
# ITALY SUPPORTS CREDIT OPPORTUNITIES FOR INVESTORS THROUGH RECENT AMENDMENTS TO THE ITALIAN SECURITISATION FRAMEWORK

Two sets of amendments innovating the "**Italian Securitisation Law**"[1] have been recently implemented by, respectively, the "**Italian Budget Law**"[2] and the "**Growth Decree**" (*Decreto Crescita*) issued by the Italian Government[3], having the effect of, among other things, introducing a new type of securitisation relating to real estate and registered movable assets and crystallising the structure and effects of securitisations of non-performing exposures, also to facilitate the disposal of credit claims qualified as unlikely-to-pay receivables. Finally, the Growth Decree introduced innovative tax provisions to streamline and clarify the existing securitisation regime to transactions on non-performing exposures.

**Key issues**

- Real estate securitisations are newly codified
- Latest developments on securitisations of non-performing exposures
- New tax provisions have been implemented, stipulating the tax neutrality of certain transactions carried out by ReoCos and LeaseCos
- Other measures to ease access to finance

## REAL ESTATE AND REGISTERED MOVABLE ASSETS: A NEW TYPE OF SECURITISATION

The combined provisions of the Budget Law and Growth Decree codified a new type of securitisation (the "**Real Estate Securitisation**"), by incorporating paragraph 1-b-bis under article 7 and a new article 7.2 under the Italian Securitisation Law. The new provisions clarify that the Italian securitisation framework applies to securitisations of proceeds (*proventi*) arising from the ownership of real estate (*beni immobili*) and registered movable assets (*beni mobili registrati*) as well as to

[1] Law no. 130 of 31 April 1999.
[2] Law no. 145 of 30 December 2018 (Official Gazette of the Italian Republic no. 302 of 31 December 2018).
[3] Law Decree no. 34 of 30 April 2019 (published on the Official Gazette of the Italian Republic on 30 April 2019 and effective as of 1 May 2019). This law decree is subject to conversion into law (with possible amendments) by the Italian Parliament within 60 days from its publication.

other rights *in rem* (*diritti reali*) or personal rights (*diritti personali*) over such assets.

The codification of Real Estate Securitisations constitutes a turning point in the regulation of this sector, with related transactions volumes expected to increase significantly thanks to the benefit of the application of this new legislation.

A core point lies in the fact that Italian special purpose vehicles ("**SPVs**") are now legally permitted to acquire and manage the receivables arising from certain portfolios of assets and own and manage real estate and registered movable assets (and any rights relating thereto). In other words, the new rules no longer require a distinction between the entity acquiring and managing the receivables and the company purchasing, having title over and managing, the real estate and registered movable assets and the contracts relating thereto (which is otherwise required *e.g*. in transactions having as object portfolios of non-performing exposures: please see in this respect the following paragraph - "*Securitisation of non-performing receivables*" below). The SPV can be the player of the entire transaction, without need to incorporate an additional vehicle entity. This should simplify the mechanics of these type of transactions, with a significant reduction of timing and costs.

The Growth Decree has incorporated a new article 7.2 entirely dedicated to these transactions, clarifying that:

- the SPVs must have as their exclusive object the realisation of the Real Estate Securitisations described in article 7.1 b-bis of the Italian Securitisation Law (excluding any other transaction);

- each Real Estate Securitisation must identify the assets and rights that are bound to satisfy the rights of the noteholders and the hedging counterparties under the hedging agreement(s) covering the interest rate risk relating to the receivables and notes;

- the statutory segregation effects of the Italian Securitisation Law extend by operation of law to the real estate and registered movable assets and rights identified by the parties, as well as to any other claims owed to the SPVs in

the context of the Real Estate Securitisation, which shall constitute assets segregated for all purposes from the assets of the SPVs and from the assets relating to other transactions (*patrimonio separato*);

- no actions are permitted on the segregated assets by creditors other than the noteholders, the grantors of the financings raised by the SPVs or the hedging counterparties of hedging agreements covering the risks on the securitised receivables, the notes and other transaction costs.

The last provision above makes reference to the possibility of the SPVs to raise funds from other lenders and so it should permit the recourse by the SPV to lending sources that are alternative to the securitisation framework (*e.g*. capital expenditures lines *etc*.).

The new legislation does not require the Italian Ministry of Economy and Finance ("**MEF**") to implement by decree the above discipline, which means that the construction of this new type of Real Estate Securitisation should be deferred contractually to the mutual agreement of the parties, to the extent not covered by the Italian Securitisation Law.

## SECURITISATION OF NON-PERFORMING RECEIVABLES

Through a previous decree ("**Decree 50/2017**")[4] article 7.1 was incorporated into the Italian Securitisation Law, pursuant to which SPVs can be incorporated in Italy (as "**ReoCos**") having the sole purpose of acquiring and managing in the exclusive interest of the transaction the non-performing receivables (*crediti deteriorati*), arising from the registered movables and real estate properties comprised in the securitised portfolios, including the assets which are the object of financial lease contracts (even if terminated), jointly with the relationships arising from such contracts. In such an event, a distinction exists between the ReoCo, managing the securitised receivables, and the "**LeaseCo**", having the purpose of acquiring and managing the assets leased under the relevant

[4] Law Decree no. 50 of 24 April 2017 (Official Gazette of the Italian Republic, number 95 of 24 April 2017), as converted into Law no. 96 of 21 June 2017 (Official Gazette of the Italian Republic, number 144 of 23 June 2017).

lease contracts with the aim of increasing the assets' value (for further details please see our previous Briefing Note).

The Growth Decree amended article 4 of the Italian Securitisation Law, which sets out the formalities to render the transfer of the receivables by the originator to the SPV enforceable (*opponibile*) to the assigned debtors and the concurring third parties. The new provision recites that in relation to the transfer of non-performing exposures pursuant to article 7.1 of the Italian Securitisation Law, the assignor-bank may transfer (contextually with the assignment of the receivables to the SPV) to another assignee-bank (or other financial intermediary enrolled in the register held by the Bank of Italy pursuant to article 106 of the "**Consolidated Banking Act**"[5]) pursuant to article 58 of the Consolidated Banking Act[6] the commitments or the rights to advance the financings arising from credit agreements (*aperture di credito*) separately from the "**Current Account**" (*conto corrente*) in which they are settled. Following this transfer:

- the collections registered to the credit of the Current Account will keep on being attributed to repay the credit claims arising from, and in accordance with, the credit agreements, even where the receivables arose after the transfer;

- the noteholders of the ABS notes issued and/or the assignee-bank or financial intermediary who purchased the commitments or the rights to advance the financings arising from the mentioned credit agreements will benefit from the statutory segregation effects of article 3 of the Italian Securitisation Law, which will expressly extend to the collections credited on the Current Account, to the extent compatible[7].

[5] Legislative Decree no. 385 of 1 September 1993.

[6] This means that the formalities to perfect the transfer are easier because (i) the assignee only needs to give notice of the assignment by registration in the Company's Register and publication in the Official Gazette and (ii) there will be an automatic transfer to the assignee of the security interests without further registrations or annotations.

[7] This means that the noteholders and the assignee-bank will be protected by the principles of "destination" and "segregation" set out in articles 1.1 (b), 3.2 and 3.2-*bis* of the Securitisation Law. Therefore:

1. the amounts paid by the underlying debtors, whose receivables have been assigned, can be applied only in satisfaction of the ABS notes issued and in payment of associated transaction costs;
2. the receivables relating to each transaction constitute assets segregated, for all purposes, both from other assets of the depository bank and from those assets related to any other transaction. In respect of each group

The above provisions should be welcomed by the credit system from a legal and economic perspective, since they are meant to ease the disposal of unlikely to pay ("**UTP**") receivables by the credit institutions, where the debtor might still entail credit relationships with the assignor-bank. To cope with this scenario, the Budget Law provided easier transfer provisions, combined with the maintenance of the Current Account with the existing depository bank, on which loan instalments are paid.

The Growth Decree further amended article 7.1 of the Italian Securitisation Law in order to (i) confirm that, in the case of a securitisation of non-performing exposures, the relevant SPVs will be legally capable of owning the non-performing receivables and the real estate and registered movable assets assigned to the ReoCos and LeaseCos, as introduced by Decree 50/2017; (ii) specify that the acquisition and management of the said assets in the exclusive interest of the transaction can be performed by the ReoCo and LeaseCo directly or through one or more additional SPVs (*ulteriori società veicolo d'appoggio*) and (iii) reaffirm the segregation effects by establishing that:

- any sums deriving from the possession, management and sale of the real estate and registered movable assets, as well as any other rights and assets created and/or granted pursuant to the transaction acquired by the ReoCo are legally due (*sono dovute*) to the ReoCo and must be applied only in satisfaction of the ABS notes issued and in payment of associated transaction costs;

- the receivables relating to such transaction constitute segregated assets (*patrimonio separato*), on which no action is permitted, other than by the holders of the ABS notes;

- any real estate and registered movable assets are not required to be transferred as a "pool" (*in blocco*) and will,

of segregated assets no action by creditors is permitted, other than the holders of the notes and of the assignee-bank who purchased the commitments or rights to advance the financings arising from the credit agreements;

3. should any insolvency proceedings, or other similar banking proceedings (including extraordinary administration and compulsory banking liquidation) be commenced in respect of the depository bank, the amounts credited on the current account and the sums deposited during the course of the relevant insolvency procedure (i) will not be subject to the suspension of payments and (ii) will be immediately and fully returned to the SPV in accordance with the provisions of the relevant agreement and without the need to for the filing of any petition in the relevant insolvency proceeding and outside any distribution plan.

nonetheless, benefit from the easier formalities and the effects of article 58 of the Consolidated Banking Act.

The above provisions significantly simplify the mechanics of the securitisation of non-performing claims carried out through a ReoCo and should reduce transaction costs, while enhancing the efficiency of such securitisation structures.

Finally, we note that the new provisions (for a more detailed description of which please see the following paragraph – "*Tax provisions*" below) make reference to the possibility of other lenders to accede to the transaction which, consequently, should permit the ReoCo to have recourse to lending sources that are alternative to the securitisation channel (including *e.g*. capital expenditures credit lines, running costs etc.) otherwise not permitted pursuant to the previous provisions of the Italian Securitisation Law.

## TAX PROVISIONS

With the aim of facilitating the disinvestment of receivables classifying as non-performing (*crediti deteriorati*), including the UTP, and support the enhancement of the underlying real estate assets, the Growth Decree stipulates, in relation to securitisations whose object are said non-performing receivables:

1. the neutrality for direct tax purposes of the proceeds and expenses derived and accrued by the ReoCo and the LeaseCo in relation to the segregated assets (*patrimonio separato*);

2. the neutrality for registration, cadastral and mortgage tax purposes ("**Transfer Taxes**") of the purchase of real estate assets by the ReoCo and LeaseCo (*i.e*. it triggers Transfer Taxes at the overall fixed amount of € 600);

3. the neutrality for Transfer Taxes purposes of the sale of real estate assets by the ReoCo and LeaseCo (*i.e*. it triggers Transfer Taxes at the overall fixed amount of €

600). The neutrality applies provided that the purchaser either:

(i) exercises an entrepreneurial activity and declares that the assets will be transferred within 5 years. Based on the explanatory memorandum, this provision should also apply to collective investment undertakings; or

(ii) does not exercise an entrepreneurial activity but is in possession of the requirements to obtain the "primary dwelling" benefit (*agevolazione prima casa*) for registration tax purposes.

Based on the wording of the new legislation, the regime under 1) above also applies to the Real Estate Securitisation whilst the provisions under 2) and 3) above do not. This exclusion is in line with the purpose of the legislator to foster, by granting benefits in terms of Transfer Taxes, only transactions concerning non-performing exposures.

## OTHER MEASURES

### Ring-fencing of Synthetic Securitisations

The Italian Securitisation Law (article 7) provides that securitisations can be structured as a (limited recourse) loan granted by the SPV to the originator of the portfolio, rather than as a true sale of receivables by the originator to the SPVs.

These structures are known as "**Synthetic Securitisations**" and entail that (i) the proceeds of the issuance of the ABS notes are used by the SPV to advance the loan to the originator and (ii) the originator repays the loan to the SPV through the proceeds received in respect of the underlying portfolio, while maintaining the title over the securitised receivables. In line with this description, the Budget Law amended article 7.1, letter (a) of the Italian Securitisation Law to clarify that such securitisations involve the transfer to the SPV of the risk relating to (as opposed to the title of) the underlying portfolio of receivables as credit rights, within the thresholds and conditions agreed by the parties.

In addition, two new sub-sections (7.2 *octies* and 7.2 *novies*) were added by the Budget Law pointing out that under the Synthetic Securitisation the originator-borrower may (but, apparently, is not obliged to) segregate the securitised portfolio (including any rights and assets securing the repayment of the credit claims) as a security for the repayment of the loan advanced by the SPV and, to this purpose, the originator-borrower may (but, again, does not seem to be obliged to) constitute a pledge security interest (*pegno*) over the mentioned credit rights and assets, to secure the repayment of the loan to the SPV.

The above provisions are again a positive to the securitisation framework, as they codify the use of Synthetic Securitisations and enhance the ring-fencing of receivables and assets, by extending the principle of destination and segregation set out in articles 1, letter (b) and 3 of the Italian Securitisation Law. We note, however, that such extension is limited and not automatic, because the legal effect seems to operate on a voluntary basis, depending on the mutual agreement of the parties, who may (but are not obliged to) structure the transaction as described above.

According to the Budget Law, the MEF should have issued within 90 days the decree(s) implementing the rules regarding Synthetic Securitisations and, in particular, the segregation of the receivables and related rights and assets. However, as of the date of this Briefing Note no MEF decree has yet been issued.

**Subscription by securitisation vehicles of bonds issued by limited liability companies and unlisted bonds issued by joint stock companies**

The *Decreto Destinazione Italia* [8] already provided that SPVs can carry out securitisation transactions also through the subscription of bonds or similar notes, subject to the conditions of article 1, paragraph 1-*bis* of the Italian Securitisation Law (for further details please see our previous Briefing Note). A restriction to the above, however, depended on:

[8] Law Decree no. 145/2013 (Official Gazette of the Italian Republic no. 43 of 21 February 2014), converted into Law n. 9 of 21 February 2014 (Official Gazette of the Italian Republic no. 43 of 21 February 2014).

- article 2483 of the Italian civil code, providing that bonds issued by Italian limited liability companies (*società a responsabilità limitata*) can be subscribed by "qualified investors" only (as defined in article 100 of the Financial Laws Consolidation Act)[9], which means the SPVs were excluded from the scope of this provision. The Italian Budget Law derogated this restriction and SPVs can now carry out securitisations by underwriting bonds issued by Italian limited liability companies too;[10]

- Article 2412 of the Italian civil code, preventing Italian joint stock companies (*società per azioni*) from issuing bonds for a nominal amount higher than 200% of their corporate capital and reserves, unless such bonds are either listed or subscribed by qualified investors. The Italian Budget Law derogated to this capital limitation and established that SPVs can perform securitisations by subscribing even unlisted bonds issued by Italian joint stock companies, provided that the ABS notes issued by the SPV under the transaction are listed on a stock exchange.

## Broadening the perimeter of SPVs' eligible borrowers

Finally, the *Decreto Competitività*[11] now allows SPVs to advance financings to corporate entities in the context of a securitisation subject to the conditions of article 1, paragraph 1-*ter* of the Italian Securitisation Law (for further details please see our previous Briefing Note). The above provision, however, expressly excluded from the perimeter of eligible borrowers any individuals and micro-enterprises (as defined in article 2, paragraph 1 of the annex to the "**EU Commission Recommendation**")[12]. The Italian Budget Law waived this restriction by stating that SPVs can advance loans to any company having a total balance sheet equal to, or higher than, Euro 2 million, thus including within the eligibility perimeter also the small and medium enterprises, regardless of the criteria set out in the EU Commission Recommendation.

[9] Legislative Decree no. 58 of 24 February 1998.
[10] For sake of clarity, we note that the ABS notes issued by the SPV under such securitisations would still need to be subscribed by qualified investors.
[11] Law Decree no. 91 of June 2014 (Official Gazette of the Italian Republic no. 144 of 24 June 2014), converted into Law no. 116 of 11 August 2014 (Official Gazette of the Italian Republic no. 192 of 20 August 2014).
[12] EU Commission Recommendation 2003/361/EC.

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