INSOLVENCY & RESTRUCTURING - ITALY

Draft statutory instrument for insolvency procedure reform: debt restructuring agreements

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Introduction

The draft reform act presented to the government in December 2015 by the Rordorf Commission (a ministerial commission established to develop and submit draft legislation designed to reform, review and reorganise the rules governing insolvency procedures in Italy) aims to:

- fill regulatory gaps in the Insolvency Act;
- ensure the early identification of business crises; and
- ensure business rehabilitation to protect debtors' business values.(1)

In this context, the commission proposed:

- the creation of new instruments (eg, crisis alert and prevention procedures); and
- the rationalisation of instruments that are already part of Italy's legal system (eg, the pre-bankruptcy composition agreement and debt restructuring agreements).

The proposed changes to debt restructuring agreements are discussed below.

Debt restructuring agreements

Debt restructuring agreements (under Article 182*bis* of the Insolvency Act) have been part of Italy's legal system for over a decade. Decree-Law 83/2015 on urgent measures concerning private law provisions, rules of civil procedure and the organisation and functioning of judicial administration in insolvency matters (enacted into Act 132/2015 on August 6 2015) had already introduced substantial changes in this area.(2)

Debt restructuring agreements provide an instrument to entrepreneurs in financial distress that wish to undertake a negotiated solution with creditors in an out-of-court process.

More specifically, the instrument that Article 182*bis* of the Insolvency Act provides allows an entrepreneur in crisis to apply to a tribunal for the homologation of one or several debt restructuring agreements concluded with at least 60% of creditors on the basis of a report to be submitted by an independent professional certifying:

- the feasibility of the relevant contractual agreements; and
- the entrepreneur's ability to ensure due payments to creditors that are not parties to such agreements.

However, it is not an easy instrument to use due to:

- the requirement that an agreement must be reached with creditors representing at least 60% of the outstanding debts;
- the funds required to pay non-party creditors in full; and
- the potential obstructions from stronger creditors (mainly financial institutions) in order to obtain prompt payment of their claims, leaving the remaining creditors to deal with the restructuring.

No such constraints exist in the pre-bankruptcy composition agreement procedure, which requires a lower proportion of consenting creditors (50% of total debts), while offering the benefit of generating effects in favour of the dissenting creditors.

In this context, and drawing inspiration from the rules governing the pre-bankruptcy composition agreement procedure, Decree-Law 83/2015 introduced Article 182*septies* to the Insolvency Act to overcome the obstacles outlined above. Article 182*septies* requires that a debt restructuring agreement be binding on:

- creditor financial institutions which are parties to the agreement; and
- any creditor financial institution which chose not to accede to the agreement.

However, the agreement must be acceded to by creditors representing at least 75% of claims owing to one or several legally and economically homogeneous classes of creditors. Further, the new set of rules supplementing debt restructuring arrangements will be applied solely to:

- cases in which the debtor entrepreneur's exposure to banks and other financial institutions exceeds half of total debts owed; and
- debts owed to, and legal relationships with, banks (other creditor claims are expressly protected).

Rordorf Commission proposal

Within the framework outlined above, and similar to Decree-Law 83/2015, the Rordorf Commission's proposal entails:

- eliminating or reducing the 60% threshold of total debts set by Article 182*bis* of the Insolvency Act if the proposed debt restructuring agreement is conducive to the full and prompt satisfaction of the non-party creditors; however, the 60% threshold still applies if the debtor wishes to apply for such protective measures as the stay of enforcement or interlocutory measures pending negotiation; and
- the extension of the agreement's effects to non-party creditors, thereby extending the provisions of Article 182*septies* of the Insolvency Act to creditors other than banks or financial institutions, subject to the non-party-creditors' right to oppose homologation in the event of fraud or non-enforceability of the agreement or by proving the existence of more favourable alternatives, provided that the agreement:
  - is entered into with creditors representing at least 75% of total debts;
  - does not prevent full payment of the creditors in the remaining claim classes; and
  - does not merely require the assignment of assets.

Comment

Decree-Law 83/2015 had already introduced a significant compelling element into a prevailingly private-law instrument as the debt restructuring agreement. In this context, the Rordorf Commission has stressed the need to revitalise this instrument by making a contractual compact enforceable and binding on all creditors – even those that are not parties to it. As a result, the configuration of debt restructuring agreements will be closer to that of pre-bankruptcy composition agreements. The main purpose of this innovation is to:

- ensure a greater chance of success for an agreed to and amiable settlement of a business crisis; and
- favour a solution that entails business continuity in line with the reform's aims.

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Endnotes

(1) For further details please see "Draft statutory instrument for reform of insolvency procedures: alert procedures", and "Reform of insolvency procedures: pre-bankruptcy composition agreement".

(2) For further details please see "Changes to the Insolvency Act concerning composition and moratorium agreements".
