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Restructuring across borders
Italy

CORPORATE RESTRUCTURING AND INSOLVENCY PROCEDURES | FEBRUARY 2024

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Introduction

The Italian legislative framework provided under the Royal Decree no. 267 of March 16, 1942 (the Italian Bankruptcy Law) has been entirely replaced by the Legislative Decree 12 January 2019 no. 14 (as amended from time to time, the Italian Crisis and Insolvency Code) which provides a major overhaul of the existing insolvency and restructuring framework. The Italian Crisis and Insolvency Code has been updated several times during the past few years (by implementing the Directive (EU) 2019/1023) with the most recently amended version entering into force on 15 July 2022.

The main features of the Italian Crisis and Insolvency Code include:

- a system aimed at preserving the going concern of debtors' businesses and ensuring that distressed situations can be detected early, in order to allow debtors to quickly react by availing themselves of the preventive restructuring tools set forth under the Italian Crisis and Insolvency Code;
- several amendments to the rules governing composition agreements with creditors, debt restructuring agreements and insolvency proceedings (that have been renamed 'judicial liquidation' to comply with European legislation);
- facilitating access to out-of-court restructuring procedures; and
- the introduction of a coherent and uniform framework and regulation of the insolvency phenomenon.

Below you will find a brief description of the main insolvency and restructuring tools for companies under the Italian Crisis and Insolvency Code.

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 overindebtedness crisis (*sovraindebitamento*).

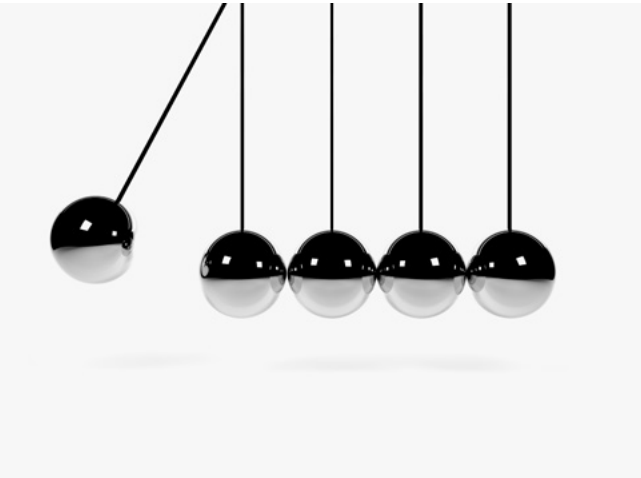
Judicial liquidation (*liquidazione giudiziale*)

The reform of the Italian Crisis and Insolvency Code has revised the lexicon of the Italian Bankruptcy Law, replacing the term "bankruptcy" (*fallimento*) with the semantically less invasive but substantially equivalent expression of "judicial liquidation" (*liquidazione giudiziale*) and has radically altered the basic idea of insolvency law.

The approach to this has changed from a static one, based on the exclusive safeguarding of the principle of equal treatment of creditors (*par condicio creditorum*) and the enhancement of creditor satisfaction, to a dynamic perspective, in which the preservation of the company as a going concern constitutes a protected value.

The main goal of the judicial liquidation procedure (*procedura di liquidazione giudiziale*) is to liquidate the insolvent debtor through the sale of its assets and distribute the proceeds collected via this procedure to the creditors, according to the order of priority established by law. Therefore, as a result of the opening of the judicial liquidation procedure, the insolvent debtor loses control over its own assets, which will constitute a separate estate, entrusted to the administrative receiver (*liquidatore giudiziale*), appointed by the judgment that declares the judicial liquidation procedure open (*sentenza di apertura della procedura di liquidazione giudiziale*), and destined exclusively to the satisfaction of the creditors' claims.

The acts performed by the debtor, and the payments made or received by it after the opening of the judicial liquidation, are ineffective with respect to the creditors. The debtor also loses both the active and passive capacity to remain party to judicial proceedings, a right which is attributed to the administrative receiver for all the proceedings which the debtor may face.



As a consequence of the opening of the judicial liquidation (i) the creditors will not be able to initiate or continue any individual, executive or precautionary action, on the assets of the debtor, (ii) any claim will need to be ascertained according to the rules governing the creation of the statement of liabilities (*formazione dello stato passivo*), (iii) all the creditors will be treated in the same way, unless there is a legal privilege that allows some of them to be satisfied with priority over the non-privileged creditors (so-called cause *legittime di prelazione*), and (iv) the administrative receiver (*liquidatore giudiziale*) will be entitled to bring claw back actions aimed at making the disposals of the debtor's assets carried out before the opening of the judicial liquidation procedure ineffective, in particular during the so-called claw back period (*periodo sospetto*), in order to restore the debtor's estate.

The bodies of the procedure are, in addition to the administrative receiver, the court (*tribunale*), the delegated judge (*giudice delegato*) and the creditors' committee (*comitato dei creditori*). The administrative receiver will draft the liquidation plan, which will need to be approved by the Creditors' Committee.

Negotiated composition proceeding (*composizione negoziata della crisi*)

The *composizione negoziata della crisi* can be pursued by entrepreneurs, either commercial (*imprenditore commerciale*) or agricultural (*imprenditore agricolo*), who 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 that the general thresholds for the application of the Italian Crisis and Insolvency Code 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 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).

The *composizione negoziata della crisi* is commenced by the entrepreneur (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 relevant entrepreneur must file certain documents, which should together provide a clear representation of its financial status and indebtedness.

If the Expert finds that there are concrete chances of recovery (*risanamento*), they start 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 pursuing a *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 (*imprenditore's*) petition is dismissed.

Together with the petition for appointment of the Expert, or with a subsequent petition, the relevant entrepreneur (*imprenditore*) can request the application of the Protective Measures, i.e. a ban on pre-existing creditors obtaining pre-emption rights (*diritti di prelazione*) (unless agreed upon by the entrepreneur (*imprenditore*) and a stay on all enforcement and interim actions.

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 sentence of opening of judicial liquidation or assessment of the state of insolvency can not be pronounced, except if the court orders the revocation of the Protective Measures.

The entrepreneur (*imprenditore*) shall request that the court confirm or amend the Protective Measures, and, if necessary, 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 and will range from 30 to 120 days. Upon request from the parties, and after obtaining the opinion of the Expert, this can be extended for the time required to positively finalize the negotiations (up to a maximum of 240 days).

Negotiated composition proceeding (*composizione negoziata della crisi*) (cont.)

Upon request of the entrepreneur (*imprenditore*) or one or more creditors, or based on the Expert's report, 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 (*imprenditore*) 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 reports this in writing to the entrepreneur (*imprenditore*) and to the entrepreneur's control body. If, notwithstanding the Expert's report, the entrepreneur (*imprenditore*) carries out the relevant act, the entrepreneur (*imprenditore*) 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 (*imprenditore*)'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 (*imprenditore*) or one or more companies belonging to the same corporate group to incur new super-senior (*prededucibile*) indebtedness;
- the entrepreneur (*imprenditore*) to incur new super-senior (*prededucibile*) indebtedness via shareholders' financing; and/or
- the entrepreneur (*imprenditore*) to transfer its business, or certain business branches, without the effects provided under article 2560, paragraph 2 of the Italian Civil Code.

If the Expert believes that the prospects of remediation are concrete, the Expert meets with other parties interested in the process of recovery and outlines the possible intervention strategies by establishing subsequent meetings on a regular basis.

If, according to the Expert, there are no concrete prospects for remediation, the negotiated composition proceeding is archived. Over the course of negotiations, the Expert may invite the parties to renegotiate in good faith the conditions of certain contracts (other than employment contracts) if such contracts pose an excessive burden on the entrepreneur (*imprenditore*).

Negotiated composition proceeding (*composizione negoziata della crisi*) (cont.)

At the end of their appointment, the Expert issues a final report (the Final Report) and notifies it to the entrepreneur (*imprenditore*) 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 (*imprenditore*) 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 two years;
- execution of a standstill agreement (*convenzione di moratoria*) pursuant to article 62 of the Italian Crisis and Insolvency Code; or
- execution of an agreement signed by the entrepreneur (*imprenditore*), by the creditors and by the Expert, with the effects provided under articles 166, para. 3, letter d) and 324 of the Italian Crisis and Insolvency Code.

Alternatively, the entrepreneur (*imprenditore*) may:

- arrange an out-of-court reorganization plan (*piano attestato di risanamento*) pursuant to article 56 of the Italian Crisis and Insolvency Code;
- file a petition requesting the sanctioning of a debt restructuring agreement pursuant to articles 57, 60 and 61 of the Italian Crisis and Insolvency Code;
- file a petition for admission to the simplified composition for asset liquidation (*concordato semplificato per la liquidazione del patrimonio*) pursuant to article 25-sexies of the Italian Crisis and Insolvency Code; or
- enter into one of the insolvency proceedings provided under the Italian Crisis and Insolvency Code 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 (*accordo di ristrutturazione dei debiti omologato*), a sanctioned composition agreement with creditors (*concordato preventivo omologato*), judicial liquidation (*liquidazione giudiziale*), 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 their 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 their appointment are subject to claw back actions if the Expert has registered their dissent in the Companies' Register or if the court has denied authorization); and
- payment and transactions made after the Expert accepted their appointment which the Expert assesses to be consistent with the development of the negotiations and with the prospects of recovery of the entrepreneur, or which have been authorized by the court, benefit from exemptions to the potential application of certain criminal sanctions.

Negotiated composition proceeding (*composizione negoziata della crisi*) (cont.)

If, in their Final Report, the Expert states that, even though the negotiations were carried out with fairness and in good faith, they did not have a positive outcome and no other option is feasible, within 60 days following the notification of the Final Report the entrepreneur (*imprenditore*) 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 in the composition agreement with creditors (*concordato preventivo*) 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 prejudice to the creditors compared to what they would receive in case of an insolvent liquidation of the entrepreneur (*imprenditore*), 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. Creditors are instead allowed to file an objection (*opposizione*) to the above-mentioned sanctioning decree within 30 days of being notified of its existence. The sanctioning decree is immediately effective and contains the appointment of a liquidator designated to deal with the actual implementation of the plan.

Composition agreement with creditors (*concordato preventivo*)

A composition agreement with creditors (*concordato preventivo*) involves an arrangement between a debtor in a state of crisis (*stato di crisi*) or in a state of insolvency (*stato di insolvenza*) and its creditors, subject to court supervision. The aim is to restructure the business and/or the indebtedness or, alternatively, to liquidate the assets and thus avoid a judicial liquidation.

"Stato di crisi" is defined as the debtor being in such a state of affairs which makes insolvency probable, and which manifests itself with the inadequacy of prospective cash flows to meet obligations in the following 12 months.

"State of insolvency" is instead defined as the debtor being in such a state of affairs, as shown by defaults or other external factors, that the debtor is no longer able to regularly satisfy their obligations.

The relevant composition agreement must provide for the satisfaction of creditors' claims (including secured creditors) to an extent which is no less than that achievable in the event of judicial liquidation, through continuation of the business as a going concern, liquidation of assets, attribution of assets to a receiver (*assuntore*) or in any other form.

Creditors which, including as a result of purchases subsequent to the filing of the relevant petition, represent at least 10% of the claims resulting from the financial situation filed by the debtor, can present a competing proposal for a composition with creditors and the related plan by no later than 30 days before the date established for the creditors' vote.

In addition, the court, exclusively when the composition plan provides for an irrevocable offer (the Offer) by an identified subject concerning the transfer in its favour of the debtor, one or more branches of the debtor or specific assets of the debtor, must make an order to give suitable publicity to the Offer in order to collect competing offers.

Concordato preventivo is available both to companies incorporated in Italy and in other EU member States (in the latter case, the company's 'centre of main interests' must be in Italy in order for proceedings to be commenced in priority to those in another relevant EU member state) and is capable of automatic recognition in the EU under the EU Recast Insolvency Regulation.

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 (including convertible bonds), 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 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 judicial liquidation 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.

Composition agreement with creditors (*concordato preventivo*) (cont.)

In order to initiate a composition agreement with creditors, the debtor must file a petition with the court of first instance. The debtor's proposal must show: (i) the restructuring proposal; (ii) the grounds on which the composition with creditors is more favourable than judicial liquidation; and (iii) if creditors have been subdivided into classes, the creditors' class composition based on each creditor's economic interests and legal position and the relevant criteria which have been applied in order to create such classes.

By way of derogation the debtor may also (subject to certain conditions) submit a simplified request reserving the right to file the proposal, the plan and the agreements. In this case the relevant proposal, plan and agreements shall be filed within the relevant deadline scheduled by the court. The possible timeframe will be between 30 and 60 days from the first filing, extendable for a maximum of a further 60 days in the presence of serious reasons and in the absence of requests for the opening of a judicial liquidation from the first filing.

The debtor shall also file, together with the petition a report prepared by an independent professional, which certifies the truthfulness of the company data and the feasibility of the plan and, in the case of continuation of the business as a going concern, that the plan is capable of preventing or overcoming the insolvency of the debtor, to guarantee the economic sustainability of the debtor and to recognize each creditor with treatment that is no worse than that which they would receive in the event of judicial liquidation.

As an alternative, and within the aforementioned timeframe, 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).

Agreements which on the date of filing of the petition are still to be performed, or under which the main obligations have not been fully performed by both parties, shall continue to be effective during the execution of the composition with creditors. Any agreement to the contrary is ineffective.

The debtor may request authorisation to suspend or terminate one or more contracts if the continuation of such contract is not consistent with the provisions of the plan nor functional to its implementation.

At the time of the filing of the petition for a composition agreement with the competent court (including by way of a simplified request), the debtor may request a stay on individual enforcement and interim actions (the Enforcement and Interim Actions Stay): the request shall be immediately effective but subject to subsequent confirmation by the court. The Enforcement and Interim Actions Stay may be implemented for a period no longer than four months provided that the court may agree to extend this period up to 12 months – upon request of the debtor or of a creditor - if (i) significant progress has been made in the negotiations on the restructuring plan and (ii) the extension does not unfairly prejudice the rights and interests of the parties concerned. Creditors in a *concordato* with business continuation as a going concern which are affected by the Enforcement and Interim Actions Stay cannot terminate or refuse performance of ongoing essential contracts (i.e. those which are necessary for the continuation of the ordinary management of the debtor's entrepreneur) as a result of non-payment of claims arisen prior to the filing of the *concordato* request.

Composition agreement with creditors (*concordato preventivo*) (cont.)

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. Ongoing court supervision continues until the date of final sanctioning (*Decreto di omologazione*) of the composition agreement by the court.

As noted, composition proceedings can have one of two goals, namely continuation of the debtor's business as a going concern (either directly or indirectly, through business disposals, leases or otherwise) or liquidation. The distinction between these two types of *concordato* is relevant in several respects.

In a composition with continuation of the business as a going concern, creditors must be satisfied (even if not to the prevailing extent) from the proceeds of the continuation (either direct or indirect) of the business. In the case of a *concordato* for liquidation, the debtor's proposal must (i) provide for an injection of external resources that increases the assets available at the time of submission of the petition by at least 10%; and (ii) envisage the repayment of at least 20% of the unsecured claims.

After the final sanctioning (*decreto di omologazione*) of the composition agreement for liquidation purposes by the court, a judicial liquidator (*liquidatore giudiziale*) and a creditors' committee will be appointed by the court.

Once the proposal is submitted, the court carries out a preliminary screening and, if satisfied, commences the procedure by way of a decree in which the court sets a date for creditors to vote on the proposal.

If creditors vote in favour (with the required majorities differing between a *concordato* for the continuation of business and a *concordato* for liquidation), the composition proceedings conclude with the court's decree validating the proposal. The proposal is then implemented by the debtor under the supervision of the judicial commissioner.

Composition agreements other than those providing for continuation of the business as a going concern must be approved with the consent of the majority of creditors entitled to vote, provided that if different classes of creditors are envisaged, the composition agreement shall be approved if approval by creditors representing the majority of claims admitted to the vote is also reached in the majority of the classes of creditors. In the event that a single creditor holds a majority amongst those entitled to vote, the composition agreement shall be approved if, in addition to being approved by this creditor, it has been voted for by the majority of creditors admitted to the vote.

A composition agreement which provides for continuation of the business as a going concern must provide the subdivision of creditors into separate "homogeneous" classes and shall be approved if all the relevant classes of creditors vote in favour of it. In respect of each class, the proposal shall be approved if creditors representing the majority of the claims (by value) entitled to vote in that class is reached (and by number, if one single creditor has the majority by value) or, failing that, if two thirds of the claims of the voting creditors in that class have voted favourably, provided that creditors holding at least half of the total claims of that class have voted.

Composition agreement with creditors (*concordato preventivo*) (cont.)

Notwithstanding the above, where there are one or more dissenting classes, business continuity may be approved subject to the following conditions:

- the 'liquidation value' is distributed to creditors in accordance with the absolute priority rule (i.e., junior creditors can be satisfied only to the extent that senior creditors have been satisfied in full);
- the 'restructuring surplus', or excess value, is distributed to creditors in such a way that the creditors belonging to a dissenting class receive no less than a class of equal rank and more than a class of a lower rank;
- no creditor receives more than the amount of their claim; and
- the proposal is approved by more than 50% (in number) of the number of classes, provided that at least one of the following classes has voted in favour:

  (a) secured creditors; or

  (b) "in-the-money" creditors (i.e. who, based on the ordinary ranking of claims, would be satisfied, at least in part, with the restructuring proceeds in excess of the liquidation value).

When a creditor belonging to a dissenting class contests the proposal, the court may approve the composition by applying a cram-down to this dissenting creditor if the court expects the recovery of the relevant claims to be "not lower than" the recovery obtainable in a judicial liquidation.

Controlling shareholders, subsidiaries of (and companies subject to common control by) such shareholders, any person having acquired their claims in the year preceding the filing of the *concordato* request and conflict of interest creditors more generally, are excluded from the vote and the relevant claims are excluded from the calculation of the relevant majorities. The creditor who proposes the *concordato* arrangement and its affiliates may only vote if inserted in a specific class of creditors.

Secured creditors to which the proposed composition agreement provides for full payment (within 180 days of sanctioning (*omologazione*) of the composition agreement by the court) do not have the right to vote unless they waive their right of pre-emption (*diritto di prelazione*) in whole or in part. If secured creditors waive their right of pre-emption (*diritto di prelazione*) in whole or in part, they will be treated as unsecured creditors for the part of their credit not covered by security. Secured creditors for which the proposed composition agreement does not provide for full satisfaction shall be treated as unsecured creditors for the residual part of their credit.

If the plan provides for continuation of the business as a going concern: (i) there can be a moratorium on payment of secured or preferred claims, unless the plan provides for the liquidation of the relevant collateral; (ii) unsecured creditors can be paid only in part, with no minimum threshold; and (iii) upon the court's authorisation, the debtor can pay pre-existing creditors (including unpaid employees) if this is necessary in order to obtain essential goods and services for the continuation of the business and are functional to ensure the best creditors' satisfaction.

Payments, acts carried out and security granted in execution of the sanctioned composition with creditors are not subject to claw back and are exempted from the application of certain criminal sanctions.

Claims arising from ordinary acts performed by the debtor during the proceedings and from new financial resources granted to the insolvent company (if duly authorised and compliant with certain legal requirements) will rank super-senior in the event of a subsequent judicial liquidation of the debtor.

Compulsory administrative winding-up (*liquidazione coatta amministrativa*)

A compulsory administrative winding-up (*liquidazione coatta amministrativa*) is the alternative to judicial liquidation 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. Before or after the administrative order, the ordinary Court (*Tribunale ordinario*) may declare the insolvency of the company subject to the compulsory administrative winding-up.

Unlike judicial liquidation 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 judicial liquidation 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.

The restructuring plan with creditors during judicial liquidation (*concordato nella liquidazione giudiziale*)

The judicial liquidation procedure (*procedura di liquidazione giudiziale*) can also be terminated through a restructuring plan with the creditors. The steps below describe how the restructuring plan with creditors during the judicial liquidation (*concordato nella liquidazione giudiziale*) takes effect.

The proposal for the restructuring plan can be advanced by both creditors and third parties unrelated to the judicial liquidation procedure, even before the decree of enforceability of the statement of liabilities (*decreto di esecutività dello stato passivo*), provided that the administrative receiver (*liquidatore giudiziale*) has drafted a provisional list of creditors.

The debtor, the companies in which it holds a participation and/or the companies subject to common control debt or other extraordinary transactions, including by debt to equity swaps. If the company in judicial liquidation has issued bonds or financial instruments subject to the proposal for the restructuring plan, the holders of such securities are constituted in a separate class can submit the proposal only (i) after one year from the opening of the procedure, but (ii) no later than two years from the decree of enforceability of the statement of liabilities. The proposal made by the debtor – or by companies in which it owns shares or that are subject to its common control – must provide for the contribution of resources that increase the value of the estate by at least 10%.

The proposal may provide for: (i) the division of creditors into classes, according to homogeneous legal position and economic interests; (ii) differentiated economic treatments among creditors belonging to different classes; (iii) the restructuring of liabilities and the satisfaction of the claims through any form, even by means of the transfer of assets (*datio in solutum*), assumption of debt or other extraordinary transactions, including debt to equity swaps.

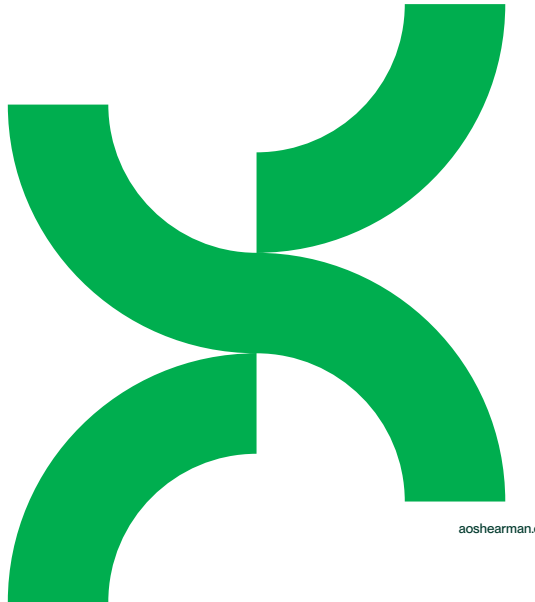
If the company in judicial liquidation has issued bonds or financial instruments subject to the proposal for the restructuring plan, the holders of such securities are constituted in a separate class.

The proposal may stipulate that privileged creditors, pledgors and mortgagors will not be fully satisfied, provided that the plan sets for their satisfaction in an amount not lower than that which would have been achievable on the proceeds recovered in the case of judicial liquidation, having regard to the market value attributable to the assets or rights on which the security interest or the privilege exist, net of the presumed amount of the procedure expenses related to the asset or right and of the pro rata general expenses indicated in the sworn report of an independent expert. The treatment established for each class cannot have the effect of altering the order of the legitimate claims of priority (*cause legittime di prelazione*).

The restructuring plan shall be approved by the creditors who represent the majority of claims entitled to vote.

If different classes of creditors are provided for, the restructuring plan is approved if it obtains a majority of votes in a majority of classes.

Creditors do not dissent to the proposal within the proposed deadline are deemed to have consented; creditors in conflict of interest are excluded from voting and from the calculation of the majorities.



Extraordinary administration (*amministrazione straordinaria*)

Italian law provides for two special insolvency-type procedures which apply to large entrepreneurs only (*amministrazione straordinaria*). The aim of this procedure is the preservation of the entrepreneur's assets, the recovery of the business by virtue of its continuation due to the strategic value of the business and the avoidance of liquidation. New rules on this insolvency procedure were recently introduced by the Law Decree no. 4 of 18 January 2024 while the Code of Crisis (Legislative Decree no. 14 of 12 January 2019) only intervened to establish the territorial competence of the court equipped with the division specialised in corporate and business law with regard to the declaration of insolvency of large entrepreneurs seeking admission to the extraordinary administration process.

In a nutshell:

- the first procedure is regulated by Legislative Decree no. 270 of 8 July 1999 (*Amministrazione Straordinaria delle grandi imprese in stato di insolvenza,* so-called *Prodi-bis*) and applies to insolvent corporations and individual entrepreneurs which can be admitted to the judicial liquidation procedure and meet the following requirements:

  (a) having employed not less than 200 employees within the year prior to the commencement of the procedure; and

  (b) holding an indebtedness equal to at least (i) two-thirds of the entity's total assets; and (ii) two-thirds of the entity's total income generated by sales and services from the last fiscal year (the Extraordinary Administration);

- the second extraordinary administration insolvency type procedure is regulated by 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*) which provides for a special procedure for larger/major insolvent entrepreneurs, i.e., for companies:

  (a) having employed more than 500 persons within the year preceding the commencement of the procedure; and

  (b) holding an indebtedness of at least EUR 300m (the Special Extraordinary Administration).

Both the Extraordinary Administration and the Special Extraordinary Administration are court-supervised and government-supervised procedures.

As regards the Extraordinary Administration, the judicial phase commences with the declaration of insolvency of the entrepreneur, which means that the debtor is declared incapable to pay its debts (i.e, it is declared to be in financial distress) by judgment issued by the competent court.

With the declaration of insolvency, the court will take the actions deemed appropriate with a view to handling the debtor's financial distress. It will appoint:

- a designated judge (*giudice delegato*), responsible for judicial supervision of the procedure; and
- one or three judicial commissioner(s) (*commissario giudiziale*), each acting as a public officer (duly note that one of these may be appointed by the Ministry of Industrial Affairs; (*Ministero 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"; otherwise the debtor will be declared bankrupted.

Said recovery can be realised through the following two alternative proceedings:

- the transfer of the business as a going concern under a disposal plan (whose performance must not exceed one year) (*amministrazione straordinaria con programma di cessione dei complessi aziendali*); or
- an economic and financial restructuring under a rescue plan (whose performance must not exceed two years) where the specific assets of the company are liquidated (*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 debtor 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, which was the Italian flag carrier recently "replaced" by ITA, the newco incorporated within the context of Alitalia's Special Extraordinary Administration), Alitalia Servizi S.p.A. and their subsidiaries in 2008. These amendments provide for specific rules for major companies that supply essential public services and constitute strategic assets for the country and the main objective of the procedure is, hence, 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 aimed at the liquidation of the company's assets (the Disposal Programme).

Extraordinary administration (*amministrazione straordinaria*) (cont.)

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

Indeed, 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 the Rescue Programme or the Disposal Programme. If the Ministry does not approve the Rescue or Disposal Programme, the bankruptcy court will order the conversion from Extraordinary Administration into bankruptcy.

The judicial phase starts when the competent court is served with 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) will take the actions deemed 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 Sviluppo Economico*). The Prime Minister or the Ministry of Economic Development will appoint an extraordinary Commissioner who can sell the company's assets without consulting the company's creditors.

Finally, it should be noted that the 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.

Debt restructuring agreements (*accordo di ristrutturazione dei debiti*)

A debt restructuring agreement (*accordo di ristrutturazione dei debiti*) is defined as an agreement between a debtor in financial difficulty (*stato di crisi*) and its creditors representing at least 60% of the value of the outstanding claims, for the reduction or reorganisation of the debtor's payment obligations. This agreement must be sanctioned (*omologazione*) by the court. A debt restructuring agreement represents an alternative to a composition agreement, debt enforcement actions and ultimately judicial liquidation. The purpose of procedure is to satisfy the claims of the adhering creditors in accordance with the provision of the relevant agreement and to satisfy (save for certain exceptions, see below) 100% of the claims of non-adhering creditors.

A debt restructuring agreement may provide for a stay on payments to creditors who are not participating in the debt restructuring agreement. The stay period for debts which are due and payable before the date of the court ratification is 120 days from the date of the court ratification (*omologazione*) whereas for debts that become due and payable after the date of the court ratification, this is 120 days from the date when the relevant debt becomes due and payable.

In addition, the agreement is published in the companies' register and is effective as of the day of its publication. Starting from the date of publication, creditors cannot start or continue any conservative or enforcement actions against the assets of the debtor in relation to pre-existing receivables and cannot obtain any security interest (unless agreed) in relation to pre-existing debts. Such protective measures (*misure protettive*) vis-à-vis existing creditors can be effective for a maximum period of four months, which may be extended – subject to certain conditions – for up to 12 months. During this period, it is not possible to commence a judicial liquidation proceeding in respect of the debtor.

The debt restructuring agreement must be accompanied by a report certified by an expert (meeting the requirements set forth under the Italian Crisis and Insolvency Code) 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 Crisis and Insolvency Code.

Debt restructuring agreements (*accordo di ristrutturazione dei debiti*) (cont.)

If substantial amendments are made to the plan:

- prior to the court's sanctioning (*omologazione*), the independent expert carries out a new assessment on the truthfulness of the business and accounting data, the feasibility of the agreement and its attitude to allow payment of the non-adhering creditors, and the debtor shall require creditors to confirm their adherence to the debt restructuring agreement. The independent expert carries out a new assessment also in case of substantial amendments to the debt restructuring agreement; or
- 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 this publication is given to the creditors by means of certified mail or certified email. Creditors may oppose the new plan within 30 days of the notice of publication.

Article 60 of the Italian Crisis and Insolvency Code introduced the so-called *accordi di ristrutturazione agevolati* in relation to which the above-mentioned percentage of 60%, provided under Article 57 of the Italian Crisis and Insolvency Code, is reduced to 30% if the debtor (i) waives the stay provision vis-à-vis its creditors provided for under paragraph 3 of Article 57 of the Italian Crisis and Insolvency Code; and (ii) does not previously file a petition for admission to temporary protective measures (*misure protettive*).

In addition, debtors are entitled to enter into "debt restructuring agreements with extended effect" (*accordi di ristrutturazione ad efficacia estesa*) by obtaining approval of creditors representing at least 75% of the creditors belonging to the same category (with respect to the homogeneity of their legal status and economic interests), and can request the court to declare the agreement binding in respect of non-adhering creditors of the same category (the so-called "cram-down") provided that, inter alia, the non-adhering creditors are not treated worse than under a judicial liquidation procedure. Article 61 of the Italian Crisis and Insolvency Code also provides that (i) the agreement shall be of a non-liquidating nature, (ii) the agreement shall contemplate the direct or indirect continuation of the business activity as a going concern, and (iii) all the creditors belonging to the relevant category have been duly notified of the beginning of the negotiations, have been kept informed and have been notified the debt restructuring agreement and the sanctioning decree (*decreto di omologa*). If these conditions are met, the remaining 25% of non-adhering creditors belonging to the same class of creditors are crammed down; however, non-adhering crammed-down creditors can challenge the agreement and refuse to be forced into it. The percentage of 75% is lowered to 60% if the reach 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*.

Debt restructuring agreements (*accordo di ristrutturazione dei debiti*) (cont.)

Similarly to the "debt restructuring agreements with extended effect" (*accordi di ristrutturazione ad efficacia estesa*), the debtor is also entitled to enter into standstill agreements (accordi di moratoria) which may also be extended to non-adhering creditors belonging to the same class. The standstill agreements are entered into between a debtor and creditors representing 75% of the same class and would also bind the non-adhering creditors, provided that (i) an independent expert certifies the truthfulness of the business data, the attitude of the standstill agreement to temporarily regulate the effects of the crisis and that non-adhering creditors suffer a prejudice that is proportionate and consistent with the recovery strategies undertaken by the debtor, and (ii) certain further conditions are met (e.g. 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 of having been notified of its existence.

In relation to tax claims, pursuant to Article 63 of the Italian Crisis and Insolvency Code, the court can sanction the debt restructuring agreement even if the Italian Tax Authority or the Italian Social Security Authority do not adhere, provided that their adherence is essential in order to reach the percentage of 60% provided under Article 57 paragraph 1 and article 60 paragraph 1 and that the claims of the non adhering Italian Tax Authority and Italian Social Security Authority are likely to be satisfied to a greater extent as a result of the debt restructuring agreement than in a judicial liquidation. The adherence of the Italian Tax Authority and of the Italian Social Security Authority must occur within 90 days from the filing of the debt restructuring agreement proposal.

Pursuant to paragraph 3 of Article 54 and paragraph 3 of Article 64 of the Italian Crisis and Insolvency Code, in case of application by the debtor to the petition for admission to temporary protective measures (*misure protettive*), creditors cannot unilaterally refuse to perform their obligations under or terminate the relevant existing agreements on the basis that the debtor has filed for such measures. Any agreements to the contrary shall be ineffective.

Out-of-court reorganization plan (*piani attestati 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, the procedure provides a safe harbour for transactions, payments and security granted 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.

The Italian Crisis and Insolvency Code provides that, should these plans fail and the debtor becomes subject to judicial liquidation proceedings, 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.

Neither ratification by the court nor publication in the Companies' Register are mandatory. Nonetheless, upon request of the debtor, an out-of-court reorganization plan can be published in the relevant Companies' Register.

Restructuring plans subject to homologation (*piani di ristrutturazione soggetti a omologazione*)

The Italian Crisis and Insolvency Code has recently introduced, in the restructuring proceedings scenario, the so-called "restructuring plans subject to homologation" (*piani di ristrutturazione soggetti a omologazione*) which are available to debtors meeting the thresholds set forth under letter d) of paragraph 1 of Article 2 of the Italian Crisis and Insolvency Code. It is a fully in-court and court-supervised procedure aimed at maintaining the business as a going concern. The restructuring plan must be sanctioned (*omologazione*) by the court.

Pursuant to Article 64 *bis* of the Italian Crisis and Insolvency Code, the absolute priority rule does not apply to creditors if the restructuring plan proposal is unanimously approved by creditors' classes. The secured creditors and employees are not entitled to vote if the restructuring plan provides for full satisfaction of their payment obligations within 180 days and 30 days (respectively) of homologation. If the restructuring plan is not approved by all classes, the debtor may amend its petition by submitting a proposal for *concordato preventivo*.

Similarly to the debt restructuring agreements (*accordi di ristrutturazione dei debiti*), the debtor is entitled to file for the application of a protective measure (*misure protettive*) vis-à-vis existing creditors to be effective for a maximum period of four months that can be extended – subject to certain conditions – for up to 12 months. During this period, the judicial liquidation proceedings cannot be filed in relation to the debtor.

In addition, during the restructuring plan subject to homologation, the debtor maintains the management of the business under the supervision of the judicial commissioner (*commissario giudiziale*), subject to certain limitations and information undertakings set forth under Article 64 *bis* of the Italian Crisis and Insolvency Code.

The procedure provides a safe harbour for transactions, payments and security granted on the debtor's assets carried out or put in place as part of the execution of the restructuring plan.

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

Pursuant to the Italian Crisis and Insolvency Code, a natural person that is not an entrepreneur (*imprenditore*) in a state of over-indebtedness (*stato di sovraindebitamento*) is entitled to file, with the assistance of a competent body (*Organismi per la composizione della crisi da sovraindebitamento*), a request for obtaining approval for a debt restructuring plan (the Restructuring Plan). The Restructuring Plan may include the deferral or release of existing debts and becomes effective (enforceable against all creditors) upon approval (*omologazione*) by the competent court and provided that the judge is satisfied that the debtor cannot be blamed – based on their previous conduct and by applying a standard of care in managing their own finances – for the situation of over-indebtedness they incurred.

Besides natural persons, entrepreneurs (*imprenditore*) that do not meet the requirements for being eligible for judicial liquidation can apply for a court-approved reorganisation agreement (*concordato minore*) (the Reorganisation Agreement) which is effective upon approval (*omologazione*) by the competent court provided that it has been approved by the creditors that represent the majority of the claims. The Reorganisation Agreement may include the deferred payment or release of existing debts.

Under the approved Reorganisation Agreement, which shall be binding for all of the creditors of the relevant debtor, it is possible to provide that claims with a lien, pledge or mortgage (*creditori privilegiati*) may be satisfied only in part if payment is ensured for an amount that is at least equal to the amount that would be obtained by the creditor through the liquidation of the pledged asset or the immovable subject to mortgage. Furthermore, the court may issue an order preventing creditors from commencing foreclosure procedures and seizures (*sequestri conservativi*) and creating preemption rights (*diritti di prelazione*) on the debtor's assets.

Eventually, debtors (other than entities eligible for judicial liquidation) can also file for a "controlled asset liquidation" procedure (*liquidazione controllata*), where all the debtor's assets are sold under a court-administered procedure, and proceeds are distributed among creditors pursuant to the applicable hierarchy. After admission to this procedure based on the competent court's decision, creditors cannot initiate nor pursue individual enforcement and precautionary proceedings.

European insolvency regulation

The 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.

The Recast Regulation has been recently amended by the Regulation (EU) 2021/2260 which has updated the procedures listed under Annex A to the Recast Regulation in order to reflect the reform introduced by the Italian Crisis and Insolvency Code. Of the above procedures, the following are listed under Annex A: judicial liquidation (*liquidazione giudiziale*), composition agreement with creditors (*concordato preventivo*), *liquidazione coatta amministrativa*, extraordinary administration (*amministrazione straordinaria*), debt restructuring agreements (*accordi di ristrutturazione dei debiti*) and liquidation of the over-indebted debtor (*liquidazione controllata del sovraindebitato*).

Key contacts

If you require advice on any of the matters raised in this document, please contact any of our partners or your usual contact at A&O Shearman, or email. **rab@aoshearman.com**.

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Further information

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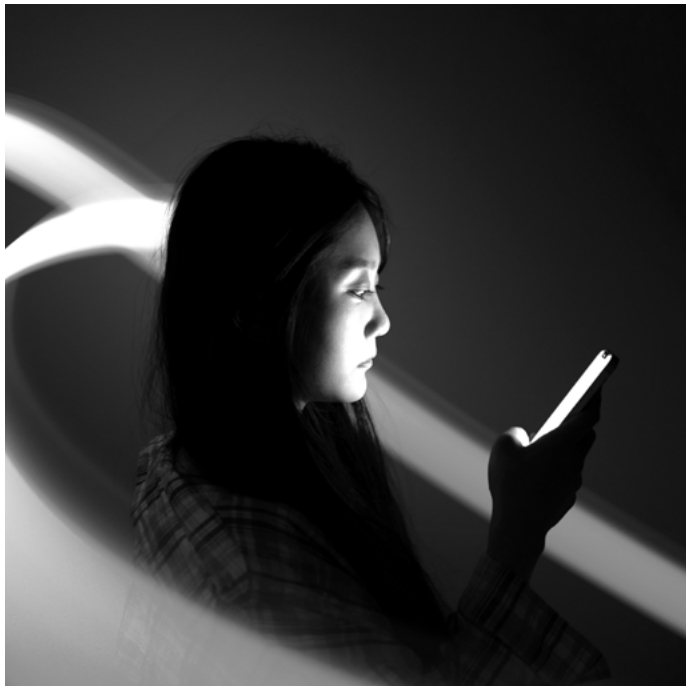

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