

New rules improve borrowers' access to capital markets

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On 23 December 2013 a law decree (so called "Destinazione Italia") has been published on the Italian Official Gazette (the "**Law Decree**"), entered into force on 24 December 2013, which provides, *inter alia*, for: (i) the introduction of amendments to the tax regime applicable to bonds emissions, reducing the tax cost of bonds emissions and (ii) the extension of certain provisions of Law 130/1999 (the "**Securitization Law**") to areas which were not originally covered.

According to Italian Law, the Law Decree is immediately effective but will then have to be converted into law by the Italian Parliament (which is entitled to make amendments and integrations) within the following 60 days.

The aim of this note is to provide a brief overview of the main provisions included in the Law Decree with respect to the tax regime applicable to bonds emissions and the Securitization Law.

1. Lower taxation of securities guaranteeing bonds emissions

According to the Law Decree, the benefit of the substitutive taxation regime¹ (the "**Imposta Sostitutiva**") – which was applicable only to guarantees securing loans having a tenure longer than 18 months – will be extended to the guarantees of any kind, granted by any entity, securing emissions of bonds or similar securities, irrespective of the timing of granting of the relevant guarantee, as well as to any subsequent substitution, fractioning, cancellation and/or transfer of such guarantees, including as a consequence of the transfer of the bonds.

As a consequence of the foregoing no registration taxes, stamp duties, cadastral taxes and/or other forms of taxation will be applicable to the creation of the securities guaranteeing bonds issuances. All such securities would be subject only to the *Imposta Sostitutiva*, at a flat taxation rate equal to 0.25% of the relevant guaranteed amount. In order to benefit from the *Imposta Sostitutiva*, according to the Law Decree, the issuers will have to opt for the application of the *Imposta Sostitutiva* in the resolution that resolves upon the emission of bonds.

This provision was much awaited by the market. Already during 2012 the taxation regime applicable to bonds emissions had been reduced, to encourage recourse to capital markets by borrowers. With the new provisions, from a taxation point of view the cost of providing collateral to secure bonds financings will be equal to the cost of providing collateral to medium and long-term loans. It is expected that the new provisions will encourage new collateralised bonds emissions and the re-financing of existing loans through bonds, particularly in the project finance market.

¹ Articles 15 and ff. of Presidential Decree No. 601 dated 29 September 1973.

2. Application of the special privilege to bonds emissions

According to the Law Decree, new bonds emissions may also be secured by the so called “special privilege”, a form of collateral previously available only to loans granted by banks, and extending to all the movable assets of the guarantor, as registered in its assets’ ledger. Bonds emissions may be secured through a special privilege provided that the bonds: (i) are issued in compliance with the requirements of the Italian Civil Code; (ii) have a mid-long term maturity; and (iii) are circulated only among professional investors, as defined under article 100 of the Legislative Decree 24 February 1998, No. 58 (the “**Italian Finance Act**”).

Furthermore, the Law Decree specifies that the special privilege may be registered either in favour of the bondholders, or in favour of a representative of the bondholders. This will solve (at least with reference to the special privilege) some of the problems encountered in the market in terms of limits to the transferability of the bonds, because in the past it was necessary to perform the relevant registration formalities at any transfer to a new bondholder.

3. Extension of the exclusion from the withholding tax for bonds subscribed by UCITS

The Law Decree extends the exclusion from the 20% withholding tax (*i.e.*, the retention to be operated by the issuer of the bonds on the interest and proceeds payable to the bondholders) to interest and proceeds payable to bondholders that:

- (i) are structured as UCITS (*i.e.*, undertakings for collective investment in transferable securities or OICVM, *organismi di investimento collettivo in valori mobiliari*);
- (ii) the quotas of which are owned only by professional investors, as defined under article 100 of the Italian Finance Act; and
- (iii) all the assets of which are invested mainly on bonds or similar securities.

Therefore, whilst in the past interest and proceeds payable to UCITS in relation to bonds emissions were subject to a 20% withholding tax (unless the exemption provided by Legislative Decree 236/96 did apply), in the future interest and proceeds payable on bonds held by UCITS that meet the above requirements will no more be subject to the 20% withholding tax. This measure aims at incentivizing the subscriptions of such bonds by a wider range of entities.

4. Securitization Law

As anticipated, article 12 of the Law Decree introduces new provisions aimed at enhancing the use of securitization, by clarifying the scope and interpretation of certain provisions of the Securitization Law and by extending its scope of application to areas which were not originally covered.

4.1. Extension of the scope of application of the Securitization Law

According to the Law Decree, the Securitization Law will now be applicable to the subscription and purchase of bonds and similar securities (excluding equity securities representing corporate capital, hybrid and convertible notes) by a special purpose securitization vehicle (a “**Law 130 SPV**”). The intention is to widen the range of potential subscribers of debt securities (extending it to Law 130 SPVs), and thus, indirectly, the “mini bonds” market.

In addition, pursuant to the Law Decree, if the notes issued in a securitization transaction are reserved for subscription by “qualified” investors, as defined in article 100 of the Italian Finance Act, such notes may be subscribed also by a sole investor.

4.2. New provisions on segregated accounts

The Law Decree also provides for the possibility for a Law 130 SPV to open segregated accounts with servicers or account banks, to the extent they are regulated entities. Specific provisions govern the segregation of amounts standing to the credit of such accounts (*i.e.*, sums paid by the assigned debtors and other transaction proceeds) and the protection of such amounts from enforcement by third parties who do not benefit from the segregation provisions. Other rules govern the legal regime of such segregated accounts in case of insolvency proceedings affecting the servicer or the account bank: in essence, amounts credited to such accounts are not considered included in the bankruptcy assets of such entities and are not subject to suspension of payments.

Other and partially corresponding provisions govern the opening of segregated accounts by regulated servicers and any of their delegates.

4.3. Possibility to apply the perfection formalities set out under the factoring law

According to the Law Decree, the parties to a securitization transaction whose assigned receivables qualify as “enterprise receivables” (*crediti d’impresa*), may now decide to apply the assignment perfection formalities set out under article 5 of Law No. 52/1991 on factoring (the “**Factoring Law**”).

This amendment simplifies the formalities for perfecting the relevant assignments, because according to the Factoring Law the perfection of the assignment is linked to the payment, in whole or in part, and with a means of payment bearing a date certain at law (*data certa*), of the consideration agreed for the receivables. To this end, also the Factoring Law has been amended specifying that the recording of the payment of the consideration in the account held by the assignor pursuant to article 2.1 b) of Legislative Decree No. 170 (which includes any electronic “durable” support) attributes a *data certa* to the payment.

This amendment may enhance the extension of the Securitization Law to smaller receivables portfolios and, thus, to smaller originators.

4.4. Limitation of the set-off defence by the assigned debtors

Another amendment to the Securitization Law prevents the assigned debtors from raising, *vis-à-vis* the Law 130 SPV, a set-off defence in respect of the assigned receivables and in relation to claims towards the assignor arisen following: (i) the date of publication of the assignment in the Official Gazette (*Gazzetta Ufficiale*); or (ii) the *data certa* payment, in whole or in part, of the consideration of the assigned receivables.

4.5. Exclusion of the applicability of article 65 of the Italian Bankruptcy Law

According to the Law Decree, article 65 of the Italian Bankruptcy Law will no longer apply to payments of receivables securitized pursuant to the Securitization Law. Article 65 of the Italian Bankruptcy Law provides for the ineffectiveness, towards creditors, of prepayments of claims made in the two years prior the declaration of bankruptcy, to the extent such claims fell due on or after such date. This amendment ensures to the parties of a securitization transaction more certainty on the payments made.

4.6. New rules for the securitization of claims towards Public Administrations

In order to simplify the assignment of claims towards Public Administrations within the context of a securitization transaction, pursuant to the new paragraph 4-*bis* of article 4 of the Securitization Law, the formalities previously required by the law in such a case (e.g. public deed or private deed certified by Notary and notification to the Public Administration in charge for the payment) will no longer be applicable. A similar provision was already in place for covered bonds governed by the Securitization Law.

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4.7. Other measures aimed at enhancing the access to securitization transactions

The Law Decree specifies that the notes issued in a securitisation transaction are eligible to cover the technical reserves of insurance companies, also in the absence of certain requirements in respect of trading on a regulated market or multilateral trading systems and assessment of creditworthiness by third party operators. Secondary regulation will set out limits for the investment by such institutions, with the aim, on one side, of ensuring sound and prudent management and, on the other, of giving impulse to the investment in the above instruments. The provision applies also to units issued by credit investment funds in the framework of securitization transactions governed by article 7 of the Securitization Law.

Securitization transactions carried out by means of assignment of the underlying receivables to investment funds have been simplified. In such case, the (regulated) service of collection of claims and cash and payment services may also be entrusted to the investment management company of the fund. In addition, the application of article 4 (relating to enforceability vis-à-vis third parties and exemption from articles 65 and 67 of the Italian Bankruptcy Law), article 6 paragraph 2 (providing for the application of the tax benefits under Presidential Decree No. 601/1973), are now expressly extended to the assignments in favour of investment funds.

Finally the introduction by the Law Decree of a new article 7-*quarter* extends the provisions of Securitization Law on covered bonds to transactions involving bonds and similar securities, claims secured by naval mortgage, claims towards SMIs, claims arising from factoring and leasing agreements as well as notes issued in the context of securitization transactions of claims of the same nature.

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