

# New more creditor friendly rules on taking and enforcing security and credit collection in Italy

On 29 April 2016, the Italian Government announced new measures in support of financings to Italian businesses, which have now been published in the Italian Official Gazette. The measures are set forth in law decree no. 59/2016 dated 3 May 2016, which came into force on 4 May 2016 (the "**Decree**"). The Decree must be converted into law (subject to amendments) by 2 July 2016.<sup>1</sup>

This briefing focuses on (1) the new rules set forth in the Decree allowing parties to existing and new credit facility agreements to agree upon the transfer of title and other rights in rem over real estate upon a payment default (this arrangement is known as "*patto marciano*")<sup>2</sup>, and (2) the key features of a new pledge (without dispossession) over moveable assets introduced by the Decree.

In addition, the Decree contains provisions intended to reduce timing of Italian enforcement proceedings, a further step taken following the 2015 reforms.

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<sup>1</sup> Please [click here](#) to read the Decree (published on the Italian Official Gazette No. 201 of 3 May 2016).

<sup>2</sup> Before the Decree, case law had already recognized, in certain conditions, the validity of the agreement known as "*patto marciano*", pursuant to which the parties agree that title to an immovable asset is transferred to the creditor following a default. These conditions are: (i) the transfer value of the asset is determined by means of an independent expert valuation or by reference to a published market price; and (ii) the creditor undertakes to pay to the owner of the asset an amount equal to the difference between the value of the asset and the value of the credit that is satisfied through the transfer of the asset.

## Right to appropriate real estate assets upon payment default

### General Features

The Decree has introduced the possibility for banks and other authorised financial institutions and businesses entering into a credit facility agreement to agree that, upon a payment default (as further defined below), the real estate asset or rights *in rem* over the assets are transferred to the creditor<sup>3</sup>. The transfer is legally qualified as a transfer subject to the condition precedent (*condizione sospensiva*) of the payment default and will have to take the form of a notarised agreement (the "**Conditional Sale Agreement**"). The entering into a Conditional Sale Agreement will not exclude that the creditor benefits from more traditional security interest, namely the mortgage.

### Triggering Event – definition of Payment Default

The Decree defines a payment default capable of triggering a transfer of the asset as:

1. in the case of a monthly repayment schedule, a payment default will be deemed to occur if at least three instalments (even if not consecutive) remain unpaid for more than six months;
2. in the case of repayment schedules with payments longer than a month (for example, quarterly or half-yearly instalments) a payment default will be deemed to occur if at least one instalment remains unpaid for more than six months;
3. in the case of a bullet repayment, a payment default will be deemed to occur if the facility remains unpaid for more than six months after agreed maturity.

Given that the Decree defines specifically the payment default that can trigger a transfer, no other event of default or acceleration event would be capable of triggering the transfer under a Conditional Sale Agreement.

### Enforcement

Upon a Payment Default, the secured creditor can decide to enforce the Conditional Sale Agreement and proceed with the transfer by notifying its intention to the debtor (or the third party holder of the relevant right) and any other holder of rights registered on the real estate after the filing of the Conditional Sale Agreement.

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<sup>3</sup> The Decree also allows the transfer to a subsidiary or an affiliate entity, which are authorised to purchase, hold, manage and dispose of real estate (in the context of NPL transactions these may include a Reeco - Real Estate Operating Companies).

The proceeding creditor will have to pay to the holder of the right which is being transferred to the creditor an amount equal to the difference between the estimated value of the asset and of the credit auctioned by the creditor (plus costs of enforcement) ("**Excess Amount**").<sup>4</sup>

The transfer does not require any Court involvement, other than in order to appoint an independent expert who will carry out a sworn evaluation of the real estate.

The expert will notify the debtor (and any third party holder of the relevant right), as well as the creditor (and any other holders of rights) of the estimated value of the asset and the "condition precedent" to the transfer will be satisfied and the transfer will take place from receipt of the notice or (if any Excess Amount is due) from the date on which such amount is paid to the debtor.

The debtor may challenge the expert's evaluation. Any challenge will not affect the creditor's right to enforce the Conditional Sale Agreement and effect the transfer. If the challenge is upheld by the Court, the Excess Amount will be adjusted by reference to the new evaluation and the creditor will have an obligation to pay the residual Excess Amount to the debtor.

### Impact on Existing Facility Agreements

The Conditional Sale Agreement can be agreed upon in connection with new credit facility agreements. It can also be agreed in connection with existing credit facility agreements by amending their terms through a notarised agreement.

### Concurrent Enforcement Proceedings

The Decree further provides that if the real estate asset becomes subject to enforcement proceedings, it will still be possible to carry out a transfer pursuant to a Conditional Sale Agreement (if contemplated in the credit facility agreement). In that case, the Court will verify if a payment default (within the meaning of the Decree) has occurred and the Court will appoint the expert for the evaluation of the asset. Once the creditor has paid any excess amount to be returned to the debtor, the enforcement costs and any prior creditors' claims, the Court will issue an order instructing the transfer of the real estate asset to the creditor.

### Bankruptcy of the Grantor

Should the party to a Conditional Sale Agreement become bankrupt, the creditor can apply to the Court to proceed with the transfer of the asset (provided that it has registered the Conditional Sale Agreement and after being recognised as creditor in the bankruptcy proceedings). The Court will consult with the receiver in bankruptcy and the creditors committee and in order to make the transfer will apply the same provisions set forth in the case of concurrent enforcement proceedings.

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<sup>4</sup> Contrary to the statement in the Press Release issued by the Italian Government on 29 April 2016, the Decree no longer requires that the debt owed by the debtor will be fully extinguished if the value of the asset is lower than the outstanding debt.

## New security over moveable assets ("*pegno mobiliare non possessorio*")

### General Features

The Decree introduces a new type of pledge over moveable assets, which will become available as part of the typical security package granted in credit financing transactions. As opposed to the "traditional" pledge, the new security over moveable assets will no longer require the grantor to lose possession of the secured assets.

The security introduced by the Decree can be granted by any commercial entrepreneur over moveable business assets, with the exception of moveable assets registered in specific public offices (such as cars, ships and airplanes). It is only available in connection with financings to businesses.

The security can cover business assets (both present and future) which may be identified, individually or in pool, or identifiable by reference to a category or to a maximum value.

The grantor of the security is granted the right of use of the assets, and may also dispose of the assets.<sup>5</sup>

The secured obligations may include existing or future claims (identified or identifiable), provided a maximum amount is agreed upon. From a first reading of the Decree (and the accompanying report), it appears to be possible to include in the secured obligations (by way of example) increased facilities and ancillary facilities, without the need to confirm and extend the security once these facilities are made available, provided that a maximum amount is stated.

Based on the wording of the Decree, the security grantor can be either the borrower or a third party security grantor. However, similarly to the "*privilegio speciale*" regulated under Article 46 of the Italian Banking Act (*Testo Unico Bancario*) (see below), the Decree requires that the assets covered by the security must be assets pertaining to the business ("*beni mobili destinati all'esercizio dell'impresa*").

### Establishment of the security through registration

The security must be effected by a written agreement and only becomes effective against third parties (and any receiver in bankruptcy) upon registration and priority over other creditors' rights is obtained from the moment of registration.

The security must be registered in the new online register to be kept by the Italian tax authority (*Agenzia delle entrate*), which is called "*Registro dei pegni non possessori*" (the "**Register**"). An

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<sup>5</sup> In such respect, the Decree specifies that pledge extends to the proceeds of any sale of the asset (or any assets purchased with the proceeds, or any processed product), without being considered a new security.

implementing decree of the Ministry of Economy and Finance will provide further details on the registration procedure and required formalities.

The registration in the Register will be valid for ten years and can be renewed for a further term of ten years.

## Enforcement

The Decree introduces specific out of-court enforcement procedures for this type of pledge.

Upon occurrence of an enforcement event the secured creditor giving prior notice to the security grantor (and any other holder of the *pegno non-possessorio*) can enforce as follows:

1. Sale of the moveable assets

The sale is made through a competitive process and on the basis of on an independent expert's evaluation of the pledged assets. The expert is appointed by the parties or, failing an agreement, by the Court.

Proceeds of the sale up to the amount secured are paid directly to the creditor and the creditor must immediately inform the security grantor in writing of the proceeds recovered from such sale and return any excess amount to the security grantor.

2. Enforcement of the pledged receivables

To the extent that the pledge relates to receivables, the collection of the receivables up to the secured amount.

3. Lease of the pledged assets

The creditor can lease the asset if that right is provided for in the pledge agreement. The rental income deriving from the lease of the pledged asset is then applied in repayment of the secured obligations up to the secured amount. This option assumes that the pledge agreement has been registered with the company's register and that it provides for criteria to determine the amount of the rent. The pledgee must immediately inform the security grantor in writing of the execution of the lease arrangements.

4. Appropriation of the assets

The creditor can enforce the pledge by appropriating the title to the pledged assets. This enforcement method must be agreed by the parties in the pledge agreement, which must be registered with the company's register. The agreement must also provide for the criteria to determine the value of the pledged asset and (also) of the secured obligation. The pledgee must immediately inform the security grantor in writing of the determination of the value of the pledged asset used for the purpose of the appropriation.

With respect to the enforcement methods set out in paragraphs 1, 3 and 4, the debtor will have the right to claim for damages (within three months from receipt of the communication by the creditor), if the enforcement was not carried out in compliance with the agreed requirements and if the price of

the sale (or in case of the lease, the rental payments, or the value of the pledged assets in case of appropriation), does not correspond to the current market value of the asset.

Should the security grantor become bankrupt, the creditor can still proceed with the enforcement of the pledge, after being recognised as secured creditor in the bankruptcy proceedings.

### Comparison with the "Special Privilege"

Prior to the introduction of this new form of pledge, it was already possible under Italian law to take security over certain moveable assets with the so-called "*privilegio speciale*" regulated by Article 46 of the Italian Banking Act (*Testo Unico Bancario*). This raises the question of what the advantages are of taking a "*pegno non possessorio*" versus the "*Privilegio Speciale*".

We have identified the following main differences between the new "*pegno non possessorio*" and the "*privilegio speciale*":

1. any creditor can be a beneficiary of the "*pegno non possessorio*". Instead, the "*privilegio speciale*" can only be granted to banks and bondholders that are "qualified investors" as defined in Article 100 of the Consolidated Financial Act (*Testo Unico della Finanza*);
2. the "*pegno non possessorio*" can secure credit of any duration while the "*privilegio speciale*" can only secure medium-long term financings and (since 2014) bonds (*obbligazioni*) or similar securities (*titoli similari*) issued by Italian companies;
3. the "*pegno non possessorio*" can cover any existing or future business moveable assets, which may also be identified by reference to a general category or an aggregate value. The "*privilegio speciale*" refers to specific categories of assets<sup>6</sup>, which must be identified when taking the security and periodically during the life of the security;
4. finally, the "*pegno non possessorio*" can be enforced through the sale, an appropriation or a lease to a third party (as well as collection of receivables). Instead, the "*privilegio speciale*" is a more defensive security likely to be working mainly upon an insolvency.

### Improvement to Enforcement Proceedings

As mentioned, the Decree also introduces further improvements to the enforcement proceedings following the 2015 reforms. For more details, please refer to our briefing "[The Italian Government adopts new measures aimed at pursuing the efficiency of enforcement proceedings](#)".

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<sup>6</sup> The business assets covered by the "*Privilegio Speciale*" are listed in Article 46 of the Italian Banking Act, and include machinery, equipment, concessions, instrumental assets, raw materials, work in progress, stocks, finished products, goods purchased with the proceeds of the facility and receivables from the sale of those items.

## Contacts

**Giuseppe De Palma**

Partner (Finance)

E: giuseppe.depalma  
@cliffordchance.com**Tanja Svetina**

Partner (Finance)

E: tanja.svetina  
@cliffordchance.com**Fabio Guastadisegni**

Partner (L&amp;DR)

E: fabio.guastadisegni  
@cliffordchance.com**Ferdinando Poscio**

Partner (Finance)

E: ferdinando.poscio  
@cliffordchance.com**Francesca Cuzzocrea**

Counsel (Finance)

E: francesca.cuzzocrea  
@cliffordchance.com

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