

## NEW SCENARIOS IN THE ITALIAN RESTRUCTURING MARKET – THE BUSINESS CRISIS AND INSOLVENCY CODE

On 15 July 2022 the Italian Business Crisis and Insolvency Code ("**Code**") entered into force. The Code has been updated by the recently enacted Legislative Decree 83 of 17 June 2022, which also implemented EU Directive 2019/1023 (the so-called Directive on restructuring and insolvency). In line with this Directive, the Code aims to ensure that distressed situations are detected early and debtors can quickly react by availing themselves of the preventive restructuring frameworks available. These frameworks are now more flexible, offer enhanced "contractual" restructuring solutions and have been made more accessible.

### EARLY DETECTION OF DISTRESS CONDITIONS

#### New alert mechanisms

- Companies are required to adopt organisational and accounting models which ensure that distressed situations are detected in time and especially that allow (i) prompt detection of financial imbalance and (ii) assessment of debt sustainability.
- Specific warning signs have been created (e.g. debts vis-à-vis banks and financial intermediaries that is more than 5% of the total indebtedness due 60 or more days later).
- Statutory auditors must alert the board of directors when a company is in distress and should apply for a negotiated settlement procedure (see below).
- Qualified creditors (e.g. the Italian Tax Authority) must alert a company's board of directors upon the occurrence of certain events, such as enforcement being started for tax claims exceeding Euro 500,000;
- Banks and financial intermediaries shall alert the statutory auditors when they notice their clients that credit facility has been revoked or revised.

#### Negotiated settlement procedure (*composizione negoziata per la soluzione della crisi d'impresa*)

The negotiated settlement procedure was introduced by way of an emergency Law Decree in August 2021. The procedure aims to identify and implement possible solutions in case of distress, at an early stage and with the assistance of an independent expert (the "**Expert**"). The Expert will be

#### Key issues

- New rules to ensure early detection of insolvency
- The negotiated settlement procedure (*procedura di composizione negoziata*) is confirmed as the main process to address early business crises and insolvency
- Simplified access to preventive restructuring schemes
- New alert duties upon banks and financial intermediaries
- Business continuity is prioritised
- More flexible distribution of the business continuity proceeds
- Companies in the same group can now apply together to preventive restructuring frameworks

# C L I F F O R D

## C H A N C E

appointed, a few days after the debtor files a request, by a commission established in each Chamber of Commerce, and will facilitate the negotiations between the debtor and its creditors and other stakeholders. Banks and financial intermediaries (and their assignees) must participate to the negotiations in a proactive and informed way. All parties involved are asked to cooperate promptly, motivate their answers, and keep the procedure and the information received confidential.

If a suitable solution to overcome the crisis<sup>1</sup> is identified, the debtor can enter into: (i) an agreement with one or more creditors ensuring business continuity for a period of at least 2 (two) years; (ii) a moratorium agreement pursuant to Article 62 of the Code; (iii) an agreement to be signed by the Expert, which has the same effects as a restructuring plan pursuant to Article 56 of the Code.

Alternatively, the debtor may (i) request validation (*omologazione*) of a restructuring agreement pursuant to Articles 57, 60 and 61 of the Code; (ii) prepare a certified restructuring plan pursuant to Article 56 of the Code; (iii) file a request for a simplified composition with creditors (*concordato semplificato*) or (iv) access the applicable bankruptcy procedures (e.g. extraordinary administration).

We have addressed the negotiated settlement procedure in a prior client briefing – please click [here](#) for more details.

### **PRIORITY IS GIVEN TO PREVENTIVE RESTRUCTURING FRAMEWORKS**

The Code introduces a simplified process to access insolvency proceedings, providing for the same procedural rules for submission of the application to start both restructuring proceedings and bankruptcy (now called *liquidazione giudiziale* rather than by the prior term, *fallimento*). When more than one application is submitted, the related proceedings will be consolidated.

To prioritise use of preventive restructuring proceedings over bankruptcy, the **Courts are required to give priority to applications aimed at overcoming the crisis or the insolvency and avoiding bankruptcy**, except when it is evident that those applications are not admissible, or the proposed plan is not sufficient to achieve the goals of the preventive restructuring framework.

Moreover, the Code prioritises access to "contractual" restructuring frameworks, *i.e.* where a write-off is agreed between the creditors and the debtor, and bankruptcy is avoided. The Code also gives the option of entering into **restructuring agreements with "extended effects"** vis-à-vis non-participating creditors that belong to the same class, provided that, among other conditions, the participating creditors represent at least 75% of the claims of that class.

This instrument had already been introduced by way of emergency legislation in August 2021 and has now been confirmed - please click [here](#) for more details.

Unlike bankruptcy, preventive restructuring frameworks should ensure the preservation of the debtor's business. For this reason, certain rules governing composition with creditors (*concordato preventivo*) have been amended to

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<sup>1</sup> Crisis is now defined as "condition of the debtor which makes insolvency likely, and which is made evident by the expected cash flows not being sufficient to repay debts within 12 months".

ensure more flexibility in the distribution of the proceeds generated by business continuity. Furthermore, the Code now expressly states that the application for *concordato preventivo* does not allow contractual counterparties to suspend the performance of existing agreements (e.g. supply deliveries) or to amend them (e.g. by shortening the terms available for payment), which frequently occurred in practice.

In those, frequent, cases where a debtor has exposure to the Tax Authority, debt-restructuring agreements can now be approved also where the Tax Authority denies its consent if it is proven that restructuring is a more suitable alternative compared to bankruptcy.

When composition with creditors provides for liquidation of assets (*concordato preventivo liquidatorio*), the proposed plan must provide for new resources to increase – by at least 10% -- the proceeds to repay creditors. This will make it easier to show that composition is a better alternative compared to a bankruptcy liquidation and will make the involvement of third-party investors (e.g. qualified investors wishing to purchase certain assets of the debtor) more straightforward.

Lastly, the Code introduced a new instrument called "restructuring plan to be validated" (*piano di ristrutturazione soggetto a omologazione*), which is inspired by the composition with creditors (*concordato preventivo*). Differently than in the *concordato*, however, creditors must be split into classes (classes are now mandatory also in the *concordato preventivo* with business continuity) and it will be possible to distribute a portion of the proceeds in a manner different than in accordance with the waterfall set forth by the law.

## **NEW RULES FOR CORPORATE GROUPS**

The Code has introduced the possibility for groups of companies to apply together for preventive restructuring framework or *liquidazione giudiziale*. All companies of the group must have their centre of main interests (COMI) in Italy; the fact that a company belongs to a group and its course of business is influenced by other companies of the Italian group – e.g. the controlling company - will probably be deemed evidence that the COMI is based in Italy, as it happened in France for the Kidiliz case, where the Tribunal de Commerce de Paris held that Kidiliz Italy's COMI was located in France.

The debtors will have to explain why a single restructuring plan for the group, or more plans linked to each other, will be more beneficial for creditors compared to a restructuring plan for each company of the group.

The Code promotes flexible restructuring solutions, and the proposed plan can now provide for liquidation of certain companies of the group while retaining business continuity for others, as well as for the transfer of assets between companies in the group.

# C L I F F O R D C H A N C E

## OVERVIEW OF INSOLVENCY AND RESTRUCTURING PROCEEDINGS IN ITALY APPLICABLE TO LARGE BUSINESSES

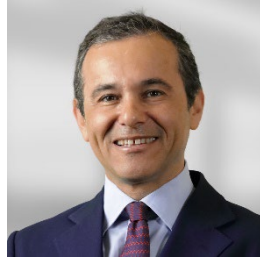
Situation	Proceedings available
Financial imbalance Assets/liabilities imbalance + business continuity possible	Negotiated settlement procedure
Crisis	Certified plan ( <i>piano attestato</i> ), composition with creditors ( <i>concordato preventivo</i> ) even simplified, debt restructuring agreements (even with extended effects), moratorium agreement
Insolvency	Composition with creditors ( <i>concordato preventivo</i> ) / debt restructuring agreement (even with extended effects) – Bankruptcy ( <i>liquidazione giudiziale</i> )
Insolvency +200 employees + Liabilities equal to at least 2/3 of net assets and income + possibility to restore financial balance	Extraordinary administration, so-called Prodi Bis (Decree Law 270/1999)
Insolvency +500 employees + Debts > Euro 300M	Extraordinary administration, c.d. Marzano Law (Decree Law 347/2003) E.g. Parmalat, Alitalia

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