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## The non-possessory pledge over movable assets: the latest news

### 1. The measure of the Italian Tax Authority<sup>1</sup> of 12 January 2023

The Italian Tax Authority approved<sup>2</sup> the technical specifications for the drafting and filing of the applications to register the non-possessory pledge over movable assets in the new online register established by the Italian Tax Authority (the "**Electronic Register**"). The implementation of the regulatory framework for the "non-possessory" pledge over movable assets<sup>3</sup> into the Italian legal system has finally been completed.

The recent Measure requires that the application and registration of the title (*i.e.*, the deed of pledge or the deed evidencing the subsequent events to be registered<sup>4</sup>) shall be submitted *exclusively in electronic form*<sup>5</sup>.

The Italian Tax Authority certifies the successful receipt of the title and the information concerning both the payments and the registration of the title through appropriate electronic receipts. The certificate of executed formality, which shall be digitally signed by a registrar (*conservatore*), is then returned to the applicant with the relevant date and registration number.

### 2. The non-possessory pledge regulation

The main features of the non-possessory pledge may be summarized as follows:

- (i) it may be created over existing or future unregistered movable assets (including intangible assets), determined or determinable also by reference to one or more classes of assets<sup>6</sup> or to an aggregate value, to the extent they relate to the business activity, or over receivables arising from or relating to such business activity (Article 1, Paragraph 2, Law Decree 59/2016);
- (ii) it may be created by the borrower registered at the Companies' Register, in order to secure present or future credit facilities relating to the companies' business, either determined or determinable, with the provision of a maximum secured amount (Art. 1, Paragraph 2, Law Decree 59/2016); and

<sup>1</sup> Agenzia delle Entrate, the Italian tax authority.

<sup>2</sup> The Measure of the Italian Tax Authority of January 12, 2023 (the "Measure") was published in the Italian Official Journal (*Gazzetta Ufficiale*) No. 18 of January 23, 2023.

<sup>3</sup> It has been introduced by Law Decree No. 59/2019 converted into law with amendments by Law No. 119 of June 30, 2016, and subsequently implemented - with a few years delay - with the issuance of the Decree of the Ministry of Economy and Finance of May 25, 2021, No. 114, in force since August 25, 2021, which mainly regulated the procedures for registration, consultation, renewal, and cancellation and established the Electronic Register, delegating the Italian Tax Authority to approve the technical aspects for its concrete entry into operation. As of today, the Electronic Register is not yet operational. The Italian Tax Authority should give notice of its entry into operation by publishing a dedicated communication on its official website.

<sup>4</sup> The document containing the consent or order for cancellation, or the document certifying the amendment event of which annotation is sought.

<sup>5</sup> With the exception of those cases in which the title is represented by court-issued orders or judicially authenticated private deeds (*scritture private accertate giudizialmente*), in compliance with the technical aspects attached to the Measure.

<sup>6</sup> The Italian Tax Authority, on October 12, 2021 approved the nomenclature of the categories of assets over which a non-possessory pledge may be created.

- (iii) most importantly, it does not require the pledgor to deliver the pledged asset to the secured creditor or to a third party as the other pledge does. Unless otherwise agreed between the parties, the pledgor is allowed to continue to use the pledged asset, in compliance with its economic use, as well as to transform it in the production process and dispose of it. In these latter cases, the pledge shall be transferred to either the product resulting from the transformation or to the consideration for the sale of the pledged asset, or to the asset purchased with such consideration, without this resulting in the creation of a new security nor in the commencement of a further term for the purposes of a claw back action (if any).

The Law Decree 59/2016 does not mention any specification or restriction with respect to the range of potential lenders: therefore, any entity authorised to grant financing may be the beneficiary of this security.

These features make the non-possessory pledge a very useful tool for stock financing in the Italian market, enabling many industrial companies to gain access to forms of secured financing without the strict “*traditio*” requirement that has so far effectively precluded this opportunity.

## 2.1 Method of creation and enforceability against third parties

The non-possessory pledge shall be created by means of a written agreement<sup>7</sup> describing the secured creditor, the debtor<sup>8</sup>, the pledged asset (or class of movable assets), the secured obligations and the maximum amount secured.

The non-possessory pledge takes effect, ranks and is effective *vis-à-vis* against third parties (including executive and bankruptcy proceedings) from the date of its registration in the Electronic Register.

The registration lasts for **ten years** and it is renewable through the submission of a new application to the Electronic Register (before the date falling on the tenth anniversary from the initial registration).

## 2.2 Enforcement of the non-possessory pledge

As to the enforceability the non-possessory pledge allows greater simplicity and effectiveness in the realization of the secured creditor's rights. In particular, the secured creditor, upon the occurrence of an enforcement event – shall serve a prior notice to the debtor (and the third-party pledgor, if any), and a written notice to the other creditors secured by a previous non-possessory pledge – and then the secured creditor is entitled to proceed to:

- (i) the sale of the pledged asset, applying the relevant proceeds in satisfaction of secured liabilities;
- (ii) the enforcement or assignment of the pledged receivables, up to an amount equal to the maximum amount guaranteed, by notifying the pledgor;
- (iii) lease the pledged asset, applying the rents in satisfaction of the secured claims, provided that the pledge agreement set forth the criteria to determine the consideration of such lease; and
- (iv) transfer the pledged asset (up to the amount of the relevant secured liabilities) to the secured creditor, provided that the pledge agreement set forth the criteria to determine the value of the pledged asset and of the secured obligation.

The debtor and the third-party pledgor, if any, have the right to file an objection, within five days from the creditor's notice of enforcement.

<sup>7</sup> Registration and other formalities (i.e., cancellation and annotation of any relevant amendments) shall be carried out by virtue of a public deed (*atto pubblico*), a notarized or judicially authenticated private deed (*scrittura privata autenticata*), a digitally signed contract pursuant to Article 24 of the Legislative Decree No. 82 of March 7, 2005, or a judicial order.

<sup>8</sup> As well as of the third party pledgor, if any.

Furthermore, in the event of the debtor's judicial liquidation (*liquidazione giudiziale*), the secured creditor may enforce the pledge in any of the aforementioned procedures (thus including outside the bankruptcy liquidation) after its claim is admitted to the liabilities with priority (*ammesso al passivo con prelazione*), and within the limits of such claim.

### **3. Preliminary Conclusions**

By way of conclusion, we believe that the introduction of this tool into the Italian legal framework may unleash significant opportunities to the stock lending.

As a matter of fact, there are several industrial sectors and operations that will benefit from this new tool, including the manufacturing and agri-food industries, commodity traders and more in general any other borrower with significant value in stock, finished or semi-finished products.

Needless to say, drafting and negotiating the appropriate set of contractual arrangement will be crucial to the process of this instrument within the Italian market.

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