Good news for Italian securitisations now that the "Destinazione Italia" Decree has been converted into law

Italian Law Decree no. 145/2013 has been converted into law and implements substantial changes to the Italian legislative framework governing securitisations and factoring, respectively law no. 130 of 1999 ("**Law 130**") and law no. 52 of 1991 ("**Law 52**").

On 19 February 2014 the Italian Senate (*Senato della Repubblica*) approved and converted into law the so-called "*Destinazione Italia*" Decree (the "**Decree**") and on 21 February 2014 the conversion law was published in the Official Gazette of the Italian Republic[1]. Article 12 of the Decree updates the legislative securitisation framework with the intent of incentivizing investment by banks and allowing Italian small and medium enterprises ("**SMEs**") to access the funding necessary to expand their business.

Securitisations can be implemented through subscription, by the SPVs, for bonds and notes

Pursuant to the Decree, the provisions of Law 130 now apply also to securitisations carried out by special purpose vehicles ("**SPVs**") that themselves subscribe for bonds or similar notes or promissory notes (*cambiali finanziarie*) (excluding hybrid or other convertible financial instruments). Under such transactions, any reference to the assigned debtors is deemed to be referred to the company issuing the mentioned bonds, notes or promissory notes.

Furthermore, the Decree clarifies that, for avoidance of doubt, securitisations can entail the participation of a sole investor, provided that it is a qualified investor pursuant to article 100 of the Consolidated Financial Act [2].

Prior to the Decree, Italian SPVs could not themselves subscribe for bonds or other financial instruments. This amendment should therefore incentivize the creation of new SPVs investing as subscribers of financial instruments, thus expanding the corporate bonds market (including the "mini-bonds" market) [3].

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2 Legislative Decree no. 58 of 24 February 1998.

3 The term "mini-bond" refers to debt securities under Law Decree no. 83 of 22 June 2012 converted into law by Law 134/2012 (*Development Decree*) as amended by Law Decree 179 of 18 October 2012 converted into law by Law 221/2012 (*Development Decree bis*) aimed at facilitating access by SMEs and unlisted companies to capital markets as, *inter alia*, an alternative method of funding.

Securitisation notes and units/shares of investment funds (*fondi comuni di investimento*) are eligible to cover technical reserves of insurance companies and pension funds

The Decree favours the investment by insurance companies, pension funds and other welfare/insurance public entities, in:

- **notes** issued in the context of securitisations;
- **units/shares of investment funds** (*fondi comuni di investimento*) (the "**Investment Funds**") investing prevailingly in the purchase of receivables pursuant to Law 130 (for further details on Investment Funds, see below "*Securitisations carried out by Investment Funds*"); and

by amending Law no. 134 of 7 August 2012, also in:

- bonds (*obbligazioni*), promissory notes (*cambiali finanziarie*) and similar securities (*titoli similari*);
- financial instruments issued under securitisation transactions **collateralised** by the said financial instruments;
- **units/shares of Investment Funds** investing, prevailingly, in said financial instruments, even if these securities are neither listed on a regulated market or multilateral listing system, nor rated.

Investments in the above notes, units/shares and financial instruments are expressly stated to be:

- **eligible** to cover the technical reserves of **insurance companies** pursuant to art. 38 of Legislative Decree no. 209 of 7 September 2005[4]; and
- **eligible** investments for **pension schemes**, in accordance with the currently applicable legal and regulatory framework.

Mitigation of insolvency and commingling risks

The Decree strengthens the segregation effect of the securitized portfolios by permitting the opening of segregated accounts held by the servicers and other depositories.

Even before the Decree, one of the most important features of Law 130 was the statutory segregation of the securitised assets: in fact, the receivables relating to each transaction form a separate estate and no actions are permitted on such estate by any creditors other than the holders of the notes issued to finance the purchase of the securitised receivables. The Decree **extends such segregation effect** to (i) the moneys and deposits held by the servicers and sub-servicers in charge of the collection services and (ii) banks holding the transaction accounts on behalf of the securitisation SPVs (the "**Depositories**").

Accordingly:

- amounts credited on the transaction accounts are segregated and separate from the Depositories' or servicer's estate;
- **no actions** are permitted on the segregated amounts by creditors other than the noteholders or the hedging counterparties of swap agreements covering the risks on the securitised receivables / notes and other transaction costs;
- should any insolvency or pre-insolvency procedure be commenced, the sums credited on the segregated accounts, up to an amount equal to the collections received by the servicers/sub-servicers and due to the SPV, will **not form part of the servicers' estate**: any amounts credited on the segregated accounts will be repaid on a pre-deduction priority basis,

4 On 23 January 2014, the Italian insurance authority (*Istituto per la Vigilanza sulle Assicurazioni* (IVASS)) published an official communication regarding the expected changes to second level regulations (including, *inter alia*, IVASS Regulation No. 36/2011 on investments and assets covering technical provisions), intended to give full implementation to the "*Destinazione Italia*" Decree. These measures will ensure sound and cautious management and enhance the investment in these new financial instruments and, in general, in the Italian credit market.

will not be subject to suspension of payments and will be paid back to the company on whose behalf the moneys were collected, without the need to wait for any composition and/or restitutions among the creditors.

The amendments at stake are intended to be legal and economic positives for the Italian credit system and should eliminate the risk that the funds owned by the SPV and paid to it by the debtors are **commingled** with the funds of an insolvent Depository. We note, however, that the real benefit of these law changes will be tangible only once the rating agencies will eventually update their criteria taking into account this new securitisation framework.

Less formalities for trade receivables (*crediti commerciali*)

The Decree provides for simplified formalities and less onerous activities to be carried out by the assignors in trade receivables transactions. In particular:

- trade receivables assigned pursuant to Law 130 are **no longer required** to be transferred as a "pool" (*in blocco*) - this significantly simplifies the mechanics of revolving transactions, which entail frequent assignments;
- the publication in the Official Gazette of the Italian Republic is **no longer mandatory for trade receivables** – this should reduce transaction costs and enhance the efficiency of these securitisation structures;
- the assignment will be enforceable against third parties as a result of the **payment of the purchase price with an undisputable date at law** (*data certa*) as provided by Law 52 and, to this purpose, it will be sufficient to **annotate the bank account of the assignor** [5]. On the same conditions, the assignment of any existing and future receivables arising from credit agreements (*aperture di credito*), even where settled in a current account (*conto corrente*), will be enforceable, provided that the credit agreements are entered into on or prior the payment of the purchase price with an undisputable date at law;
- should the assignment of trade receivables be published in any case in the Official Gazette, the disclosure of information as to the name of the assignor, assignee and the transfer date will suffice to render the assignment enforceable against third parties.

These amendments should render more economically convenient securitisations entailing portfolios of trade receivables, conversely increasing the possibilities for securitisation by Italian SMEs, who now will have a chance to obtain liquidity through capital markets, as an alternative to the ordinary funding provided by the banking credit system and factoring financing.

Furthermore, starting from (i) the date of payment with an undisputable date (*data certa*), with respect to trade receivables or (ii) the date of publication in the Official Gazette for other types of receivables (each, a "**Ring-fencing Date**"):

- **no actions** will be permitted on the assigned receivables or cash-flows collected from the debtors, other than to satisfy the noteholders' rights and transaction costs;
- **no set-off** will be permitted to the assigned debtors, between any amounts relating to the assigned receivables against credits owed to the SPV or assignee that arise after the Ring-fencing Date;
- the assignment to the SPV will be **enforceable** against the assignor's (i) permitted assigns who have not perfected the assignment prior to the Ring-fencing Date and (ii) creditors who have not started enforcement proceedings on the assigned receivables before the Ring-fencing Date.

These amendments will strengthen and render more efficient the securitisation structures and possibly enhance consumer loan securitisations.

5 The bank account is to be annotated in accordance with art. 2 para. 1(b) of Legislative Decree no. 170 of 21 May 2004, which implemented in Italy the Financial Collateral Directive 2002/47/EC.

Less formalities *vìs-à-vìs* Italian public entities

Thus far, articles 60 and 70 of Royal decree no. 2440/1923 required heavy formalities to make the assignment of receivables involving Italian public entities as assigned debtors enforceable against the relevant public entities[6].

The Decree simplifies this matter, by stating that **no formalities, other than those set out in Law 130**, apply to Italian securitisations involving the assignment of receivables to be made enforceable *vìs-à-vìs* any public entities.

Therefore, to the extent an assignment is collateralised by receivables owed by Italian public entities, such an assignment will not be subject to additional formalities, provided that the appointment of a servicer (other than the assignor) in charge of the collection and payment services is (i) **published in the Official Gazette** and (ii) **notified by way of registered mail with return receipt** to the relevant public administration entities. On the same conditions, the assignment of receivables deriving from credit agreements (*aperture di credito*) even where settled in a current account (*conto corrente*), will be enforceable by the SPVs, in accordance with the agreed contractual terms or in any case with notice of at least 15 days.

Risk of insolvency of the assigned debtors

Art. 65 of the Italian Bankruptcy Law[7] states that payments made in the 2 years preceding the declaration of insolvency are ineffective as against the company's creditors, if the relevant payment was due on or after the insolvency declaration.

The Decree states that **article 65 does not apply** to payments made by the assigned debtors to the SPV or assignee.

Securitisations carried out by Investment Funds

The Decree regulates transactions carried out through the assignment of assets to **Investment Funds**, providing that:

- for such securitisations, the collection and payment services can be carried out by the asset manager (*società di gestione del risparmio - SGR*) (the "**Asset Manager**") already managing the Investment Fund (as opposed to appointing third-party Servicers): this amendment allows the transaction to remain subject to the Bank of Italy's supervision, without increasing the transaction costs, as would be the case if a third-party Servicer had to be appointed. Therefore, if the Asset Manager is appointed to act as "collection agent", it will be responsible for the collection and payment services and will have the express obligation, as servicers have under Law 130, to verify that the transactions comply with the applicable laws and the prospectus;
- the assignment of receivables to the Investment Fund is subject to articles 4 and 6 of Law 130 (and the other provisions of Law 130 to the extent compatible): this means that **article 58** of the Italian Consolidated Banking Act [8] will apply, by effect of which (i) the assignee must give notice of 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 securing the receivables (without the need for further registrations or annotations);
- where the assignment of receivables relates to receivables deriving from bank financings having a maturity of more than 18 months, the favourable tax[9] regime provided for by articles 15, 16 and 19 of Presidential Decree no. 601/1973 continues to apply.

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[6] Royal decree no. 2440/1923 requires that, in the context of securitisations where public entities are assigned debtors (i) the assignment must be executed by way of a public deed (*atto pubblico*) or by way of a notarised private deed (*scrittura privata autenticata*); (ii) the relevant public entity needs to be notified of the assignment by means of a Court Bailiff (*ufficiale giudiziario*); (iii) to the extent the assigned receivables relate to payments to be carried out by more than one public entity, each entity must be notified of the assignment.

7 Royal Decree no. 267 of 16 March 1942

[8] Italian Legislative Decree no. 385 of 1 September 1993.

[9] The 0.25% *imposta sostitutiva* originally applied on the bank loans covers certain documentary taxes possibly due in relation to the facility agreement and/or other related documents.

New assets for collateralised bonds

The Decree supports the investment by banks in new types of assets, through the issuance of "**collateralised bonds**" (*obbligazioni bancarie collateralizzate*) backed by:

- bonds (*obbligazioni*), similar securities or promissory notes (*cambiali finanziarie*);
- claims secured by **mortgages over ships** (*ipoteca navale*);
- receivables *vìs-à-vìs* **SMEs**;
- claims deriving from **leasing** or **factoring** contracts;
- **notes** issued in the context of securitisations transferring receivables of the same nature as those listed above, which can be assigned also by companies being part of a banking group.

The Decree provides that a further decree by the Italian Ministry of Economy and Finance will identify the range and types of assets subject of these collateralised bonds (*obbligazioni bancarie collateralizzate*) and their issuance, so to diversify these instruments from the covered bonds (*obbligazioni bancarie garantite*) already regulated under article 7-*bis* of Law 130.

Other provisions

The SMEs guarantee fund can guarantee for the Asset Managers that, on behalf of investment funds (*fondi comuni di investimento*), subscribed for "mini-bonds"

The guarantee provided under the fund established by art. 2, paragraph 100, letter a) of Law no. 662 of 23 December 1996, can now be granted in favour of the Asset Managers acting in the name and on behalf of the investment funds (*fondi comuni di investimento*), who subscribed for "mini-bonds" or similar securities issued by the SMEs. Such guarantee will be granted for single or multiple transactions.

The Decree provides that a further decree by the Ministry of Development and Ministry of Economy and Finance will identify the requirements, limits and other features of these transactions and of the guarantee fund.

The Italian "floating charge" known as "*Privilegio Speciale*" now available in connection with bond issuance

Amongst other measures adopted to promote alternative financing and liquidity to SMEs, the Decree amends significantly Article 46 of the Consolidated Banking Act, by extending the scope of use of the "***Privilegio Speciale***"[10]. Further to the Decree, a "*Privilegio Speciale*" can now be granted also to secure bonds and similar securities issued by the corporate entities under article 2410 *et seq*. or 2483 of the Italian civil code. The bonds or similar securities must have a medium- or long- term maturity date and the subscription for and transfer of the bonds or similar securities must be reserved to qualified investors (as the term is defined in article 100 of the Consolidated Financial Act).

The Decree further provides that if the "*Privilegio Speciale*" is granted in connection with a bond issue, it may be granted either for the benefit of the noteholder(s) subscribing for the bonds or similar securities, or for the benefit of the noteholder(s) or the noteholders' representative acting also as security agent for the noteholders.

[10] This is a type of security, in some respect analogous to the floating charge, which allows a company to grant security over certain of the moveable assets it uses for its business (such as machinery, raw materials, work in progress, stocks, etc) without depriving the company from the possession of those assets, i.e. there is no requirement to deliver the assets to the security beneficiary.

Tax provisions

The option for the application of *imposta sostitutiva*

The Decree amended article 17 of Presidential Decree no. 601 of 29 September 1973 by providing that the 0.25% *imposta sostitutiva* on medium and long term bank loans becomes payable upon exercise of a specific option in the relevant facility agreement. *Imposta sostitutiva* is levied on loans from EU banks, Italian banks or Italian branches of non-Italian banks at the rate of 0.25% on the amount of the loans. The tax is paid directly by each lending bank through a specific tax return to be filed with the registration tax office of reference. In case of non-Italian lenders, the tax office of reference is Rome.

The option for the *imposta sostitutiva* entails that no other ordinary documentary taxes (other than those triggered by subsequent transfers of positions under the loan) will become payable with reference to the loan and related security documents (e.g. registration, mortgage taxes and stamp duties).

Where the option for the *imposta sotitutiva* is not exercised, the loan and the security documentation remain subject to ordinary documentary taxes.

The introduction of a specific option for the application of *imposta sostitutiva* emphasizes the favourable nature of such regime which franks the payment of the ordinary taxes, where more convenient (e.g. when the loan is secured by hard guarantees), thereby allowing a tax saving.

Extension of the *imposta sostitutiva* regime to bonds issuance

By introducing article 20-bis to the Presidential Decree no. 601 of 29 September 1973, the Decree extends the *Imposta sostitutiva* regime also to finance transactions structured as issuance of bonds or other debentures similar to bonds pursuant to article 44, para. 2 (c) of Presidential Decree no. 917 of 22 December 1986.

The application of the *imposta sostitutiva* regime is effective following a specific option exercised in the relevant resolution of issuance or equivalent authorization measure. The tax, applied at 0.25% on the value of the securities, is due from the financial intermediaries in charge of the placement and marketing activities or, absent such intermediaries, from the issuer. The issuer remains jointly and severally liable with the financial intermediaries for the payment of the *imposta sostitutiva.*

The option for the *imposta sostitutiva* implies that no other ordinary documentary taxes (e.g. registration, mortgage taxes and stamp duties) will become payable in relation to the security documents, including those triggered by any transfer of the bonds or other debentures similar to bonds.

The new regime will foster the issuance by unrated issuers of security bonds, so far encumbered by the significant tax burden on bond securities.

Exemption from WHT on interest payments on bonds made to investment funds

Through the introduction of para. 9-*bis* to article 32 of the Decree Law no. 83 of 22 June 2012, the Decree provides for an exemption from the 20% withholding tax applicable on interest and another remunerations of bonds and debentures similar to bonds, and on finance bills, which do not qualify for the regime provided for by Legislative Decree no. 239 of 1 April 1996, when the underwriter of those securities is a Investment Funds reserved to qualified investors whose assets are mainly invested in such securities (e.g. specialised bond funds).

This change introduces an exemption from withholding tax on payments on bonds where the issuer is a SME and the investor is a specialised bond fund. The changes to the law will facilitate the issuance of bonds by companies, other than banks and listed companies, with the intent of expanding the bond market amongst institutional investors and to foster the raising of funds.

Collection of tax bills by off-setting commercial payables of the public administration toward companies.

A decree of the Ministry of Economy and Finance, to be issued within 90 days from the conversion into law of the Decree, will establish the procedures to permit Italian enterprises holding receivables[11], due and payable to them by the public administration because of supplies, tenders or services, to offset the relevant amounts against tax bills of equivalent or lower amounts.

11 The receivables must be certified in compliance with the procedures provided for by decree of the Ministry of Economy and Finance 22 May 2012 and 22 June 2012.

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