

## CONCORDATO PREVENTIVO AND STATE AID

Massimo Merola\*, Alessandro Cogoni\*\*

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**Abstract:** *This article examines the interactions between the rules governing State aid in EU law and the Italian concordato preventivo (pre-bankruptcy arrangement with creditors), which may take place both when Member States are granting aid and when aid considered illegal by the European Commission is being recovered. This contribution therefore analyses – also in light of Italy’s recent Financial Distress and Insolvency Code (Codice della crisi d’impresa e dell’insolvenza) – the compatibility of a concordato preventivo, whether as part of a company’s winding-up or continuity, with the obligation incumbent on the Member States to restore the situation to that preceding the granting of aid and remove the competitive advantage gained by the beneficiary.*

### 1. INTRODUCTION

A *concordato preventivo* is a type of insolvency proceedings based on the debtor’s inability to pay, currently governed by Arts. 160–186-*bis* of Royal Decree No. 267/1942 (“Bankruptcy Law” – published in Official Gazette of the Italian Republic No. 81 of 6 April 1942), but which will be governed by Arts. 84–120 of Legislative Decree No. 14<sup>1</sup> of 12 January 2019 (“FDIC” – Italian Financial Distress and Insolvency Code, *Codice della crisi d’impresa e dell’insolvenza*) as of 15 August 2020<sup>2</sup>. From this perspective, this article discusses the provisions in force at present, referring to the FDIC only in the presence of substantial changes relevant to our analysis.

The *concordato preventivo*, the ultimate purpose of which is to avoid a declaration of bankruptcy, may be requested by companies (with the exception of agricultural enterprises and public bodies) with liquidity problems<sup>3</sup> to: (i) attempt to restore solvency, also by continuing the

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\* Massimo Merola, lawyer and professor at the College of Europe, Bruges, and Paris II Panthéon-Assas. All views expressed in this paper are strictly personal and unrelated to the position taken by the author in his professional activity.

\*\* Alessandro Cogoni, LL.M. in International and EU Law at VUB, Brussels, is a trainee lawyer.

<sup>1</sup> Legislative Decree No. 14 of 12 January 2019, Italian Business Crisis and Insolvency Code (*Codice della crisi d’impresa e dell’insolvenza*), Implementing Act No. 155 of 19 October 2017, Official Gazette of the Italian Republic No. 38 of 14 February 2019 – Ordinary Supplement No. 6.

<sup>2</sup> Except for Art. 27, para. 1, and Arts. 350, 356, 357, 359, 363, 364, 366, 375, 377, 378, 379, 385, 386, 387 and 388, which came into force on 16 March 2019.

<sup>3</sup> These are companies in a state of insolvency or, more generally, serious financial difficulty. Under Art. 5 of the Bankruptcy Law (Art. 2 of the FDIC), the state of insolvency “is defined by non-performance or other external factors, which demonstrate that the debtor is no longer able to satisfy its obligations properly”. The state of insolvency is only a part of the greater and more general state of crisis described in Art. 160 of the Bankruptcy Law (Art. 85 of the FDIC).

business and possibly transferring the going concern to a third party (the *concordato con continuità aziendale* – pre-bankruptcy arrangement with creditors on a going concern basis)<sup>4</sup>; or (ii) wind up their own assets and use the proceeds to satisfy creditors, thereby avoiding bankruptcy<sup>5</sup>.

The admission of a company to a *concordato preventivo* becomes important with regard to State aid control, the primary provisions for which are set out under Arts. 107–109 of the Treaty on the Functioning of the European Union (“TFEU”)<sup>6</sup>, at least regarding the following two aspects:

(i) Limits regarding the granting of State aid: Companies involved in a *concordato preventivo*, such as those meeting the requirements to undergo insolvency proceedings, may benefit from State aid only to a limited extent and, in any case, exclusively with the prior authorisation of the European Commission (“Commission”). This applies not only to individual aid but also to previously authorised aid schemes. This aspect is examined in Section I.

(ii) Specific rules applicable to the recovery of illegal State aid<sup>7</sup> declared incompatible with the internal market by the Commission: In brief, the fact that the beneficiary of unlawful and incompatible State aid is undergoing insolvency proceedings does not exempt the Member State from recovering the aid. Compliance with this obligation might result in the Member State, in particular circumstances, having to object to the company’s admission to a *concordato preventivo*, especially if the proceedings aim to restore the company’s solvency and continue carrying on its business. This aspect is examined in Section II.

## 2. THE GRANTING OF STATE AID TO COMPANIES UNDERGOING A *CONCORDATO PREVENTIVO*

A *concordato preventivo* is covered by the “insolvency proceedings” governed by Art. 2, para. 4, of EU Regulation No. 845/2015<sup>8</sup>.

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<sup>4</sup> See Art. 186-*bis* of the Bankruptcy Law (Art. 84 of the FDIC).

<sup>5</sup> They must be companies that satisfy the insolvency requirements set out in Art. 1 of the Bankruptcy Law (Art. 1 of the FDIC). The term “bankruptcy” is used in this article; however, with the introduction of the FDIC, the term will be replaced by the expression “judicial liquidation” (*liquidazione giudiziale* – compulsory winding-up). This is a purely terminological change, as the characteristics of a “judicial liquidation” are the same as those of the current bankruptcy proceedings.

<sup>6</sup> State aid control derives from primary law provisions (Arts. 107–109 of the TFEU) and many secondary law and soft law provisions, in addition to the principles established in the CJEU caselaw. The secondary law

reference for recovery issues is Art. 16 EU Regulation No. 1589/2015.

<sup>7</sup> Under Art. 1, point f), of EU Regulation No. 1589/2015, new aid granted in breach of Art. 108, para. 3, of the TFEU is considered illegal. “New aid” includes all individual aid or aid schemes that do not fall into one of the categories of existing aid, as strictly defined, including amendments to existing aid. Art. 108, para. 3, specifies the obligation to notify the Commission of all new aid (or “aid projects” according to the terminology of the TFEU) and the additional obligation of suspension of payment (“standstill”) of such aid until the Commission has authorised them.

<sup>8</sup> Regulation (EU) No. 2015/848 of the European Parliament and the Council of 20 May 2015 regarding

As recently confirmed by the Court of Justice of the European Union (“CJEU”)<sup>9</sup>, the term “insolvency proceedings” is also valid as a description of a *concordato con continuità aziendale*. Although the latter is not expressly mentioned in EU Regulation No. 848/2015 and, unlike other insolvency proceedings, is not opened compulsorily by the competent court but on request by the company involved, the provision governing it is contained in the Italian bankruptcy system (i.e., Art. 186-*bis* of the Bankruptcy Law or Art. 84 of the FDIC). The tone of the provision denotes that the *concordato con continuità aziendale* is simply a specific type of *concordato preventivo*<sup>10</sup>.

Describing the *concordato preventivo* as a type of “insolvency proceedings” is important for the purpose of applying State aid provisions because companies undergoing insolvency proceedings or that meet the requirements set out by national

law for starting insolvency proceedings at the request of creditors are considered “enterprises in difficulty”<sup>11</sup>. The definition of an “enterprise in difficulty” has precise implications for the application of State aid provisions because it significantly affects the company’s suitability to receive new aid – though it does not rule out the possibility for it to retain aid already granted<sup>12</sup>.

As a rule, companies in difficulty may benefit from State aid only if the aid has been previously authorised by the Commission on an individual basis under Art. 107, para. 3, point c), of the TFEU. The General Block Exemption Regulation (which defines certain categories of State aid as compatible with the internal market, exempting them from the obligation to notify the Commission) does not apply to aid to companies in difficulty, apart from limited exceptions<sup>13</sup>. Therefore, aid to companies in difficulty – together with regional aid for major

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insolvency proceedings (recasting), OJEU L 141 of 5 June 2015, page 19, as amended by Regulation (EU) No. 2017/353 of the European Parliament and the Council of 15 February 2017, OJEU L 57 of 3 March 2017, page 19.

<sup>9</sup> CJEU judgment of 6 July 2017, *Nerea S.p.A. v. Regione Marche*, C-245/16, EU:C:2017:521, para. 29.

<sup>10</sup> See the Opinion of the Advocate-General M. Campos Sánchez-Bordona of 5 April 2017 in *Nerea S.p.A. v. Regione Marche*, C-245/16, EU:C:2017:271, paras. 58–59.

<sup>11</sup> See para. 20, point c), of Communication from the Commission – Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, published in OJEU C 249 of 31 July 2014, page 1. See also Art. 2, para. 1, point 18, subpoint c), of Regulation (EU) No. 651/2014 of the Commission of 17 June 2014, which declares certain categories of aid to be compatible with the internal market under Arts. 107 and 108, OJEU L 187 of 26 June 2014, para. 1 (“General Block Exemption Regulation”), as amended by Regulation (EU) No. 1084/2017 of 14 June 2017, which amended: (i) Regulation (EU) No. 651/2014 with regard to aid for port and airport infrastructures, the notification thresholds applicable to aid for culture and the preservation of

cultural heritage and aid for sport and multifunctional recreation infrastructures, and the aid schemes for regions for functioning in the ultra-peripheral regions; and (ii) Regulation (EU) No. 702/2014 with regard to the calculation of admissible costs (OJEU L 156 of 20 June 2017, in effect from 10 July 2017). The validity of the General Block Exemption Regulation has been extended to 31 December 2022.

<sup>12</sup> The aid set out in Art. 107, para. 1, of the TFEU, is deemed granted when the beneficiary – in accordance with the applicable national legal system – is granted the right to receive the aid; see Art. 2, para. 1, point 28, of the General Block Exemption Regulation.

<sup>13</sup> An exception is provided for aid schemes intended to counter the harmful consequences of specific natural disasters, aid schemes for launching and operating regional development projects, provided that the schemes do not envisage a more favourable treatment for companies in difficulty than for other companies; see Art. 1, para. 4, point c), of the General Block Exemption Regulation, as most recently amended.

investment projects and a few other categories – remains the only aid requiring prior authorisation from the Commission. This thus differs from the dominant tendency (in the post-modernisation period of State aid control) towards an automatic assessment of State incentives for companies. When assessing whether to authorise the aid, the Commission refers to the Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty (“Guidelines”)<sup>14</sup>.

Therefore, the aid granted to a company undergoing a *concordato preventivo* must not only be always notified in advance to the Commission but must also comply with the conditions specified in the Guidelines. For example, the aid must be “one-off”<sup>15</sup>; it must also be granted in a form suitable to tackle the beneficiary’s difficulties, be adequately remunerated, and be limited to the minimum

necessary to reach the set objective (rescuing and/or restructuring, as the case may be)<sup>16</sup>.

Conversely, the beneficiary of legitimately granted State aid that is admitted to a *concordato preventivo* may continue to benefit from the aid despite its insolvency.

The CJEU recently clarified this point in the *Nerea* judgment<sup>17</sup>, issued following a reference for a preliminary ruling made by the Marche Regional Administrative Court following *Nerea S.p.A.*’s objection to the revoking of a public contribution granted in 2007 by the Marche Region and financed by the European Regional Development Fund programme<sup>18</sup>. The regional court examined the following issue: whether, under EU law, simply meeting the requirements for starting insolvency proceedings regarding the company involved obliged the National Authority to revoke the funding already awarded. The CJEU ruled that aid granted in compliance with the General Block Exemption

<sup>14</sup> Communication from the Commission – Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty, OJEU C 249 of 31 July 2014, page 1. This communication applies to all sectors, except particular cases, such as the financial sector. This sector is governed by the Communication from the Commission regarding the application, from 1 August 2013, of the provisions governing State aid to measures of support to banks during the financial crisis (“the communication on the banking sector”), OJEU C 216 of 30 July 2013, page 1.

<sup>15</sup> This means it may not be granted more than once every 10 years, with limited exceptions; see section 3.6.1. of the Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty.

<sup>16</sup> In the case of aid for restructuring, the beneficiary must significantly contribute to the restructuring costs (see section 3.5.2.1. of the Guidelines) and the existing investors (shareholders and subordinated creditors) must share the costs (see section 3.5.2.2. of the Guidelines).

<sup>17</sup> CJEU judgment of 6 July 2017, *Nerea S.p.A. v. Regione Marche*, C-245/16, EU:C:2017:521, para. 39.

<sup>18</sup> In that case, the requirements of the public notice included the condition that the company, when submitting the application, should not be in a situation of “difficulty” as defined by the General Block Exemption Regulation in force at the time (i.e., Regulation (CE) No. 800/2008 of the Commission of 6 August 2008, which declared some categories of aid compatible with the common market under Arts. 87–88 of the TFEU, replaced by Regulation (EU) No. 651/2014 referred to above), and that this situation should remain stable for five years following the date of completion of the co-financed operation. The *Nerea* company was awarded the aid but, as in 2013 it requested and was admitted to a *concordato con continuità aziendale* under Art. 186-bis of the Bankruptcy Law, the Region revoked the aid and requested that the company return the amount already paid.

Regulation (and, therefore, of which the Commission was not notified) “cannot be withdrawn solely on the ground that that undertaking was subject to collective insolvency proceedings subsequent to the date on which it was granted the aid”. In other words, under EU law the beneficiary of legitimately granted State aid that is admitted to a *concordato preventivo* may continue to benefit from the aid despite undergoing insolvency proceedings. The principle applies regardless of the nature of the aid and the payment procedures and, therefore, even if the aid has been granted but not yet paid out<sup>19</sup> or is to be paid out in instalments but based on a single deed of award.

In short, the opening of a *concordato preventivo* does not oblige the Member State to amend the assessments that led it to grant aid to a particular company, nor does it change the nature of the aid from “existing” to “new” (according to the definitions in Art. 1 of Regulation No. 1589/2015) or require a new assessment by the Commission. This, however, does not prevent the Member State concerned from independently deciding to revoke the aid,

without being obliged to do so by EU law, provided that it is allowed to do so under domestic law<sup>20</sup>. This consideration is valid for all companies undergoing insolvency proceedings and not just those involved in a *concordato preventivo*.

### 3. THE RECOVERY OF STATE AID FROM COMPANIES UNDERGOING A *CONCORDATO PREVENTIVO*

#### 1. General observations

The Commission systematically orders Member States to recover all illegal aid that it has declared to be incompatible with the internal market, except in cases in which recovery would conflict with a general principle of EU law<sup>21</sup>. Interest is added to the principal amount to be recovered to ensure the financial advantage the beneficiary gained from the aid is removed<sup>22</sup>. According to CJEU caselaw since the landmark *Kohlegesetz*<sup>23</sup> judgment, the logic underlying the recovery of State aid is to restore the situation to that preceding the award of the aid, thereby

<sup>19</sup> See footnote 12.

<sup>20</sup> As observed by the Advocate-General M. Campos Sánchez-Bordona in his opinion of 5 April 2017, *Nerea S.p.A. v. Regione Marche*, C-245/16, EU:C:2017:271, paras. 74–76, the fact that State aid is declared compatible with the internal market does not mean that a Member State is obliged to grant it or that it may not request repayment of it when so envisaged by national regulations, whether of a general kind or regarding the public notice.

<sup>21</sup> Art. 16, para. 1, of EU Regulation 1589/2015; para. 17 of the 2007 Recovery Notice; and para. 31 of the 2019 Recovery Notice.

<sup>22</sup> The interest is calculated in a composite way, on the basis of a rate fixed by the Commission. See Arts. 9–11 of Regulation (CE) No. 794/2004 of the Commission of 21

April 2004, containing implementing provisions for EU Regulation No. 1589/2015. The Commission publishes current and previous interest rates for the recovery of State aid in the OJEU and for information purposes on the Internet. The interest rate to be applied is that in force on the day on which the illegal aid was first made available to the beneficiary. This rate applies for the whole period up to the recovery of the aid. If the recovery takes place at more than a year from the date on which the aid was made available to the beneficiary, the interest rate is recalculated at intervals of one year, based on the rate in force at the time of the recalculation.

<sup>23</sup> CJEU judgment of 12 July 1973, *Commission of the European Communities v. Germany*, 70/72, EU:C:1973:87.

removing the competitive advantage the beneficiary gained. Until the beneficiary pays back the incompatible and illegal aid that is subject to a recovery decision, the Commission may order the Member State to suspend payment of new aid to the same beneficiary even if the new aid is compatible with the internal market<sup>24</sup>.

The Member State affected by a decision ordering it to recover illegal aid is obliged (by Art. 288 of the TFEU) to adopt all suitable measures to ensure the decision is enforced<sup>25</sup>. Art. 16, para. 3, of Regulation (EU) No. 1589/2015, in providing that “recovery shall be effected without delay and in accordance with the procedures under the national law of the Member State concerned”, sets out no specific recovery procedure, but limits itself to requiring “the immediate and effective execution of the Commission’s decision” in accordance with the principle of procedural autonomy of the

Member State concerned. This approach is rooted in the principle of good-faith cooperation set out in Art. 4, para. 3, of the Treaty on European Union (“TEU”), according to which: “the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties”, which EU caselaw confirmed several times<sup>26</sup>.

The 2007 Recovery Notice<sup>27</sup> (recently reviewed<sup>28</sup>) reaffirms that the EU allows Member States to regulate the issue of recovery in accordance with their own domestic law<sup>29</sup>, subject to the limit of the “rule of effectiveness”<sup>30</sup>. The measures chosen must be suitable to ensure the practical effectiveness of the Commission’s decision in guaranteeing: (i) the restoring of the market situation to that preceding the awarding of the aid; (ii) the effective enforcement of the recovery order; and (iii) the timely enforcement of the recovery

<sup>24</sup> CJEU judgment of 9 March 1994, *TWD Textilwerke Deggendorf GmbH v. Germany*, C-188/92, EU:C:1994:90.

<sup>25</sup> If the Member State in question does not comply with the Commission’s decision within the set time period, the Commission or any other interested Member State may bring the matter directly before the CJEU to have an infringement established. Once the infringement is established, if the Member State in question fails to recover the aid from the beneficiary, the Commission may ask the CJEU to order the Member State to pay a lump sum or penalty; see Art. 260, para. 2, of the TFEU.

<sup>26</sup> Caselaw is consistent on this point. See, among others, CJEU judgments of 12 December 2002, *Commission v. Germany*, C-209/00, EU:C:2002:747, paras. 35–35 and 40; 7 July 2009, *Commission v. Greece*, C-369/07, EU:C:2009:428, para. 67; 20 May 2010, *Scott*, C-210/09, EU:C:2010:294, para. 21; and 22 December 2010, *Commission v. Slovak Republic*, C-507/08, EU:C:2010:802, paras. 34, 51 and 53.

<sup>27</sup> Communication from the Commission – Towards the effective execution of the decisions of the Commission

enjoining the Member States to recover illegal and incompatible State aid, OJEU C 272 of 15 November 2007, para. 4.

<sup>28</sup> On 4 February 2019 the Commission published a draft new recovery notice and opened a public consultation, which closed on 25 April 2019. The Commission adopted the final text on 22 July 2019. This contribution refers to the 2007 Recovery Notice and discusses the new draft only with regard to substantial changes that are significant for our analysis.

<sup>29</sup> 2007 Recovery Notice, para. 22.

<sup>30</sup> “Effectiveness” means that the Member State is obliged to adopt all measures suitable for ensuring the enforcement of the decision requiring it to recover illegal aid. Among many others, CJEU judgments of 12 December 2002, *Commission v. Germany*, C-209/00, EU:C:2002:747, para. 31; and 26 June 2003, *Commission v. Spain*, C-404/00, EU:C:2003:373, para. 21.

order (within the time limits set by the Commission in the final decision or, possibly, by the deadline subsequently established by the Commission).

Suspending the enforcement of the recovery order is rare<sup>31</sup> and, in the absence of suspension, the Member State concerned may not allege that the decision is illegitimate to justify not enforcing it, with the exception of the scenario in which the decision must be considered non-existent<sup>32</sup>. Naturally, if the decision is appealed before the CJEU, suspension may be requested as a precautionary measure, within the very strict limits imposed by EU law and the relevant caselaw<sup>33</sup>.

In general, recovery proceedings brought in Italy on the basis of Commission decisions issued after 19 January 2013 are governed by Act No. 234 of 24 December 2012. These proceedings are based on an administrative order<sup>34</sup> of the competent government minister or the regional or local authority competent for the aid<sup>35</sup>. This order is valid as a writ of execution against the parties summoned to perform and entitles the concessionaire for collection to undertake this “irrespective of the form of the aid and the party that granted it”<sup>36</sup>. However, there is nothing to prevent the national authorities in specific cases from choosing alternative recovery procedures, including transferring the beneficiary’s assets and winding up the beneficiary<sup>37</sup>, insofar as the

<sup>31</sup> At EU level, provisional measures may be granted by the court before which interim proceedings are brought only if it is proved that doing so is justified *prima facie* by factual and legal arguments (*fumus boni iuris*) and that their immediate adoption before the decision in the main proceedings is necessary to avoid serious and irreparable damage to the applicant. Applicable caselaw states that the urgency requirement need not be satisfied when domestic legal remedies allow the applicant to obtain suspended enforcement of the binding measures that national authorities would have to adopt to recover the aid in question. The national courts, however, cannot suspend enforcement of a national recovery order for reasons concerning the validity of the Commission’s decision when the beneficiary can dispute the validity of the decision before the CJEU; see Commission notice on the enforcement of State aid law by national courts, OJEU C-85 of 9 April 2009, para. 66.

<sup>32</sup> See CJEU judgment of 1 June 2006, *Commission v. Italy*, C-207/05, EU:C:2006:366, paras. 40–43 and the caselaw cited therein.

<sup>33</sup> Order of the President of the CJEU of 21 February 2002, *Front National and Jean-Claude Martinez v. European Parliament*, joined cases C-486/01 P-R and C-488/01 P-R, EU:C:2002:116.

<sup>34</sup> The administrative nature of this activity is demonstrated by the fact that Act No. 234/2012, which amended the administrative procedure code, made all appeals of orders and measures adopted in enforcement

of a recovery decision subject to the exclusive jurisdiction of the administrative court. See Art. 49, para. 1, of Act No. 234/2012, which amended Art. 119, para. 1, of Legislative Decree. No. 104 of 2010 (administrative process code).

<sup>35</sup> These parties are obliged to verify the amounts due and determine the payment procedures and deadlines.

<sup>36</sup> Art. 48, para. 1, of Act No. 234/2012. The typical enforcement procedure therefore does not change – unlike in other legal systems – depending on the form of concession (through administrative order, law or private transaction).

<sup>37</sup> This irrespective of the fact that the Commission – during negotiations on the recovery – prefers one recovery method to another. In the CJEU judgment of 13 February 2014, *Mediaset S.p.A. v. Ministry of Economic Development*, C-69/13, EU:C:2014:71, para. 24, the EU judges specified that the Commission’s positions taken subsequent to the recovery decision, i.e., when enforcing the recovery decision, are not binding on the national authorities. Not only do these letters not constitute decisions within the meaning of Art. 288, para. 4, of the TFEU, but they do not even appear among the orders that can be adopted based on EU Regulation No. 1589/2015. In the *Mediaset* case, the positions taken by the Commission regarded the calculation method adopted by the Italian authorities to quantify the amount of aid to be recovered; however, the court’s reasoning is doubtless transposable to any position

measures selected are suitable for restoring normal competition conditions within the time limits specified by the Commission<sup>38</sup>.

In the case of insolvent beneficiaries, the time limits specified by the Commission lead to the following alternatives: either the aid is repaid in full within the time limits or the company must cease to do business in the market in which competition was distorted. The theoretical premise on which this rule is based is that if the aid cannot be repaid, it can be assumed that the company would have been wound up without public support<sup>39</sup>; ceasing to do business is therefore necessary and will free up its share of the market, thereby restoring normal market conditions as far as possible. The business may also be definitively wound up by selling its assets at market conditions<sup>40</sup>. These preliminary considerations must guide the assessment of the type of insolvency proceedings to which the beneficiary is admitted (i.e., proceedings allowing the beneficiary's business to continue

or proceedings ending in winding-up). From an EU law perspective, the distinction is indeed quite significant, as we examine below.

## 2. *The recovery and the different types of concordato preventivo*

A *concordato preventivo* is a type of insolvency proceedings aimed at continuing the beneficiary's business. Bringing these proceedings has the effect of: (i) "freezing" – until the court approves the *concordato preventivo* – all recovery measures ordered on the entrepreneur's assets, based on the amounts owed (the title to which or the cause of which originated before the court issued its ruling to approve the *concordato preventivo*); and (ii) prohibiting creditors from acquiring pre-emption rights that they could use to the disadvantage of competing creditors<sup>41</sup>.

Until the *concordato preventivo* proceedings conclude, the Member State may not undertake action – based on national law – on the

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taken after the recovery decision was issued and, therefore, also to that regarding the methods of enforcing the recovery. See N. NIEJHR, *It may be zero! CJEU highlights national courts' authority to review and determine amounts of aid to be recovered*, in *ESTAL* 4, 2014, page 707; and M. MEROLA, *Mediaset III: The Recovery Revolution Deactivated*, in C. BUTS AND J. L. BUENDIA SIERRA (eds.), *Milestones in State Aid Case Law – ESTAL's First 15 Years in Perspective*, 2017.

<sup>38</sup> See CJEU judgments of 4 April 1995, *Commission v. Italy*, C-350/93, EU:C:1995:96, para. 21; 17 June 1999, *Belgium v. Commission*, C-75/97, EU:C:1999:311, para. 64; 12 December 2002, *Commission v. Germany*, C-209/00, EU:C:2002:747, paras. 35–35 and 40; and 20 May 2010, *Scott*, C-210/09, EU:C:2010:294, para. 22 and caselaw cited therein.

<sup>39</sup> 2019 Recovery Notice, para. 127.

<sup>40</sup> The commercial activity that has benefitted from the aid is considered finally terminated when the company is wound up; see, among others, CJEU judgment of 13

October 2011, *Commission v. Italian Republic*, C-454/09, EU:C:2011:650, para. 30. The caselaw accepts the possibility of creating rescue companies to continue a part of the beneficiary's business when the beneficiary undergoes bankruptcy proceedings; see CJEU judgment of 8 May 2003, *SIM 2 Multimedia*, C-328/99 and C-399/00, EU:C:2003:252, para. 76; and 29 April 2004, *Germany v. Commission*, C-277/00, EU:C:2004:238, para. 86.

<sup>41</sup> Under Art. 168 of the Bankruptcy Law: "[...] from the date of submission of the recourse and up to when the approval decree becomes definitive, creditors for title or cause prior to the decree may not, under pain of nullity, initiate or pursue executive actions on the assets of the debtor. Any extinctive prescriptions interrupted by the aforesaid deeds remain suspended and expiry times do not take place. Creditors may not acquire pre-emptive rights with respect to competing creditors, unless authorised by the judge in the cases provided for in the previous article".

See also Art. 94 of the FDIC.

company's assets and may only request that the amount the Member State is owed be filed in the proceedings. However, promptly lodging a claim for the aid amount to be recovered may not always suffice to guarantee the immediate and effective enforcement of the Commission's recovery decisions<sup>42</sup>. This is only the case if the proceedings, as structured, guarantee that the aid will be repaid in full within the time limits set out in the recovery decision<sup>43</sup>. In any case to the contrary, not only would the Member State have to appeal any decision of the judicial body allowing the beneficiary's business to continue beyond the time limits set out in the recovery decisions<sup>44</sup>, but it would also have to do everything in its power to bring about the final winding-up of the business<sup>45</sup>. It must be borne in mind that the hypothetical unsuitability of the proceedings envisaged by national law to achieve these results does not constitute an exclusion or justification of the Member State's

responsibility regarding any breach of the obligations arising out of the TFEU, as it has a duty to make provision for adequate proceedings<sup>46</sup>.

This implies, above all, that the Member State may not waive its recovery claim by accepting anything less than full repayment of the State aid granted, even if national law allows for the partial satisfaction of creditors<sup>47</sup>. The Italian tax authority (*Agenzia delle Entrate*), in line with the Commission's clarifications in the *New Interline* decision<sup>48</sup>, expressly stipulates that debts relating to State aid cannot be reduced in *concordato preventivo* proceedings or debt-restructuring agreements<sup>49</sup>.

In light of the foregoing, the Commission retains that various elements of the proceedings are problematic. It is therefore appropriate to bear this in mind in all cases in which insolvency is determined by the obligation to recover the

<sup>42</sup> See CJEU judgment of 21 March 2013, *Commission v. Italian Republic*, C-613/11, EU:C:2013:192, para. 43. See also Commission Decision of 16 April 2008, SA.20618, *New Interline*, para. 16; 2007 Recovery Notice, paras. 63–64; and 2019 Recovery Notice, paras. 129–130.

<sup>43</sup> See CJEU judgments of 15 January 1986, *Commission v. Belgium*, 52/84, EU:C:1986:3, para. 14; 21 March 1990, *Belgium v. Commission* (the “*Tubemeuse*” case), C-142/87, EU:C:1990:125, paras. 60–62; 29 April 2004, *Germany v. Commission*, C-277/00, EU:C:2004:238, para. 85; and 14 April 2011, *Commission v. Poland*, C-331/09, EU:C:2011:250, para. 60.

<sup>44</sup> 2007 Recovery Notice, para. 66; 2019 Recovery Notice, para. 134, and CJEU judgment of 17 November 2011, *Commission v. Italy* (“*Interventions in favour of employment II*”), C-496/09, EU:C:2011:740, para. 74.

<sup>45</sup> 2007 Recovery Notice, para. 67; 2019 Recovery Notice, para. 128. See also, among others, CJEU judgments of 15 January 1986, *Commission v. Belgium*, 52/84, EU:C:1986:3, paras. 14–15; 2 July 2002, *Commission v. Spain*, C-499/99, EU:C:2002:408, paras. 26–28 and 37–43; 14 April 2011, *Commission v. Poland*, C-331/09, EU:C:2011:250, paras. 63–

64; and 17 January 2018, *Commission v. Greece* (the “*United Textiles*” case), C-363/16, EU:C:2018:12, para. 36.

<sup>46</sup> 2019 Recovery Notice, para. 134.

<sup>47</sup> Under Art. 160, para. 2, of the Bankruptcy Law (Art. 85 of the FDIC), an enterprise facing financial failure may propose an arrangement to its creditors whereby “creditors with priority, security or mortgages are not fully satisfied”. In a *concordato con continuità aziendale*, even the payment of at least 20% of the unsecured receivables (Art. 160, para. 4, of the Bankruptcy Law) is not guaranteed. This is not possible under EU State aid provisions; see 2019 Recovery Notice, para. 132.

<sup>48</sup> See para. 17 of Commission Decision of 16 April 2008, SA.20618, *New Interline*, which states: “In particular, the Member State cannot waive part of its recovery claim [...]”.

<sup>49</sup> Italian tax authority (*Agenzia delle Entrate*) Circular No. 40/E of 18 April 2008 – *Concordato preventivo* and fiscal transaction, para. 23.

aid or in any case that involves a beneficiary of State aid subject to a recovery order.

Above all, unlike in normal bankruptcy proceedings<sup>50</sup>, a company in a *concordato preventivo* continues to have access to its assets and continues to run its business, under the monitoring of the court-appointed administrator<sup>51</sup>. However, allowing the company to continue its business until it is wound up could conflict with State aid provisions<sup>52</sup> because in allowing the business to operate in the absence of (or while awaiting) complete repayment of the financial advantage it benefitted from, the distortion of competition continues<sup>53</sup>.

Additionally, once the court issues its ruling to approve the *concordato preventivo*, the insolvent company regains access to all its assets. For this reason, the Commission does not consider the Member State's lodging a claim in a *concordato preventivo* for the amount to be recovered as State aid to constitute compliance with the recovery decision. The Commission instead awaits proof of the beneficiary's final exit from the market, which occurs if the beneficiary's entire business or assets are transferred to third parties, thereby establishing economic discontinuity, in accordance with the Commission's practice and CJEU caselaw<sup>54</sup>, or the proof of payment of the

<sup>50</sup> Under Italian law, once the judgment declaring bankruptcy is issued, the court may – but is not obliged to – allow the business to provisionally continue, provided, however, that it could cause serious damage (Art. 104 of the Bankruptcy Law).

<sup>51</sup> Art. 167 of the Bankruptcy Law (Art. 92 of the FDIC). Furthermore, in accordance with the caselaw of the Italian Supreme Court, a company undergoing a *concordato preventivo* retains the right to bring civil actions in its own name and to be a party to the case to protect its assets; see General Court judgment of 6 April 2017, *Saremar – Sardegna Regionale Marittima S.p.A.*, T-220/14, EU:T:2017:267, para. 46.

<sup>52</sup> Commission Decision of 4 April 2012, SA.34547, *Reprise des actifs du groupe SERNAM*, para. 58.

<sup>53</sup> 2007 Recovery Notice, para. 63.

<sup>54</sup> Based on consolidated caselaw, to avoid a situation in which the useful effect of a recovery decision is void and market distortion continues, when a company that has benefitted from illegal aid has become bankrupt and a company is set up to continue part of the bankrupt company's business, this newly incorporated company may be required to pay back the State aid if it continues to benefit from the competitive advantage corresponding to the benefit of the illegal aid (see, among others, CJEU judgments of 20 September 2001, *Banks*, C-390/98, EU:C:2001:456, para. 78; 8 May 2003, *SIM 2 Multimedia*, joined cases C-328/99 and C-399/00, EU:C:2003:252,

paras. 69, 77–78; 29 April 2004, *Germany v. Commission*, C-277/00, EU:C:2004:238, para. 80; and 11 December 2012, *Commission v. Spain*, C-610/10, EU:C:2012:781, para. 106 and the caselaw cited therein). To determine whether a company other than the initial beneficiary is obliged to repay the aid, the Commission may take one or several of the following criteria into consideration: (i) the object of the transfer (assets and liabilities, continuance of the workforce, bundled assets, etc.); (ii) the price of the transfer; (iii) the identity of the shareholders or owners; (iv) the time at which the transfer took place (after the beginning of the investigations, the commencement of proceedings or the final decision); and (v) the financial logic of the operation (see, among others, CJEU judgment of 8 May 2003, *SIM 2 Multimedia*, joined cases C-328/99 and C-399/00, EU:C:2003:252, para. 52; and General Court judgments of 13 September 2010, *Greece and o. v. Commission*, joined cases T-415/05, T-416/05 and T-423/05, EU:T:2010:386, para. 135; 28 March 2012, *Ryanair v. Commission*, T-123/09, EU:T:2012:164, para. 155; and 17 December 2015, *Société nationale des chemins de fer français (SNCF) v. Commission*, T-242/12, EU:T:2015:1003, paras. 237–265). See also the 2019 Recovery Notice, para. 92. For example, under the above criteria, the Commission excluded the presence of economic continuity in the *Sernam 2* case, in which the obligation to recover the aid imposed on the *Sernam* group companies was not extended to the *Geodis* and *BMV* companies when some of the *Sernam* group companies'

amount due<sup>55</sup>. Since the introduction of the FDIC, proof of economic discontinuity is more demanding, as the third party taking over the business is now required to maintain in employment or re-employ – for one year following the court ruling approving the *concordato preventivo* – at least half the average number of workers employed in the two financial years before the request for a *concordato preventivo*<sup>56</sup>.

Finally, the duration of the *concordato preventivo* is difficult to reconcile with the time limits set out in the recovery decision (generally four months from notification of the decision), and recovery after the Commission's time limit leaves the

Member State at risk of an infringement procedure for breach of the Treaty<sup>57</sup>. The new recovery notice partially overcomes this issue: indeed, the new notice no longer specifies a four-month time limit but allows the Commission ample discretion to set the limit it sees fit<sup>58</sup>.

Other elements linked to the type of *concordato preventivo* chosen require analysis from an EU perspective. In this regard, the main distinction is between a *concordato* ending in winding-up<sup>59</sup> and a *concordato con continuità aziendale*<sup>60</sup>. From an EU perspective, a *concordato* ending in winding-up includes both the sale of individual assets or asset groups and the sale of the entire business<sup>61</sup>.

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assets were purchased (Commission Decision of 4 April 2012, SA.34547, *Reprise des actifs du groupe SERNAM*, paras. 110–114). Economic continuity is simply excluded when the subject of the transfer does not concern the entire company (see Commission Decisions of 12 November 2008, N510/2008, Italy – Transfer of the assets of the airline Alitalia, para. 141; and 17 September 2008, N321/2008, Greece – Sale of some of the assets of Olympic Airlines, para. 198). If all or almost all of a company is transferred (assets and liabilities included), economic discontinuity can be argued if: (i) the purchaser is a different operator from the aid beneficiary and includes the assets in its own commercial strategy; and (ii) the transfer, in addition to having taken place at the market price, is carried out as part of an unconditional procedure, open to all competitors of the aid beneficiary (see Commission Decision of 9 March 2012, SA.12522 (C37/08), France – Application of the decision *Sernam 2*, paras. 90 and 95 *et seq.*, in which the Commission established that some of the conditions imposed by the *Sernam 1* decision had not been complied with, thereby giving rise to an improper implementation of the authorised decision. This decision was confirmed by General Court judgment of 17 December 2015, *SNCF v. Commission*, T-242/12, EU:T:2015:1003, and by CJEU judgment of 7 March 2018, *SNCF v. Commission*, C-127/16 P, EU:C:2018:165). In legal doctrine, the topic was recently addressed exhaustively by A. PAPPAS, *Aides d'État et le principe de continuité économique: La cohérence de la notion et la protection effective des concurrents et des repreneurs*, September

2017, *Revue Concurrences* No. 3–2017, Article No. 84413, [www.concurrences.com](http://www.concurrences.com).

<sup>55</sup> 2019 Recovery Notice, para. 129.

<sup>56</sup> Art. 84, para. 2, of the FDIC.

<sup>57</sup> See, among others, CJEU judgments of 13 October 2011, *Commission v. Italian Republic*, C-454/09, EU:C:2011:650, para. 37; and 21 March 2013, *Commission v. Italian Republic*, C-613/11, EU:C:2013:192, para. 43.

<sup>58</sup> 2019 Recovery Notice, para. 71.

<sup>59</sup> Art. 160 of the Bankruptcy Law (Art. 85 of the FDIC).

<sup>60</sup> Art. 186-*bis* of the Bankruptcy Law (Art. 84 of the FDIC).

<sup>61</sup> Indeed, from an EU perspective, the distinction is always between economic continuity and discontinuity, as established by the Commission's practice and CJEU caselaw; see footnote 58. In this sense, the transfer of the entire business, as regulated by the *concordato preventivo*, guarantees economic discontinuity and, therefore, from an EU standpoint, is to be classified as a subcategory of the *concordato preventivo* ending in winding-up. Conversely, from an Italian perspective, the key concept is that of continuity in the objective sense, "it being necessary to have regard to the continuation of the life of the business whether under the direction of the original entrepreneur or under that of third-party renters or purchasers" (Court of Rome Decision of 24 March 2015). On this basis,

Conversely, the *concordato con continuità aziendale* presupposes that the insolvent company continues to run the business and, in doing so, generates the necessary proceeds to pay its creditors. The second case includes both *concordato con continuità aziendale* in its pure form and the mixed formulas between the *concordato* ending in winding-up and the *concordato con continuità aziendale* (spurious or partial arrangement with continuity), as they both envisage that the core business, or one of the core businesses, will continue to be run by the insolvent company, which will satisfy the creditors in part with the proceeds from the sale of assets or branches of the company and in part with the proceeds from running the core business<sup>62</sup>.

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Italian law classifies the transfer of the entire business as a *concordato con continuità aziendale*, i.e., as an arrangement with indirect continuity and distinguishing it from an arrangement with direct continuity, in which the continuation of the life of the business lies under the direction of the original entrepreneur; see S. AMBROSINI, *Il diritto della crisi d'impresa nella legge n. 132 del 2015 e nelle prospettive di riforma*, in *Crisi d'impresa e Fallimento*, 2015, page 1.

<sup>62</sup> From an EU perspective, the distinction is always that between economic continuity and discontinuity, see footnote 58. The fact that the core business, or one of the core businesses, continues to be run by the insolvent company guarantees continuity. See F. LAMANNA, *L'anomalia del concordato in continuità puro (o promissorio)*, in *Il Fallimentarista*, 2016, and M. VITIELLO, *Il concordato preventivo con continuità aziendale*, in *Giustizia Civile.com*, 2016.

<sup>63</sup> Under Art. 160, para. 1, of the Bankruptcy Law (Art. 85, para. 3, of the FDIC), the design of the *concordato preventivo* proposed by the company facing financial difficulty may specify “the satisfaction of receivables under any form, also through sale of assets, assumption of responsibility or other extraordinary operations [...]”. In this case, the governance of the sale of the assets follows the rules governing the sale of a business, of branches, assets and relationships en bloc within bankruptcy proceedings under Art. 105 of the Bankruptcy Law (Art. 214 of the

### 3. The recovery and the *concordato preventivo* ending in winding-up

In a *concordato* ending in winding-up, until the aid is repaid in full, the Member State – to avoid incurring liability – must above all object to any sale of the company’s assets to its creditors<sup>63</sup> at a price lower than that of the market, as any such sale would reduce the amounts available to repay the State aid<sup>64</sup>.

Furthermore, the Member State must do all it can in the proceedings to recover the maximum amount of aid possible and to ensure that the activity that benefitted from the aid ceases<sup>65</sup>, regardless of any legal, political or practical difficulties faced in complying with the recovery obligation<sup>66</sup>. Both conditions can be met if the beneficiary sells its assets or entire business at

FDIC) (see Art. 182, penultimate para., of the Bankruptcy Law).

<sup>64</sup> Commission Decision of 16 April 2008, SA.20618, *New Interline*, para. 18; 2007 Recovery Notice, para. 68 and caselaw cited therein; and 2019 Recovery Notice, para. 132.

<sup>65</sup> Commission Decision of 4 April 2012, SA.34547 - *Reprise des actifs du groupe SERNAM*, para. 58; and Commission Decision of 10 March 2009, N83/2009, *Olympic Airlines/Olympic Airways Services*, para. 61.

<sup>66</sup> In fact, not only is it uncontested in caselaw that such difficulties do not constitute grounds for the absolute impossibility of enforcing the recovery decision (see CJEU judgments of 14 April 2011, *Commission v. Poland*, C-331/09, EU:C:2011:250, paras. 69–70; 13 November 2008, *Commission v. France*, C-214/07, EU:C:2008:619, para. 44; and 5 May 2011, *Commission v. Italy*, C-305/09, EU:C:2011:274, para. 32), but, by virtue of the principle of cooperation in good faith, the Member State that encounters unforeseen or unforeseeable difficulties following a recovery decision must submit these problems to the Commission for assessment to find an agreed solution (2007 Recovery Notice, para. 28, and 2019 Recovery Notice, para. 49).

market conditions in a competitive tender. Compliance with these conditions simplifies the proof of economic discontinuity between the aid beneficiary and the third-party purchaser, without the need for an in-depth examination of the complex economic discontinuity requirements established in the Commission's practice and CJEU caselaw<sup>67</sup>.

In a *concordato* ending in winding-up, assets are transferred with the assistance of one or several liquidators and a committee of three or five creditors appointed by the court in its order approving the *concordato* ending in winding-up and based on the liquidation arrangements the court determines<sup>68</sup>. This solution is to be evaluated positively with regard to the aspect of aid maximisation, given that the sales and transfers carried out after the request for a *concordato* ending in winding-up are subject to the proceedings set out in the bankruptcy regulations (compulsory winding-up following the entry into force of the FDIC)<sup>69</sup>. Under Art. 107 of the Bankruptcy Law (Art. 216 of the FDIC<sup>70</sup>): “*the sales and other winding-up measures [...] are carried out by the receiver through competitive tenders also using specialised parties, based on estimates provided [...] by expert operators, ensuring, with*

*adequate forms of advertising, maximum information and the participation of the interested parties (known as “sale by order of court”)*”.

Given that the assets would be transferred through an open, transparent and non-discriminatory tender<sup>71</sup>, it is reasonable to assume that they will be transferred at the market price<sup>72</sup>.

This course of action would not give rise to any problems in terms of the aid potentially being transferred to the third-party purchaser. As is also the case in bankruptcy/compulsory winding-up proceedings, a third party that purchases the entire company would not be legally liable for debts preceding the bankruptcy/winding-up proceedings, which would include the debt for returning the State aid<sup>73</sup>.

#### 4. *The recovery and the concordato preventivo con continuità aziendale*

Conversely, the compatibility of the *concordato con continuità aziendale* with EU provisions and, in particular, with the rules governing the recovery of State aid appears problematic. In fact, under

<sup>67</sup> See footnote 58.

<sup>68</sup> Art. 182 of the Bankruptcy Law (Art. 114 of the FDIC).

<sup>69</sup> Arts. 105–108-ter of the Bankruptcy Law (Arts. 214–218 of the FDIC).

<sup>70</sup> The formulation differs in form but is the same in content.

<sup>71</sup> Tenders are generally preferred by the Commission; see Commission Decision of 12 November 2008, N510/2008, *Transfer of the assets of the airline Alitalia*, para. 106.

<sup>72</sup> Namely, the highest price that a private investor operating under normal competition conditions is willing

to pay for a company in its current situation (see CJEU judgment of 29 April 2004, *Germany v. Commission*, C-277/00, EU:C:2004:238, para. 80). This occurs, in particular, when the assets are transferred following an open, competitive invitation to tender (see CJEU judgment of 20 September 2001, *Banks*, C-390/98, EU:C:2001:456, para. 77).

<sup>73</sup> Under Art. 105, para. 5, of the Bankruptcy Law (Art. 214, para. 4, of the FDIC): “*The liquidator may also transfer the assets and liabilities of the company or its branches, and assets or legal relationships en bloc, excluding, however, the seller’s liability envisaged under Art. 2560 of the Italian Civil Code*”.

Art. 16(3) of Regulation No. 1589/2015<sup>74</sup>, State aid must be recovered without delay and enforcement must be immediate and effective.

Indeed, the *concordato con continuità* envisages that creditors be satisfied using the proceeds from the future running of the core business by the insolvent company. Consequently, even if the *concordato con continuità aziendale* plan submitted to the court envisages the full repayment of the State aid, this repayment remains uncertain as it is dependent on the potential proceeds of a currently insolvent company and is delayed<sup>75</sup>. Thus, the *concordato con continuità aziendale* does not guarantee that the situation before the aid was awarded will be restored, thereby eliminating the competitive advantage gained by the beneficiary. Nor does it ensure the immediate repayment of the aid or the cessation of the line of business in question; it merely results in a continued distortion of competition.

Therefore, given that all creditors are called to vote on the arrangement proposed<sup>76</sup>, the Member State will have to vote against adopting a plan that envisages business continuity<sup>77</sup>.

Voting could have the following outcomes: (i) if the majority of creditors reject the proposed *concordato preventivo*, so the court will then declare the debtor bankrupt, following a request in this respect from the public prosecutor's office<sup>78</sup> or the creditors; or (ii) if the majority of creditors approve the proposed *concordato preventivo*, but dissenting creditors who represent 20% of the receivables with voting rights dispute the advantages stated in the proposal, the court may approve the proposal if it holds that the proposal would satisfy the receivables to no less an extent than the concretely practicable alternatives<sup>79</sup>.

If the Member State votes against the *concordato preventivo* but does not succeed in bringing about the debtor's bankruptcy (and, therefore, no proceedings are brought for the cessation of the company's business)<sup>80</sup>, after the *concordato preventivo* is approved, the homologation phase commences. This phase, in accordance with Art. 181 of the Bankruptcy Law (Art. 113 of the FDIC), must terminate within nine months of the submission of the request for a *concordato preventivo*, which the court may extend only once for a maximum of 60 days (however, the FDIC

<sup>74</sup> See footnote 6. See also CJEU judgments of 12 May 2005, *Commission of the European Communities v. Hellenic Republic*, C-415/03, EU:C:2005:287; and 5 October 2006, *Commission of the European Communities v. French Republic*, C-232/05, EU:C:2006:651.

<sup>75</sup> Under Art. 186-I, para. 2, point c), of the Bankruptcy Law: "[...] the plan may, subject to Art. 160, para. 2, envisage a moratorium of up to one year from approval for the payment of creditors with priority, security or mortgage, except if it is planned to liquidate the assets or rights affected by the pre-emption rights".

Art. 86 of the FDIC envisages a moratorium of up to two years from approval.

<sup>76</sup> The proposal is approved, in accordance with Art. 177 of the Bankruptcy Law (Art. 109 of the FDIC), only when

it obtains the favourable vote of all creditors representing the majority of the receivables with voting rights.

<sup>77</sup> 2007 Recovery Notice, para. 67.

<sup>78</sup> The public prosecutor's office requests a bankruptcy declaration when, for example, the insolvency is reported by the court that ascertained it in civil proceedings, see Art. 7 of the Bankruptcy Law.

<sup>79</sup> Art. 180 of the Bankruptcy Law (Art. 112 of the FDIC).

<sup>80</sup> The Commission views admission to the bankruptcy proceedings as a safe road leading to the company's winding-up and it definitively ceasing its business; see Commission Decision of 4 April 2012, SA.34547, *Reprise des actifs du groupe SERNAM*, para. 56.

does not set out this term). In such a case, the Member State is liable for failing to recover the State aid and is exposed to an EU infringement procedure for breach of the obligations under the Treaty.

The problematic nature of the *concordato preventivo* is even greater since the FDIC was introduced because the new code clearly favours the *concordato con continuità aziendale*, which is the type of insolvency proceedings in which recovering State aid is most difficult. Since the FDIC came into force, recourse to the *concordato* ending in winding-up is extremely limited and, in fact, has become a last resort. Specifically, Art. 84, para. 4, of the FDIC states that in a *concordato* ending in winding-up: “[...] the contribution of external resources must increase by at least 10%, compared with the alternative of judicial liquidation, the satisfaction of the unsecured creditors, which may not in any case be less than 20% of the total unsecured receivables”.

#### 4. CONCLUSIONS

Two clear aspects emerge regarding the *concordato preventivo* and EU State aid control: (i) the consequences of the *concordato preventivo* from the point of view of the company having access to State contributions for the entire duration of the proceedings; and (ii) the enforcement of the Commission’s decision that ordered the Member State to recover incompatible aid from a company undergoing a *concordato preventivo*, regardless of whether the obligation to repay is the cause of insolvency or merely one factor in a well-established situation of insolvency.

With regard to the granting of State aid, the fulfilment of the requirements for admission to

a *concordato preventivo*, even if not yet commenced, as is the case for all insolvency proceedings, precludes the possibility for the company concerned to have access to aid granted in accordance with the General Block Exemption Regulation and limits the public support measures it could receive outside the scope of application of the General Block Exemption Regulation.

As to the recovery of State aid, the beneficiary’s involvement in a *concordato preventivo* rather than other insolvency proceedings could pose problems. Indeed, a *concordato preventivo* allows a company to continue its business throughout the proceedings and, following approval of the proposed *concordato preventivo*, regain access to all its assets, thereby distorting competition.

Moreover, the *concordato preventivo* poses further compatibility problems regarding the type of arrangement adopted. More specifically, for the reasons set out above, the *concordato con continuità aziendale* does not guarantee the removal of the competitive advantage gained by the beneficiary; therefore, the Member State, in its capacity as creditor, will have to oppose the *concordato con continuità aziendale* and favour measures to wind up the company. The *concordato* ending in winding-up appears compatible with EU regulations on recovery, as it allows the Member State to recover the maximum amount of aid possible and ensures the cessation of the business activity benefitting from the aid in compliance with the principle of economic discontinuity. However, since the introduction of the FDIC, this form of arrangement is a last resort. This is a source of potential conflict with EU State aid rules. Therefore, a specific assessment is needed in all cases where the

insolvent company is liable to repay an unlawful and incompatible aid.

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