

## Italy Significantly Implements Floating Charge and Repossession Agreements and Amends Credit Recovery Proceedings

*Italy's latest law reforms continue with creditor-friendly amendments to support the local banking sector while providing confidence to investors.*

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Decree Law No. 59/2016 (the so-called "Banks Decree," hereinafter the Decree) was published in the Official Gazette (the Decree was later amended and converted into law by Law No. 119/2016) and has recently entered into force.

The Decree, which focuses on the bail out of few local banks, also introduces, *inter alia*, several material and creditor-friendly amendments to regulations concerning security interests, repossession agreements, credit recovery and insolvency proceedings. Some of the most relevant novelties are described below.

### Pegno Non-Possessorio

The Decree introduces the Italian floating charge regulation (*pegno non-possessorio*, hereinafter the Floating Charge), a new type of security.

The main differences between the new Floating Charge and the Italian pledge (*pegno*) provided by Articles 2784 and ff. of the Italian Civil Code (the Italian Pledge) are the following: (i) pursuant to Article 2786 of the Italian Civil Code, to perfect an Italian Pledge the pledgor shall be dispossessed of the charged assets; (ii) on the contrary, the Floating Charge may be granted over assets which remain in possession of the pledgor, and thus the same asset may continue to be used by the pledgor.

The Floating Charge may be granted over non-registered movable assets that relate to the business activity, in order to secure existing as well as future claims (to the extent certain or determinable, provided that a fixed maximum guaranteed amount shall be explicitly indicated in the relevant agreement) relating to the same business activity.

In particular, the Floating Charge may be granted over existing and future assets, to the extent certain or determinable, also by way of reference to a specific kind of asset or to a global value.

Subject to any contrary provision in the relevant deed of charge, the pledgor may transform or dispose of the charged assets.

In the event of transformation or disposal of the collateral, the Floating Charge will automatically extend to the relevant transformed asset(s)/proceedings of the sale of the collateral/replacing asset(s), provided that no new hardening period shall be triggered in this respect, without any novation (*novazione*).

### **Perfection of the Floating Charge**

The following perfection formalities are both required:

- The deed of charge constituting the Floating Charge (hereinafter, the Deed of Charge) shall be executed in writing (*forma scritta a pena di nullità*).
- The Floating Charge shall be registered in the relevant “Register of the floating charges” (*Registro dei pigni non possessori*), an electronic register held by the Italian Tax Authority (*Agenzia delle Entrate*) (the Registration).

In particular, as to paragraph (i) above, to be deemed valid and binding, the Deed of Charge shall also specify information relating to the secured creditor(s), the relevant obligor(s) granting the Floating Charge and/or any third-party pledgor.

The Deed of Charge shall also include (i) a description of the assets granted as security collateral, (ii) a list of the secured obligations and (iii) the maximum guaranteed amount.

Notably, the Floating Charge will be deemed as perfected and enforceable against any third party and in any insolvency proceedings from the date of Registration, which will therefore determine ranking of the Floating Charge against any security interests of other creditors granted over the same assets. Therefore, in an enforcement scenario the earlier perfected Floating Charge shall have priority over the subsequently registered ones.

For the purposes of Articles 66 and 67 of the Royal Decree No. 167/1942 (the Italian Bankruptcy Law) which regulate the claw-back action (*azione revocatoria ordinaria*), the Floating Charge is equivalent to the Italian Pledge.

Notwithstanding the above, a Floating Charge which secures the right of creditor(s) financing the purchase of the collateral secured under the Floating Charge shall have a super priority over any other Floating Charges over the same assets, provided that both:

- The Floating Charge was duly registered.
- Upon Registration, the relevant creditor(s) served notice to any other creditor(s) secured by a registered Floating Charge over the same asset(s).

The Registration will last 10 years and may be renewed by way of a new registration application to be submitted before the expiration of the first 10 years.

The secured creditor(s) and the pledgor(s) acting in concert may request the competent court to release the Floating Charge.

The Ministry of the Economic and Financial Affairs (*Ministero della Economia e delle Finanze*), together with the Ministry of Justice (*Ministero della Giustizia*) should have issued a decree to implement the “Register of the floating charges” regulation (including the formalities for the registration, consultation, amendment, renewal or release of the Floating Charge or its Registration, as well as for access to the

said register) within 30 days from the entering into force of Law No. 119/2016 (*i.e.* 3 July 2016). However, at the date of this Client Alert we have no evidence that such decree has been yet enacted.

### **Enforcement of the Floating Charge**

The secured creditor(s), upon written notice to the pledgor(s), may decide to do one of the following:

- Sell the collateral, satisfying certain claims on the proceeds up to the value of the secured obligations and transferring to the pledgor any exceeding amount. The assets shall be sold through competitive procedures, also with the assistance of specialized operators, on the basis of the value assessed by experts. The selling procedure shall be adequately publicized, including, in any case, the publication on the Ministry of Justice's (*Ministero della Giustizia*) website, pursuant to Article 490 of the Italian Code of Civil Procedure.
- Enforce the receivables which have been granted as collateral.
- To the extent provided under the relevant registered Deed of Charge, lease the assets in accordance with the criteria (including as to income deriving from the lease) specified therein and retain the relevant income up to the value of the secured obligations.
- To the extent provided under the relevant registered Deed of Charge (which shall also provide the criteria for the valuation of the assets and of the secured obligations), seize the collateral up to the value of the secured obligations.

The Decree further provides that in case of a debtor's bankruptcy, the Floating Charge may be enforced upon admission of the relevant secured obligations with priority to the bankruptcy real estate (*ammissione al passivo con prelazione*) and, differently from the Italian Pledge, further to the admission, the secured creditors may dispose of the collateral without court authorization.

### **Repossession Agreements (*Patto Marciano*)**

Real estate assets (other than the main residence of the relevant entrepreneurs or their affiliates) may be subject to repossession agreements.

The Decree, as amended by Law No. 119/2016, allows the secured creditor(s) to repossess the relevant assets only in the event of non-payment for a period of more than nine months, starting from the maturity of three installments (may be non-consecutive). The period increases to 12 months in the event that, at the date of the first non-payment, the debtor has already paid at least 85% of the relevant financing agreement.

The repossession agreement may be included both in new financing agreements and in agreements already existing at the date on which the Decree entered into force. In the latter scenario, the parties shall insert the repossession agreement by amending the financing agreement, in the form of a notarial deed.

Where the facility is already drawn and secured by a mortgage, the repossession of the charged asset, conditioned upon the non-payment, shall prevail over any registration (*trascrizione* or *iscrizione*) subsequent to the original mortgage registration. Therefore, any security — including any mortgage — which is registered after the original mortgage, ranks lower than the repossession agreement.

The relevant creditor shall notify the debtor or, if different, the owner of the relevant assets, of the relevant creditor's intention to enforce the repossession clause.

Following 60 days from such notice, an independent expert appointed by the competent court, shall assess the value of the relevant assets and notify the creditor, the debtor or, if different, the owner the relevant assets of the its certified report/assessment.

If the debtor raises any objection to the expert's valuation, such objection shall only affect the differential amount to be paid to the debtor and not the creditor's right to enforce the repossession clause.

## Amendments to Enforcement and Insolvency Proceedings

The Decree also amends some provisions of the Civil Procedure Code and of the Italian Bankruptcy Law, with the specific aim of speeding up enforcement and insolvency proceedings in general.

The main amendments are as follows:

- **A shortening of the deadline for the filing of any debtor's challenge against the enforcement proceedings.** Said challenge, in fact, is now inadmissible if submitted after the court orders the sale or assignment of the asset, unless the challenge is grounded on supervening facts or the debtor gives evidence that the delayed filing of the challenge is not the fault of the debtor.
- **The shortening from one year to six months of the time limit for the sale of the relevant movable assets.** The reform has also limited to three the number of the possible sale attempts, giving also broader power to the judges to close in advance of the enforcement proceedings.
- **Allowing judges to lower the base price of the attached real estate assets** up to 50% of the previous base price after four actions with no bidders.
- **The right of any potential bidder to inspect the real estate asset** within 15 days after the potential bidder submits a request through the dedicated auctions' website. Particular attention is given to the confidentiality of the bidders' identity, which can be only disclosed to the custodian of the relevant assets. The inspection shall be organized in order to ensure confidentiality and to avoid contacts or interactions among the interested persons.
- The opportunity for any successful bidder to request, within 10 days before the hearing for the sale of the auctioned asset, the **assignment of the relevant asset to third parties.** In this case, the successful bidder shall designate the beneficiary of the asset within five days after the sale of the asset and shall also file with the court the formal acceptance of the designated beneficiary.
- **The power of the custodian of the real estate asset** to implement the court order for the release of the real estate in favor of the assignee.
- In case of bankruptcy or composition with creditors (*concordato preventivo*) and taking into account the number of creditors and the amount of the outstanding debts, **judges may decide to hold the hearing with creditors by using electronic means.**
- The introduction of an **electronic register of real estate enforcement proceedings, insolvency and pre-insolvency procedures.** The Ministry of Justice shall keep the register, which shall be accessible to the Bank of Italy, in order to improve the Bank's ability to supervise financial intermediaries in the interest of sound management and system stability.

## Conclusion

Creditors, especially foreign investors, will likely view these amendments as a sign the Italian government is continuing to promote creditor-friendly bankruptcy and restructuring to encourage foreign investment.

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