

## “New measures regarding Italian debt enforcement and insolvency procedures”

*Summary: Introduction. 1. Non-Possessory Pledge over Chattels. 2. “Springing mortgage” arrangement in new loan agreements. 3. Measures regarding forced sale. 4. Deferred tax assets.*

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On 3 May 2016 Italian Law Decree No. 59 of 2016 entitled “Urgent Measures regarding Enforcement and Insolvency Procedures, including vis-à-vis investors in banks in liquidation” (the “Law Decree”) was published in the Italian Official Gazette (*Gazzetta Ufficiale*).

The Law Decree, now in force (but subject to conversion into law), introduces a new category of Italian law security interest aimed at encouraging bank lending to companies and measures to facilitate debt recovery.

Below we summarise the salient points of the Law Decree (which may be subject to amendment upon enactment into law).

### 1. Non-Possessory Pledge over Chattels

A new legal concept, that of the “non-possessory pledge over chattels” (chattels being moveable personal property) has been introduced as a new form of security in Italy. Businesses registered with Italian Companies House (*registro delle imprese*) may grant such a pledge to secure loans granted by banks and other financial intermediaries for current or future business purposes, if identified or capable of being identified and provided a maximum secured amount is specified.

The non-possessory pledge may be created by written instrument over existing or future assets that are in use within a business and which are specified or capable of being identified. Unless the parties agree otherwise, the borrower (or third party granting the pledge) is permitted to transform, alienate or otherwise dispose of the assets the subject of the pledge – in which case the pledge attaches to the asset into which it is transformed, the proceeds, or the substitute asset

as the case may be, without this constituting a new grant of security. Chattels that are otherwise subject to registration requirements are excluded.

In order to be validly constituted the pledge must be registered in a computerized database held with the Italian tax authorities (*agenzia delle entrate*). The pledge has a duration of ten years (unless extended), shall be subject to insolvency priority rules, and shall be enforceable against third parties in insolvency proceedings.

Details regarding registration, public access, amendment, renewal and removal from the register will be subject to secondary legislation to be issued by the Italian Ministry of Economy and Finance within 30 days of the entry into force of the law converting the Law Decree into law.

Upon an enforcement event relating to the pledge, the creditor may, by written notice to the grantor and any other holders of subsequently registered non-possessory pledges, proceed to:

- i.* sell the asset and retain the proceeds in satisfaction of his debt up to the secured amount, duly returning any excess. The sale must take place by way of competitive tender following professional valuation and adequate publicity in order to ensure maximum interest;
- ii.* enforce any debt secured by such pledge up to the secured amount;
- iii.* if so provided for in the contract and subject to due registration at Italian Companies House, to lease the asset and retain the lease payments in satisfaction of his debt up to the secured amount;
- iv.* if the relevant contract so provides and subject to due registration, convert the asset

for an amount up to the secured amount, provided that the contract sets out the criteria and valuation method of the relevant asset and secured obligation.

In the case of an insolvent borrower, the creditor may enforce the pledge in accordance with its terms once its debt has been proven in the insolvency procedure.

## 2. "Springing mortgage" arrangement in new loan agreements

The Law Decree amends the Italian Single Banking Act (TUB) by introducing at Article 2 a new article 48-*bis* which permits debts arising under loan agreements between a business and a bank (or other entity entitled to lend money to the public in Italy) to secure the loan by way of springing mortgage over land in favour of the creditor or a subsidiary or associated company thereof, which can then be triggered upon default of the borrower or other obligor. The principal private residence of the business owner, spouse and family (up to third degree of relation) may not be made subject to such an arrangement.

The Law Decree provides that the arrangement can be entered into from the moment the loan agreement is entered into or by way of notarised document in the case of pre-existing loans. If the loan is already secured by way of mortgage, upon registration, a springing mortgage takes priority over interests that are subsequently registered over the relevant property.

For the purposes of the Law Decree, "default" is considered to have occurred six months after non-payment of at least three loan instalments (which need not be consecutive), in the case of monthly payment obligations, or non-payment of a single loan instalment where the payment obligations are longer than monthly or are not on an instalment basis.

Upon the occurrence of an event of default and the creditor declares its intention to activate the springing mortgage, the creditor can ask the president of the competent court to appoint a valuer to value the property. The registered owner

is entitled to the balance (if any) between the net sale proceeds and the amount of the unpaid debt.

The springing mortgage may arise even where the property is subject to an Italian mandatory sale procedure (*esecuzione forzata per espropriazione*), (to the extent compatible therewith) where subject to the mandatory procedures pursuant to Presidential Decree of No. 602 of 29 September 1973, and where the holder of such right subsequently becomes insolvent. In this case, the creditor shall have the rights relating to the registration of the springing mortgage as outlined above.

## 3. Measures regarding forced sale

Article 4 of the Law Decree introduces a raft of new measures regarding forced sale procedures.

Firstly, attachment orders must now contain a specific warning that the borrower will not be entitled to appeal against the forced sale of a property where the courts have approved the sale or transfer of the relevant property unless the borrower is able to demonstrate that he was not able to do so on account of supervening events or factors beyond his control.

The Law Decree also prescribes a maximum number of sale attempts: if the property is unsold following the third attempt the courts are required to bring the enforcement procedure to a close.

As regards the phases of the procedure (payment of deposit, presentation of the offers, the auction, the declaration of the winning bid and payment), the Law Decree stipulates that this shall take place online other than in cases where creditors would otherwise be prejudiced thereby or the procedure would otherwise be hindered.

Finally, the Law Decree permits the property to be transferred to a third party by allowing the creditor to nominate a third party to take ownership of the property by lodging a request within 5 days of the court decision together with an acceptance from the third party itself. In all other cases, the property is transferred to the creditor itself.

#### 4. *Deferred tax assets*

Finally, the Law Decree introduces measures relating to deferred tax assets: under Article 11, companies may continue to apply tax measures relating to deferred tax assets (“DTA”), provided that they pay an annual amount equal to 1.5% of the difference between the DTA and the taxes actually paid.

Since 2011 it has been possible to compute DTA as part of the bank’s regulatory capital (since in the cases of losses, they become debts owed by the State). However, in 2015 the European Commission raised State-aid related concerns regarding the legislative basis of DTAs, hence the introduction of this new annual tax.

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