Recent amendments to the Italian Securitization Law introduced by the 2019 Italian Budget Law

1. Introduction

Italian Law no. 145 dated 30 December 2018 (hereinafter, "**2019 Budget Law**") has introduced certain amendments to the Italian law on securitizations (law no. 130 dated 30 April 1999, the "**Securitization Law**"). In particular, Article 1, paragraphs 1088, 1089 and 1090 of 2019 Budget Law introduced some clarifications and additions to certain articles of the Securitization Law, which had already been modified by previous reforms[1].

This new reform mainly aims at: (i) fostering the financing of small and medium-sized companies by securitization vehicle companies ("**SPV**"), both through the underwriting of debt notes by the SPV and the advancing of loans directly by the SPV; (ii) introducing a new scheme of securitization over immovable assets, which is now regulated under Article 7 (*Other transactions*); and (iii) clarifying certain aspects of previous pieces of legislation relating to the so called "sub-participation" securitization transactions (Article 7 of the Securitization Law).

2. Amendments introduced by the 2019 Italian Budget Law

The main innovations introduced by such reform are briefly summarized below:

a) Article 1, paragraph 1-*bis*, of the Securitization Law: derogation to the restrictions on the issuance of debt notes where the notes are subscribed by an SPV

The newly introduced provisions aim at expanding and facilitating the possibility introduced in 2014[2] for the SPV to underwrite or purchase certain types of bonds (*i.e.*, debt notes or similar notes as well as financial papers). In this respect, where the notes are underwritten by an SPV, certain restrictions regarding the issuance of the notes set forth under the Italian Civil Code have now been lifted.

In particular, subject to the investors in the notes issued by the SPV being qualified investors (as defined under Article 100 of the Financial Consolidated Act (legislative decree no. 58 dated 24 February 1998)):

(i) certain restrictions provided under Article 2483, second paragraph, of the Italian Civil Code[3] in respect of the underwriters of the bonds and their liabilities *vis-à-vis* non-qualifying investors have been lifted; and

---

[1] See Legislative Decree no. 145 dated 23 December 2013, converted with amendments by law no. 9 dated 21 February 2014 and Legislative Decree no. 91 dated 24 June 2014, converted with amendments by law no. 116 dated 11 August 2014. For sake of completeness, the Securitization Law has been recently amended by Legislative Decree no. 50 dated 24 April 2017, converted with amendments by law no. 96 dated 21 June 2017. The 2017 reform has introduced certain new provisions – which have not been amended by 2019 Budget Law – aiming at facilitating the assignment of non-performing loans (NPLs) by banks that we have already analyzed under the newsletter named "*Modifiche alla legge sulla cartolarizzazione dei crediti*" available at the following site http://www.gop.it/doc_pubblicazioni/673_otfkyjp4wq_ita.pdf.

[2] Paragraph 1-*bis* has been added by letter a), paragraph 1, Article 12 of the Legislative Decree no. 145 dated 23 December 2013, as modified by the conversion law no. 9 dated 21 February 2014.

[3] According to Article 2483, second paragraph, of Italian Civil Code, in case a limited liability company issues debt notes (i) such notes may be subscribed solely by professional investors under prudential supervision (*investitori professionali soggetti a vigilanza*

(ii) the requirement for the bonds to be listed provided for under Article 2412 of the Italian Civil Code[4] can now be satisfied also by way of listing of the sole notes issued by the SPV in the framework of the securitization.

The aforesaid amendments seems to facilitate the financing of small and medium-sized Italian companies through the issuance of debt capital (including the issuance of "*minibonds*", whose regulation has been amended several times over the past years).

b) Article 1, paragraph 1-*ter*, of the Securitization Law: amendments to the micro enterprises lending ban and the so called "mixed" securitizations

Article 1, paragraph 1-*ter* of the Securitization Law has been firstly introduced in 2014, providing SPVs with the possibility of advancing loans and, consequently, widening the available sources of finance alternative to the bank credit. SPVs, however, were prevented from advancing loans to physical persons and micro enterprises[5].

In such respect, the micro enterprises lending ban has now been partly lifted by the amendments to such paragraph introduced by 2019 Budget Law. In particular, the previous restriction has been replaced by a ban to lend to enterprises having an overall balance sheet lower than Euro 2,000,000; consequently, under the current legislation, an SPV cannot advance loans in favor of such enterprises as well as in favor of physical persons while loans may be advanced by an SPV in favor of any other beneficiary.

In addition to the above, the 2019 Budget Law clarified that an SPV may both advance loans, according to Article 1, paragraph 1-*ter* of the Securitization Law, and purchase receivables, according to the traditional scheme of securitization, in the context of the same securitization transaction (so called "mixed" securitizations).

c) Article 7, paragraph 1, letter a), of the Securitization Law: the so called "sub-participation" in the context of securitization

With reference to Article 7 of the Securitization Law, the 2019 Budget Law has both amended paragraph 1, letter a) and added the new paragraphs 2-*octies* and 2-*novies*, regarding a specific scheme of securitization (so called, "sub-participation" scheme).

Such scheme of securitization transactions provides for the issuance of notes by the SPV in order to finance the advance of a loan to an entity who shall repay such loan out of the collections deriving from a certain portfolio of claims, which is identified at the onset of the securitization and remains owned by such entity (departing from the "traditional" or "true sale" scheme of securitization, which provides for the transferring of the claims to the SPV).

---

prudenziale), and (ii) in case of transferring of such notes, the transferor shall guarantee the debtor's solvency solely in favor of those transferee which are not professional investors nor member of the same company.

[4] According to Article 2412 of the Italian Civil Code, the company shall issue notes for a total amount lower than twice the share capital, the legal reserve and the available reserves resulting from the latest approved financial statement. Such restrictions may be lifted in case: (i) the notes exceeding the limits are subscribed by professional investors under prudential supervision (*investitori professionali soggetti a vigilanza prudenziale*), (ii) the notes are secured by a first range mortgage over real estate assets owned by the company; (iii) the notes are whether listed on regulated markets or multilateral trading facilities or securities which give the right to purchase or underwrite shares.

[5] According to Article 2, paragraph 1, of the annex to the European Commission Recommendation 2003/361/EC dated 6 May 2003, a micro enterprise is defined as a company employing less than 10 people and having an annual turnover or an overall balance sheet lower than EUR 2 million (*un'impresa che occupa meno di 10 persone e realizza un fatturato annuo o un totale di bilancio annuo non superiori a 2 milioni di euro*).

In Italy, such transactions have been rarely used in practice, since, on the one hand, the bond between the securitized claims and the relevant loan granted by the SPV has always been considered ineffective and, on the other hand, the rules on segregation (*segregazione*) did not appear to be applicable to such claims (in particular, in case of bankruptcy of the borrower).

In such respect, in order to probably attempt the re-launch of this scheme of transaction, the 2019 Budget Law clarifies certain features of the previous regulation, and, precisely:

(i) the amended provision sets out that the borrower can segregate (*segregare*) the claims, as well as the rights and assets securing them, by way of example, creating a pledge over such claims or assigning in favor of the SPV the proceeds arising from the same; and

(ii) provisions on asset segregation shall be further implemented by means of one or more ministry decree to be issued within 90 days from the entry into force of the 2019 Budget Law. Such decrees shall set out, among other things, the assets and the rights being able to be segregated (*segregati*) as well as the legal effects of such segregation (*segregazione*), also in case the relevant borrower becomes subject to an insolvency proceeding, and the possible assignment to the SPV of the management and administration of the claims.

d) Article 7, paragraph 1, letter b-*bis*, of the Securitization Law: the securitization of "incomes" (*proventi*) deriving from immovable assets

In addition to the above, the 2019 Budget Law has also amended Article 7 of the Securitization Law introducing a new type of securitization over real estate assets. In particular, a new sub-paragraph "1-*bis*" has been introduced under Article 7, paragraph 1, providing for the securitization of the incomes (*proventi*) deriving from the ownership of immovable assets (as well as registered movable assets and rights *in rem* or personal rights over such assets).

The wording of the provision is pretty concise and does not exactly specify the meaning of the word "incomes", which, by the way, is not neither defined nor utilized in other sections of the Securitization Law; stretching the scope of application of such word, this securitization transactions may be deemed to include the cash flows arising out of both the rental (*messa a reddito*) and the disposal (*dismissione*) of the assets[6], along the lines of the first securitization transactions over public immovable assets during the early 00's (so called, "SCIP" securitizations).

Notwithstanding the above, as already pointed out, the wording of the provision is very concise and, consequently, neither the limits of such type of transactions nor the discipline regarding the segregation of the relevant assets have been clearly set.

3. Preliminary considerations

Even if the efforts of the Legislator to incentivize structured finance in Italy can be favorably considered, certain uncertainties seem to remain with respect to the newly introduced rules on securitization. In particular, it is worth noting the following:

[6] By way of background, in the early '00s, a set of rules on securitization transactions over public immovable assets was introduced in the Italian legislation (so-called "*SCIP*" securitization). Such rules, however, provided a legal framework expressly designed for certain specific structured public finance transactions and, so far, the Italian legal system lacked general rules on the securitization of immoveable assets.

a) **issues about the so called "sub-participation" transactions**: as already mentioned above, the 2019 Budget Law has not clearly defined such scheme of transaction, since the relevant amendments have only set out certain examples of segregation (*segregazione*) of such claims. In addition to the above, further legislation on the matter is still to be issued. As a consequence, the scope of the provision it is not generally clear; by way of example, it is not clear whether the assets involved in the transaction must be segregated (*segregazione*) or not.

b) **segregation of the assets with reference to the securitization of "incomes" (*proventi*) deriving from immovable assets**: the amendments introduced under Article 7, paragraph 1, letter b-*bis* regarding the securitization of the "incomes" (*proventi*) deriving from immovable assets are particularly concise and, currently, the issuance of further secondary rules aiming at specifying the scope of such provision is not envisaged. Therefore, certain interpretative doubts remains in relation to such scheme of securitization. In particular, it is not clear whether the word "incomes" (*proventi*) only refers to future claims concerning agreements already executed (preliminary sale and purchase agreements, lease agreements etc.) or such word may generally include further cash flows deriving from the execution of future agreements concerning the securitized pool of assets. In addition, it is unclear how the relevant assets can be segregated (*segregati*), so that such assets are not subject to enforcement by third creditors which are not involved in the transaction.

In addition to the above, it is worth noting that paragraphs 2-*quater* and ff. of the Securitization Law have not been amended by the recent reform[7]. The scope of such provision it is still not clear and may be better determined, as well as the other cases involved in this reform.

[7] Such provisions provides that (i) Securitization Law also applies to those securitization of receivables deriving from the advancing of one or more loans by the company issuing the notes (*operazioni di cartolarizzazione di crediti sorti dalla concessione di uno o più finanziamenti da parte della società emittente i titoli*), and (ii) in case of transactions involving loans advancing (*operazioni realizzate mediante concessione di finanziamenti*), Articles 1, 2, 3, 5, 6 and 7 apply, to the extent they are compatible.

GIANNI·ORIGONI
GRIPPO·CAPPELLI
PARTNERS

This document is delivered for informative purposes only.

It does not constitute a reference for agreements and/or commitments of any nature.

For any further clarification or research please contact:

Giuseppe De Simone
Partner
Banking & Finance

Rome
+39 06 478751
gdesimone@gop.it

Stefano Agnoli
Partner
Banking & Finance

Rome
+39 06 478751
sagnoli@gop.it

Domenico Gentile
Counsel
Banking & Finance

Milan
+39 02 763741
dgentile@gop.it

Alfonso Parziale
Associate
Banking & Finance

Rome
+39 06 478751
aparziale@gop.it

gop.it