

# Competitive sales in *concordato preventivo* proceedings

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STUDIO LEGALE

June 16 2017 | Contributed by Lombardi Segni e Associati

Insolvency & Restructuring, Italy

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### Bankruptcy law reform

The reform of the Italian bankruptcy law by Decree-Law 83 of June 27 2015, converted with amendments into Law 132 of August 6 2015, entered into force on August 21 2015. The law introduced new rules based on recent case law in the well-known precedents of *San Raffaele* (Court of Milan) and *La Perla* (Court of Bologna). In both cases, the terms of the sale of a business unit to a third party, previously designated by the debtor, were considered by the courts to be inconsistent with the aims of the procedure of *concordato preventivo* (ie, composition with creditors) to maximise the value of the assets in the creditors' best interest, thus ordering an immediate public auction in order to identify the subject to whom the business unit should be transferred.

This case law, which has not been uniformly followed by the Italian courts, is now governed by the new Article 163bis of the bankruptcy law, which provides the courts with the ability to order a public and competitive bid procedure to be run whenever a plan presented by a debtor (jointly with the proposal to pay off its creditors) includes an offer by a pre-selected investor to purchase all or some of the debtor's assets for a predetermined price.

### Drivers of reform

One of the drivers of the reform was a desire to discourage pre-packaged restructuring deals originating from the debtor (who can hide behind the pre-packaged structure or the investor who presented the initial offer assumed as the base of the debtor's proposal) and to implement the efficiency of *concordato preventivo* proceedings, opening them up to the market and generating new opportunities for both investors and distressed companies.

For this reason, the competitive procedure will be launched even when the debtor has already entered into a binding contract for the transfer of the debtor's company or of its business units or assets.

Consequently, the original third party may modify its original offer accordingly and new bidders are required to do the same, submitting an offer consistent with the court's requests.

The formal provision opening the competitive bid process is represented by a judicial decree of the court, which is addressed to both the original offering party and other potential bidders, setting out the rules for the submission of the offers.

Among others things, the decree provides:

- the necessary requirements when presenting competing offers – that they shall be presented in secret form, irrevocable and not subject to conditions;
- terms and time limits for bidders to access to the company's relevant information;
- the date of the public hearing in which the offers will be disclosed and examined; and

- the minimum increase of the price determined in the first offer included in the debtor's plan and criteria to compare the different offers.

The first offer included in the debtor's plan will become irrevocable only when the same offer is submitted again, modified and adapted in accordance with the decree and the first bidder grants the guarantee required by the court.

At the public hearing the offers are disclosed and examined in the presence of the bidders and all other interested parties.

Should new offers be presented which are better than the first offer, the court can open an auction among the bidders. The auction can take place at the same hearing or in a hearing immediately following and must be completed before the creditors' meeting provided by Article 163 of the bankruptcy law for voting on the proposal submitted by the debtor.

The bankruptcy law does not expressly provide for the existence of a pre-emption right – on which the debtor and the initial offering party have agreed in the initial offer – or of a right to match in favour of the initial offering. However, considering the aim of the new competitive sales in *concordato preventivo* proceedings, for the purpose of maximising the value of the debtor's assets and guaranteeing the creditors' best interest, it is assumed that even the pre-existing right in favour of the original offering party does not entitle the bidder to be preferred to its competitors.

The transfer of the auctioned assets or business units can take place not only after but also before the approval by the court of the *concordato preventivo*.

Should the purchase be awarded to a bidder different from the party who presented the first offer included in the debtor's plan, the latter will be released from all obligations entered into with the debtor and the judicial commissioner will dispose the reimbursement of the expenses and costs incurred by the first bidder in relation to its offer, within the limit of 3% of the total price indicated in the offer. A similar rule is not provided for those who participate in the auction but do not win.

The debtor can amend the *concordato preventivo*'s plan, in the case where the bidding process is completed and the best offer is selected, in accordance with the offer selected in order to allow the creditors to vote the proposal as being updated.

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