

CASH POOLING RECOGNITION UNDER BANKRUPTCY CRIMINAL LAW THROUGH SCYLLA AND CHARYBDIS

The Italian Supreme Court (Criminal Chamber) - in its judgment No. 34457 of 20 July 2018 (published in *Le Società*, 11/2018, p. 1311) - has stated that payments effected under intercompany cash pooling arrangements by a company later declared bankrupt do not fall within the criminal pattern of fraudulent bankruptcy, provided that such arrangements are documented under an agreement concluded prior to the bankruptcy declaration and it is demonstrated that the payments occur in the interest of both the bankrupt company and the Group as a whole.

The underlying matter can be reconstructed as follows:

- in the context of a Group of companies, the directors of a subsidiary in financial distress (the "Participant") effected certain payments in favor of the controlling entity, in spite of the presence of Participant's privileged creditors;
- the Participant has been later declared bankrupt, and its directors have been charged with fraudulent preferential bankruptcy since, through the foregoing payments, they dissipated the Participant's assets to the privileged creditors' detriment;
- the Participant's directors asserted that the payments in question have been made under intercompany cash pooling arrangements aimed to the benefit of the whole Group;
- notwithstanding, the same directors were found guilty.

The guilty verdict:

- was in line with the principles expressed in prior Italian Supreme Court rulings;

- was appealed and the appeals process went all the way to the Criminal Chamber of the Italian Supreme Court.

The same Italian Supreme Court, with the judgment No. 34457/2018 rendered by the Criminal Chamber, traced a narrow path along which cash pooling arrangements might no longer be seen - in the context of a bankruptcy procedure - as a mere instrument to distract money from a Group company to another.

Such path passes through the need to:

- (a) conclude by the pooler and the participant, prior to the latter's bankruptcy declaration, a written cash pooling agreement containing precise terms and conditions of the cash pooling relationship (such as the terms for the transfer of resources among the Group companies, the interest to be paid to the participants that contribute money or by the participants that receive money, the pooler's fees, etc.); and
- (b) demonstrate that the transfer of money from the participant to the pooler under the cash pooling agreement is not only justified by the interest of the Group as a whole, in light of the compensatory benefits theory, but also by the participant's autonomous interest (a demonstration that, incidentally, is very hard to offer).

The foregoing elements were deemed as non-subsistent in the case at hand, with the consequent confirmation of the guilty verdict issued against the Participant's directors.