtedness vis-à-vis the banks and financial intermediaries belonging to the same category; and

(d) all creditors belonging to the relevant category have been informed of the ongoing negotiations and have been allowed to participate in such negotiations in good faith.

The court ratifies the Debt Restructuring Agreement only after having ascertained that the negotiations have been carried out in good faith and that the banks and financial intermediaries in respect of which the debtor requests the extension of the effects of the Debt Restructuring Agreement:

(a) have legal status and economic interests similar to those of the banks and financial intermediaries belonging to the same category which have agreed to the Debt Restructuring Agreement;

(b) have received complete and updated information on the assets, economic and financial situation of the debtor as well as on the Debt Restructuring Agreement and its effects, and they have been allowed to participate in the negotiations; and

(c) may be satisfied, on the basis of the Debt Restructuring Agreement, in a measure which is not less than the other concrete practicable solutions.

The rights and claims of the creditors that are not banks or financial intermediaries are not affected by the aforementioned provisions (it should be noted that the draft bill no. 2681 provides for the extension of the mechanism set out in the Article 182-septies to creditors that are not banks or financial intermediaries).

The debtor may also enter into a moratorium arrangement (*convenzione di moratoria*) (the **MA**) with its creditors which are banks and financial intermediaries and under which the non-consenting banks and financial intermediaries are also bound, provided that: (i) they have been informed of the ongoing negotiations and have been allowed to participate in such negotiations in good faith; and (ii) an expert meeting (the requirements for which are provided for under Article 67, Paragraph 3(d) of the Italian Bankruptcy Law) certifies that the non-consenting banks and financial intermediaries have legal status and economic interests similar to those of the banks and financial intermediaries which have agreed to the MA. The banks and financial intermediaries which have not agreed to the MA may file an objection (*opposizione*) to it within 30 days after having been notified of the MA.

In no case can the Debt Restructuring Agreement, provided for under Article 182-septies of the Italian Bankruptcy Law or the MA, impose on the non-adhering creditors, the performance of new obligations, the granting of new overdraft facilities or new drawdowns under existing loan agreements.

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

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

– interim preferred credit facilities (*prededucibili*): these can be requested by the debtor but only when: (i) the Debt Restructuring Agreement and the underlying plan provide for the continuation of the business; or (ii) the business plan provides for a temporary continuation of the debtor as a going concern whereby such continuation aims at maximising the value of the assets to be sold in a subsequent liquidation of the debtor's estate;

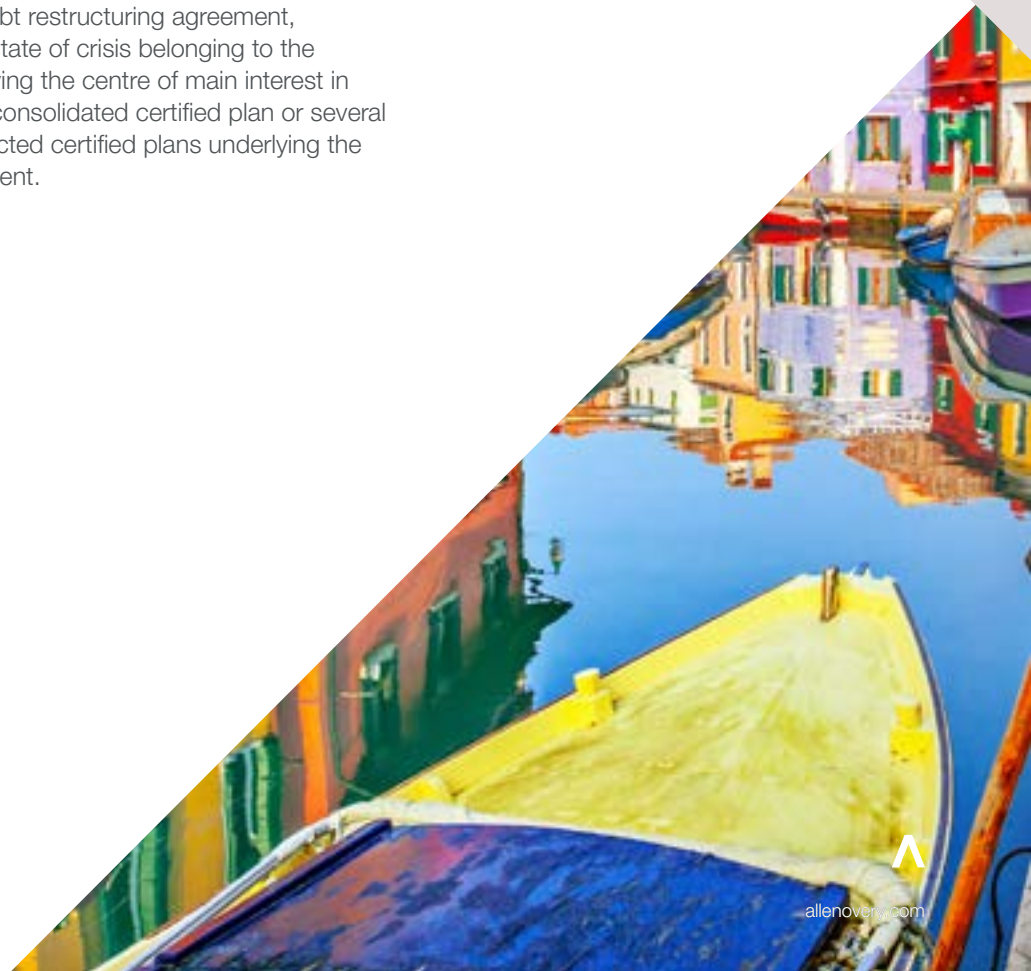
– extension of the "cram-down" mechanism described above to other creditors, such creditors not being banks or financial intermediaries, it being understood that the Debt Restructuring Agreement must provide for the debtor to continue as a going concern;

– the possibility to amend or renew the independent expert's report (*attestazione*) in the event that modifications to the business plan (underlying the Debt Restructuring Agreement) occur before and/or after the ratification of the Debt Restructuring Agreement;

– introduction of a "facilitated" debt restructuring agreement, whereby the actual approval quorum is reduced by half when the conditions under Article 60 of the Italian Crisis and Insolvency Code are met;

– introduction of a rule whereby a Debt Restructuring Agreement that provides for the restructuring of the indebtedness vis-à-vis the tax authority can be ratified (*omologato*) by the court even if no agreement is reached with the tax authorities, provided that both of the following legal requirements are met: (i) such agreement is decisive for the achievement of the approval quorum; and (ii) the recovery ratio for such authorities is higher compared to the liquidation alternative; and

– introduction of a group debt restructuring agreement, 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 debt restructuring agreement.



Voluntary composition agreement (*Piano di risanamento*)

The purpose of a voluntary composition agreement through a rescue 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 rescue plans are freely negotiable. Unlike in *concordato preventivo* and Debt Restructuring Agreement proceedings, out-of-court recovery plan does not offer the debtor any protection against enforcement proceedings and/or precautionary actions of third-party creditors.

However, 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 a rescue 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 the rescue 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 a rescue 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 rescue plan together with the truthfulness of the debtor's accounting data.

The Italian Bankruptcy Law was amended so that it can be ensured that the external auditor (or audit firm) is independent. In particular, it is now 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 rescue plan;
- 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, a rescue 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 wilful misconduct (*dolo*) or gross negligence (*colpa grave*) of the independent expert and/or the debtor; and
- introduction of a group voluntary composition agreement, 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 voluntary composition agreement.

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 procedures' aim 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 he/she deems 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
(*Procedura di allerta e di composizione assistita della crisi*)

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 (SMEs) 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.

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 restructuring procedure (*sovraindebitamento*) are listed in Annex A.

Key contacts

If you require advice on any of the matters raised in this document, please call any of our partners or your usual contact at Allen & Overy.

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Further information

Developed by Allen & Overy's market-leading Restructuring group, Restructuring Across Borders is an easy-to-use website that provides information and guidance on all key practical aspects of restructuring and insolvency in Europe, Asia, the Middle East and the U.S.

To access this resource, please click **here**.

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