Banks Focus Team

Capital Markets Focus Team

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2019 Budget law: New amendments to the Italian securitisation law

The **2019 Budget Law** has amended the Securitisation Law[1] in the following ways:

- **A.** removal of certain restrictions on **CDOs**[2];
- **B.** clarifications on the rules governing the **direct lending** by securitisation vehicles ("**SPVs**");
- **C.** clarification on the rules governing **synthetic securitisations** (i.e., securitisations carried out through the granting of a loan by the SPV to the originator of the receivables, rather than through a transfer of the receivables themselves to the SPV); and
- **D.** introduction of a potential new type of securitisation, i.e. **securitisation of proceeds**[3] from the ownership of real estate, registered movable assets and other *in rem* or personal rights[4] over those assets.

This newsletter summarises certain **key aspects** of this new legislation.

A Certain restrictions on Italian CDOs lifted

Before the amendment, **securitisations of bonds** issued by Italian limited liability companies (S.r.l.) and joint-stock companies (S.p.A.) were subject to restrictions deriving from Italian corporate law.

In fact, bonds issued by limited liability companies may be subscribed only by professional investors subject to prudential supervision,[5] which Italian securitisation vehicles do not qualify as.

Furthermore, the amount of bonds that joint-stock companies may issue is limited by law,[6] although the limit may be exceeded if the bonds are listed on a regulated market or a multilateral trading market.[7]

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1 Law No. 130 of 30 April 1999.

2 Art. 1, para. 1-*bis* of the Securitisation Law.

3 *Proventi.*

4 *Diritti reali o personali.*

5 *Investitori professionali soggetti a vigilanza prudenziale,* as per Art. 2483, para. 2, of the Civil Code.

However, structuring a CDO would be extremely complex if listing the underlying bonds was a pre-condition to completing the transaction. Furthermore, the underlying assets of standardised securitisations may not include securities, with the sole exception of unlisted corporate bonds[8].

Now, as long as the securitisation notes are subscribed by qualified investors[9]:

- the restrictions under Art. 2483, para. 2, of the Civil Code do not apply to SPVs that subscribe bonds issued by limited liability companies; and
- the limit under Art. 2412 of the Civil Code does not apply to unlisted bonds issued by joint stock companies and subscribed by an SPV if the relevant securitisation notes are listed.

B Rules on direct lending by SPVs now clearer

SPVs are allowed to grant loans, subject to certain conditions[10].

It has now been clarified that:

(a) SPVs may grant loans also in the context of securitisations of receivables; as a consequence, it may also be argued that SPVs may carry out securitisations of direct loans only; and

(b) SPVs may not grant direct loans to individuals or businesses with an annual total balance sheet of less than EUR 2 m (the Securitisation Law previously referred to microenterprises).

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[6] Twice the amount of the company's share capital, legal reserve and available reserves reported in the most recently approved financial statements as per Art. 2412, para. 1, of the Civil Code.

[7] Art. 2412, para. 5, of the Civil Code.

[8] Regulation (EU) 2017/2402, which sets out the framework for simple, transparent and standardised securitisations.

[9] I.e., investors that meet the requirements under Art. 100 of Legislative Decree No. 58 of 24 February 1998.

[10] Art. 1, para. 1-*ter*, of the Securitisation Law stipulates that: (a) the borrowers must be identified by a bank or a financial intermediary; (b) securitisation notes backed by direct loans granted by SPVs may be purchased only by qualified investors; and (c) banks/financial intermediaries that identify borrowers must retain an economic interest in the transaction (as better specified in the Bank of Italy regulations).

C Synthetic securitisations

The amended Art. 7 of the Securitisation Law clarifies the following:

- synthetic securitisations result in a transfer of the risk relating to the underlying receivables from the originator/borrower to the SPV/lender, although legal ownership of the receivables remains with the originator/borrower;
- the originator/borrower may segregate the receivables, together with the rights and assets securing repayment thereof, to satisfy the rights of the SPV/lender;
- the originator/borrower may create a pledge in favour of the SPV/lender over the rights and assets mentioned above (we believe also over the receivables, although this is not expressly mentioned) to secure loan repayment; and
- agreements relating to synthetic securitisations may oblige the originator/borrower to transfer all funds collected from the underlying receivables to the SPV/lender.

Some of the above features have already been incorporated into various synthetic securitisations carried out so far: the real change would appear to be that originators/borrowers may now segregate the receivables and the related rights and assets.

The Italian Ministry of Finance should, by 1 April 2019[11], define how this is to be carried out (and the effects thereof) and to clarify how originators/borrowers may pledge the underlying receivables and the connected rights and assets – including when the originator/borrower is subject to insolvency proceedings. The ministry should also clarify when the management and collection of the underlying receivables vests with the SPV/lender.

We expect that this revised segregation regime will ensure a more efficient use of synthetic securitisations by banks and investors, which might be keen to apply it, for instance, to loan portfolios that restrict transferability of the receivables.

Securitisation of proceeds from real estate and registered movable assets

Under the amended Art. 7, the Securitisation Law applies (to the extent compatible) to securitisations of proceeds (not receivables) arising from: (a) the ownership of real estate and registered movable assets, and (b) other *in rem* or personal rights[12] over the assets. Proceeds could include cash flows from (non-identified) future leases and sale agreements.

Unfortunately, this new legal provision is poorly drafted and thus it is not possible at the moment to provide a definitive and univocal interpretation thereof. In particular, its wording could arguably be taken to mean that:

(i) SPVs may purchase and own real estate, registered movables assets and other *in rem* or personal rights over the assets to carry out a securitisation of the proceeds therefrom[13]; or

(ii) owners of real estate, registered movable assets or other *in rem* or personal rights over the assets may carry out a true-sale securitisation (by transferring the proceeds deriving from such assets or rights to an SPV) or a synthetic securitisation (through a loan granted by an SPV, and the risk connected to the proceeds transferring to the SPV/lender).

In addition, **significant issues and doubts remain**, for example:

- whether SPVs may purchase real estate and registered movable assets given that: (a) their corporate purpose remains limited to purchasing receivables[14]; and (b) the Securitisation Law continues to require that potential investments in assets mortgaged in favour of a SPV should be carried out indirectly through a ReoCo (therefore apparently not allowing ownership of real estate and

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[12] In addition to property (*proprietà*), *in rem* rights include: (a) surface rights (*diritti di superficie*); (b) usufruct rights (*diritti di usufrutto*); (c) rights of use (*diritti d'uso*); (d) habitation rights (*diritti di abitazione*); and (e) easement rights (*servitù*). Personal rights pertaining to real estate may arise from: (a) lease agreements (*locazioni*); (b) commodatum (*comodato*); and (c) antichresis (*anticresi*).

[13] According to this interpretation, the securitisation would be similar to the real estate securitisations carried out some years ago by the State (SCIP) and other public entities. However, SPVs have a limited corporate object, and it is uncertain whether they could incur risks connected with the real estate business.

[14] Art. 3, para. 1, of the Securitisation Law.

registered movable assets directly by the SPV)[15];

- how the segregation in favour of noteholders will work in practice, what assets and rights it will cover and how it may be published and made enforceable against third parties; and
- how real estate and registered movable assets purchased by an SPV or owned by the entity carrying out a securitisation of the proceeds therefrom should be treated from an accounting and tax perspective.



In the absence of further guidance, market players might thus find it difficult to implement this new potential kind of securitisation.

[15] Art. 7.1, para. 4, of the Securitisation Law.

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