

Italy's Emergency Budget's Provisions Facilitate Restructurings

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In the context of its € 24 billion emergency budgetary measures aimed at addressing the current market turbulences, Italy has introduced a range of changes to the Bankruptcy Act¹ that will have the effect of facilitating restructurings and providing investment opportunities in distressed situations.

The new measures have been introduced through an emergency decree that is immediately effective after publication on the *Official Gazette* expected this week. The emergency decree will then need to be converted into law within 60 days from its entry into force.

The new measures impact two critical areas of Italian restructuring procedures: (i) the protection of new financing; and (ii) the automatic stay period for the Article 182-*bis* procedure.

Additional Protections for New Financing

1. Any financing granted to a debtor for the purpose, or for the implementation, of an Article 182-*bis* or *Concordato Preventivo*² procedure is treated as a priority claim in case, after the approval of the Article 182-*bis* or the *Concordato Preventivo* procedure, the debtor is filed into bankruptcy.

Such priority status applies if the following requirements are met:

- (i) The lender is a bank or a financial institution registered with the Bank of Italy; and
- (ii) The *Concordato Preventivo* or the Article 182-*bis* restructuring agreement have been approved by the court.

We believe that these provisions will have several positive effects.

First, the lenders will be more willing to provide "new finance," even in those situations in which there are no sufficient assets to secure the new finance, as they will benefit from a priority status of their claims by operation of law.

The second positive effect is that these provisions will increase the availability of financial resources to distressed companies, by freeing company's assets that can be used as security for additional financing. Typically, the providers of "new finance" in distressed situations are willing to provide additional cash only if, in the event of insolvency, the new loans enjoy priority over the pre-existing debt of the borrower. This is normally achieved by securing the new loans with any unencumbered asset and/or by entering into appropriate contractual arrangements with the other financial creditors of the debtor and the debtor itself. Following the new measures, the providers of

new finance will now be protected by operation of law and may, therefore, allow the debtor to use its unencumbered assets to obtain additional financing from third parties.

Another positive effect is that the complex negotiations and arrangements normally used to secure a contractual priority position will in certain cases not be necessary. This will considerably streamline the restructuring process, reducing the transaction costs and shortening the amount of time necessary to close a restructuring.

2. Also the financing granted to a debtor by its shareholders in the context of, or for the implementation of, a restructuring procedure under Article 182-*bis* or *Concordato Preventivo* will be eligible for priority status for a portion equal to 80% of the amount due, provided that the Article 182-*bis* or *Concordato Preventivo* restructuring agreement has been finally confirmed by the competent court. This is a significant exception to the equitable subordination normally applicable to shareholders' loans in these circumstances.

We believe that the effect of this provision will be that additional financial resources will become available to address distressed situations by providing an opportunity for shareholders to inject cash with an investment risk similar to that of a debt provider, rather than the higher risk faced by an equity provider.

The provision is likely to be of particular interest to private equity funds addressing distressed situations in their portfolios.

3. To avoid conflicts of interest, the new legislation states that the holders of priority claims are not allowed to vote on the *Concordato Preventivo* proposal, nor are they considered for the calculation of majorities respectively required for the approval of a *Concordato Preventivo* or the 60% threshold of the Article 182-*bis* proceedings.

This provision will avoid any potential abuse of the position of the providers of new finance against the interest of the pre-existing lenders.

Extension of the Automatic Stay in Article 182-*bis* Procedure

Under current law, a debtor who carries out a restructuring under Article 182-*bis* is entitled to benefit from the automatic stay for a period of 60 days following the publication of the agreement that it has reached with its creditors representing 60% of the overall claims along with an expert's assessment. No protection is, therefore, granted during the negotiation phase.

Pursuant to the new amendments, a debtor is also allowed to benefit from the automatic stay for the 60-day period preceding the mentioned publication, provided that it has followed the specific procedure introduced by the emergency decree.³

This additional remedy should represent a further incentive for debtors to adopt the new restructuring procedures.



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- ¹ Royal Decree No. 267 of 16 March 1942.
- ² The *Concordato Preventivo* procedure consists of an arrangement proposal that, if approved by the creditors holding the majority of the debts, binds all the creditors (including the ones who have not approved it). The procedure is supervised by the court. Examples of restructurings conducted through a *Concordato Preventivo* include Sergio Tacchini and Kartogroup. Please refer to our *StayCurrent* Client Alert of 9 March 2010 for a description of the Article 182-*bis* procedure and the recent case law, which you can find on our website <http://www.paulhastings.com/FeaturedPublications.aspx>. Risanamento is an example of a restructuring conducted through an Article 182-*bis* procedure.
- ³ The debtor files the relevant petition with the bankruptcy court together with, among others, a personal declaration upon oath that he is under negotiation with the creditors holding at least 60% of the claims, and a declaration of an independent expert (who will likely be the same expert that will express its opinion of the final agreement) that the undergoing restructuring proposal is able to ensure the regular payment of the creditors who are not party thereto. The court examines the petition and sets a hearing within 30 days for debating the request and gives notice of such hearing to the creditors. The automatic stay period starts when the court confirms the relevant petition and sets the terms, not exceeding 60 days, for the filing of the final and executed agreement along with the opinion of the independent expert.