



7 July 2015

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## *Italy Amends Bankruptcy Act and Other Laws to Facilitate Restructurings and Reinforce Creditors' Rights*

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On 23 June 2015, the Italian Cabinet approved Law Decree No. 83 which amends Royal Decree No. 267 16 March 1942 (the “Bankruptcy Act”), the civil code and the code of civil procedure, and certain tax provisions (the “Decree”). The amendments aim to facilitate debt restructurings, support distressed companies in their turnaround attempts, and foster quicker liquidations in bankruptcy proceedings.

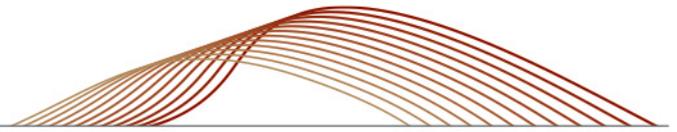
### **Interim Financing**

The Decree streamlines and makes more transparent the process for granting to the debtor super-senior interim financing in the context of all types of in-court pre-insolvency restructuring proceedings (*pre-concordato*, *concordato preventivo* and restructuring agreements under Article 182-*bis* of the Bankruptcy Act). The streamlining is obtained by allowing the debtor to request the granting of the court’s approval to the interim financing prior to the filing of certain documents and information. The process is made more transparent by the possibility that the court informally hear the views of the debtor’s main creditors. By expressly extending the reach of the interim financing provisions to existing short-term lines, the Decree makes it easier to ensure that the debtor’s business can continue during the restructuring process. The extension of the security package of the interim financing to the debtor’s claims against third parties increases the protection of new money providers.

### **Competing Offers in *Concordato* Proceedings**

The Decree opens the way to competitive bidding in the context of *concordato* proceedings. This is achieved through two mechanisms:

- In the event the *concordato* proposal envisages the sale or lease (*affitto*) of going concerns or assets of the debtor to a third party offeror already identified, the Decree allows the court, based on a judicial commissioner’s report on the offer received, to open a competitive procedure for the sale of such going concerns or assets of the third party original offer was not in the best interest of creditors. If the bidding process results in an offer which is better than the original one, the debtor must amend its proposal of *concordato* accordingly. The original initial offeror is reimbursed of its costs up to 3% of the price of its offer.
- If the proposal for *concordato* provides for payments to unsecured creditors of less than 40% of their claims, one or more creditors holding overall at least 10%—including claims



acquired by such creditors after the filing of the *concordato* petition—of the overall claims have the right to submit an alternative proposal for *concordato* until 30 days prior to the creditors' meeting scheduled by the court. Creditors are then allowed to vote the various proposals, with the one having obtained most votes being finally submitted to a final vote of the creditors—and the proposal is approved if voted by creditors representing the majority of claims admitted to vote and, if existing, of the classes of creditors.

The Decree contemplates provisions aimed at neutralizing conflicts of interest, guaranteeing access to information, and ensuring the debtor's performance of the terms of the proposal adopted by the creditors—such as the issue of new equity of the debtor with the exclusion or limitation of existing shareholders' option rights. If the debtor does not fulfil or delays the performance of the proposal approved by the creditors, the court may also temporarily replace the directors with a judicial administrator that can exercise all powers necessary to perform the proposal.

### **Cram-down of Dissenting Financial Creditors in Debt Restructuring Agreements**

If at least 50% of the claims *vis-à-vis* a debtor are held by financial creditors—banks or financial intermediaries—the debtor may enter into a debt restructuring agreement under Art. 182-*bis* of the Bankruptcy Act with financial creditors representing at least 75% of the claims of the same category (*i.e.*, creditors that have homogenous economic interests and legal positions), asking the court to extend the effects of such restructuring agreement also to the dissenting financial creditors, as long as the latter have been duly informed and invited to participate to the negotiations, and there are no viable alternatives that would be more satisfactory for such creditors.

The same mechanisms applies, *mutatis mutandis*, to standstill agreements entered into by the debtor and financial creditors representing at least 75% of the overall financial exposure of the debtor of the same category.

In any case, the dissenting creditors cannot be bound to assume new obligations, grant new finance, or keep available existing credit lines.

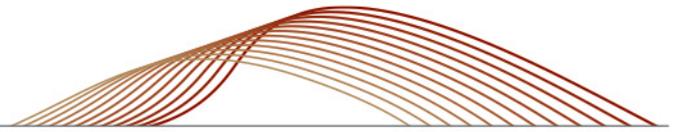
### **Criminal Sanctions for Fraudulent Debtors**

The Decree introduces criminal sanctions for debtors who dissimulate or artificially create claims to fraudulently influence financial creditors with the view of obtaining their consent to a debt restructuring agreement or a standstill agreement—the criminal sanctions were already applicable in the context of *concordato* proceedings.

### **Measures to Facilitate Liquidations**

The Decree introduces additional rules aimed at increasing the transparency and efficiency of insolvency proceedings. The rules include:

- measures aimed at avoiding a receiver's conflict of interest;
- a tight timeline for the closing of insolvency proceedings, which can now be closed also if litigation proceedings are pending;
- the requirement that a receiver has adequate resources to carry out the liquidation within the new stricter timeline contemplated by the Decree; and
- the possibility of revoking a receiver in the event he does not carry out the liquidation within the timeline contemplated by the Decree.



## Introduction of Register of Insolvencies

The Decree mandates the Ministry of Justice to set up a national register of insolvencies, which will contain information relevant to creditors and other market players—including data that will allow to calculate recovery ratios—and will be open to the public. The register will be an important stepping stone in the creation of the European insolvency register contemplated by the recent reform of the European Regulation on Insolvency Proceedings—see our Client Alert “*New EU Regulation on Insolvency Proceedings*” of 29 June 2015.

## Enforcement Proceedings

The Decree amends several provisions of the Civil Code and the Code of Civil Procedure with the aim of streamlining and making more transparent the process for the enforcement of claims—and in particular, claims secured by pledges and mortgages—and reducing its costs.

Creditors are now allowed, under certain conditions, to seize registered movable and immovable assets that the debtor has sold to third parties. While under the past regime, creditors in similar circumstances had to file ordinary claw-back actions—extremely burdensome and of uncertain outcome—now creditors have a fast-track proceeding to obtain the same result.

Also, the new Decree sets forth an easier and more transparent procedure to identify debtor's assets to be seized as well as specific criteria to be used for the assessment of the value of the properties to be sold, with the aim of reducing possible differences in such evaluation amongst the various courts.

## Deductibility of Credit Losses for Italian Banks

The new Decree amends the current framework provided by the Italian Income Tax Code, introducing a new deductibility regime for credit losses.

In particular, for the purposes of Italian Corporate Income Tax, Italian banks can now deduct in full—rather than pro-quota on a five-year basis—both write-downs and losses related to non-performing receivables in the current year in which they occurred. Furthermore, the recently approved amendments confirm that also credit losses deriving from the sale of such credits can now be deducted as of above.

The new Decree provides for a transitional *ad hoc* regime with respect to the current financial year, according to which write-down and losses related to non-performing receivables are deductible up to 75% of their value. The quotas of past years can be progressively deducted until financial year 2025 up to percentages—ranking from 5% to 12%, depending on the relevant financial year on which they will be deducted.

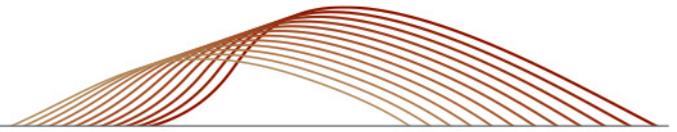
Finally, for purposes of the taxable basis of the Italian Regional Tax on Productive Activities, Italian banks can now consider losses, write-downs, adjustments and readjustments—related to credit depreciation in full—rather than pro-quota on a five-year basis.

## Entry into Force

The Decree was adopted as an emergency decree, which means that—while its provisions are already in force, although some of them will become effective within different timeframes—it will automatically expire unless it is converted into law by Parliament within 60 days.

## Conclusions

The Decree's provisions constitute a comprehensive set of measures aimed at addressing practically all the segments of the value chain of the restructuring and distressed debt markets.



The enhanced provisions on interim financing are intended to:

- facilitate restructurings by providing the debtor with the liquidity necessary to have the time to identify the best restructuring option while at the same time preserving the value of the debtor as a going concern;
- encouraging DIP lending by providing enhanced protections to new money providers which, following the opening of the Italian market to alternative lending—see our Client Alert “*Italy Introduces Measures to Facilitate Alternative Funding*” of 7 June 2014—can now include international funds.

The introduction of a competitive process in the context of *concordato* proceedings is aimed at:

- “keeping the debtor and the shareholders honest” by creating a remedy against non-transparent deals between the debtor and an offeror to the detriment of creditors;
- enhancing returns to creditors by ensuring that the assets of the debtor are disposed of at the highest possible price (as already demonstrated in the *San Raffaele*, *La Perla* and *Bruno Magli* cases, where a *de-facto* competitive process was conducted even in the absence of express provisions of law);
- providing a more secure framework for distressed M&A transactions, thus encouraging new offers in a transparent and court-supervised process, while at the same time allowing the initial offeror to recover reasonable transaction costs; and
- allowing creditors to file their own *concordato* proposal(s) thus increasing the options available. This provision is particularly relevant in the context of “loan-to-own” strategies, and creditors’ led solutions.

The introduction of a cram-down mechanism in Article 182-*bis* restructurings—a sort of English-style scheme of agreement—will facilitate restructurings by greatly reducing the ability of dissenting financial creditors to extract unfair value by leveraging their hold-out power.

The measures to facilitate liquidation are intended to remove perverse incentives and reduce the timing of liquidation processes, with a view to allowing more prompt recoveries by the creditors.

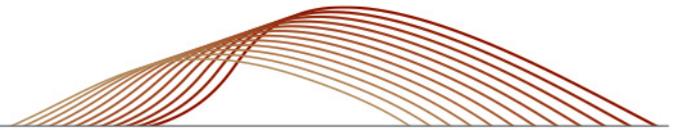
The setting up of a national register of insolvencies will greatly assist in increasing market transparency and reduce transaction costs.

Streamlining and making enforcement proceedings more transparent will increase predictability and reduce transaction costs, thus increasing the appeal of secured loans.

The tax provisions align the Italian tax system to more common international standards and finally meet the requests the Italian banking system has made for many years. Furthermore, since Italian banks apply the International Accounting Standards, from now on the accounting result will be more and more “similar” to the tax result.

The new measures, that may be followed by additional measures currently under scrutiny by a special committee of experts appointed by the Ministry of Justice, further open the way to domestic and international investors operating in the distressed equity and debt market, as its provisions provide novel instruments to debtors, shareholders, buyers of distressed companies and assets, alternative money providers, special situations funds, and traditional banks.

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