

# New provisions of the Italian securitisation law introduce innovative tools to boost securitisations of non-performing loan and leasing receivables

Law Decree 50 of 24 April 2017 (the "**Law Decree**")<sup>1</sup>, as converted with amendments into law 96 of 21 June 2017 (the "**Conversion Law**")<sup>2</sup>, amended the Italian securitisation law 130 of 30 April 1999 (the "**Italian Securitisation Law**") by introducing new provisions aimed at fostering the securitisation of non-performing loans and leasing portfolios.

The Conversion Law has introduced innovative tools to maximise the recovery of non-performing loans (*sofferenze*) and non-performing lease receivables securitised by Italian banks and expanded the scope of activity of special purpose vehicles in the context of securitisation transactions of non-performing loans and leases.

## Main measures introduced by the Conversion Law

The newly introduced measures aim at enhancing the recovery of securitised non-performing portfolios by, *inter alia*, restoring the solvency of the assigned debtors and increasing the value of the underlying assets.

Among the main innovations now available in the Italian securitisation market, we note that:

- special purpose vehicles incorporated pursuant Article 3 of the Italian Securitization Law (the "**Securitisation SPVs**") will be capable of owning receivables and equity/"quasi-equity" holdings in the assigned debtors as well as of acting as direct lenders;
- ring-fencing will be extended to (i) all funds made available by the Securitisation SPVs to the assigned debtors either in the form of direct lending or as equity or "quasi-equity"

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<sup>1</sup> Official Gazette of the Italian Republic, number 95 of 24 April 2017.

<sup>2</sup> Official Gazette of the Italian Republic, number 144 of 23 June 2017.

holdings, and (ii) proceeds deriving from the management of the underlying assets (including, where applicable, the relevant lease contracts) by REOCOs and LeaseCos (as defined and described in more detail in paragraph 3 below);

- loans granted by the Securitisation SPVs to assigned debtors undergoing restructuring will rank senior to other ordinary shareholder loans and will be segregated by operation of law;
- assignment of non-performing receivables not identified as a pool will be incentivised through simplified perfection formalities; and
- ReoCos and LeaseCos will receive beneficial tax treatment for the acquisition of the real estate assets underlying the non-performing receivables.

More in detail, pursuant to the Conversion Law, the following tools are now available:

#### 1. Direct financing by the Securitisation SPVs

The Securitisation SPVs will be able to grant financing to the assigned debtors so that they may restore their solvency and enhance the recovery of non-performing receivables.

Direct lending by the Securitisation SPVs was already allowed under article 1, paragraph 1-*ter* of the Italian Securitisation Law subject to, *inter alia*, identification of the relevant borrowers by a financial intermediary that was required to continue to hold a significant economic interest in the transaction (for further details on the regulatory requirements relating to this type of financing, see our Briefing Notes [Italy: breakthrough tax and legal measures to foster credit to Italian businesses](#) and [Competitiveness Decree converted into Law](#)).

However, following enactment of the Conversion Law, Securitisation SPVs are now able to grant such financings to assigned debtors within a securitisation transaction of non-performing receivables, hence combining their traditional receivables purchase activity with an active lending strategy, which will nevertheless remain subject to the requirements set out under article 1, paragraph 1-*ter* of the Italian Securitisation Law.

#### 2. Funding of assigned debtors in restructuring also through equity investments

Securitisation SPVs can provide funds to assigned debtors that are involved in restructuring arrangements with the originating bank --such as '*concordato*', '*concordato preventivo*', '*accordi di ristrutturazione dei debiti*', '*concordato con continuità aziendale*' under the Italian Bankruptcy Law (Royal Decree of 16 March 1942, n. 267 -- or other analogous pre-insolvency arrangement or insolvency proceedings, by financing these debtors directly or by investing in their equity capital by acquiring shares, quotas and other equity or "*quasi-equity*" instruments, with the purpose of restoring the assigned debtor's solvency and enhancing recovery.

Any proceeds deriving from this type of funding will be statutorily segregated and will have to be used by Securitisation SPVs to satisfy payments due under the notes and to cover the securitisation's costs and expenses.

Furthermore, by express provision of law, any financing made available by the Securitisation SPVs to the assigned debtors will not be subordinated to the claims of other creditors of the debtor and will therefore rank senior to ordinary shareholder loans (as an exception to the general rule under articles 2467 and 2497-*quinquies* of the Italian Civil Code).

#### 3. Incorporation of a special purpose vehicle to improve the management of the underlying assets: REOCOs and LeaseCos

The Conversion Law provides that special purpose vehicles can be incorporated in the form of limited liability companies (*società di capitali*), with the single corporate purpose of acquiring and managing the non-performing receivables' underlying real estate or other registered moveable assets (the "**REOCOs**") or assets leased under the relevant lease contracts (the "**LeaseCos**") with the objective of increasing the assets' value.

Pursuant to the Conversion Law, if leased assets are to be assigned to a LeaseCo together with the relevant lease agreements or, in case the lease agreements are terminated, together with the relevant claims *vis-à-vis* the lessees, then the LeaseCo must be: (i) consolidated into the balance sheet of a bank; and (ii) incorporated for the sole purpose of the securitisation and, accordingly, wound-up upon unwinding of the securitisation transaction.

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Lastly, the proceeds deriving from the possession, management or disposal of the underlying assets by REOCOs and LeaseCos will be treated as portfolio collections, *i.e.* will be segregated by operation of law, and will be used by the Securitisation SPV to make payments due under the notes and to cover the securitisation costs. The immediate consequence of this provision should be to give tax neutrality to the REOCOs and the LeaseCos, which should therefore enjoy the same tax treatment of the relevant Securitisation SPVs.

#### 4. Simplified publicity formalities for transfer of non-performing receivables not identified as a pool

As a further incentive to the securitisation of non-performing receivables, the simplified publicity and registration formalities provided by article 58 of Legislative Decree 385 of 1 September 1993 (the "**Italian Banking Act**") will apply also where the assigned non-performing receivables are not identified as a pool (*'blocco'*) of receivables and are instead related, for example, to single name positions.

To perfect such assignment, the notice to be published in the Italian Official Gazette will have to specify the following information: name of assignor and assignee, date of assignment, type of receivables and origination period, and the website where the assignor and the assignee will render such information available to the assigned debtors.

#### 5. Tax aspects

The new measures provide that LeaseCos will benefit from the tax provisions applicable to leasing companies. This would include, for example, the application of registration, cadastral and mortgage taxes at the fixed amount of €200 each, in case of exercise of the purchase option by the lessee or in case of termination of the leasing agreement because of the lessee's default.

Moreover, disposals of real estate assets by LeaseCos will benefit from the application of registration, cadastral and mortgage taxes at the fixed amount of €200 each (as provided by article 35, paragraph 10-ter.1 of Law Decree of 4 July 2006, as converted, with amendments, into Law 248 of 4 August 2006). According to a literal interpretation, the new provision seems to address only disposals by LeaseCos, without covering disposals by the originating leasing company to the LeaseCo.

Such disposals should be covered by existing legislation, providing for the application of registration, cadastral and mortgage taxes at the fixed amount of € 200 each only in the case of assets underlying contracts that have been terminated due to the default of the lessee. Assets underlying contracts (whether performing or not) that have not been terminated due to the default of the lessee would remain subject to full taxes.

However, said interpretation would be clearly in contrast with the rationale of the provision aimed at removing tax hurdles for disposals of assets preordained to the implementation of the securitisation, which should necessarily provide for little or no taxation of transfers from the leasing company to LeaseCos.

Concluding otherwise would result in the preventive recapture of the tax benefit, so that the aim of the new legislation would be entirely frustrated (full transfer taxation on the sale of property from the originator to the LeaseCos would *de facto* be a show stopper).

Hopefully, an official interpretation will endorse the general application of the exemption and will clarify that the exclusion of transfers from the leasing company to LeaseCos was not envisaged by the legislator.

Finally, the above seems to apply to LeaseCos but not to REOCOs. Indeed, no beneficial regime is specifically provided for REOCOs that seem to remain subject to the ordinary regime. This circumstance may represent a significant disincentive for transactions whereby the concerned receivables do not arise from leasing contracts.

### Conclusive remarks and points to note

As a result of the newly introduced amendments to the Italian Securitisation Law, securitisation schemes may constitute an important tool to maximize the management of non-performing securitised portfolios.

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The new funding tools available to the Italian non-performing receivables securitisation market can result not only in fundamental financial resources for non-performing debtors, whose access to leveraged finance is limited due to their temporary crisis condition, but also as a means to maximize the value of the underlying assets.

On one side, the REOCOs' participation in enforcement auctions may have the effect of rendering the bidding process more competitive and mitigate depreciation of the underlying real estate or moveable registered assets being sold; on the other hand, the possibility to assign leased assets relating to non-performing lease contracts and/or the lease contracts themselves to LeaseCos will have the effect, in practice, to segregate such assets and subject them to the service of the securitisation transaction.

In this respect, there is little doubt that Securitisation SPVs, REOCOs and LeaseCos can assume a key role in the restructuring of the assigned debtors' financial position and the recovery of non-performing receivables.

It should be however noted that the scope of application of these new measures could in practice be narrowed by the following:

- the new provisions will exclusively apply to receivables qualifying as non performing (*i.e.* receivables that are qualified as "*sofferenze*", "*inadempienze probabili*" or "*esposizioni scadute e/o sconfinanti*", in accordance with Circular Letter of the Bank of Italy 272 of 30 July 2008, as amended);
- the financial intermediary responsible for identifying the beneficiaries of the financing made available by the Securitisation SPVs to the assigned debtors, as mentioned under paragraph 1 above, will have to retain a significant economic interest in the transaction;
- from a literal reading of the Conversion Law, it seems that the REOCOs and the LeaseCos can only be set up as limited liability companies (*società di capitali*), thus possibly excluding real estate investment funds, which could instead be beneficial in many respects;
- disposals of the leased assets from the relevant originating leasing company to LeaseCos may be subject to significant tax burdens if the underlying lease agreement has not been terminated, unless clarification to the contrary from the Tax Authorities is obtained.