1. What insolvency procedures – either liquidation or reorganization procedures – are available for distressed or insolvent companies?

The Italian Bankruptcy Act (r.d. 16th March 1942, no. 267, «Legge Fallimentare», hereinafter “LF”) provides for two different procedures for ordinary business companies (i.e., companies that do not carry on business in special regulated sectors):

(1) the ‘judicial composition with creditors’” («concordato preventivo»; see LF, articles 160 et seq.), which has mainly reorganization and restructuring purposes. The procedure is court-supervised, but can be initiated only by the debtor, which must be in financial distress («stato di crisi»; see answer to Question 4). Either upon filing or within 120 days (extendable up to 180 days) from the initial petition, the debtor is required to file with the Court a restructuring plan and make a proposal to its creditors. Upon filing of the initial petition, all actions against the debtor and its assets initiated by pre-petition creditors are subject to an automatic stay. If the debtor does not timely file with the Court the required restructuring plan and proposal, the automatic stay ceases to offer protection. During the proceeding, the debtor is normally allowed to retain its assets and continue operating its business, although under court supervision (thus, it is a “debtor-in-possession” procedure). However, any acts that are not in the ordinary course of business must be previously authorized by the Court. The concordato preventivo must be approved by creditors holding a majority of the value of the debt, and, if the restructuring proposal divides creditors into different classes, also by a majority of classes. Secured creditors are not entitled to vote, if paid in full. When secured creditors’ claims are treated as unsecured claims as to the portion of their claims that exceeds the market value of their collateral, they are entitled to vote with respect to such a portion. Following creditors’ approval, dissenting creditors and interested third parties (but not shareholders, according to the prevailing literature and case law) may challenge the concordato preventivo in court on the grounds of its validity. The court may rule against creditors in a dissenting class only if it determines that such creditors’ claims will be satisfied at least to the same extent as under any other feasible alternative (“no creditor worse off”). Following creditors’ approval and court confirmation, the judicial composition becomes binding on all creditors, including those that cast a dissenting vote. In the event that the concordato preventivo is not approved by creditors, the debtor, if found insolvent, is declared bankrupt and becomes subject to ordinary bankruptcy liquidation proceedings.

(2) the bankruptcy procedure («fallimento»; see LF, articles 5 et seq.), which has mainly liquidation purposes. A bankruptcy may be filed either by the debtor, its creditors, and, seldom, by the Public Prosecutor. Upon declaration of bankruptcy (which requires the debtor to be considered cash-flow insolvent by the Court), the Court delegates a judge to supervise the procedure and appoints a committee representing the debtor’s creditors. Upon the insolvency declaration, the Court also appoints a bankruptcy trustee, who is in charge of the liquidation of the bankrupt’s estate and distribution of the proceeds to creditors according to the priority of their respective claims. In performing those tasks, the bankruptcy trustee acts under the supervision of the court-delegated judge and the creditors’ committee. The liquidation is usually carried out piecemeal, but the trustee may sell the whole business (or portions thereof) as a going concern when in the best interest of creditors. In place of the liquidation of the bankrupt’s estate and distribution of the proceeds, the law provides for the possibility of reaching a court-supervised composition with creditors (concordato fallimentare) in the course of the proceeding, thereby enabling a speedier and generally more fruitful closure of the liquidation. The relevant proposal required to pursue such an
alternative must be made by one or more creditors or a third party. The possibility to propose a *concordato fallimentare* is given to the debtor as well, but only when the insolvency declaration has been issued from at least 1 year and no more than 2 years have passed from the judicial determination of the outstanding claims (such narrow timeframe is intended to incentivize the debtor to propose a restructuring plan before going bankrupt). This *concordato fallimentare* proposal usually provides for the transfer of the assets to the proponent and the restructuring of those liabilities that the proponent proposes to assume. The procedures for creditors’ approval and the possible subsequent challenges by dissenting creditors and interested third parties follow rules substantially corresponding to those set forth for the *concordato preventivo* (see above).

All said procedures are managed before and under supervision of the court.

Recourse to the procedures regulated by the LF is restricted to companies that carry on ‘commercial business’ (i.e., any business different from farming; see arts. 2195 and 2221 of the Italian Civil Code, and also art. 1 of the LF) and fit certain dimension requirements. Small businesses and consumers cannot avail themselves of the bankruptcy procedures set out in the LF. As regards small businesses (i.e., companies that have been having less than 300k euro of total assets during all the previous 3 fiscal years; and less than 200k euro of total revenues during all the previous 3 fiscal years; and less than 500k euro of total outstanding debt: see art. 1 of the LF), they may decide either to settle their debts through a judicial voluntary arrangement (to be approved by a majority of at least 60% of creditors) or to file for a liquidation procedure shaped along the lines of the bankruptcy procedure available for medium size businesses (these procedures have been introduced by Law no 3/2012).

The provisions of LF apply to any type of business enterprise that exceeds one or more of the above-indicated thresholds (assets, revenues, outstanding debt); it applies therefore to individual enterprises, partnerships, società a responsabilità limitata (i.e., limited liability companies or private companies) and società per azioni (i.e., joint-stock companies or public companies). The law includes however a limited set of provisions that specifically refer to the bankruptcy of companies and regulate the effects of the proceeding on directors and on partnerships’ members, and also clarifies the relationship between the bankruptcy of a partnership and the bankruptcy of its members. Apart from this, there are no specific provisions in relation to the legal form of companies. Peculiarities may derive, however from the interaction of bankruptcy law with specific provisions of company law concerning the various types of companies.

Large insolvent enterprises that satisfy certain requirements in terms of number of employees and size of debt are subject to special reorganization procedures (*amministrazione straordinaria*) *in lieu* of the ordinary liquidation under the bankruptcy procedure. Pursuant to the “*Prodi Act*” – d.lgs 8th July 1999, no. 270 – companies having more than 200 employees and an outstanding amount of debt greater than the 2/3 of both the company’s total assets and the last fiscal year total revenues, are subject to a special administration procedure, mainly with reorganisation purposes, managed by a special commissioner, appointed by the Ministry of economic development. Pursuant to the “*Marzano Act*” – d.l. 23rd December 2003, no. 347 – a modified (and more flexible) procedure is applicable to companies having more than 500 employees and an outstanding amount of debt greater than 300 million of euro. These procedures are particularly aimed at preserving economic activities and maintaining employment’s levels, whereas the maximization of creditor’s satisfaction stays in the background. The large enterprises that meet the requirements for *amministrazione straordinaria* in place of ordinary bankruptcy, when in financial distress, are also entitled to file a petition for judicial composition with creditors (*concordato preventivo*) according to the ordinary rules set forth for this procedure.

In the following responses we will consider only limited liability and joint-stock companies (which represent the bulk of our economic system and the most common types of debtors entering into a judicial composition with creditors or a bankruptcy procedure¹). The responses below will also highlight, whenever

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¹ According to the data published by CervedGroup, limited liability and joint-stock companies represented in 2013 around seventy percent of all debtors declared bankrupt.
it is the case, any peculiarities that arise – in a crisis scenario – from the interference between bankruptcy rules and company law provisions regarding either società a responsabilità limitata or società per azioni.

2. Are there special insolvency procedures available for financial institutions or for other special classes of companies?

All financial companies (i.e., companies that can be qualified as credit institutions, financial institutions, investment companies, fund management companies or Financial Market Infrastructures, under either the Italian Banking Act – d.lgs. 1st September 1993, no. 385 – or the Italian Securities and Exchange Act – d.lgs. 24th February 1998, no. 58) are subject to a special liquidation procedure («liquidazione coatta amministrativa»), mainly with liquidation purposes, and to a special management procedure («amministrazione straordinaria»), which is mainly intended for restructuring purposes. Assurance, insurance and reinsurance companies (as defined by the Italian Private Insurance Code, d.lgs. 7th September 2005, no. 209) are subject to the same procedures.

All these special procedures are initiated, supervised (and, to some extent, managed) by the authorities that supervise these businesses on an ongoing basis. The relevant rules do not require, as a condition for the commencement of these procedures, that the company be declared balance-sheet or cash-flow insolvent (see answer 4, below). Indeed, these procedures can be initiated upon a decision of the supervision authorities, whenever they detect either irregularities in the management of the business or serious violations of the administrative or legal rules governing the industry’s specific sector, or where serious losses are expected. In these cases, if the company is also insolvent, it can still be declared technically insolvent for the purposes of bankruptcy law (i.e., for the production of those effects arising from the judicial qualification of the debtor as ‘bankrupt’)\(^2\), whenever a court ascertains that the insolvency test is satisfied (see answer 4, below).

Large insolvent enterprises carrying on businesses in non-regulated sectors are subject to special reorganization procedures (amministrazione straordinaria) in lieu of the ordinary liquidation under the bankruptcy procedure (see answer to Question 1).

3. Are there specific provisions that apply to debt restructurings achieved without a full formal insolvency process?

Article 182-bis of LF allows the debtor to reach out-of-court restructuring agreements (accordi di ristrutturazione dei debiti) to be approved by not less than 60% of creditors by value of claims. Such agreements, which are only binding for the consenting creditors, are subject to judicial confirmation. The effect of confirmation is that the acts executing the restructuring agreement are exempt from the regime of claw-back actions and cannot give rise to criminal prosecution in a subsequent bankruptcy proceeding.

Upon filing for confirmation, the debtor has to submit to the court an expert opinion certifying his ability to pay in full the claims of those creditor who did not enter into the restructuring agreement with the debtor and, thus, are not affected thereby (except for a moratorium of 120 days from confirmation). Creditors who are extraneous to the Agreement may challenge it before the court by requiring verification that the debtor will be able to satisfy their claims in full after the moratorium period.

From the date of the publication of the restructuring agreement, a 60-day stay is granted to the debtor from creditors claims’ enforcement. This provision has been recently amended (in 2010 and, again, in 2012) with the aim of making the recourse to this restructuring tool more appealing to debtors. According to the new text, the debtor has now the possibility to request a stay while still negotiating the agreement with

\(^2\) For instance, for the purpose of initiating claw-back actions or for the prosecution of the debtor for crimes related to bankruptcy.
creditors, just by submitting to the court the documentation required for the *concordato preventivo* together with a proposal of restructuring agreement and a formal self-declaration that negotiations are underway with creditors representing at least the 60% of claims by value. A declaration by a certified expert is also required, whereby the suitability of the proposal to ensure full payment of creditors extraneous to the agreement is testified. The debtor, if its request for a stay is accepted, has to present a finalized Agreement by 60 days, unless he decides - within the same deadline - to file for *concordato preventivo*.

The law specifies that a Restructuring Agreement becomes enforceable upon its publication in the Register of Companies, which takes place before the court's confirmation. The Agreement, therefore, would remain enforceable for those creditors who gave their approval even if the court rejects the confirmation, thereby not granting the exemption from the claw-back provisions. For this reason, creditors tend to subordinate the effect of the Agreement to the issuance of a confirmation order by the court.

The LF also provides for a more generic (and less regulated) type of out-of-court restructuring mechanism, namely the “Certified Recovery Plan” (*Piano di risanamento attestato*). The Recovery Plan is based on a debtor’s plan, the assumptions and conclusions thereof being certified by an independent accountant, to be either implemented unilaterally or agreed with some creditors, without any moratorium granted by the law. As in the case of the restructuring agreements, the recovery plans need to be grounded on an expert opinion certifying the “feasibility” of the plan. When this is accomplished, payments, transactions entered, and guarantees given by the debtor in accordance with such plans are exempted from the application of claw-back provisions and cannot give rise to criminal prosecution, should bankruptcy be subsequently declared.

4. What are the commencement criteria for insolvency procedures?

**Bankruptcy Procedure (Fallimento).** Pursuant to Art. 5 of the LF, a bankruptcy procedure can be started if a company is cash-flow insolvent, *i.e.* if it is «no longer able to regularly perform its obligations». The Italian Supreme Court interpreted the rule as describing a «structural, non-transitory state that follows the loss of the conditions of liquidity and creditworthiness, necessary to carry on the business» (see Cass. Civ., Sez. Un., 13th March 2001, no. 115). Therefore, a company may be technically insolvent, even if balance-sheet solvent, *i.e.* the total assets value exceeds the outstanding debt.

**Judicial Composition with Creditors (Concordato Preventivo).** Pursuant to Art. 160 of the LF, a company can file for a “judicial composition with creditors” whenever a «state of crisis» materialises. Even if no explicit definition of ‘state of crisis’ is provided for by the law, Art. 160 of the LF expressly states that it «shall be intended as including also insolvency», thereby suggesting that the ‘state of crisis’ refers to a wider set of events, that includes all the situations of technical insolvency. As a consequence of the lack of any specific definition, the fact that the procedure can be initiated only by the debtor, and the goal of the procedure, namely to provide the debtor with a tool to effectively and timely fulfil its duty to prevent a further deterioration of the economic viability of a company, many different interpretations of the meaning of state of crisis have been proposed in the literature: temporary difficulty to perform the business obligations; situations of actual, but still reversible insolvency; situations of imminent insolvency of the company. The interpretations of the Courts are not uniform in this respect: there are precedents in which the state of crisis is defined either as a «situation of economic and financial imbalance which has not yet given rise to an insolvency» (see Tribunale di Pescara, 20th October 2005); or as a circumstance including both the technical insolvency and also «different situations of financial straits, not necessarily involving a future insolvency» (see Tribunale di Milano, sez. II, 7th November 2005); or as a «synonymous of insolvency, including the reversible insolvency (temporary difficulty to perform the obligations) and the irreversible one» (see Tribunale di Sulmona, 19th January 2006); or as a circumstance «that can potentially give rise to an insolvency» (see Tribunale di Palermo, 17th February 2006; Tribunale di Arezzo, 17th September 2009 and 24th January 2013).
5. Who can propose a restructuring plan? (e.g. corporate bodies, insolvency representatives, creditors)

*Judicial Composition with Creditors (Concordato Preventivo).* In the *concordato preventivo* only the debtor is entitled to propose a restructuring plan either upon filing or within 120 days from the initial petition. If the debtor is a company, the plan will be prepared by the management bodies and submitted to the court by the legal representative. The decision to file, however, is to be taken by the board of directors, unless the company’s articles reserves this task to the shareholders meeting.

*Bankruptcy Procedure (Fallimento).* In the *concordato fallimentare*, which may occur in the course of a bankruptcy proceeding (see answer to Question 1), the (restructuring or liquidation) plan can be proposed by any creditor or third party and, under strict time conditions, also by the debtor.

6. Please describe whether and to what extent shareholders’ rights can be affected by a situation of distress/insolvency of a company before and/or irrespective of the opening of a formal insolvency proceeding (e.g., are there any fiduciary duties of the shareholders to approve corrective measures/plans proposed by the board?)

As a general principle, shareholders’ duties are not affected, from a legal standpoint, by the situation of distress/insolvency of a company, before and/or irrespective of the opening of a formal insolvency proceeding. However, there is a growing trend in literature to recognise that shareholders are bound by a general duty of fairness and good faith in the exercise of their rights (including voting rights). Such duty should prevent them from taking actions contrary to the general interest of the company and its violation would determine their responsibility for the damages caused by such actions. Along this reasoning, in the literature it has been deemed that, whenever the shareholders’ consent is required for the adoption of certain corrective measures/plans proposed by the board and its withholding would lead to the company’s insolvency, shareholders must not arbitrarily withhold their consent. This academic view is however not reflected yet in court’s decisions.

A sort of voting-related liability is however established for members of private limited companies. Namely, Article 2476 of the Italian Civil Code provides the joint liability of directors and shareholders who have intentionally decided or authorized acts or resolutions which damage the company. Although there are no known cases, such liability may apply to decisions that lead to the insolvency of the company, or deepen an already existing insolvency.

In addition, the Italian company law entails specific provisions affecting the duties of shareholders in cases where the company is undercapitalized or otherwise in troubles.

Article 2447 of the Italian Civil Code considers the situation whereby losses reduce a joint-stock company’s net worth below two thirds of its subscribed share capital and the value of such net worth falls below €120,000 (this amount representing the minimum share capital required under Italian law for the setting up of a joint-stock company, i.e. “società per azioni”). In such a circumstance, the consequences are more intrusive than those implied by the scenario considered under Article 2446. In fact, the shareholders’ meeting is bound to either resolve: a) to wipe the company’s share capital out and simultaneously increase it to at least €120,000 (after having covered all losses); b) to transform the company in either a partnership or a limited liability company (“società a responsabilità limitata”), if the share capital requirements are met (see below); or c) the dissolution of the company.

Although corresponding provisions are formally set forth under Article 2482-ter of the Italian Civil Code (concerning private limited liability companies = “società a responsabilità limitata”), the above intrusive effects no longer materialize *de facto* when losses reduce the net worth of a limited liability company below two thirds of its subscribed share capital, since (pursuant to a reform enacted in 2013) the minimum legal capital requirement for this type of company is now just 1 euro.
Under article 2484, first paragraph, number 4), of the Italian Civil Code, failure to wipe out and simultaneously increase the company’s share capital, or to transform the company, entails the immediate and automatic dissolution and subsequent liquidation of the company.

Finally, the Civil Code also addresses the problem of “nominal” undercapitalization. Under Art. 2467, which is directly applicable only to private limited liability companies, the reimbursement of loans advanced to the company by its quotaholders shall be subordinated to the claims of the other creditors, when such loans were granted when the company was facing an excessive imbalance between the company's debts and its net equity or when the financial condition would have anyway made an equity contribution more appropriate than a loan. In this way, such loans are to some extent assimilated to risk-capital. Further, should the company be declared bankrupt, any payment back of such loans made to the lender-quotaholders in the year before the insolvency declaration must be reimbursed to the company.

Many scholars and some courts have deemed the above provision applicable also to joint-stock companies, arguing on the fact that this would be just a specific application of a principle of more general nature.

Pursuant to Article 2497 quinquies the abovementioned provisions set forth under Article 2467 are expressly applicable to claims resulting from loans advanced by a parent company (or by any other subsidiary of the parent company) to a controlled company over which the lender-parent company exercises management and coordination powers, regardless of its nature as private limited liability company or joint-stock company. Such provision responds to the need for preventing undercapitalization, which is very common in the context of groups of companies.

II. Shareholders’ Rights in Companies Subject to Insolvency Proceedings

7. Are shareholders notified of the initiation of an insolvency process? If notification is individualized, what are the mechanisms used to identify shareholders?

Shareholders are not individually notified of the beginning of any bankruptcy or restructuring procedures. However the initiation of an insolvency proceeding is made generally available to the public through the Public Registry of business organizations. In particular, in the context of:

a) a Judicial Composition with Creditors (Concordato Preventivo), the relevant petition and the decision of the court on the formal initiation of the procedure must be published in the Public Registry of business organisations pursuant to Arts. 161 and 163 of the LF;

b) a Bankruptcy Procedure (Fallimento), the decision of the Court that declares the insolvency must be published in the Public Registry of business organisations pursuant to Article 17 of the LF.

Should the company be listed in a stock exchange market, the judicial declaration of insolvency, the petition for a court-supervised judicial petition with creditors, like all other material or privileged information on the listed issuer, must be communicated, as soon as possible, to the Consob (the Italian Securities and Exchange Commission) and advertised – also via a “dissemination of regulated disclosures system” (SDIR) or via the issuer’s website – to the Stock Exchange Company, the media and the general public (see art. 114 of the Italian Securities and Exchange Act and arts. 65 et seq. of the Issuer Regulation – Consob’s Resolution No. 11971 of 14 May 1999).
8. Are shareholders required to file claims in the insolvency proceeding? What are the consequences of not filing a claim?

**Judicial Composition with Creditors (Concordato Preventivo).** Shareholders are not required to file any claim in the proceedings and they are not allowed to cast a vote on the proposal, nor to exercise any other right specifically related to the procedure. Although, it should be taken into account that only the debtor (i.e., the management of the company) can file the *concordato preventivo* proposal. Thus, the majority shareholders (or quotaholders) are, in fact, often able to participate, through the management, to the preparation of such proposal. The shareholders, in their position as holders of a residual interest in the company, automatically benefit of the company’s residual value, if any, after creditors have been paid accordingly to the terms of the creditor-approved and court-ratified proposal. Should the *concordato preventivo* plan provide for any extraordinary operations (e.g., merger, a capital increase), its implementation necessarily requires a resolution of the company’s Extraordinary General Meeting approving such operations.

**Bankruptcy Procedure (Fallimento).** Shareholders and quotaholders are not required to file any claim in the proceedings. In their position as ‘residual claimants’, they are entitled to all the proceeds remaining after the full payment of any debt, if any. The law does not grant them any specific rights (either voting or governance rights) in the course of the insolvency procedure. They are not even entitled to challenge the court decisions on the admission of claims, notwithstanding the fact that it may affect the amount of the company residual value.

9. Can shareholders continue to trade and transfer shares after the initiation of an insolvency proceeding affecting the company?

The law does not provide for any restriction to the transfer of shares after the initiation of an insolvency proceeding (*concordato preventivo* or *fallimento*).

10. Do shareholders have the right to request that a shareholders’ meeting is held, even if the company is insolvent? (If there are separate reorganization and liquidation procedures, does this affect the response?)

Both in the context of a *concordato preventivo* or a *fallimento*, shareholders representing at least the 10% of the capital of a joint-stock company (5%, for listed issuers; in both cases, the articles of association can provide for lower thresholds) have the right to convene a shareholders’ meeting (*Art. 2367 of the Italian Civil Code*). Said right is not suspended because of the initiation of an insolvency procedure, even though some of the competences and powers of the general meeting cannot be exercised during a bankruptcy process (see answers to Questions 28-30 below).

When the debtor is a limited liability company, no express provision allows quotaholders to convene a quotaholders’ meeting. However, by analogy with the right of quotaholders representing one third of the capital to add further issues to the agenda of a convened meeting (*Article 2479 of the Italian Civil Code*), certain courts have maintained that quotaholders representing the same portion of the company’s legal capital are entitled to convene a quotaholders’ meeting (*Tribunal of Milan 19th November 2010*). Such a right should be exercisable both in the context of a *concordato preventivo* or a *fallimento*.
11. Do shareholders have the right of requesting information in an insolvent company? Do they have information rights as to the progress of a reorganization procedure? Can they exercise that right vis-à-vis the directors of the company, if they remain in charge of the company, or vis-à-vis the insolvency representative?

During the ordinary course of business, shareholders of Italian joint-stock companies (società per azioni) have the right of examining some company’s books (namely the shareholders register and the general meeting minutes; see Art. 2422 of the Italian Civil Code); the right of examining the preparatory documents to the general meetings provided by the corporate bodies; the right of intervention to the general meeting and of asking questions on the topics in the meeting’s agenda (see Art. 2370 of the Italian Civil Code). With respect to quotaholders of a private limited liability company, the law provides only for a generic right of information (Arts. 2479 and 2479 ter of the Italian Civil Code), which has been construed by legal scholarship as involving at least the same right as those set forth in favor of shareholders. No specific individual right of information is provided for as to the liquidation or the restructuring process.

Judicial Composition with Creditors (Concordato Preventivo). In this context the debtors retain possession of its assets and may continue operating the company’s business, although under court supervision (see art. 167 of the LF). Therefore, its bodies remain in office and the shareholders’ meetings are regularly held (at least annually). Shareholders and quotaholders may, thus, exercise the abovementioned information rights.

Bankruptcy Procedure (Fallimento). Despite the ordinary information rights of shareholders and quotaholders not being suspended during a bankruptcy procedure, such rights are unlikely to be exercised in this context, since shareholders’ (or quotaholders’) meetings are seldom held during bankruptcy (see answers to Questions 28-30 below).

12. Can shareholders make proposals for nomination of directors, if the directors continue managing the company?

As a general principle, the Italian insolvency proceedings produce their effects only on the company’s assets, leaving instead unaffected the ordinary rules relating to corporate governance (e.g., the right of shareholders to make proposals for the nomination of directors). However, from a practical standpoint, shareholders (or quotaholders) may lose their interest in exercising such rights when the company, through its directors, is no longer entrusted with the management of the company’s assets, as it happens upon the initiation of insolvency proceedings that dispossess the current management, as in bankruptcy (see below).

Judicial Composition with Creditors (Concordato Preventivo). The directors continue managing the company’s assets, since – as mentioned above in answer to Question 1 – the judicial composition with creditors is a debtor-in-possession procedure (see Art. 167 of the LF). Therefore, during the procedure, shareholders (or quotaholders) may actually be interested in exercising their right to appoint and replace directors under general rules (Arts. 2364, no. 2, and 2383 of the Italian Civil Code, as to the joint-stock companies, and Art. 2479 of the Italian Civil Code, as to the private limited liability company).

Bankruptcy Procedure (Fallimento). Upon the insolvency declaration, the current directors (or liquidators, if the company is in liquidation) remain in place, but they have no power over the assets of the company, whose management is entrusted to the court-appointed trustee. Therefore, despite the shareholders (or quotaholders) being theoretically allowed to make proposals for nomination of directors during the bankruptcy procedure, they generally lack any practical interest to do so (except when the bankruptcy liquidation is carried out through a concordato fallimentare).
13. If special categories of shares exist whose holders are granted additional governance rights, are these additional rights affected by the opening of an insolvency procedure? (If there are separate reorganization and liquidation procedures, does this affect the response?)

As said in answer to Question 12 above, governance rights are generally not affected by the opening of an insolvency procedure, although the exercise of such rights may, depending on the type of insolvency proceedings, become of little interest for shareholders (or quotaholders) due to the effects of the procedure on the management of company’s assets.

Judicial Composition with Creditors (Concordato Preventivo). In the case of a judicial composition with creditors, the debtor remains in possession and its corporate bodies continue exercising their respective powers. Thus, shareholders (or quotaholders) retain their interest in exercising possible additional governance rights under the ordinary rules. In particular, the articles of association of Italian joint-stock companies may provide for several additional governance rights to the holders of special classes of shares (e.g., some deviation from the one-share-one-vote principle; some special voting rights on particular subjects; the right of appointing a director or a member of the board of statutory auditors; see, in general, arts. 2348 and 2351 of the Italian Civil Code). The articles of association of a private limited liability company may provide for a wide set of additional governance rights in favour of individual quotaholders (Arts. 2479 of the Italian Civil Code). If the company is an issuer listed in a stock exchange, Art. 147-ter of the Italian Securities and Exchange Act applies, which grants the shareholders representing some qualified percentages of the company’s capital the individual right of filing lists of candidates for the election of the corporate bodies.

Bankruptcy Procedure (Fallimento). From a theoretical standpoint, the additional governance rights mentioned above are not affected by the insolvency declaration. As a matter of fact, however, during the liquidation procedure following a formal insolvency declaration, there could be no occasion of exercising most of those governance rights, since it is highly unlikely that a general meeting be held (see answers to Questions 28-30 below), and because the management of the company’s assets is entrusted to the trustee appointed by the court (so all board members, including those appointed by the special-class shareholders, no longer exercise their powers).

14. Can shareholders challenge the decisions of the shareholder meeting, if it is still active? Do they retain the possibility of taking action against the acts of the directors? And against the acts of an insolvency representative? Is any authorization by a judicial or administrative body required to do so or, more generally, to exercise corporate rights? (If there are separate reorganization and liquidation procedures, does this affect the response?)

Judicial Composition with Creditors (Concordato Preventivo). Pursuant to Arts. 2377 and 2378 of the Italian Civil Code, dissenting, abstaining, or absent shareholders representing at least the 5% of the legal capital of the company (0,1%, for listed issuers; in both the cases, the articles of association can provide for lower thresholds) always have the right of challenging the resolutions of the shareholder meeting when deemed to be in breach of the articles of association of the company or the law. In the context of private limited liability companies, the same right to challenge a resolution may be exercised by individual quotaholders, regardless of the size of their interest in the company (Art. 2479 ter of the Italian Civil Code). Pursuant to substantially corresponding rules, shareholders (Art. 2388 of the Italian Civil Code) and quotaholders may also challenge those resolutions of the board of directors that are allegedly detrimental to their individual rights.

The beginning of a judicial composition with creditors does not affect the shareholders’ (or quotaholders’) right to take action against the directors of the company. In the context of a joint-stock company, shareholders representing at least the 1/5 of the capital of the company (the articles of association can lower this threshold or raise it up to the 1/3; for listed issuers the threshold is the 1/40, which can be reduced in the articles of association) can sue the current and/or former directors on behalf of the company,
claiming for damages (see Arts. 2393-bis of the Italian Civil Code). Each quotaholder, regardless of the size of its interest company, can sue for damages the directors of a private limited liability company (Art. 2476 of the Italian Civil Code).

As a general rule, no special authorisation is required to shareholders in order to exercise any governance power.

Finally, interested third parties are entitled to challenge a creditor-approved concordato preventivo proposal in court. According to the slightly prevailing literature and case law, shareholders (or quotaholders) are not entitled to challenge the court’s confirmation of such a proposal pursuant to Art. 180 of the LF. However, some scholars and courts have deemed shareholders individually entitled to challenge the court’s confirmation of a concordato preventivo proposal (Tribunale di Roma, 19 April 1988).

Bankruptcy Procedure (Fallimento). From a theoretical standpoint, the bankruptcy procedure does not affect the rights of dissenting, abstaining, or absent shareholders (and quotaholders) to challenge the resolutions of the shareholders’ (or quotaholders’) meeting and the resolution of the board of directors, under general rules. Nevertheless, from a practical standpoint, those rights are never exercised in the context of bankruptcy due to the fact that the shareholders’ (or quotaholders’) meeting is seldom held (see answers to Questions 28-30 below) and the management of the estate is entrusted to the court-appointed trustee.

Shareholders and quotaholders can challenge single decisions or operations made by the trustee following the special procedure provided for by Art. 36 of the LF. They cannot, however, sue the former directors on behalf of the company, since the capacity to file such actions stays only with the trustee upon the insolvency declaration (see Art. 2394-bis of the Italian Civil Code); similarly, any lawsuit against the former trustee can be made only by the current trustee, previously authorised by the creditors’ committee or by the court (see Art. 38 of the LF).

Finally, the right of shareholders to individually challenge the court’s confirmation of a creditor-approved concordato fallimentare proposal is debated by scholars and courts under terms substantially corresponding to what described above regarding the concordato preventivo proposal. However, the prevailing view (as confirmed by Tribunale di Palermo 20th April 2009) seems that shareholders (and quotaholders) have the right to challenge such confirmation.

15. Do shareholders have the right to call a special investigation of the affairs of the insolvent company?

Judicial Composition with Creditors (Concordato Prevenitivo). Pursuant to ordinary rules, shareholders and quotaholders have a right to investigate the affairs of the company. Such right is not affected by the occurrence of an insolvency procedure. In particular, in the context of joint-stock companies, each individual shareholder may file a complaint with the company’s board of statutory auditors, who must take into consideration such complaint. Should the complaint be filed by shareholders representing 5% of the company’s capital (2% for listed issuers; in both cases, the articles of association may provide for lower thresholds), the company’s board of statutory auditors have a more pervasive legal duty that mandates them to actually investigate on the specific circumstances reported in the complaint (see Art. 2408 of the Italian Civil Code). Moreover, shareholders representing 10% of the company’s capital (or 5% for listed issuers; in both the cases, the articles of association may provide for lower thresholds) are entitled to claim for a special investigation made by a special officer appointed by the court (see Art. 2409 of the Italian Civil Code). In the context of private limited liability companies, individual quotaholders that are not directors of the company have extensive monitoring rights over directors and company’s affairs, including the right of requiring directors to provide information on the affairs of the company in general and with respect to specific affairs, and inspecting all the corporate documentation (Art. 2476 of the Italian Civil Code). In exercising such rights, quotaholders may act personally, or through professionals appointed by the
quotaholders to perform the relevant tasks. In this regard, the sole limit to which quotaholders are bound is conducting themselves according to good faith.

**Bankruptcy Procedure (Fallimento).** Shareholders and quotaholders have no specific individual right to a special investigation in a bankruptcy procedure following a formal declaration of insolvency.

The court-appointed trustee shall investigate on the causes of insolvency and possible responsibilities of directors, and report thereabout to the court ([Art. 33 of the LF](http://example.com)). The trustee is also exclusively entitled to file claims against directors upon the bankruptcy declaration (with the single exception of claims against directors resulting out of damages directly caused to one or more shareholders or quotaholders, without any damages to the company).

In light of the above and, more in general, of the entrustment to the trustee of the management and control duties ordinarily appertaining to the company’s board of directors and board of statutory auditors, shareholders of a joint-stock company would probably have very little interest in exercising their ordinary investigation rights (which may only be exercised indirectly through the board of statutory auditors or the court, as discussed above).

Differently, the broader scope of the investigation powers to which quotaholders of a limited liability company not managing the company are individually entitled pursuant to [Article 2476 of the Italian Civil Code](http://example.com), and the right to exercise such powers personally (or through professionals appointed by the very same quotaholder), may provide a stronger incentive, from a practical standpoint, to exercise such ordinary powers even during the bankruptcy procedure; indeed, the pervasive information rights granted to individual quotaholders not managing the company do not necessarily overlap with the trustee’s duties of investigation.

As of today, however, no case law on the subject exists.

16. Does the law provide for the establishment of a shareholders’ committee (or several committees, in case of different share classes)? What are their powers? Who bears the related costs?

No shareholders’ committee is provided for in any liquidation or restructuring procedure.

17. Can shareholders voluntarily transfer shares of the company undergoing insolvency proceedings against any provisions in the articles/bylaws restricting transfers of shares?

Pursuant to [Art. 2355-bis of the Italian Civil Code](http://example.com), the articles of association of joint-stock companies can impose some temporary restrictions or some conditions to the transfer of the company’s shares. As to private limited liability companies, the articles of association may permanently limit the transfer of quotas. In order to counterbalance such possible non-transferability, the law provides for the necessary granting to quotaholders of the right to withdraw from the company and obtain the reimbursement of their participation in proportion with company net assets at any moment ([Art. 2469 of the Italian Civil Code](http://example.com)).

These restrictions and conditions are not affected by the fact that the company is undergoing any liquidation or restructuring procedure. Thus, there are no provisions allowing shareholders or quotaholders to freely transfer their interest in a company undergoing an insolvency procedure (either *concordato preventivo* or *fallimento*), regardless of the limitations to shares’ or quotas’ transferability set forth by the company’s articles of association/bylaws.

18. Can outstanding shares of the company undergoing insolvency proceedings be assigned to third parties without the consent of the relevant shareholders? If yes, under what conditions? Are existing shareholders entitled to compensation? What other safeguards are provided? (e.g., does the law
include a principle according to which the affected shareholders should not receive less than in a liquidation procedure?)

**Judicial Composition with Creditors (Concordato Preventivo).** Fully consistently with the fact that only the debtor is allowed to initiate this procedure and that it retains its assets and continues operating its business, there are no provisions providing for the mandatory transfer of outstanding shares or quotas to third parties.

**Bankruptcy Procedure (Fallimento).** There are no provisions allowing the court (or any other authorities or bodies involved in the bankruptcy procedure) to mandate the transfer of outstanding shares or quotas to third party. Indeed, the focus of the procedure is completely on the assets of the debtor. However, as a matter of fact, a corresponding result is achieved when the trustee contributes the company’s assets to a newly incorporated company (NewCo) and sells the shares of such NewCo (art. 105 of the LF).

19. Can outstanding shares of the company undergoing insolvency proceedings be cancelled without the consent of the relevant shareholders? If yes, under what conditions? Are existing shareholders entitled to compensation? What other safeguards are provided? (e.g. does the law include a principle according to which the affected shareholders should not receive less than in a liquidation procedure?)

**Judicial Composition with Creditors (Concordato Preventivo).** Under ordinary rules (see Arts. 2446 and 2447 of the Italian Civil Code, as to joint-stock companies, and Arts. 2482 bis and 2482 ter, as to private limited liability companies), shares or quotas must be (even partially) cancelled every time it is verified that the company’s equity has been reduced, because of losses, under a certain threshold or, in any case, under the minimum level provided by the law for the company’s capital. The resolution to reduce the company’s equity is taken by the general meeting. During the concordato preventivo procedure, the above legal duty is temporarily suspended, but the company is required to comply with the capital requirements set forth by the above provision upon the court confirmation of the creditor-approved proposal (see art. 182-sexies of the LF). When the shares or quotas are cancelled due to company’s losses, the relevant equity holders are not entitled to any compensation.

**Bankruptcy Procedure (Fallimento).** The only case in which the shares/quotas of the insolvent company can be cancelled without the consent of the shareholders/quotaholders is when upon completion of the liquidation of the company’s assets the resulting proceeds do not permit to fully reimburse creditors, as it happens in the vast majority of cases..

20. Do shareholders of the company undergoing insolvency proceedings have pre-emption rights over new issues of shares? Are there special conditions for the suppression of pre-emption rights if the company is insolvent (if there are separate reorganization and liquidation procedures, does this affect the response?).

**Judicial Composition with Creditors (Concordato Preventivo).** Under ordinary rules, shareholders and quotaholders have a pre-emption right over newly issued shares or quotas. With respect to joint-stock companies, such a pre-emption right is suppressed (i) when the extraordinary meeting resolution increasing the capital so provides by reason of being in the “best interest of the company”, (ii) when the capital increase, according to relevant resolution, must be paid by contributions in kind, or (iii) when the articles of association of a listed issuer authorizes the suppression of the pre-emption right with respect to newly issued shares not exceeding 10% of the pre-existing capital, if it is certified that the relevant issue price is equivalent to the market price of the shares (Art. 2441 of the Italian Civil Code). With respect to private limited liability companies, the suppression of the pre-emption right on newly issued quotas must be previously authorized by the company’s articles of association. Further, the quotaholders that have not consented to the capital increase resolution excluding the pre-emption right of former quotaholders are
entitled to withdraw from the company and obtain the reimbursement of their participation in proportion with company net assets (Art. 2481 bis of the Italian Civil Code).

The above rules are not affected by the initiation of a reorganization proceeding and, thus, apply also in the context of a concordato preventivo.

Bankruptcy Procedure (Fallimento). The rules on shareholders’ and quotaholders’ pre-emption rights are not affected by the opening of a bankruptcy procedure. However, this procedure is aimed at winding up the company and liquidating its assets. Therefore, the procedure does not generally provide for the issuance of new shares or quotas of the debtor-company and shareholders and quotaholders only have a residual claim over the proceeds of the liquidation after the payment of all creditors, if any. The pre-emption rights may come into practical relevance in the context of bankruptcy only when the issuance of new shares or quotas is provided for in a concordato fallimentare plan.

21. Can shareholders retain a participation in the company that has emerged from an insolvency process (or in the company to which the insolvent company’s assets have been transferred) even if the company was insolvent according to a balance-sheet test? (i.e., where the value of its liabilities exceeds the value of its assets) If yes, under what conditions? (If there are separate reorganization and liquidation procedures, does this affect the response?)

Judicial Composition with Creditors (Concordato Preventivo). It is debated whether shareholders and quotaholders may retain an interest in the company after the completion of the judicial composition with creditors. Also in light of the recent reforms that have substantially reshaped the Italian bankruptcy law, courts and scholars have not yet found a consensus on whether an absolute, as opposed to a relative, priority rule shall apply in judicial compositions with creditors.

In this regard, the slightly prevailing view – at least with respect to a concordato preventivo proposal providing for the continuation of the debtor’s business – seems to be that a relative priority rule applies (Tribunal of Rome 25th July 2012; Court of Appeal of Rome 5th March 2013). In other words, the concordato preventivo proposal would not be required to allocate all the assets to the creditors even when the company is balance-sheet insolvent, but it would just need to comply with the “no creditors worse off principle” mandating that every creditor is paid at least the same amount as under any other feasible alternative. Shareholders and quotaholders might, thus, retain an interest even in a balance-sheet insolvent company to the extent that creditors approve a concordato preventivo proposal allocating all or part of the restructuring surplus to the company (and, thus, indirectly to its shareholders or quotaholders). The same rulings have stated that an opposite rule applies in case of a purely liquidating plan: in other words, a violation of absolute priority rule would be justified only as long as it facilitates the survival of the business as a going concern.

Bankruptcy Procedure (Fallimento). Shareholders and quotaholders can retain an interest in a balance-sheet insolvent company. However, all the company assets must be allocated to the payment of creditors. Therefore, shareholders’ and quotaholders’ interest in the company will be of some value only when some proceeds are left after all the creditors have been fully paid back (i.e., when unexpected circumstances have restored the company’s balance-sheet solvency). When the proceeds from the liquidation of the company’s assets do not permit to fully reimburse creditors, as it happens in the vast majority of cases, the company is extinguished upon completion of the bankruptcy procedure (the outstanding shares or quotas are thus cancelled with no compensation to their holders).
22. Are the ranking of classes of shares and the preferential rights of classes of shares affected (and if yes, to what extent) by the fact that the company is undergoing an insolvency process? (If there are separate reorganization and liquidation procedures, does this affect the response?)

The ranking of classes of shares are generally not affected by the fact that a company is undergoing an insolvency procedure (either concordato preventivo or fallimento).

Similarly, the occurrence of an insolvency procedure does not generally affect the special rights that may be granted to the holders of special classes of shares of joint-stock companies or to individual quotaholders pursuant to the company’s articles of association (e.g., preferential rights relating to the distribution of the liquidation’s proceeds; governance rights over the management of the company; special rights as to profits distribution). However, it is important to note that in the context of the bankruptcy procedure some of the special rights concerning the company’s governance may be of no practical interest due to the removal of the company from the management of its assets, which are entrusted to the court-appointed trustee (see answer to Question 13 above).

Exceptionally, the ranking and rights mentioned above are directly affected by the fact that the company is undergoing an insolvency process when the provisions on which they are grounded are conditional upon the event of insolvency (e.g., if the right to a preferential dividend may be made contingent upon the fact that the company is not undergoing any restructuring process).

23. Can shareholders, in the course of an insolvency procedure, supply goods, services or financial resources to the company? If yes, under what conditions (e.g., judicial authorization)? What would their ranking position be towards other creditors?

Judicial Composition with Creditors (Concordato Preventivo). Shareholders and quotaholders are allowed to supply to the company pre- and post-petition financing. The 80% of the amount of the claim arising from such debtor-in-possession financing is reimbursed to the lending shareholders’ and quotaholders’ with priority over all the other debts of the company (Art. 182-quater of the LF). Shareholders and quotaholders supplying financial resources to the company under the aforementioned terms have no right to vote on the approval of the plan. The amount of the lending shareholders’ and quotaholders’ claim that does not rank as a priority claim (i.e., 20%) is subject to the ordinary rules on shareholders’ and quotaholders’ financing set forth by Arts. 2467 and 2497-quinquies of the Italian Civil Code (see answer to Question 6 above). Therefore, such portion of the shareholders, quotaholders’, or parent company’s claims are indeed subordinated to those of the other creditors.

After the filing of the initial petition, the court may allow shareholders (and quotaholders) to supply financing upon the company’s formal request. Such a request must be accompanied by a report by an independent expert certifying that the financing is in the best interest of creditors (Art. 182 quinquies of the LF). Due to the previous authorization of the court, such provision allows certainty with respect to the priority ranking of the claim arising from the relevant financings.

Further, those having an interest in the company undergoing a concordato preventivo can also supply goods and other services to the company. As a general rule, the company undergoing a concordato preventivo procedure is bound to assume all the executory contracts, including those with shareholders (or quotaholders). Pursuant to Art. 169 bis of the LF, the debtor may file a petition to the court asking to be authorized to temporarily suspend or reject certain executory contracts. In these circumstances, the relevant counterpart is entitled to file a claim for the resulting damages, which is treated as a pre-petition claim.

During the concordato preventivo procedure, the company may also enter into new agreements with third parties, including shareholders and quotaholders. In this regard, when the supply of goods or services by the equity holders is in the ordinary course of business, the company does not need any authorization and the resulting claim of the shareholder-supplier ranks as a priority claim. The court’s authorization is instead required for any acts out of the ordinary course of business. In both cases, the claims arising thereby rank as priority claims (Arts. 161 and 167 of the LF).
Bankruptcy Procedure (Fallimento). In a bankruptcy procedure, the trustee can enter into new contracts on behalf of the company, thereby contracting new debts. These debts (including those taken up in the course of the temporary continuation of the business pursuant to art. 104 of the LF) are qualified as administrative expenses and, thus, the relevant claim ranks as a priority claim (i.e., it ranks over all the other obligations taken out before the formal declaration of insolvency) (see art. 111 et seq. of the LF). The company’s shareholders or quotaholders can be, without restrictions, counterparties of the new contracts. Shareholders and quotaholders can provide new financial resources as well (although it is quite unlikely, in a liquidation context); if they provide new equity (see answer to Question 34 below) they do not have priority over creditors (pursuant to the absolute priority principle that governs the bankruptcy procedure), nor over the other shareholders or quotaholders of the company (unless otherwise provided in the contribution agreement).

Further, shareholders and quotaholders may continue to supply goods, services, and financial resources under the executory contracts that the trustees has deemed convenient to assume (Art. 72 of the LF). When the trustee is authorized by the court to carry on the business activities pursuant to Art. 104 of the LF (see answer to Question 36 below), all the executory contracts are deemed assumed by the debtor undergoing the procedure, unless otherwise expressly stated by the trustee with respect to specific executory agreements. Third parties’ claims (including those of shareholders and quotaholders) arising out of assumed executory contracts rank as priority claims.

24. Can shareholders, in their capacity as counterparties, be under a duty to continue a contractual relationship with the insolvent company during an insolvency procedure? (If there are separate reorganization and liquidation procedures, does this affect the response?).

Judicial Composition with Creditors (Concordato Preventivo). As a general rule, all the executory contracts continue to be binding for both the company-debtor and the relevant counterpart, regardless of such counterpart being a shareholder or a quotaholder of the company (see answer to Question 23 above). However, pursuant to art. 169-bis of the LF, upon a specific petition of the company, the court may authorize to early terminate certain executory contracts and the resulting third party’s claims for damages are treated as a pre-petition claim (see also answer to Question 38 below).

Bankruptcy Procedure (Fallimento). As a general rule, pursuant to art. 72 of the LF all contractual clauses providing for the early termination of a contract contingent upon the formal declaration of insolvency are invalid. Upon the bankruptcy declaration, the effects of most executory agreements are temporarily suspended in order to allow the trustee to decide whether to assume or reject such contracts according to the best interest of creditors. If the trustee opts for the assumption of an executory contract, the third party’s claim under such contract ranks as a priority claim and such third party (possibly a shareholder or quotaholder) is under a legal duty to continue the contractual relationship under the original terms of the assumed agreement (see answer to Question 38 below).

As an exception to the general rules discussed above, exchange-traded futures contracts ex are subject to automatic termination upon bankruptcy of one of the parties, when bankruptcy is declared prior to the contract maturity date. The difference between the price of the underlying assets as contractually agreed and their value at the date of the agreement’s termination, if positive, is due by the third party to the debtor and used to pay its creditors; if negative, may be claimed by the third party against the debtor and be allowed to participate pro-rata, according to its priority, in the distribution of the liquidation’s proceeds (art. 76 of the LF). Such provisions also apply to any forward contracts, securities lending transactions, repurchase agreements and stock exchange repos (art. 203 of Italian Securities and Exchange Act).

25. Can shareholders (or companies of the same group) holding credit claims against the company under insolvency procedure participate in the creditors’ meeting and vote on the insolvency plan
without restrictions? (If there are separate reorganization and liquidation procedures, does this affect the response?)

**Judicial Composition with Creditors (Concordato Preventivo).** As a general principle, all creditors are entitled to participate in the creditors’ meeting (if any) and vote on the concordato preventivo proposal (see Arts. 174 and 177 of the LF). Especially in the past, certain courts (Court of Appeal of Venice 23rd February 2012; Tribunal of Florence 26th April 2010) have not allowed to vote on the proposal shareholders (or quotaholders) having a claim against the company subordinated pursuant to Arts. 2467 and 2497 quinquies of the Italian Civil Code (see answer to Question 6 above). Despite the issue being still debated, the prevailing case law (Tribunal of Mantua 11th April 2013) and literature support the recognition of the right to vote on the proposal also to those creditors whose claims are subordinated in light of the fact of being, at the same time, shareholders (or quotaholders) of the company.

**Bankruptcy Procedure (Fallimento).** The bankruptcy procedure is overseen by a committee of 3 to 5 creditors, who are appointed by the court-delegated judge so as to reflect the different interests and positions existing among the company’s creditors (Art. 40 of the LF). Creditors that are also shareholders (or quotaholders) of the company often rank as subordinated creditors (see answer to Question 6 above). Despite the lack of a provision preventing their appointment as members of the creditors’ committee, they never participate in it as a matter of fact.

When the bankruptcy liquidation is carried out through a concordato fallimentare, creditors must approve the relevant proposal (see answer to Question 1 above). Differently to what said above with respect to shareholders’ voting rights on the concordato preventivo proposal, the law expressly denies the right to vote to creditors being also a parent company, a subsidiary, or a jointly controlled company of the debtor (see Art. 127 of the LF). In light of this provision, a controlling shareholder holding a credit claim, even if not a parent company, should probably be also excluded from voting on a concordato fallimentare proposal.

26. If shareholders (or companies of the same group) do not hold credit claims against the company under insolvency procedure, must/can they participate in the creditors’ meeting? If that is the case, what rights or duties do they have in that meeting? (If there are separate reorganization and liquidation procedures, does this affect the response?)

**Judicial Composition with Creditors (Concordato Preventivo).** Shareholders and quotaholders that do not have a claim against the company generally lack any standing. However, according to certain courts and some scholars, they are entitled to the right of challenging the court’s confirmation of the concordato preventivo proposal. The slightly prevailing case law and literature is inclined to deny such right to shareholders and quotaholders that do not have a claim against the company (see answer to Question 14 above).

**Bankruptcy Procedure (Fallimento).** Pursuant to the absolute priority principle, holders of equity claims cannot ever participate in the creditors’ committee. Should the liquidation be carried out through a concordato fallimentare (see answer to Question 1 above), according to the prevailing view (Tribunal of Palermo 20th April 2009), shareholders (and quotaholders) have the right to challenge the confirmation by the court of the creditor-approved concordato fallimentare proposal (see answer to Question 14 above).

27. Do shareholders in an individual company have information rights as to the filing of insolvency proceedings by the parent or other related companies?

As a general principle, shareholders (and quotaholders) have no individual information right as to the beginning of a bankruptcy or judicial composition with creditors procedure (see answer to Question 7 above). The same principles apply to the insolvency of a parent (or other related) company; thus, shareholders can only learn of the insolvency of a parent (or other related) company from the information published in the
III. The Role of the Shareholders’ Meeting

28. Does the shareholders’ meeting continue to exist in insolvency proceedings? (If there are separate reorganization and liquidation procedures, does this affect the response?)

As a general principle, formally the general meeting continues to exist in any insolvency proceedings (see answers to Questions 28-30 below).

29. Does the shareholders’ meeting preserve all of its competences, generally? (If there are separate reorganization and liquidation procedures, does this affect the response?)

*Judicial Composition with Creditors (Concordato Preventivo).* The shareholders’ (or quotaholders’) meeting preserves all of its ordinary competences, fully consistently with the fact that the company retains possession of its assets and may continue to operate its business in the context of a judicial composition with creditors procedure.

*Bankruptcy Procedure (Fallimento).* Despite the shareholders’ (and quotaholders’) meeting continuing to stay in place and retaining its competences during the bankruptcy procedure, the management of the company’s estate is committed to the trustee appointed by the court and the procedure is solely aimed at pursuing a liquidation piecemeal or as a going concern of the assets in order to satisfy the creditors’ claims (see answer to Question 1 above). Therefore, it is quite unlikely that there could be the occasion to call for a shareholders’ (or quotaholders’) meeting. However, in a limited set of circumstances – namely in the case of a *concordato fallimentare* plan providing for extraordinary operations (e.g., merger, a capital increase) – the shareholders (or quotaholders) are called to approve such operations pursuant to the ordinary rules governing the Extraordinary General Meeting.

30. Does the shareholders’ meeting need to approve the accounts of the distressed/insolvent company?

*Judicial Composition with Creditors (Concordato Preventivo).* As the company retains possession of its assets and may continue operating the business, the General Meeting needs to approve the accounts of the company pursuant to the ordinary rules.

*Bankruptcy Procedure (Fallimento).* Pursuant to art. 33 of the LF, by 60 days from the insolvency declaration, the court-appointed trustee must file a report with the court, which is made available to the creditors that are members of the creditors’ committee (whereas the law prohibits access to the company and, arguably, to its shareholders or quotaholders). The report contains, inter alia, information substantially corresponding to what should be included in the company’s accounts. The trustee must report periodically to the court by filing again such documentation on a semi-annual basis. Neither the initial report, nor the periodical ones are subject to the shareholders’ (or quotaholders’) approval. Before the end of the procedure, the trustee files with the court a final statement that does not need to be approved by the General Meeting, but may be challenged by each individual shareholders (or quotaholders) (see art. 116 of the LF; see also Tribunale di Milano, sez. II, 14th December 2005).

31. Does the shareholders’ meeting have the power to dismiss directors – if directors are still in charge of the insolvent company? Can the shareholders’ meeting request the removal of the insolvency
representative? (If there are separate reorganization and liquidation procedures, does this affect the response?)

**Judicial Composition with Creditors (Concordato Preventivo).** Since the company acts automatically as debtor in possession and its bodies continue exercising their powers, the dismissal of directors is subject to ordinary rules. Therefore, in the context of a joint-stock company, the General Meeting retains its power to remove directors at any moment (see [Art. 2383 of the Italian Civil Code](https://example.com)). In the context of a private limited liability company, it is debated whether a good reason for dismissal be needed in order to remove directors, if the company’s articles of association do not specifically provide thereon. In this regard, the prevailing view is that the General Meeting is anyway entitled to remove directors at any moment (see [Tribunal of Milan, 20th October 2005](https://example.com)).

**Bankruptcy Procedure (Fallimento).** As mentioned above, during bankruptcy the management of the company’s estate is committed to the trustee appointed by the court. Whereas the creditors’ committee has the right to replace the trustee (see [Arts. 37 and 37 bis of the LF](https://example.com)), shareholders and quotaholders have no standing to require the removal of the trustee and may just informally ask to the court to exercise its *ex officio* power to remove the trustee.

### 32. Is a shareholders’ meeting authorization required to start an insolvency procedure? (If there are separate reorganization and liquidation procedures, does this affect the response?)

**Judicial Composition with Creditors (Concordato Preventivo).** No shareholders’ or quotaholders’ authorization is required for the management of the company to file the initial petition that initiates the *concordato preventivo* procedure. Indeed, such a decision is included among the competences of the company’s board of directors, except as otherwise provided in the articles of association or bylaws of the company (see [Art. 152 of the LF](https://example.com)).

**Bankruptcy Procedure (Fallimento).** No general meeting’s authorisation is required for a debtor to file for bankruptcy.

### 33. Does the shareholders’ meeting need to approve an insolvency or reorganization plan? Can shareholders challenge an insolvency or reorganization plan?

**Judicial Composition with Creditors (Concordato Preventivo).** Except as otherwise provided in the articles of association or bylaws of the company, the initial petition as well as the restructuring plan and the proposal to the company’s creditors (see answer to Question 1 above) do not need to be approved by shareholders or quotaholders. As discussed more extensively above (see answer to Question 14), according to certain literature and case law, shareholders are entitled to challenge the court’s confirmation of a creditor-approved proposal (see [Art. 180 of the LF](https://example.com); see also [Tribunale di Roma, 19th April 1988](https://example.com)).

**Bankruptcy Procedure (Fallimento).** The shareholders (or quotaholders) do not need to approve the bankruptcy petition possibly filed by the company, nor the possible *concordato fallimentare* proposal that the debtor is entitled to propose subject to the limitations discussed above (see answer to Question 1). Indeed, such a proposal and the relevant conditions «are decided by the company’s board of directors» pursuant to [Art. 152 of the LF](https://example.com). The same provision, however, allows the articles of association to give such competence to the General Meeting.

According to the prevailing view, shareholders are individually entitled to challenge the confirmation of a creditor-approved *concordato fallimentare* plan (see answer to Question 26 above).
34. Is a shareholders’ meeting decision required to issue new shares of the company undergoing insolvency proceeding? Can a new share issue be decided by the board or the insolvency representative? If a capital increase has to take place through the conversion of claims into new shares, does this affect the response?

**Judicial Composition with Creditors (Concordato Preventivo).** The circumstance that a company is undergoing a concordato preventivo procedure does not affect the rules governing capital increases and the issue of new shares or quotas. Pursuant to Arts. 2365, 2438 and 2442 of the Italian Civil Code, the issue of new shares of joint-stock company always requires a shareholders’ meeting decision, even if the capital increase takes place through the conversion of claims into new shares. Pursuant to Art. 2443 of the Italian Civil Code, however, the general meeting can delegate the issue of new shares, with some time limits and some quantitative conditions, to the board of directors. Similar rules apply to the issue of new quotas of a private limited liability company (see Art. 2481 of the Italian Civil Code).

**Bankruptcy Procedure (Fallimento).** Despite the opening of the bankruptcy procedure not affecting the ordinary rules regarding capital increases and the issue of shares, it should be noted that such operations are rather uncommon in this context. In fact, a new share issue and claims’ conversion into new shares could be pursued only in a concordato fallimentare. In this case, the approval by the shareholders’ (o quotaholders’) meeting would be required. In light of the fact that the management of the company’s estate is committed to the trustee appointed by the court, it is questionable if the delegation of the power to issue new shares to the board of directors can survive to the formal opening of a bankruptcy procedure (no precedents found).

35. Can an insolvency/reorganization plan affect the structure of the corporate entity (e.g., by merger, spin-off, or change of the legal form)? Is a shareholders’ authorization required for this?

**Judicial Composition with Creditors (Concordato Preventivo).** All the competences of the extraordinary shareholders’ (or quotaholders’) meeting (see answer to Questions 28 above) remain unaffected by the start of an insolvency procedure. Hence, even though the plan can provide for change in the legal structure of the corporate entity (mergers; spin-offs; changes of the legal form; issues of new capital), a shareholders’ (or quotaholders’) authorisation is required.

**Bankruptcy Procedure (Fallimento).** Despite the shareholders’ (and quotaholders’) meeting continuing to stay in place and retaining its competences during the bankruptcy procedure, it is quite unlikely that there could be the occasion to call for a shareholders’ (or quotaholders’) meeting (see answer to Questions 28 above). In fact, operations affecting the structure of the corporate entity (e.g., by merger, spin-off, or change of the legal form) could be pursued only in a concordato fallimentare. In this case, the approval by the shareholders’ (o quotaholders’) meeting of these operations is required. The carve-out of material parts of the insolvency estate, including the sale of the entire business activities (see answer to Question 37 below) is deemed not requiring any approval by the General Meeting (see also Art. 105 of the LF).

36. On what conditions can the company carry on business during an insolvency procedure? (If there are separate reorganization and liquidation procedures, does this affect the response?). Is a shareholders’ meeting authorisation required?

**Judicial Composition with Creditors (Concordato Preventivo).** Pursuant to art. 186-bis of the LF, a concordato preventivo plan may provide for the continuation of the business activities, if (a) the plan provides for an analytic description of the expected costs and revenues arising out of the continuation of the business activities, with express indication of the necessary financial resources; (b) the opinion of an expert is submitted along with the plan, certifying that the continuation of said activities is in the creditors’ best interest. In this regard, no shareholders’ (or quotaholders’) authorisation is required, except for when the
Bankruptcy Procedure (Fallimento). Pursuant to Art. 104 of the LF, in a bankruptcy procedure, the court may order the continuation of the business activities if both it is likely that their interruption would cause serious damages and the continuation of the business activities would not be detrimental to creditors. No shareholders’ (or quotaholders’) authorisation is required therefor. The continuation of the business activities may be interrupted upon request of the creditors’ committee at any moment.

37. In the course of an insolvency procedure, what provisions apply to the sale of specific assets out of the ordinary course of business and to the sale of the entire business operation of the company? Is a shareholders’ meeting authorisation required? (If there are separate reorganization and liquidation procedures, does this affect the response?)

Judicial Composition with Creditors (Concordato Preventivo). In a concordato preventivo procedure, the sale (if any) of specific assets or of the entire business operation of the company is realised according to the plan prepared by the debtor itself. As discussed above (see answer to Question 1), the concordato preventivo procedure is aimed at reorganizing and restructuring the company, while the debtor retains its assets and continues operating its business. Pursuant to Art. 182 of the LF, if the plan does not provide for the terms and procedures under which the sale of the assets is to be carried out, such a sale must follow the rules set forth for the liquidation of the estate in the bankruptcy procedure. The General Meeting does not need to authorize the sale of specific assets or of the entire business. However, it may be required to approve the concordato preventivo plan, which contains the terms and procedures for such a sale, if so provided for under the company’s articles of association. Absent such a provision, the decision on the concordato preventivo plan is taken by the company’s board of directors (see answer to Question 33 above).

Bankruptcy Procedure (Fallimento). Pursuant to Art. 105 of the LF, in a bankruptcy procedure, the liquidation is carried out piecemeal (i.e., by selling specific assets out of the ordinary course of business) only when deemed more convenient to the company’s creditors rather than selling the entire business operations of the company. Pursuant to Art. 107 of the LF, every sale must be made through auctions or other competitive procedures. No shareholders’ authorisation is required therefor.

38. Does the shareholders’ meeting have any power in relation to a decision of the board or the insolvency representative to continue or reject any favourable, unfavourable or essential contract during an insolvency procedure? (If there are separate reorganization and liquidation procedures, does this affect the response?)

Judicial Composition with Creditors (Concordato Preventivo). As a general principle, in a concordato preventivo process, which takes place without any formal declaration of insolvency, all the existing executory contracts continue to be binding both for the debtor and for the relevant counterpart. However, pursuant to Art. 169-bis of the LF, the debtor can ask for the court’s authorisation to temporarily suspend the performance of or to terminate certain executory contracts (see also answer to Question 23 above). The petition to the court to suspend or terminate one or more executory contracts is made by the board of directors either in the initial petition or in a following request, without the need of any specific shareholders’ (or quotaholders’) authorisation.

Bankruptcy Procedure (Fallimento). Pursuant to Arts. 72 et seq. of the LF, the insolvency declaration generally suspends the effects of the executory contracts so as to allow enough time to the trustee to assess whether to assume or reject such contracts according to the best creditors’ interest. With respect to certain type of executory contracts (e.g., financial leasing agreements, bank accounts, real estate leasing agreements, insurance agreements), the law provides for some exceptions from the ordinary regime. In particular, some of them are automatically terminated upon the declaration of insolvency, whereas others are
automatically assumed by the trustee. In any case, no shareholders’ or quotaholders’ authorisation is required.

39. If an insolvency plan can be presented for a whole corporate group, must that plan be approved by the shareholders’ meetings of each company of the group, including of those that are balance-sheet insolvent? How are the different meetings’ decisions coordinated? Are there specific safeguards (e.g., any veto power or other remedy) for minority shareholders of the companies that are not insolvent?

Under Italian law, the only rules governing the insolvency of groups of companies are set forth with respect to the amministrazione straordinaria procedure. Pursuant to Arts. 80 et seq. of d.lgs 8th July 1999, no. 270, when a company is undergoing the so-called “Prodi” amministrazione straordinaria procedure, the others companies of the group that are insolvent may be subjected to the same proceeding, regardless of whether or not they individually satisfy the requirements in terms of number of employees and size of debt (see answer to Question 1 above). A single special commissioner is, thus, entrusted with the management of all the companies of the group and the relevant administrative costs are charged proportionally to the estate of each company. No shareholders’ (or quotaholders’) approval is required; no safeguards are set forth in favor of the minority shareholders of the companies attracted to the main proceeding (i.e., amministrazione straordinaria), consistently with the fact that such companies need to be insolvent (although from a cash-flow standpoint).

Similar rules are set forth as to the so-called “Marzano” amministrazione straordinaria (see d.l. 23rd December 2003, no. 347), which applies to larger companies (see answer to Question 1 above).

Judicial Composition with Creditors (Concordato Preventivo). The law does not provide for any coordination mechanism as to the concordato preventivo of groups of companies. However, the prevailing case law (Tribunal Rome 7th March 2011; Tribunal of Arezzo 27th March 2012) allows groups to file a sole petition and concordato preventivo plan, provided that the plan keeps the different companies’ estates distinct from each other as far as the treatment of creditors is concerned (e.g., the “no creditor worse off principle” must be complied with taking into account the asset partitioning among the companies of the group). The creditors’ resolutions approving or rejecting the proposal must be separate for each company involved, although the creditors’ meeting might be called at the same time and place. Besides, the proposal might be made conditional upon the plan to be approved and confirmed as to all the companies of the group involved in the procedure. No shareholders’ (or quotaholders’) approval is needed.

Bankruptcy Procedure (Fallimento). In the absence of any specific provision governing the bankruptcy of groups of companies, most courts appoint anyway a single delegated judge and a single trustee for all the insolvent companies of the group in order to allow coordination between the procedures.

40. If companies belonging to the same group file separate insolvency proceedings, are there specific requirements/mechanisms to provide for coordination of those proceedings? Are shareholders of the relevant companies involved in the coordination mechanisms, if any?

Judicial Composition with Creditors (Concordato Preventivo). If the companies of a group file separate concordato preventivo plans, there is no mechanism allowing the subsequent coordination of the proceedings. Shareholders and quotaholders are not involved whatsoever in the coordination of the proceedings.

Bankruptcy Procedure (Fallimento). Despite the lack of any coordination mechanisms, the courts having the authority to supervise the various procedures may nevertheless appoint the same delegated judge and the same trustee in order to allow, as a matter of fact, coordination between the proceedings.
If a company of a group is declared bankrupt before the beginning of an *amministrazione straordinaria* procedure (either “Prodi” or “Marzano”; see answer to Question 1 above) involving another company of the same group, the court may decide to convert the bankruptcy procedure into an *amministrazione straordinaria* and, thereby, coordinate the proceedings (see Art. 84 of d.lgs 8th July 1999, no. 270). In any case, shareholders and quotaholders are not involved in the implementation of such coordination mechanism.

### IV. Other Obstacles for Insolvency Procedures Found in Company Law

41. Please list any other legal provision in company law that, in your opinion or in your experience, may interfere with the insolvency procedure of a company in your jurisdiction.