Banks Focus Team

Capital Markets Focus Team

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"Development Decree": new amendments to the Italian Securitisation Law

Law Decree No. 34 of 30 April 2019 (the so-called *Decreto Crescita*, or "**Development Decree**") has introduced some further, significant amendments to the "Italian Securitisation Law"[1] aimed at, *inter alia*:

- fostering the transfer of "unlikely to pay" ("**UTP**") receivables;
- introducing changes to and clarification on the legal and tax regime of ReoCos and LeaseCos established for the sole purpose of purchasing, managing and increasing the value of the assets (usually real estate assets) securing the securitised receivables; and
- clarifying the legal framework applicable to the new type of securitisation of the proceeds (rather than the receivables) arising from the ownership of real estate assets, registered movable assets and other *in rem* and personal rights deriving from such assets.

The Development Decree came into force upon publication in Italy's Official Journal and is in the process of being converted into law by Parliament, which may entail changes. To the extent Parliament should not convert the Development Decree into law within 60 days (or 120 days, in case of prorogation by Government), the Development Decree will automatically lapse with retroactive effect.

This newsletter summarises the key amendments to the Italian Securitisation Law introduced by the Development Decree.

A. UTP receivables

The amended Art. 4, para. 4-*ter* of the Italian Securitisation Law purports to promote the transfer of UTP receivables by allowing the transfer of outstanding loan commitments to banks or financial intermediaries enrolled in the Register of Financial Intermediaries pursuant to Art. 106 of Italian Legislative Decree 385/1993 (the "**Italian Banking Act**"), also permitting the retention of the bank account at the transferor bank. Indeed, this avoids the termination of the credit facility agreements and guarantees the continuity of the transferor's loan commitments.

[1] Law No. 130 of 30 April 1999. In respect of previous amendments, please refer to the following newsletters: "2019 Budget Law: new amendments to the Italian securitization law"; and "Tax treatment of the ReoCos: some clarification from the Italian tax authority".

The amendments to Art. 4, para. 4-*ter*, of the Italian Securitisation Law have essentially codified the market practice, whereby outstanding loan commitments are assigned (by assigning the contract out of which the commitment and assigned receivables arise) to a fronting bank. The fronting bank will advance the outstanding commitment and then accelerate the receivables (in its capacity as creditor/lender of record and party to the original contract).

However, it is noted that the currently envisaged structure will require to address and regulate contractually the relationships between the fronting bank and the securitisation SPV, especially in respect of the management of the concurrent claims and rights of the fronting bank and the securitisation SPV *vis-à-vis* the assigned debtor (i.e. in the event that the fronting bank disburses any loan amount to the assigned debtor and entirely bears the risk of such advance). This is likely to be managed by way of an *ad hoc* waterfall payment.

B. Changes to the legal regime of ReoCos and LeaseCos

The Development Decree has introduced certain clarifications and innovations to the legal regime of the so-called "ReoCos" and "LeaseCos"[2] .

Art. 7.1, paras. 4 and 5, have been amended to:

(a) clarify that: (i) it is possible to use more than one ReoCo or LeaseCo in the context of a single securitisation transaction, and that, in such cases (ii) a ReoCo or LeaseCo may control other ReoCos/LeaseCos. This will allow investors to place different assets in different real estate companies, thus *i.e.* reducing the risk of "cross-infection";

(b) clarify that ReoCos and LeaseCos may acquire assets by assuming all or part of the original debt *vis-à-vis* the securitisation SPV;

(c) provide that any transfer of assets to a ReoCo or LeaseCo may be carried out also pursuant to Art. 58 of the Italian Banking Act (i.e. publication by the supporting SPV of the transfer in the compentent companies register and the Official Journal). This may represent a significant simplification of the formalities applicable to the transfer

[2] ReoCos are real estate companies which may be set up, in the context of securitisations of collateralised distressed receivables, in order to purchase, manage and develop (in the exclusive interest of the securitisation) the real estate and other assets forming the receivables' collateral. LeaseCos are real estate companies which may be set up, in the context of securitisations of distressed financial lease receivables, in order to purchase (in addition to the leased asset) the financial lease agreement or the legal relationship arising from the termination of the financial lease agreement.

of assets. However, it is unlikely that such amendment will be interpreted to mean that the formalities specifically applicable to the transfer of real estate assets (i.e. registration in the Italian Real Estate Registry) need not be fulfilled. Indeed, the Development Decree does not include any specific provision on this matter but it refers (in Art. 7.1, para. 4-*ter*) to the new tax regime for registration and mortgage taxes in respect of transfers of real estate and registered movable assets. It would thus be advisable – pending further clarification on the new provisions – to continue to comply with the additional formalities associated with these transfers, including transfers of assets pursuant to Art. 58 of the Italian Banking Act; and

(d) clarify that the segregation regime (in favour of the noteholders) applies not only to the amounts that arise from the management of the assets and the connected rights, but also to the assets and the connected rights themselves.

In addition, Art. 7.1, para. 5 has been amended to allow also financial intermediaries (not only banks) to consolidate LeaseCos in their balance sheets.

C. Changes to the tax regime of ReoCos and LeaseCos

The new Art. 7.1, para. 4 of the Italian Securitisation Law – according to which any amount, asset and ancillary rights constitute a cover pool of the supporting SPVs – removes any doubts on the applicability, also to the supporting SPVs, of the "tax neutrality" regime. It follows that any cash derived from the pool of receivables acquired by the supporting SPV flows through the securitisation SPV directly to the noteholders, without any direct tax leakage at the level of the supporting SPV. This new article thus formally sets out a tax treatment that is coherent with the treatment of securitisation SPVs, as the proceeds realised by these supporting SPVs are exclusively for the benefit of the noteholders.

Furthermore, four paragraphs have been added to Art. 7.1 to address the taxation of transactions that involve supporting SPVs (paras. 4-*bis*, 4-*ter*, 4-*quater* and 4-*quinqies*). The new provisions have been introduced to guarantee the tax neutrality of such transactions, also in respect of indirect taxes, similar to the tax regime applicable to the SPVs incorporated pursuant to the Italian Securitisation Law.

In brief:

(a) transfers (for any reason) of assets and ancillay rights to supporting SPVs are subject to registration, mortgage and cadastral taxes at fixed amount; and

(b) the subsequent transfer of those assets and ancillary rights to taxable persons or undertakings for collective investment are subject to registration, mortgage and cadastral taxes at fixed amount, provided that the purchaser declares (in the transfer deed) that it intends to re-transfer such assets and ancillary rights within five years from the first purchase date.

D. Further provisions on the securitisation of proceeds from real estate assets and registered movable assets

A new Art. 7.2 has been introduced, on the securitisation of the proceeds arising from the ownership of real estate, registered movable assets and other *in rem* and personal rights deriving from such assets.

Lawmakers have now addressed most of the original doubts concerning the previous wording of the Italian Securitisation Law in respect of the securitisation of proceeds arising from the ownership of real estate and registered movable assets.

The Italian Securitisation Law now sets forth that:

(a) securitisation SPVs may now purchase – and have title to – real estate, registered movable assets and other *in rem* or personal rights over the assets and carry out a securitisation of the related proceeds;

(b) securitisation SPVs incorporated for the purposes of carrying out securitisation of the proceeds from real estate assets and registered movable assets shall exclusively purport such transactions, but no other type of securitisation transactions;

(c) the assets and the rights which are intended to satisfy the rights of the noteholders and the other creditors of the real estate and movable assets proceeds securitisation, shall be expressly identified and segregated from the other assets of the securitisation SPV, including and any other assets (if existing) securitised by the same SPV in the context of different securitisation transactions;

(d) attachment and foreclosure proceedings on segregated assets and rights may be initiated only by (i) noteholders of the securitisation, (ii) further lenders disbursing loans to the SPVs that carry out the securitisation, and (iii) hedge counterparties; and

(e) SPVs that carry out securitisations must select an adequately competent entity, having all licenses and authorisations according to the applicable

law for the management of the securitised assets[3], in the interest of the noteholders.

However, pending clarification and interpretations of such new amendments, doubts remain in respect of whether the entity managing the securitised assets must necessarily be a licensed entity (such as an SGR – *società per la gestione del risparmio*) or whether any real estate company, competent and skilled as to the management of real estate assets, would be able to perform such management.

E. Concluding remarks

The amendments introduced by the Development Decree broadened the scope of the Italian Securitisation Law and the use of securitisations in general. This represents a clear step forward in addressing the needs of market players in Italy.

As concerns the securitisation of proceeds from real estate and registered movable assets:

(a) the reference to "further lenders" (*altro finanziatore*) of the securitisation SPVs seems to suggest that such SPVs can now avail themselves of third-party funding. This would represent a significant advantage, considering that securitisation SPVs are likely to require funding to support their working capital and/or running cost when carrying out these types of securitisations; and

(b) the possibility that the relevant assets may be managed, eventually, by a real estate company rather than a licensed entity (such as an SGR), may lead to significantly greater flexibility for real estate investments in Italy.

However, further flexibility in favour of market participants, specifically in respect of UTP receivables, could have also been achieved by providing a structure envisaging assignment of loan contracts also to securitisation SPVs (and not exclusively to banks or financial intermediaries, as currently set forth following the amendments introduced by the Development Decree).

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[3] Art. 7.2 of the Italian Securitisation Law, in fact, expressly refers, as applicable, to the provisions under Art. 7.1, para. 8, first sentence of the Italian Securitisation Law, setting out that in case of conversion of the receivables, by the securitisation SPV, into equity and/or quasi-equity, such assets resulting from the conversion, shall be managed by an adequately competent entity, having all licenses and authorisations in accordance with the applicable law.

This would be particularly beneficial in such cases where the loan receivables are crystallised (i.e. there are no outstanding drawdown obligations on the lender) and the relevant loan contract would be transferred with the sole purpose of accelerating the underlying loan receivables. The current Italian Securitisation Law appears not to envisage this possibility yet.

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