NEWSLETTER NO. 46

NEW RULES ON ACCESS TO CREDIT INTRODUCED BY ITALIAN LAW DECREE NO. 83/2015

➢ Introduction

On **June 23, 2015**, the Italian Government passed a law decree[1] setting forth new provisions on bankruptcy, civil procedure, organization and functioning of the judicial administration, which was subsequently published on June 27 on the Official Journal of the Italian Republic, under **no. 83/2015** (the "**Decree**").

The rules of major interest are certainly those regarding, firstly, new **fiscal provisions**, and, secondly, **bankruptcy and debt restructuring**, all having a direct impact on banks and financial institutions. Such measures are mainly aimed at boosting the credit market, currently burdened by distressed receivables, and, more generally, grant an enhanced access to credit. Indeed, what the Decree tries to achieve is to ease the collection of receivables, by safeguarding, on the one hand, creditors' rights, and, on the other hand, debtors' rights of companies in economic and financial crisis.

It is worth noting that the Decree is part of a broader framework of reforms and innovations that has primarily involved banks and credit institutions[2].

➢ New fiscal provisions for credit and financial institutions

With regard to the new **fiscal provisions**, Article 16 of the Decree brings new rules to the consolidated legislation on income tax[3] (the "**Tax Legislation**"). In particular, paragraph 3 of Article 106 of the Tax Legislation, on *bad debts and transfers to bad and doubtful debt fund*, is amended so as to introduce new rules specifically targeted to credit and financial institutions.

The new paragraph 3 provides that *bad debts* and *losses on credits* towards the clientele, entered as such in the balance sheet, as well as the losses realized by means of the transfer of such receivables for consideration, shall be **entirely deductible** in the same fiscal year in which they are realized. This new rule has repealed the old paragraph 3, according to which bad debts and losses on credits could be deducted only for one fifth of their total amount, for each fiscal year. These provisions shall be of immediate application as they will be applicable starting from the fiscal year in progress as of December 31, 2015.

On a provisional basis, for the first period of application of the new provisions, bad debts and losses on credits other than those realized by transfers against payment shall

[1] A law decree ("*Decreto Legge*") is a provisional legal measure having the force of ordinary law that the Government may adopt in "extraordinary cases of necessity and urgency", pursuant to Article 77 of the Italian Constitution. A law decree shall be converted into ordinary law within 60 days from its publication in the Official Journal of the Italian Republic, and, upon its conversion, may carry along amendments and modifications. Should it not be confirmed and converted within the said term, the decree loses its effects starting of its inception *(ex tunc).*

[2] One of the reform we refer to is, for instance, the reform of credit societies passed in January 2015.

[3] Decree of President of the Republic no. 917 of 1986.

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be deductible for 75% of their total amount. The exceeding amount shall be deducted as follows: 5% of their amount in the fiscal year in progress as of December 31, 2016; 8% of their amount in the fiscal year in progress as of December 31, 2017; 10% in the fiscal year in progress as of December 31, 2018; 12% in the fiscal year in progress as of December 31, 2019 and up to the fiscal year in progress as of December 31, 2024, and, finally 5% in the fiscal year in progress as of December 31, 2025.

The new provisions described above are basically aimed at encouraging credit and financial institutions to dispose of their non-performing loans and, most importantly, speed up the lengthy process of deductibility so that the capital margin is increased in order to grant new loans. As a result, the increased revenues resulting from the implementation of this Article shall foster a special State Fund created by Law no. 190 of 2014 in order to meet urgent necessities.

- **New rules on bankruptcy and debt restructuring**

With reference to **bankruptcy** and **debt restructuring**, starting from those concerning banks and financial institutions, the main innovations introduced by the Decree include:

- **New rules on debt restructuring targeted to banks and financial institutions:** Article 9 of the Decree adds the new Article **182-*septies*** to the Bankruptcy Law, providing new rules on *restructuring arrangements with financial institutions*.

  In particular, an arrangement on debt restructuring, as per Article 182-*bis*[4] of the Bankruptcy Law, is an agreement between the debtor and creditors representing at least 60% of the total receivables.

  Pursuant to Article 182-*bis*, such an agreement, upon certain conditions, is effective also *vis-à-vis* the creditors that have not adhered to it.

  The new provisions added by the Decree enhance the scope of Article 182-*bis* in situations where at least 50% of the total indebtedness is *vis-à-vis* banks and financial institutions. In such case, the new rules stipulate that if an agreement is reached with 75% of bank/financial receivables, the debtor can request that such agreement be declared effective *vis-à-vis* the banks and financial institutions that have not adhered to it, provided that (*a*) all such banks/financial institutions have

[4] Article **182-*bis*** relates to arrangements on debt restructuring, pursuant to which, a failing company can apply for the Court's approval of an arrangement on debt restructuring negotiated with creditors representing at least 60% of the receivables. Such an arrangement is published in the relevant Company Register, and starting from the day of its publication, and for the following sixty days, creditors cannot commence or proceed with interim or enforcement actions. Within thirty days from the publication, creditors or any other interested party can appeal against the arrangement itself.

been informed of the negotiations and (*b*) they have been offered the possibility to take part in the same on a *bona fide* basis.

The receivables of the banks and/or financial institutions to which the request is aimed are taken into account for the purpose of calculating the 60% threshold provided, in general, by Article 182-*bis*.

The same rules apply, *mutatis mutandis*, in case among the various banks and/or financial institutions, there can be identified one or more categories of creditors sharing a similar position. In such case, the percentages of 75% and 60% are calculated with respect to each single category identified.

The rationale of this amendment is to prevent some financial receivables from blocking the outcome of the procedure, and, therefore, it assures a faster debt restructuring.

- **Access to credit during a company's crisis:** Article 1 of the Decree, on interim founding, amends Article **182-*quinquies*** of Royal Decree no. 267 of 1942 (the "**Bankruptcy Law**") on funding and business continuity in case of composition with creditors ("*concordato preventivo*") and debt restructuring arrangement ("*accordo di ristrutturazione dei debiti*").

  According to the amendment, the debtor who applies for a composition with creditors (also in case of a "white" composition with creditors, as per Article 161, paragraph 6[5], of the Bankruptcy Law), or the Court's approval of a debt restructuring arrangement ("*omologazione di accordo di ristrutturazione dei debiti*"), as per Article 182-*bis* of the Bankruptcy Law, may require to the Bankruptcy Court to be authorized, *before* the filing of the documentation supporting the request for composition with creditors, and *on an urgent basis* to obtain funding functional to urgent necessities connected to the exercise of the company's activity up to the admission to the composition with creditors or the Court's approval of the above-mentioned arrangement.

  Such a request shall specify that the debtor is not capable of receiving funding in any other way and that the non-granting of that funding would result in an imminent and irreparable prejudice to the company. From the filing of the request, the Bankruptcy Court has 10 days to decide on the issue, after consulting with the main creditors and carrying out a rough assessment on the plan of composition with creditors. In addition, the sums received as funding are considered as pre-deductible

[5] Law decree no. 83 of 2012 introduced, at paragraph 6, the so-called "white" composition with creditors, inspired by the US Chapter 11, according to which the debtor can file a request for the protections granted by the composition proceeding, even without having already elaborated a Plan, which will be prepared with a term assigned by the Bankruptcy Court. If the request is accepted, the "automatic stay" effects, provided by Article 168 of the Bankruptcy Law, apply, and protection against actions of the creditors is assured.

receivables, pursuant to Article 111 of the Bankruptcy Law, and, therefore, are satisfied with preference (super priority).

Finally, the Bankruptcy Court may authorize the debtor to grant a pledge, a mortgage or *assign receivables* to guarantee the funding itself.

This amendment has certainly the purpose of increasing the possibility of success of business continuity and debt restructuring plans of companies in crisis.

- **Opening to competition of the composition with creditors – competing offers:** Article 2 of the Decree, adds the new **Article 163-*bis*** to Article 163 and amends **Article 182** of the **Bankruptcy Law**, respectively, on the admission to the composition with creditors, and the transfer of assets.

  Pursuant to the new **Article 163-*bis***, the plan for the composition with creditors may contain an offer also by a third party (*i.e.*, other than the debtor) to acquire single assets (*i.e.*, the business as a whole, a branch or other specific assets). In such case, the judicial Commissioner has the duty to assess the congruity of the offer, by taking into consideration the terms and conditions of the offer itself, the consideration and the bidder's features.

  The offer and the plan may also provide that the purchase takes place before the approval of the debt restructuring arrangement scheme.

  Should the offer not be considered as corresponding to the best interest of the creditors, the Commissioner must ask the Court to open a competitive procedure, taking into account the value of the business or the asset concerned. In particular, the order opening the competitive procedure must establish, among others things, the modalities of presentation of the irrevocable offers, the requirements that the bidder must fulfill, as well as the modalities according to which the competitive procedure shall be carried out. The offers shall be secret and deemed void if they do not comply with the requirements of the order.

  Afterwards, the offers are assessed and made public at an *ad hoc* hearing. When several ameliorative offers are presented, the judge shall arrange a competition among bidders, which shall terminate before the creditors' meeting (convened within 30 days of the decree confirming the procedure after the filing of the plan). With the purchase made by a bidder other than the bidder who submitted the first offer, the latter is released from any obligation undertaken towards the debtor. Finally, as a result of the competition, the debtor has the duty to modify their proposal and the plan for the composition with creditors accordingly.

  With regard to **Article 182**, paragraph 1 of the Article has been amended so as to provide that, should the plan for composition with creditors provide for the transfer of part or all of the debtor's assets, the Bankruptcy Court shall appoint one or more liquidators and a committee of three or five creditors to attend to the winding up

and shall also determine the modalities of the winding up. The liquidator shall give due publicity to the whole procedure, as per Article 490 of the Code of Civil Procedure.

These measures are chiefly meant to prevent the abusive devaluation of the assets, that might be carried out by the debtor through the sale of his own assets.

- **Opening to competition of the composition with creditors – competing plans:** while Article 2 of the Decree introduces the possibility of competing offers for the purchase of single assets, Article 3 amends Articles 163, 165, 172, 175, 177 and 185 of the Bankruptcy Law, so as to introduce and regulate, under various aspects, the possibility for the creditors to submit **competing plans** for the composition with creditors, as opposed to the plan proposed by the debtor.

  Article 163 on the admission to the composition with creditors has been amended so as to include also the admission of alternative, competing plans proposed by the creditors. The new provisions specify that not later than thirty days before the creditors' meeting, one or more creditors, representing at least 10%[6] of the receivables resulting from the financial situation attached to the petition for the admission to the plan of composition with creditors, may submit a competing alternative plan of composition with creditors.

  However, competing plans can be submitted only when the debtor's plan of composition with creditors does not contain a commitment to the payment of at least 40% of unsecured debts. Should the creditors' offer provide for various classes of creditors, it shall be subject to the Court's judgment that assesses the correctness of the criteria according to which the classes are formed. Finally, the creditors that submit a competitive plan has the right to vote their proposed plan only if they are separated in an independent class.

  Consequently, **Article 165** has been amended by providing that the appointed judicial commissioner shall provide the interested creditors with all the information, subject to confidentiality, useful to submit competing plans, based on mandatory tax and accounting records of the debtor.

  Pursuant to the amended **Article 172**, should competing plans be proposed, the judicial Commissioner has the duty to report and notify them to the other creditors, at least 10 days before the creditors' meeting, by comparing each proposed plan. Each competing plan of composition with creditors, including the debtor's one, can be modified up to 15 days before the creditors' meeting.

[6] The Decree further specifies that for the purposes of computing such percentage, the receivables of those creditors who, with respect to the debtor, are controlling, controlled or subject to a joint control, shall not be counted.

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The new **Article 175** provides that, during the creditors' meeting, each creditor can express the reasons why they do not consider as admissible or convenient the plan for the composition offered, while, at the same time, the debtor can express the reasons why they do not consider the competing plans as acceptable or feasible.

When more plans are proposed and put to vote, pursuant to **Article 177**, the plan that obtains the highest majority of receivables admitted to vote shall be approved, while in case of equality the debtor's plan shall still be considered as the one prevailing.

In final analysis, **Article 185**, as integrated, provides that once the competing plan has been approved, the debtor has the duty to carry out any action necessary to execute the plan offered by the winning creditor(s). If not, the judicial commissioner may be authorized by the Bankruptcy Court to execute the plan on behalf of the debtor. Should the debtor be a company, the Bankruptcy Court may also revoke its management body and appoint a judicial administrator to give execution to the proposed creditors' plan.

Hence, it can be inferred that the aim of the provisions described above mainly resides in the promotion of the entry of new capitals in a company in crisis and the proper use of the debtor's assets, granted by the intervention of the creditors.

- **Concluding remarks**

In conclusion, the purpose of this brief analysis is to shed light over the recent measures adopted by the Italian Government, by means of Law Decree no. 83/2015, of particular significance for banks and financial institutions. Indeed, such measures are particularly relevant for, on the one hand, companies in economic difficulties, and, on the other hands, creditors, as they are chiefly meant to accelerate the process of debt collection and grant an easier access to credit. As known, credit is one of the main engine that makes an economy run, and interventions on credit are generally those having a faster and imminent impact on a Country's economy. Therefore, this Decree represents one further attempt made by the Government to give new inputs to the Italian economy and the financial system, supposedly, without burdening the public budget.

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