Client Alert | Banking / Corporate - Italy

The "Cure Italy" and "Restore Liquidity" Decrees: Keeping Italian Companies Alive?

April 2020

On 8 April 2020, the Italian Government enacted Law Decree no. 23 of 2020 (the "Restore Liquidity" Decree). In combination with Law Decree no. 18 of 17 March 2020 (the "Cure Italy" Decree), it provides businesses affected by the novel coronavirus ("COVID-19") pandemic with a package of financial assistance designed to help Italian businesses survive the dramatic short term effects of COVID-19. Measures include guarantee schemes from export credit agency SACE, the Italian government (in relation to CDP loans) and the Central Guarantee Fund, support for business continuity and a tailored package of measures for SMEs including a standstill period for their debts.

Italian companies are not eligible to benefit from SACE guarantees if they authorize the distribution of dividends or a share buy-back in 2020.

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The SACE Guarantee Scheme[1]

SACE S.p.A., the Italian export credit finance agency, will provide up to €200 billion of loan guarantees between now and 31 December 2020 (each a "**SACE Guarantee**").
Borrowers can request a SACE Guarantee with respect to financings in any form, provided by banks, national and international financial institutions and other entities authorized to lend in Italy. This should therefore include bonds as well as loans, provided that the subscribers satisfy the criteria above. Key details of the scheme are as follows:

- **Beneficiaries**: a SACE Guarantee can be requested by any type of enterprise with its registered office in Italy which, as of 31 December 2019, was not classified as an "undertaking in difficulty" (*impresa in difficoltà*) under EU Regulation no. 651/2014, the EU Regulation no. 702/2014 and the EU Regulation no. 1388/2014 and whose liabilities, as of 29 February 2020, were not classified as "deteriorated" by the lending banks.
- **Purpose**: a SACE Guarantee can cover financings granted after the Restore Liquidity Decree comes into force, for the sole purpose of covering personnel costs, investments and working capital relating to operations located in Italy.
- **Maximum guaranteed amount**: the maximum loan percentage covered by a SACE Guarantee shall be equal to:
    - 90% of the principal amount of the financing for companies which employ fewer than 5,000 persons in Italy and which have annual revenues lower than €1.5 billion;
    - 80% of the principal amount of the financing for companies which employ more than 5,000 persons in Italy and which have annual revenues between €1.5 billion and €5 billion; or
    - 70% of the principal amount of the financing for companies which have annual revenues higher than €5 billion.
- **Conditions**: the granting of a SACE Guarantee is subject to the following conditions:

1.	Maximum duration	▪ Six year maturity ▪ Pre-amortization (*preammortamento*) period of 24 months is permitted
2.	Maximum size	The aggregate amount of all financings granted to the same entity backed by a state guarantee cannot exceed the higher of: ▪ 25% of the beneficiary's 2019 annual revenue; or ▪ twice its 2019 employment costs
3.	No dividends No share buy-back	The beneficiary and other entities registered in Italy which are part of the same group must not approve payment of dividends or a share buy-back within the year 2020. Note: this provision is problematic as currently drafted because it would limit the ability of a pure holding company to distribute dividends, even if such holding company is not the borrower of the guaranteed financing. It would also prevent

1 Article 1 of the Restore Liquidity Decree

		subsidiaries of the borrower from up-streaming cash for the purpose of servicing the guaranteed financing, which is evidently counterintuitive.
4.	Job security undertaking	The beneficiary must commit to manage its employment arrangements with the Italian trade unions.
5.	Increase of overall liability of the lender	The overall amount disbursed by the relevant lenders *vis à vis* the borrower must be increased as a result of the financing transaction,

- **Commercial terms**: the all-in annual commissions payable by the borrower for the SACE Guarantee shall be calculated on the basis of the type of beneficiary and the year of financing as follows:

	First year	Second and third year	Fourth, fifth and sixth year
SMEs	25 bps	50 bps	100 bps
Other companies	50 bps	100 bps	200 bps

- **Process**: companies which employ fewer than 5,000 persons in Italy and annual revenues not exceeding €1.5 billion can access the SACE Guarantee through a simplified procedure involving only the lender and SACE. Above such thresholds, the procedure would also require an approval process with the Ministry of Economy and Finance in consultation with the Ministry of Economic Development.

State Guarantees of CDP Loans[2]

Companies which (i) are too large to apply for a Central Guarantee Fund guarantee (see below) (ii) operate in specific sectors to be identified by a ministerial decree (still to be issued) and (iii) have suffered a reduction in their revenues due to COVID-19 are entitled to a state guarantee in respect of financings made available by Cassa Depositi e Prestiti S.p.A., also in the form of first-loss guarantee in respect of financings made available by banks and other entities authorised to lend in Italy (each a "**CDP Financing Guarantee**").

A CDP Financing Guarantee can cover up to 80% of the underlying liability and will be structured, among other things, as an irrevocable and unconditional first demand guarantee.

A state counter-guarantee can be issued through a ministerial decree with respect to guarantees issued by Cassa Depositi e Prestiti S.p.A. within 31 December 2020.

Shareholders' funding

One of the main objectives of the Italian government's actions, including the Restore Liquidity Decree, is to tackle the liquidity shortage faced by Italian companies through guarantee schemes. But liquidity relief can also be obtained through shareholders' loans, especially in privately held companies. However, Italian law has historically penalized the undercapitalization of companies by imposing equitable subordination of shareholders loans if granted when the company's indebtedness was excessively high compared to shareholders' equity, even if the company's financial situation was such that a shareholders' contribution would have been reasonable under the circumstances.

2 Article 57 of the Decree no. 18/2020.

To this end, the Restore Liquidity Decree states that reimbursements of shareholder loans granted in the period between the Restore Liquidity Decree coming into force and 31 December 2020 will not be subordinated to the satisfaction of other creditors of the company, thereby incentivizing shareholders to provide rescue funding to companies. In the current circumstances the provision of liquidity ranks higher in government priorities than the capitalization of companies.

Central Guarantee Fund (SMEs only)[3]

The Central Guarantee Fund (*Fondo Centrale di Garanzia*) provide guarantees of the financial liabilities of SMEs until 31 December 2020 (each an "**SME Guarantee**").

The following are the main features of SME Guarantees:

- SME Guarantees are available to companies with fewer than 500 employees;
- the maximum guaranteed amount for each SME is €5 million and no fees or commissions are payable;
- subject to the exceptions below, the maximum coverage is equal to 80% of the principal amount in the case of direct guarantees and 90% in the case of indirect guarantees. Such percentages can be adjusted up to 90% and 100% respectively upon authorization of the European Commission;
- the maximum coverage for an SME Guarantee will be equal to 100% in the case of new financings up to €25,000 or, in the case of financing provided to SMEs which have annual revenue not exceeding €3,200,000, for an amount not exceeding 25% of the annual revenue of the borrower, subject to certain conditions;
- the guaranteed liability can also include financings made available in the context of a debt-renegotiation transaction with the SME, provided that an additional credit facility for an amount at least equal to 10% of the residual re-negotiated indebtedness is made available by the guaranteed institution to the SME;
- any pre-existing guarantee issued by the Central Guarantee Fund will automatically be extended if the guaranteed indebtedness is subject to any suspension of payments or extension of the termination date as a result of COVID-19; and
- an SME Guarantee can be requested for pre-existing financings entered into not earlier than three months before the request and, in any case, after 31 January 2020.

An SME Guarantee cannot be provided in respect of any liabilities classified as NPL (*sofferenze*).

Standstill and Postponement Measures (SMEs only)

SMEs experiencing liquidity issues resulting from COVID-19 can require banks, financial intermediaries and other lenders to apply certain measures of financial support, by delivering a self-declaration to the lenders.

Such measures include:

- a standstill until 30 September 2020 with respect to any withdrawal of uncommitted credit facilities (*aperture di credito a revoca*) and facilities for credit advances (*anticipi su crediti*) outstanding as at 29 February 2020 (or as at 17 March 2020 in case of a longer duration);
- an extension until 30 September 2020 of the termination date of bullet term loan facilities where such termination date was originally set to expire before 30 September 2020;
- a postponement until 30 September 2020 for the payment of instalments of principal due before 30 September 2020 and an extension of the duration of amortizing term loan facilities; and

[3] Article 49 of the Decree no. 18/2020

- in case of pre-funded facilities (*finanziamenti erogati con fondi di terzi*) or subsidized loans (*finanziamenti agevolati*), the automatic extension of the funding agreements subject only to communication to (as opposed to the previous agreement of) the subsidizing entity.

The aforementioned measures do not apply to companies whose indebtedness is classified as "deteriorated credit exposures" (*esposizioni creditizie deteriorate*) under the regulatory rules applicable to financial intermediaries as of 17 March 2020.

Measures aimed at supporting business continuity

The Restore Liquidity Decree contains measures to relieve enterprises from certain obligations or procedures that could trigger adverse effects due to the COVID-19 pandemic and the associated restrictions.

Directors' duties

One set of measures is aimed at "relaxing" directors' duties in connection with insolvency/pre-insolvency scenarios.

These measures provide that:
no proceedings for the declaration of insolvency or bankruptcy (except as set out below) can be brought or pursued between 9 March 2020 and 30 June 2020. Insolvent companies will have time during this period to assess the impact of the COVID-19 outbreak on their business and to pursue alternative routes, if any. The measure applies across the board, i.e. to filings initiated by the debtor, the creditors or the public prosecutor, except for filings initiated by the public prosecutor requesting the application of interim or precautionary measures to protect the assets of the debtor. To mitigate the potential negative effects of this suspension, the limitation period applicable to claw-back actions (i.e. three years from the declaration of bankruptcy and five years from the date of completion of the relevant transactions) and for the declaration of insolvency (i.e. one year since the cancellation from the relevant companies' register) are also suspended for an equal period;
the rules requiring the recapitalization (or liquidation or transformation into a different company type) of companies whose losses have substantially eroded the share capital will not apply from the date on which the Restore Liquidity Decree comes into force until 31 December 2020 with reference to events occurred in 2020. This measure is intended to address the risk that the impact of losses arising from COVID-19 on the share capital of companies push directors into the unsustainable position of choosing between dramatic alternatives: put the company into liquidation or face potential personal liability as a result of the delay in complying with such obligations; directors are allowed to prepare year-end financial statements in 2020 under a going concern assumption, to the extent the company's status as a going concern was ascertained with reference to the preceding financial statements closed before the entry into force of lockdown measures (i.e. 23 February 2020). Such provision is applicable also to year-end financial statements closed before 23 February 2023 but still not approved. The government has acknowledged that, in the current unprecedented circumstances, directors of a significant number of companies would not have been in a position to confirm the going-concern assessment underpinning the on-going preparation of financial statements (with the ensuing liquidation procedures). Therefore, this measure sterilizes the COVID-19 effect on items recorded in the financial statements while allowing companies to approve year-end financial statements on time. We expect this measure may also help companies avoid the triggering of events of default under financing agreements, which usually require the approval of financial statements within 120 or 180 days of year-end.

Restructuring Arrangements and Composition with Creditors

The Restore Liquidity Decree also addresses the impact of COVID-19 on existing restructuring arrangements and compositions with creditors through the following measures:

- a six-month extension of the term for performance of connected obligations falling in the period between 23 February 2020 and 31 December 2021; and
- provisions allowing debtors to ask the competent Court for extensions to prepare and submit to the Court new plans and arrangements / proposals for compositions in on-going procedures. The new term cannot exceed 90 days starting from the date of the relevant decree by which the Court assigns the new term and cannot subsequently be extended.

These measures are aimed at providing companies with additional time to assess and address the adverse effects of COVID-19 on ongoing restructuring arrangements and compositions with creditors, potentially increasing their chance of success.

Postponement of the new distress and insolvency regime

Lastly, the Restore Liquidity Decree postpones the entry into force of the new distress and insolvency regime (*Codice della Crisi e dell'Insolvenza*), originally scheduled to apply from 18 August 2020, to 1 September 2021.This was a long awaited measure also before the COVID-19 outbreak and is meant to ensure that companies, professionals and Courts do not have to deal with the uncertainties connected with the entry into force of an overhaul of the applicable regime when the entire economic and legal system of the country is already under considerable stress. We expect this measure will facilitate the handling of the numerous restructurings that are unfortunately to be expected in the coming months.
The above measures are intended to provide companies with substantive tools to face the immediate effects of the COVID-19 on their share capital and financial statements as well as to grant time and flexibility to their directors in reacting to the challenges deriving from such effects. Directors and officers should begin working with their advisors quickly in order to assess whether any of these measures could suit their needs now or in the near future.

Conclusions

The Cure Italy and Restore Liquidity Decrees provide a series of urgent measures which are intended to support Italian companies through the banking system, SACE and the Central Guarantee Fund.

While measures in favor of SMEs include a standstill until 30 September 2020 with respect to various forms of committed and uncommitted facilities, the government has taken additional steps to support all businesses by providing access to guarantees to be issued by SACE in favor of lenders who make new financing available, including by refinancing existing liabilities. Note that the measures under the Decrees described above are not considered "forbearance measures" as such term is defined by EU regulatory authorities.

We encourage our clients to consider the opportunities presented by the Decrees carefully, consulting with us as appropriate.

Separately, Italian companies which meet the relevant credit rating requirements may also benefit from liquidity assistance via the European Central Bank ("**ECB**") Pandemic Emergency Purchase Programme ("**PEPP**"), pursuant to which the ECB may purchase bonds and commercial paper issued by European private and public sector entities. See our client alert https://www.whitecase.com/publications/alert/european-central-bank-launches-emergency-bond-buying-programme-response for further details.

In addition, White & Case has carried out an analysis of global governmental responses to the COVID-19 crisis. These vary considerably from country to country and are being updated and amended regularly.

We have prepared an in-depth and nuanced analysis for various major jurisdictions – a list of which is attached as Annex II – and pulled together a global response team.

For useful information on COVID-19, please consult the Coronavirus section of www.whitecase.com.

Annex I

The "Cura-Italia Decree" and the "Liquidity Decree" include urgent measures to support the liquidity of companies and ensure business continuity. The applicable measures are described and compared below.

Applicable Measures	**Large corporates**	**SMEs**
Eligible Beneficiary	All enterprises registered in Italy regardless of their shareholder structure	SMEs registered in Italy regardless of their shareholder structure
SACE Guarantee Scheme	Type of guarantee: irrevocable and unconditional first demand guarantee	Same
	Type of financing: any form of financing by banks or other institution authorized to lend in Italy	Same
	Beneficiary: any enterprises not classified as an "undertaking in difficulty" (*impresa in difficoltà*) and whose liabilities, as of 29 February 2020, were not classified as "deteriorated" by the bank	Same
	Purpose of the financing: limited to coverage of personnel costs, investments and working capital relating to plants and business activities located in Italy	Same
	Maximum guaranteed amount: (i) **90%** for companies which employ fewer than 5,000 persons in Italy and which have an annual revenue not exceeding €1.5 billion; (ii) **80%** for companies which employ more than 5,000 persons in Italy and which have an annual revenue higher than €1.5 billion but not exceeding €5 billion; or (iii) **70%** for companies which have an annual revenue higher than €5 billion	Same
	Conditions 1. *Duration:* maximum 6 years, subject to a possible amortization period of 24 months; 2. *Maximum size*: aggregate amount of all the financings backed by public guarantee cannot exceed the higher of (i) 25% of the beneficiary's 2019 annual revenue; or (ii) double its 2019 employee costs; 3. *No approval of dividends payment or share buy-back*:	Same

	during the year 2020 (applicable also to group companies registered in Italy) 4. *Job Security Undertaking*: commitment to manage occupational levels by reaching agreements with labor unions; 5. *Increase of overall liability*: the overall amount of the liability of the lender *vis à vis* the borrower must be increased as a result of the financing/refinancing Economic conditions: all-in commission equal to: ▪ 50 bps during the first year ▪ 100 bps during the second and third year ▪ 200 bps during the fourth, fifth and sixth year Maximum cost of financing: not to exceed the cost normally applied for a similar transaction with no guarantee Process: for companies employing more than 5,000 persons in Italy and which have an annual revenue exceeding €1.5 billion, the guarantee must be approved also by the Ministry of Economy and Finance, upon consultation with the Ministry of Economic Development	Economic conditions: all-in commission equal to: ▪ 25 bps for the first year ▪ 50 bps during the second and third year ▪ 100 bps during the fourth, fifth and sixth year Same Simplified process involving only the lender and SACE
State Guarantees of CDP Loans	Type of guarantee: irrevocable and unconditional first demand guarantee Type of financing: any guaranteed and/or pre-funded financings made available by Cassa Depositi e Prestiti S.p.A. after the Cura-Italia Decree date Conditions 1. beneficiary to operate in one of the sectors to be identified by ministerial decree 2. beneficiary to declare it was impacted by COVID-19 Maximum Guaranteed Amount*:* up to 80% of the financing	
Guarantees provided by the Central Guarantee Fund *(Fondo Centrale di Garanzia)*	Not available to large corporates	Conditions - until 31 December 2020, free of charge - guarantee up to a maximum amount equal to €5 million

		- maximum coverage ranges from 80% to 100% - liabilities classified as NPL (*sofferenze*) are excluded
Standstill and postponement	Not available to large corporates	SMEs affected by COVID-19 which indebtedness is not classified as "deteriorated credit exposures" can apply for: - standstill until 30 September 2020 with respect to any withdrawal of uncommitted credit facilities and facilities for credit advances; - extension until 30 September 2020 of the termination date of bullet term loan facilities; - a postponement until 30 September 2020 of the payment of the installments due before 30 September 2020 and an extension of the duration of amortizing term loan facilities; and - in case of pre-funded facilities or subsidized loans, the automatic extension of the funding agreements
Shareholders' funding	Shareholder loans granted between the effective date of the Restore Liquidity Decree and 31 December 2020 are not subject to statutory subordination.	
Other Corporate Measures	Temporary suspension of recapitalization duties Until 31 December 2020 companies are not required to fulfil statutory recapitalization duties provided and any of such circumstances does not constitute a liquidation event. Temporary criteria to verify business continuity When evaluating business continuity as at 31 December 2020, companies are allowed to refer to the latest financial statement approved before 23 February 2020. Such provision is applicable also to year-end financial statements closed before 23 February 2023 but still not approved.	
Insolvency Related Measures	Suspension of proceedings for the declaration of insolvency or bankruptcy up to 30 June 2020. With respect to restructuring arrangements and composition with creditors (i) six-month extension of the terms for performance of connected obligations falling in the period comprised between 23 February 2020 and 31 December 2021; and (ii) (upon request) the competent Court may grant a new term of up to 90 days (starting from the date of the court decree) to prepare and submit to the Court new plans and arrangements / proposal for compositions in on-going procedures. S. Postponement of the entry into force of the new distress and insolvency regime (Codice della Crisi e dell'Insolvenza), from 18 August 2020, to 1 September 2021.	

Annex II

List of major jurisdictions in respect of which we carried out an in-depth analysis on governmental responses to the COVID-19 crisis.

Jurisdiction	Is financial assistance locally provided?	Is financial assistance available to Italian companies' local subsidiaries?	Is financial assistance available if assistance has already been obtained in other jurisdictions?
Czech Republic	YES	YES	No
Finland	YES	YES	Possibly
France	YES	YES	YES
Germany	YES	YES	YES
Hungary	NO	NO	NO
Portugal	YES	YES	YES
Singapore	YES	YES	YES
Spain	YES	YES	YES
Sweden	YES	YES	YES
Switzerland	YES	YES	YES
UAE	Possibly	Possibly	Possibly
UK	YES	YES	YES
USA	YES	YES	YES

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