

JANUARY 2014

Amendments to the Italian Securitisation Law introduced by the "*Destinazione Italia*" decree

On 23 December 2013, law decree n. 145 or the so-called *Destinazione Italia* decree ("**Decree n. 145**") was published in the Italian Official Gazette providing for certain changes to law n. 130 of 30 April 1999 ("**Law 130**" or the "**Italian Securitisation Law**"). Decree n. 145 must be converted into law by late February, being no later than 60 days from the date on which it was published in the Italian Official Gazette.

The changes include the following:

- extension of the segregation principle to funds held in a bank account for the Law 130 special purpose vehicle (the "**SPV**")
- abolition of claw-back risk in relation to certain prepayments made by corporate debtors
- changes in relation to the transfer formalities for certain types of receivables including trade receivables and public healthcare receivables
- clarification that the asset-backed securities issued under Law 130 ("**ABS**") can be held by a sole "qualified" investor
- enlarging the group of potential assets for Italian securitisation and covered bond transactions to include ABS and other bonds

1. Segregation of Bank Accounts

Arguably the most important change introduced by Decree n. 145 to the Italian Securitisation Law is to extend the ring-fencing or segregation principle to capture funds of the SPV held in a bank account with the Servicer or other depositary bank.

Segregated bank accounts can be held with the Servicer or a third party bank

Under the proposed reforms it will be possible for a segregated bank account to be opened for the deposit of collections arising under the securitised receivables and any other amounts received under the securitisation, being either:

- (a) an account in the name of the SPV held with the Servicer (as long as it is a bank authorised to be a deposit-taking institution); or

- (b) an account in the name of the Servicer or sub-servicer held with a third party depositary bank.

Any such funds will constitute assets effectively segregated from the assets of both the depositary bank (whether the Servicer or a third party bank) and its other account-holding customers.

Such funds will be deemed ring-fenced to be used exclusively to make payments of interest and principal on the ABS and in satisfaction of amounts owing to the secured creditors and other costs and expenses of the SPV arising under the securitisation.

If the Servicer or sub-servicer becomes subject to insolvency proceedings (including a restructuring of its debts), the segregated amounts will be protected and ringfenced from such proceedings and the bank account will not be frozen.

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Disappointingly, Decree n. 145 does not state that the segregation principle will be effective in an insolvency scenario of a third party depositary bank holding the SPV's funds.

Nor does it expressly state that it is possible for the SPV to open a segregated account in its name held with a third party bank other than the Servicer.

It remains to be seen whether either of these points will be clarified in the conversion law needed to bring Decree n. 145 into force, or in any other amendment.

Liquidity in the Italian banking system

In the explanatory notes to Decree n. 145, the concept of segregated accounts is described as having two goals: - Firstly, to safeguard, in any insolvency of the Servicer or subservicer, funds destined to pay investors and other creditors of the SPV under the securitisation. Secondly, to remove a limitation prohibiting banks in Italy from retaining liquidity arising from securitised receivables. Accordingly, this reform is aimed to inject liquidity into the Italian banking system.

This could refer to the fact that on many rated Italian securitisations, due to insufficient credit ratings of most Italian banks, the SPV is required to open accounts outside of Italy (often the UK) with an adequately rated bank and, accordingly, such sums are taken out of the Italian banking system.

It is not clear at this stage whether the introduction of segregated accounts held by the SPV with the Servicer will improve the liquidity of the individual bank concerned.

2. Exemption from clawback for prepayments

The second major change to the Italian Securitisation Law is in relation to clawback risk and can be seen as a positive development for investors.

Decree n. 145 exempts from clawback procedures under Article 65 of the Italian Insolvency Law (Royal Law Decree n. 267 of 16 March 1942, as amended) any prepayments made under a securitised loan in the two years prior to the assigned debtor's subsequent insolvency. This is applicable to loan payments maturing on or after the date of the assigned debtor becoming insolvent.

Readers should note that Article 65 clawback is relevant only for entities subject to the Italian Insolvency Law (i.e. corporate debtors and not individuals) so this change will principally affect deals where the assigned borrowers are mainly or exclusively companies (such as CMBS and SME deals) rather than securitisations where

the majority or all of the assigned borrowers are individuals (such as RMBS or auto loan deals).

Previously, the applicability of such clawback action was perceived by the rating agencies assigning a credit rating to the ABS as a potential liquidity and credit risk. They typically required a mitigant to such risks in the form of a cash reserve or other credit enhancement feature. It therefore seems likely that such mitigants will no longer be required on deals closed after the changes to the Italian Securitisation Law become effective.

3. Scope of Law 130 extended

The proposed reforms expressly permit the securitisation under Law 130 of not only receivables (*crediti*), but also bonds (*obbligazioni e titoli similari*) with the exception of exchangeable and convertible bonds, hybrids and bond representing company equity.

This change will allow Law 130 SPVs to be more like investment companies holding a portfolio of assets comprising both receivables and bonds including Italian securitisation ABS and so-called Italian "mini-bonds".

4. Single investor permitted

Decree n. 145 has clarified that ABS issued under a Law 130 securitisation can be held by a sole investor so long as it is an "*investitore qualificato*" (qualified investor) under Article 100 of Law Decree n. 58 of 24 February 1998 ("**TUF**") without any risk of the transaction being recharacterised for fiscal or other purposes.

5. Transfer formalities in respect of trade receivables

A further amendment introduced to Law 130 by Decree n. 145 provides that in the case of securitisations of trade receivables (*crediti d'impresa*) effected under the Italian Securitisation Law, the transfer formalities required in order to make the transfer effective and enforceable against third parties can be those provided for under Italy's factoring laws, namely the full or partial payment of the purchase price, as long as evidence of such payment appears in the banking records of the transferor.

It is worth clarifying that it is still possible as previously to render a transfer of trade receivables enforceable by carrying out the formalities provided for in the Italian Securitisation Law, namely publication of a notice in the Italian Official Gazette and filing notice of the transfer at the local Companies Registry of the SPV.



From the date certain at law on which such formalities have been completed, notwithstanding any express or implied law providing otherwise, assigned debtors may not exercise against the transferor any right of set off in respect of the securitised receivables with any receivables arising after the formalities have been completed.

This is of particular relevance to consumer loan deals where, without this amendment, assigned debtors are able to exercise against the SPV set-off rights in respect of receivables arising in their favour from the transferor after the transfer formalities in respect of the securitised receivables are carried out.

6. Transfer formalities in respect of receivables against public entities

In the current reform package under Decree n. 145, it will no longer be necessary to carry out any additional transfer formalities required under any applicable law other than Law 130.

For example, where currently the receivables being securitised are owed by a debtor which is an Italian public entity, it is necessary to notify the transfer to such entity in a specific form prescribed by the law. Once the amendments introduced by Decree n. 145 are in effect, it will be sufficient to carry out the transfer formalities provided for under the Italian Securitisation Law, namely publication of a notice in the Italian Official Gazette and filing notice of the transfer at the local Companies Registry of the SPV.

In any case, Decree n. 145 also states that it will still be necessary to notify the public entity by registered post informing it of the appointment of the Servicer to carry out certain functions in respect of the assigned debt.

7. Bond-backed ABS may be held by Italian insurance companies and pension funds

Law 130 ABS backed by bonds (described under paragraph 3 above) even if they are unrated and/or unlisted are stated to be suitable assets to be held as investments by Italian pension funds and by Italian insurance companies to form their technical reserves (*riserve tecniche*).

Such amendment should have the effect of expanding the potential investor base for Italian securitisation ABS.

An implementing regulation by IVASS (the Italian insurance industry regulator) containing further details in relation to the proposed reform is required.

8. Italian covered bonds: expanded list of eligible assets for cover pool

Decree n. 145 states that the following assets are suitable to constitute collateral in the cover pool under an Italian covered bond transaction: bonds (*obbligazioni e titoli similari*) which would include so-called Italian "mini-bonds", receivables arising under loans secured by a naval mortgage (*ipoteca navale*), receivables under SME loans, receivables arising under leasing and factoring agreements as well as Italian securitisation ABS.

9. Next Steps

Decree n. 145 must be converted into law by late February, being no later than 60 days from the date on which it was published in the Italian Official Gazette. It is possible that the conversion law (and any circular or other communication made by the Ministry of Economy and Finance) may contain additional amendments and corrections.

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