



Italian Government Enacts Further Measures to Boost Italian Lending Market

During the last two years, the Italian government has focused on reforming the Italian lending market, with the aim of boosting access to financing for Italian businesses and improving bankruptcy and enforcement proceedings in Italy. As part of this reform process, the Italian Council of Ministers enacted Decree No. 59 of May 3, 2016 (the “Decree”).¹ The Decree introduces measures designed to, among other things: (i) create a new security consisting of a “non-possessory pledge” (i.e., floating charge), (ii) establish the “*patto marciano*” agreement, which permits out-of-court appropriation of real estate assets securing financings, and (iii) reduce the length of time and improve efficiency of enforcement and insolvency proceedings.

This *Commentary* summarizes the principal innovations introduced by the Decree.

Non-Possessory Pledge

The “non-possessory” pledge (i.e., floating charge) introduced by the Decree offers Italian businesses the possibility of securing the monetary obligations connected with their business activity without dispossession of the pledged assets, as had previously been

required. This security may be applied only to movable assets,² present or future, to be used for business purposes (e.g., machineries or raw materials), which also may be differentiated by general reference to the relevant asset class. The pledgor maintains the right to dispose of, even by selling, the pledged assets. Should this be the case, the pledge will be automatically extended over replacing assets or sale proceeds, as applicable.

The non-possessory pledge is created through the execution of a written deed bearing a firm date (*data certa*), which must include, *inter alia*, the details of the borrower and the secured creditor, the description of the pledged asset, the secured obligations, and the maximum secured amount.

The enforceability against third parties and insolvency proceedings is obtained through the registration of the pledge in an *ad hoc* electronic register managed by the Italian tax authorities.³ This should have, *inter alia*, more non-possessory pledges over the same asset but with a different ranking of priority. The registration is valid and effective for a period of up to 10 years but may be renewed before the relevant maturity date.

The enforcement allows the secured creditors to sell the pledged assets under a bid process based on a valuation rendered by a third-party appraiser appointed in advance by the pledgor and the secured creditor, acting jointly. In this case, the secured creditor has the right to fulfill its claims with the sale proceeds, provided that any residual proceeds are returned to the pledgor. In addition, the secured creditor has the right to enforce the security by (i) receiving the rent paid by the lessee if the pledged asset is leased; or (ii) appropriating the pledged assets to the extent that the security agreement provides for criteria and procedures to be adopted to appraise the market value of such assets.

Enforcement of the non-possessory pledge also may take place in the context of a bankruptcy scenario.

Introduction of “*Patto Marciano*” for Corporate Financings

The Decree introduces the possibility for financial institutions and businesses entering into a new facility or restructuring an existing one to agree to a so-called “*patto marciano*.”⁴ This represents a significant innovation since, as a rule, transfer of ownership of a pledged or mortgaged asset to secured creditors upon default of the borrower (i.e., *divieto del patto commissorio*) is generally prohibited.

In practice, security interest providing for “*patto marciano*” allows a secured creditor (or any subsidiary or affiliated entity thereof) to obtain transfer of full legal ownership title over real estate assets⁵ securing commercial loans—granted by banks or other entities authorized to carry out lending activity in Italy—conditioned upon default by the borrower. For the purpose of the Decree, a “default” will be deemed to occur (i) in the case of a monthly repayment schedule, if at least three installments remain unpaid for more than six months, or (ii) in any other case, if only one installment or the final bullet payment, as applicable, remains unpaid for more than six months.

The agreement providing for security based on “*patto marciano*” will be executed in notarial form.

To enforce the security, the creditor must notify the borrower, the security provider if other than the borrower, and any other

secured creditor of its intention to enforce the security. After 60 days from the above notification, the creditor may ask the president of the competent court to appoint a third-party expert to appraise the property. The expert will evaluate the property and inform the borrower, the secured creditor, and any other interested party of its appraisal.

Should the debtor challenge the expert appraisal, the creditor may still carry out the enforcement, provided that the debtor’s claim will be relevant only with regard to the determination of the potential amount payable by the secured creditor to the borrower, as per above.

In the case of enforcement, the secured creditor is obliged to pay to the security provider an amount equal to the difference, if positive, between the estimated market value of the property and the amount of the outstanding debt.

The Decree states that the condition precedent to the transfer of the property to the secured creditor is fulfilled when the secured creditor is informed by the third-party expert of its appraisal or, alternatively, when the secured creditor pays the amount due, if any, to the debtor.

Fulfillment of the condition precedent to the transfer must be confirmed through a written statement rendered in notarial form, for registration and enforceability purposes.

The above security also may be enforced under a bankruptcy scenario.

Electronic Register of Enforcement and Insolvency Proceedings

The Decree provides for the Italian Ministry of Justice’s establishment of an electronic register of, *inter alia*, the following proceedings: (i) enforcement proceedings, (ii) insolvency proceedings, (iii) debt rescheduling and debt restructuring agreements, and (iv) extraordinary administration procedures.

This innovation should allow all interested parties to timely collect information on possible proceedings affecting the debtors and their relevant assets.

Amendments to Enforcement and Insolvency Proceedings

The Decree introduced changes to the legal provisions governing enforcement procedures with the aim of reducing the length of time required to satisfy creditors' claims.

Secured creditors that may become assignees of the mortgaged assets are now entitled to elect a third party as actual assignee of the property. This should allow secured creditors to avoid the typical downsides connected with foreclosure procedures (e.g., duration of the process and pathologic discount sales, etc.) by directly individuating third parties interested in acquiring the mortgaged assets.

The Decree reduced the terms for filing challenges against enforcement proceedings. Notably, debtors are no longer entitled to raise objections following the filing of an application for the forced sale of the debtor's assets unless for supervening or previously unknowable circumstances.

Italian courts are now obliged immediately to issue enforceable payment orders in respect of unchallenged claimed amounts. In the past, such decisions were taken by Italian courts on discretionary basis.

Finally, the Decree provides for a minor set of amendments to the Italian bankruptcy law. The scope of such amendments is to reduce the duration of bankruptcy proceedings by approving the performance of certain procedural steps through electronic means.

Lawyer Contacts

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Endnotes

- 1 The Decree will be converted into law within 60 days from its publication in the Italian Official Gazette; otherwise, it will cease to be effective and will be considered to have never entered into force. The Italian Parliament may carry out amendments, also material, to the Decree during its conversion process.
- 2 Movable assets to be registered by operation of law in public registers, such as cars, ships, and aircrafts, fall outside the scope of this security.
- 3 The registration of the non-possessory pledge will be possible only upon establishment of the relevant register. In this respect, please note that the Ministry of Finance will enact specific implementing measures within 30 days of the Decree's date of conversion in law.
- 4 The "*patto marciano*" is an agreement according to which, upon the borrower's default, the secured creditor may acquire ownership of the pledged or mortgaged asset, to the extent that: (i) the value of the asset is estimated by a third-party expert; and (ii) the secured creditor returns to the pledgor any excess amount between the value of the pledged asset and the debt due and payable.
- 5 Primary dwelling properties fall outside the scope of the Decree.