Subject: Participation in public tenders and insolvency and bankruptcy procedures.

Parties: IDI s.r.l. – Arcadis

The question at issue in the proceedings concerns the conformity with EU law of national legislation which, according to the current interpretation, prevents a company from taking part in a tender procedure when it has an application for a request for settlement with creditors so called 'in bianco' (this is an institution, under Italian bankruptcy law, which allows the insolvent entrepreneur to apply for an agreement among creditors, reserving the right to submit the arrangement plan and related documents only later).

Specifically, it is relevant the compliance with the “Procurement Directive” 2014/24/EU, Article 57 par.4 point b, according to which an economic operator who is subject to insolvency or liquidation proceedings may be prevented from participating in public tenders.

In particular, the Fifth Section of the Council of State submitted the following questions to the ECJ:

- “Whether it is compatible with Article 45 par.2 point a and b of Directive 2004/18/EC of 31 March 2004 to consider as ‘ongoing proceedings' the mere application, submitted to the competent judicial body, for a pre-bankruptcy agreement with creditors by the debtor.

-” Whether it is compatible with the above mentioned legislation to consider the debtor’s confession to be in a state of insolvency and wishing to submit an application for an agreement among creditors “in bianco” (whose characteristics have been set out above) as a reason for exclusion from the public procurement procedure, thus interpreting extensively the concept of “ongoing proceedings” laid down in the abovementioned Community Law (Article 45 of the Directive) and national law (Article 38 of Legislative Decree No 163-2006).

By order of 28 March 2019 in Case C-101/18, the ECJ clarified that:

“Article 45 par.2, first subparagraph, point b, of Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which allows the exclusion from a public procurement procedure of an economic operator who, on the date of the exclusion decision, has appealed in order to be admitted to an agreement among creditors, reserving the right to submit a plan for the continuation of the activity.”