

## EMEA DC MEETING STATEMENT 9 OCTOBER 2018

### SUMMARY

The DC met on 5 October 2018 to continue its discussion as to whether a Bankruptcy Credit Event had occurred with respect to Astaldi S.p.A. (**Astaldi** or the **Reference Entity**) as a result of the filing with the Rome Tribunal by Astaldi on 27 September 2018 of an application for *concordato con riserva* proceedings in accordance with Article 161(6) of the Royal Decree no. 267/1942 as amended (the **Bankruptcy Law**).<sup>1</sup>

The DC Resolved:

- (a) to treat the DC Question as separate requests in respect of (i) 2014 Transactions and (ii) Updated 2003 Transactions<sup>2</sup>;
- (b) that a Bankruptcy Credit Event had occurred with respect to the Reference Entity in relation to 2014 Transactions;
- (c) that a Bankruptcy Credit Event had also occurred with respect to the Reference Entity in relation to Updated 2003 Transactions;
- (d) that the date of the Bankruptcy Credit Event with respect to the Reference Entity in relation to both 2014 Transactions and Updated 2003 Transactions is 27 September 2018;
- (e) the Credit Event Resolution Request Date is 1 October 2018; and
- (f) to hold an Auction in respect of 2014 Transactions and Updated 2003 Transactions on a date to be determined by the DC. The intention is to combine the Auction for 2014 Transactions with an Auction for Updated 2003 Transactions if the Deliverable Obligations for each set of transactions are identical.

Capitalised terms used but not defined in this Meeting Statement have the meanings given to them in the Credit Derivatives Determinations Committees Rules (September 28, 2018 version) (including in the 2014 Definitions and the Updated 2003 Definitions, each as defined therein) (the **DC Rules**).

### EFFECT OF CONCORDATO

The DC obtained Italian legal advice as to the nature of *Concordato Preventivo* proceedings (herein **Concordato**) and the effect of filing a request for Concordato and the Concordato itself, specifically in the context of a *con riserva* filing which simply reflects the manner in which a request for Concordato is made, has on the debtor requesting it and its creditors' rights.

The aim of Concordato is to restructure the business and/or the indebtedness of the debtor and thus avoid a declaration of bankruptcy.

The application for admission to Concordato is required to be filed by the debtor with the tribunal (the **Court**) of the place where it has its head office. The debtor is required to provide certain documentation to support the application (updated financial statements, list of assets, list of creditors and security, etc.) and the application must be accompanied by a report from an independent expert who attests to the accuracy of financial and other information, as well as the feasibility of the composition plan (the **CP**). The application is notified to the Public Prosecutors Office and filed in the Companies Register within one business day.

<sup>1</sup> Further details of the Concordato filing are available on the Astaldi website: [http://www.astaldi.com/sites/astaldi16corp/files/2018\\_09\\_28\\_astaldi\\_press\\_release.pdf](http://www.astaldi.com/sites/astaldi16corp/files/2018_09_28_astaldi_press_release.pdf)

<sup>2</sup> In accordance with the DC Rules, "Updated 2003 Transaction" means a March 2009 Supplement Transaction or a July 2009 Supplement Transaction (and not a Credit Derivative Transaction incorporating the 2014 Definitions as a result of the ISDA 2014 Credit Derivatives Definitions Protocol).

Concordato is available to debtors "in a state of crisis", although there is no formal requirement for a declaration of insolvency.

The CP 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 convertible), 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 sale of the secured asset, 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.

A debtor may also file a petition for admission to Concordato together with balance sheets for the last three fiscal years and a list of creditors and their respective claims, without depositing the CP and the full suite of supporting documents, in which case the judge may grant between 60 and 120 days (potentially subject to an additional 60 day extension) to provide the CP and complete the application (also known as *concordato "in bianco"* or *concordato "con riserva"* (see further below)). It is this type of filing that has been made by Astaldi in the present case. The debtor becomes subject to various reporting obligations in this case. During this period, the debtor could decide to pursue a court-supervised private work-out as foreseen by Article 182-bis of the Bankruptcy Law (commonly referred to as a hybrid restructuring), although based on Astaldi's press releases it appears Astaldi's intention is to pursue the continuation strategy (see below) under Concordato. The DC understands that all of the rules/procedures set forth below would equally apply to these in bianco/con riserva proceedings.

If the Court rejects the application for admission to Concordato, it may commence proceedings for bankruptcy upon request by the Public Prosecutors Office or creditors.

Upon admission to Concordato, the presiding judge will, *inter alia*, appoint a judicial commissioner (*commissario giudiziale*), who acts as a public official (*pubblico ufficiale*). The judicial commissioner performs a variety of tasks in the context of the proceedings. In particular, while the debtor maintains the right to administer its assets and conduct its business (i.e. the debtor retains management powers), this is subject to the supervision of the judicial commissioner<sup>3</sup>. The presiding judge may also decide to appoint a judicial commissioner at the time of filing of an application "con riserva"/"in bianco" (i.e. before the filing of a complete proposal) which will exercise control over the debtor in an effort to prevent the debtor from undertaking actions that might jeopardise the interest of the creditors.<sup>4</sup> Following court approval of the CP, the judicial commissioner is tasked with supervising implementation and is required to communicate to the judge any facts which may prejudice creditors. Where the judicial commissioner determines that the debtor is not performing actions necessary to implement the CP or is delaying completion of such actions, she is required to refer the situation without delay to the Court, in which case the Court may give the necessary power to take action to the judicial commissioner, instead of the debtor. The Court may also revoke the board of directors where the debtor is a company, and appoint a judicial director instead for the purposes of taking any action needed to implement the CP, including convocation of shareholders' meetings for the purposes of undertaking a capital increase.

The judicial commissioner is obliged to report to the Court, the Public Prosecutors Office and creditors any material irregularities in accounting records and/or actions taken by the debtor, which may lead to revocation of the proceedings for Concordato and commencement of bankruptcy proceedings.

A CP which foresees the sale of assets may also give rise to appointment by the presiding judge of one or more liquidators and a committee of between three and five creditors to oversee the sale.

---

<sup>3</sup> Additionally, the debtor is subject to (not less than) monthly reporting obligations to the Court and (not less than) monthly filing of financial statements with the Companies Register.

<sup>4</sup> The DC is not aware whether this early appointment has occurred in the context of Astaldi's con riserva filing.

Creditors seeking to vote on the CP must be recognised by the Court. There is no formal proof of claim or other action which creditors need to take when a company files for Concordato, including concordato con riserva/in bianco. Creditors not included in the list prepared by the debtor or not contacted by the judicial commissioner may still attend the court hearing to vote on the CP. Creditors will be given a vote if they can produce some evidence of their claim, although the judge may subsequently decide that the claim is not to be admitted.

The CP can be approved with the positive vote of creditors representing more than 50% of claims admitted to voting<sup>5</sup>. If the CP foresees the division of creditors into classes, the majority of classes must vote in favour of the CP in addition to creditors representing more than 50% of claims.

As from the filing of the application for admission to Concordato, the debtor may undertake actions of ordinary administration, while actions of extraordinary administration are only permitted if required as a matter of urgency and upon authorisation by the Court. In particular, certain actions, including the granting or cancelling of mortgages, pledges or similar security, the settlement of disputes, the sale of immovable property, the granting of *in personam* guarantees, recognition of third party rights, require written authorisation of the presiding judge. The concept of ordinary administration is interpreted narrowly (for example, the hiring of employees would fall within the concept of **extraordinary** administration). Because lack of authorisation for actions taken by the debtor which are found to constitute extraordinary administration may result in the contracting party not benefiting from exemptions for claw back, a prudent approach is typically taken by the debtor (and the counterparty) to seek authorisation if any transaction results in a disposition of assets.

Proceedings for Concordato are structured such that one of two strategies may be pursued, namely a liquidation strategy or a continuation strategy. A debtor is also able to file a form of “blank” petition (*concordato in bianco* or *concordato con riserva*), as is the case in respect of Astaldi, which requests admission to proceedings but reserves the possibility to elect between a liquidation or continuation strategy (although Astaldi appears to have indicated already, via press release, that it intends to pursue a continuation strategy).

From the date of publication of the petition for admission to the proceedings (in the Companies Register), and up until the time of court approval of the CP, all creditors (including secured creditors) are prohibited from initiating or continuing enforcement proceedings against the debtor’s assets (and such proceedings already pending are suspended). This rule applies in the case of proceedings pursuing either a liquidation strategy or a continuation of business strategy and the DC has been advised that the same approach should apply in the case of a *concordato in bianco/con riserva*. This prohibition applies to all of the debtors’ assets (i.e. not merely those functional for realisation of the debtor’s business and/or the CP). However, the rules against enforcement proceedings do not apply to creditors who have a financial collateral arrangement in place.

Payment obligations in respect of executory contracts will continue to become due and payable on their scheduled payment date and the debtor is able to satisfy such payment obligations so long as they relate to matters of ordinary administration (although see above re: prudent approach typically taken by debtors and counterparties) and do not represent claims which became due prior to the date of the petition. Bonds and term (i.e. non-revolving) loans are not considered executory contracts and are subject to the separate rule on acceleration of pecuniary debts (see below). Alternatively, if the debtor wishes to terminate a contract, it must seek approval from the presiding judge. In practice, a period of suspension of contracts (up to 120 days) is likely to arise for executory contracts, even though only in the case of the continuation strategy does the law make specific provision for a bar on the enforcement of termination rights. Suspension or termination of a contract at the initiative of the debtor only takes effect from the date of communication of the relevant court order to the non-defaulting party. By contrast, if a contract is continued during the proceedings, the debtor must pay all amounts to the creditor in full (so long as they relate to matters of

---

<sup>5</sup> Secured creditors are not able to vote if the CP provides that they will be repaid in full, unless they waive their security.

ordinary administration and do not represent claims which became due prior to the date of the petition as noted above)<sup>6</sup>.

Financing arrangements foreseen in the CP may benefit from super-priority if this is specifically provided for in the court approval of the CP. It is possible for the debtor, subject to court approval, to secure financing benefiting from super-priority even prior to the deposit of all required documentation if the court is satisfied that such financing is key to the success of the CP, in which case such financing will be granted super-priority. Court approval is likewise required for any pledge, mortgage, assignment of receivables or other form of security to be granted by the debtor or for the payment of any creditors in respect of claims relating to the supply of goods or services which became due prior to the date of the petition for admission to the proceedings (and which, in principle, would otherwise be subject to rateable satisfaction).

All pecuniary debts<sup>7</sup> mature by operation of law from the date of filing the petition for admission to Concordato and, there is a suspension of interest on unsecured claims<sup>8</sup> as from such date. The DC understand that this rule applies also in the context of *concordato in bianco/con riserva* and to any financing arrangement in the context of which the only performance remaining is for repayment of funds by the debtor, i.e. excluding only arrangements such as revolving loans including those made available through current accounts. Set-off rights are enforceable, subject to a one-year anti-build up rule, although if creditors need to terminate an executory contract in order to crystallise a claim for purposes of set-off, then they could be caught by the suspension on termination (i.e. creditors don't have a crystallised claim to set-off until they terminate).

## **WHETHER A BANKRUPTCY CREDIT EVENT HAS OCCURRED IN RELATION TO 2014 TRANSACTIONS**

### ***Section 4.2(d) of the 2014 Definitions***

Limb (d) of the definition of Bankruptcy Credit Event in Section 4.2 of the 2014 Definitions provides as follows:

*"the Reference Entity... institutes or has instituted against it a proceeding seeking a judgment of insolvency or bankruptcy or any other similar relief under any bankruptcy or insolvency law or other law affecting creditors' rights..."*

The DC was of the view that the Reference Entity having filed a petition for admission to *concordato con riserva* proceedings with the Rome Tribunal would constitute the "[institution of] a proceeding". The law under which the filing was made is the Bankruptcy Law, which is a bankruptcy or insolvency law or other law affecting creditors' rights.

The DC noted that this particular limb of the Bankruptcy Credit Event definition in the 2014 Definitions was considered in some detail by the DC in relation to three fairly recent Bankruptcy Credit Event questions: Abengoa<sup>9</sup>, Portugal Telecom<sup>10</sup> and Isolux<sup>11</sup>. As for each of those DC questions, the key issue in relation to the 2014 Transactions turned on whether the relief sought by virtue of the *concordato con riserva* proceedings (or, in the case of Abengoa, Spanish *preconcurso* proceedings, in the case of Portugal Telecom, Brazilian judicial reorganisation proceedings and, in the case of Isolux, Dutch moratorium proceedings) was "similar" to that sought under "proceedings seeking a judgment of insolvency or bankruptcy". As such, the

<sup>6</sup> In the context of ISDA Master Agreements, it is clear that no "cherry-picking" rights arise in favour of the debtor/judicial commissioner. i.e. loans and bonds, rather than executory contracts.

<sup>8</sup> Where a creditor possesses security, interest may continue to accrue up to the value of the security

<sup>9</sup> For further details see: <http://dc.isda.org/cds/abengoa-sa-2/>

<sup>10</sup> For further details see: <http://dc.isda.org/cds/portugal-telecom-international-finance-b-v/>

<sup>11</sup> For further details see: <https://dc.isda.org/cds/grupo-isolux-corsan-finance-b-v/>

DC made reference to its analysis and determinations with respect to the Abengoa<sup>12</sup>, Portugal Telecom<sup>13</sup> and Isolux<sup>14</sup> questions for the purposes of considering the present DC question.

The DC was of the view that the relief granted by the *concordato con riserva* proceedings is sufficiently similar in effect to that granted by proceedings seeking a judgment of insolvency or bankruptcy, and noted a number of points in reaching this conclusion:

- (a) the effect of making a filing for admission to Concordato proceedings is for the Reference Entity to avail itself of an automatic stay (albeit temporary in nature), providing relief for all of its assets (and not just those functional for the realisation of the debtor's business and/or the CP) and from all of its creditors including secured creditors (but excluding any creditors who have a financial collateral arrangement in place) – i.e. universal application. Specifically, this takes the form of a stay on creditor petitions for bankruptcy as well as enforcement claims (both new and existing) against the debtor and/or all of its assets, subject to the aforementioned limited exception;
- (b) the debtor is relieved from having to satisfy any claims which became due prior to the date of the petition. Further, although payment obligations in respect of executory contracts continue to become due and payable on their scheduled payment date and the debtor is able to satisfy such payment obligations if they relate to matters of ordinary administration (and do not represent claims which became due prior to the date of the petition as aforesaid), in practice these contracts are likely to be subject to a court-authorized suspension (albeit temporary in nature) and so the debtor is effectively relieved from having to satisfy such payment obligations and creditors are effectively prevented from exercising any early termination rights as a result of any such non-payment and/or other default. Even though, so far as the DC is aware, no such suspension order has been made by the Court in respect of the current proceedings, it was considered to be significant that such an order is permitted in certain circumstances;
- (c) all pecuniary debts mature by operation of law from the date of filing the petition for admission to Concordato, and there is a suspension of interest as from such date in respect of unsecured debts;
- (d) Concordato proceedings are a court-based process (indeed, a significant amount of documentation, including a report from an independent expert attesting to the accuracy of the financial and other information and the feasibility of the CP, must support the application) and ultimately require approval of the Court to be commenced as well as to ratify the CP. Even though the debtor retains management powers (see below), the Court is able to revoke the board of directors and appoint a judicial director instead. Additionally, the Court also has final determinative powers as to whether creditor claims are admitted for the purposes of voting on the CP;
- (e) while the debtor retains management power and may undertake actions of ordinary administration (subject in each case to the supervision of the judicial commissioner – see below), actions of extraordinary administration, including granting or cancelling of certain security arrangements, the settlement of disputes and recognition of third party rights, are only permitted if required as a matter of urgency and with Court approval. Further, on account of the fact that the concept of ordinary administration is interpreted narrowly, the debtor and creditor usually seek Court authorisation for any transaction resulting in a disposition of assets. Also one or more liquidators and a committee of between three and five creditors may be appointed by the Court to oversee the sale of any assets required pursuant to the CP. In other words, the debtor's management powers are in practice significantly curtailed by virtue of Concordato proceedings;

---

<sup>12</sup> Please see the EMEA DC meeting statement dated 8 December 2015 for further details: <http://dc.isda.org/documents/2015/12/emea-dc-decision-09122015.pdf>

<sup>13</sup> Please see the EMEA DC meeting statement dated 1 July 2016 for further details: <http://dc.isda.org/documents/2016/07/emea-dc-decision-01072016-meeting-statement.pdf>

<sup>14</sup> Please see the EMEA DC meeting statement dated 5 August 2016 for further details: <https://dc.isda.org/documents/2016/08/grupo-isolux-corsan-finance-b-v-statement-aug-5-2016.pdf>

- (f) a judicial commissioner is appointed by the court for the duration of the Concordato proceedings (and may even be appointed ahead of the commencement of such proceedings being approved by the Court) to supervise and monitor the debtor's management, albeit that such judicial commissioner does not generally speaking engage in the management function itself. Significantly, however, the judicial commissioner may be given the power to implement the CP in place of the debtor's management in circumstances where the Court believes the management is not performing the relevant actions, or delaying completion thereof, to implement the CP;
- (g) the CP which must be submitted by the debtor may provide for, inter alia, the restructuring of debts and the satisfaction of creditors' claims in any manner and the placing of creditors into different classes and different treatment for creditors belonging to different classes. If the CP is approved by the required majority of creditors/creditor classes and is subsequently ratified by the Court, all of the creditors of the debtor are bound by the CP. As such, through the Concordato procedure, dissenting creditors may be crammed down;
- (h) although set-off rights are enforceable (subject to a one-year anti-build up rule), in practice these may not be exercisable as certain claims may not be capable of being crystallised due to the suspension on termination rights; and
- (i) the Concordato proceedings can last for up to 6 months (and in practice are likely to last for a greater period of time factoring in time for the creditors' meetings to be held, the court approval process as well CP-implementation time) – i.e. a significant amount of time for creditors' rights to be restricted in the ways described above.

The DC was of the view that the relief granted by the *concordato con riserva* proceedings is therefore sufficiently "similar" to the relief granted by proceedings seeking a judgment of insolvency or bankruptcy for purposes of limb (d) of the Bankruptcy Credit Event definition under the 2014 Definitions. Accordingly, the DC resolved that a Bankruptcy Credit Event had occurred with respect to the Reference Entity in relation to 2014 Transactions.

## **WHETHER A BANKRUPTCY CREDIT EVENT HAS OCCURRED IN RELATION TO UPDATED 2003 TRANSACTIONS**

### ***Section 4.2(d) of the Updated 2003 Definitions***

The DC noted that limb (d) of the definition of Bankruptcy Credit Event in Section 4.2 of the Updated 2003 Definitions is drafted slightly differently to limb (d) of the definition of Bankruptcy Credit Event in Section 4.2 of the 2014 Definitions.

Specifically, under the Updated 2003 Definitions, one of the requirements in order to constitute a Bankruptcy Credit Event is that the Reference Entity institutes "proceedings seeking a judgment of insolvency or bankruptcy or any other relief" (emphasis added). Unlike under the 2014 Definitions, there is no requirement in the wording of the provision that the relevant relief be *similar* to that granted by proceedings seeking a judgment of insolvency or bankruptcy.

The DC was of the view that the relief sought pursuant to of the *concordato con riserva* proceedings did constitute such "other relief", considering the points noted at (a) to (i) above, in particular, the universal application of the automatic stay on enforcement actions, the payment obligation suspension/suspension of contracts relief that is available, the early acceleration of pecuniary debts, the appointment of a judicial commissioner and the level of court involvement entailed, the fact that the CP could bind dissenting creditors, and the time for which the Concordato proceedings are in place.

Accordingly, the DC resolved that a Bankruptcy Credit Event had occurred with respect to the Reference Entity in relation to Updated 2003 Transactions.