

Italy's New Rules to Foster Access to Medium/Long-Term Financing

On December 13, 2013, the Italian Government adopted a Law Decree (“Decree”),¹ that introduced various urgent measures, including important legislative changes with a view to facilitating access to (both banking and non-banking) medium/long-term financing by Italian enterprises and lifting obstacles to enable the creation of funds for the subscription of bonds, debentures and commercial paper issued by non-listed companies pursuant to Article 32 of Law Decree No. 83 of June 22, 2012 (the “Growth Decree” and the “Debt Securities”, respectively).²

This memorandum outlines some of the measures introduced by the Decree, aimed at: (i) providing that payments due under debt securities may be secured by the lien (*privilegio speciale*) contemplated under Article 46 of the Italian Banking Act (as defined below), previously available only to secure bank financings; (ii) broadening the use of securitization transactions by making them more flexible and secure for investors; (iii) amending and broadening the scope of the substitute tax regime applicable to medium/long-term bank financing (*i.e.* having a maturity exceeding eighteen months), contemplated under Articles 15 and ff. of Presidential Decree No. 601 of September 29, 1973 (the “Substitute Tax Regime”); and (iv) abolishing the application of withholding tax on interest income earned by funds held solely by qualified investors and investing exclusively in Debt Securities.

- ***Extension of the privilegio speciale under Article 46 of the Italian Banking Act***

Article 46 of Legislative Decree No. 385 of September 1, 1993 (as subsequently amended and integrated; the “Italian Banking Act”) provides that medium/long-term financing granted by banks to enterprises may be secured by an *ad hoc* lien

¹ The Decree should become effective 15 days following its publication on the Official Gazette (not yet occurred) and will need to be converted into law by Parliament, possibly with amendments, within 60 days, otherwise it will lapse on retroactive basis.

² For a description of the reform enacted with the Growth Decree, please see our alert memos dated June 15, 2012, August 9, 2012, and December 14, 2012, available at http://www.cgsh.com/italys_new_rules_on_notes_and_commercial_paper/, http://www.cgsh.com/italys_new_rules_on_notes_and_commercial_paper_update/, and http://www.cgsh.com/italy_lessens_tax_rules_applicable_to_bond_issuances_made_by_non_listed_companies/.

(*privilegio speciale*) over movable assets of the debtor.³ The Decree amends Article 46 of the Italian Banking Act in order to allow the creation of a *privilegio speciale* in favor of holders of notes or other debt securities issued by companies (*società di capitali*), with a medium/long-term maturity, which may be subscribed by and circulate among qualified investors⁴ only.

- ***Amendments to the Italian Securitization Law***⁵

Securitization of Debt Securities: transactions may be structured under the Italian Securitization Law also where the underlying assets are bonds and other debt securities issued by companies (*società di capitali*), with the exclusion of equity, hybrid and convertible securities.

Funds: securitization transactions where the underlying assets are purchased by an investment fund, are incentivized by providing that in such case servicing activities may be carried out by the asset manager of the fund (*società di gestione del risparmio*) without the need to involve a third-party servicer.

Rules on Assignment: in case the underlying assets are business receivables, the assignment may become effective *vis-à-vis* third parties upon payment (with a date certain) of the relevant consideration by the assignee⁶ as an alternative to the current regime that requires the publication of a notice on the Official Gazette.⁷

³ Specifically, the lien may be granted over: (i) existing and future machinery and works, concessions and instrumental goods; (ii) raw materials, working products, inventory, finished products, fruits, cattle and goods; (iii) goods acquired with the same financing; and (iv) receivables (also future) deriving from the sale of the aforesaid goods. The security interest must be granted in writing and the relevant deed must, *inter alia*, clearly describe the assets (goods and receivables) on which the security interest is granted, the financing bank, the debtor and the subject granting the security interest, the amount and conditions of the financing, as well as the amount for which the security interest is granted.

⁴ As defined under Article 100 of Legislative Decree No. 58 of February 24, 1998 (the "Italian Securities Act").

⁵ With respect to the paragraph "Securitization of Debt Securities", see Article 12, Para. 1(a), of the Decree; with respect to the paragraph "Funds" see Article 12, Para. 1(f), of the Decree; with respect to the paragraph "Rules on Assignment" see Article 12, Paras. 1(d)(1) and (3), and 3, of the Decree; with respect to the paragraph "Bank Covered Bonds" see Article 12, Para. 1(h), of the Decree; with respect to the paragraph "Bankruptcy Remoteness" see Article 12, Para. 1(c), of the Decree; with respect to the paragraph "Claw Back Actions" see Article 12, Para. 1(d)(2), of the Decree; with respect to the paragraph "Technical Reserves" see Article 12, Paras. 1(e) and 2, of the Decree; and with respect to the paragraph "Sole Investor" see Article 12, Para. 1(b), of the Decree;

⁶ Thus extending the regime provided for factoring transactions to securitization transactions. Moreover, the Decree also modifies Article 5 of Law No. 52 of February 21, 1991 on factoring to specify that in order for the payment to have a date certain (*data certa*) it is sufficient that it be registered on the assignor's account.

⁷ See Article 4 of Law No. 130 of April 30, 1999 ("Italian Securitization Law").

Moreover, the Decree provides that the specific rules on assignment of receivables *vis-à-vis* the public administration do not apply with respect to assignments taking place within a securitization transaction.⁸

Bank Covered Bonds: bank covered bonds (*obbligazioni bancarie garantite*) may be backed also by bonds and other debt securities, and other credits *vis-à-vis* small/medium-size enterprises.⁹

Bankruptcy Remoteness: protection of investors has been enhanced by providing that the funds resulting from the collection on assigned receivables and other amounts may be kept in segregated accounts that would not be included in the bankruptcy estate in case the servicer or the bank at which the account is held becomes bankrupt.¹⁰

Claw Back Actions: early repayments by the assigned debtors may not be subject to claw back.¹¹

Technical Reserves: certain securities issued in securitization transactions (where the underlying assets are bonds and other debt securities issued by companies) or pursuant to Article 32 of the Growth Decree¹² are qualified as assets that:

- can be held by insurance companies as coverage for technical reserves;

⁸ Previously, an exemption from the rules set forth in Articles 69 and 70 of the Royal Decree No. 2440 of November 18, 1923 was provided only with respect to bank covered bonds transactions.

⁹ In addition to bonds and other credits *vis-à-vis* small/medium-size enterprises, eligible assets added by the Decree are: (i) credits guaranteed by security interests over vessels (*ipoteca navale*), (ii) credits deriving from leasing or factoring transactions, and (iii) securities issued in securitization transactions backed by the aforementioned assets.

¹⁰ Specifically, the Decree provides, *inter alia*, that the servicer may open segregated bank current accounts where the money received from the assigned debtors on behalf of the vehicle are credited. The servicer's creditors have no claim over such money and, should the servicer enter into any bankruptcy proceedings, this money is considered as not making part of the servicer's estate. Moreover, the money is completely segregated from the estate of the depository bank and of other depositors and can only be used to reimburse holders of securities issued by the securitization vehicle, to pay counterparties to any derivative contracts entered into for hedging purposes, or to pay other costs incurred, in the context of the relevant securitization transactions. Should the depository bank enter into a bankruptcy proceedings, this money must be reimbursed before distribution and such reimbursement is not subject to any stay.

¹¹ In certain cases, early repayments could otherwise be revoked, pursuant to Article 65 of Royal Decree No. 267 of March 16, 1942 (*i.e.*, the Italian Bankruptcy Act).

¹² Namely, (i) securities issued in securitization transactions; (ii) notes and other debt securities issued by companies under Article 32 of the Growth Decree; (iii) units of an investment fund investing in such debt securities; and (iv) securities issued in securitization transactions backed by the aforementioned debt securities, even if they are not intended to be listed on a regulated market or on a multilateral trading system and have no rating.

- can be subscribed by pension funds.¹³

Sole Investor: It is clarified that the securities issued in the context of a securitization transaction may be subscribed by a single qualified investor.

- ***Amendment of the Substitute Tax Regime***

Firstly, the Decree amended the Substitute Tax Regime by providing that such regime would become applicable only upon election. In line with its original rationale, whereby such Substitute Tax Regime was intended to be a beneficial regime enabling to reduce the cost of financing, this election now enables to apply the 0.25% substitute tax only when a medium/long term loan and the relating security package would otherwise be subject to higher transactional tax charges and not in any circumstance in which any such loan is executed in Italy. Therefore, the security package should be carefully analyzed in order to assess whether to exercise the election.¹⁴

In addition, the Decree extended the application of the Substitute Tax Regime to security packages granted in connection with medium/long-term financing structured by means of the issuance of Debt Securities, as well as their transfer, and/or with the amendment and/or cancellation of the underlying financing. The extension of the scope of the Substitute Tax Regime aims at promoting access to fund raising by means of Debt Securities issuance that will likely need to be secured by guarantees which, otherwise, would have entailed not insignificant ordinary transactional tax costs, most likely higher than the 25 bps charge triggered by the Substitute Tax Regime.

¹³ For the sake of completeness, the fact that the securities indicated under point (ii), (iii), and (iv) of the previous footnote may be held by insurance companies as coverage for their technical reserves, and be subscribed by pension funds and public entities active in the social security and insurance sector has been introduced through an amendment to Article 32 of the Growth Decree.

¹⁴ Under the rules in force until the Decree becomes effective, the Substitute Tax Regime is a compulsory regime: it applies to loans (and the relating security package) (i) extended by financial institutions, (ii) having a maturity exceeding eighteen months, and (iii) executed in Italy, in lieu of all transactional taxes ordinarily applicable thereto, which, depending on the type of security granted, could trigger a charge as high as 5.5%. Whenever the ordinary regime would entail a transactional tax cost in excess of 25 bps, *i.e.* the rate at which the substitute tax is currently applicable, the Substitute Tax Regime is clearly advantageous. Otherwise (*i.e.* whenever the loan and related security's execution would be subject to nominal taxes), the substitute tax would ultimately result in an increased cost of the financing. By contemplating the optionality of Substitute Tax Regime, the Decree enables the borrower to choose and, hence, to assess in advance whether such regime is in fact advantageous, eliminating the additional 25 bps cost of the substitute tax and reducing the cost of the financing in all circumstances in which it is not.

Hence, this measure ensures equal transactional tax treatment of medium/long-term financing, regardless of whether raised with the issuance of the Debt Securities or with bank facilities, therefore lifting another important obstacle to enabling access to capital markets financing for Italian enterprises.

- ***Withholding Tax on Interest on Debt Securities Held by Certain Funds Repealed***

Finally, with a view to favoring the creation of funds investing in Debt Securities, the Decree repeals the application of the 20% withholding tax ordinarily due on interest relating to such securities if the holder is a fund held solely by qualified investors and invests exclusively in such securities.

* * *

If you have any questions concerning this memorandum, please feel free to contact Vania Petrella (+39 06 6952 2204; ypetrella@cgsh.com), Claudio Di Falco (+39 06 6952 2207; cdifalco@cgsh.com) or Paola Albano (+39 06 6952 2637; palbano@cgsh.com) in our Rome office or any of our other Italy-based partners and counsel listed under [Capital Markets](#) or [Tax](#) Practice Areas under the “Practices” section of our website at www.clearygottlieb.com, or any of your regular contacts at the firm.

CLEARY GOTTLIEB STEEN & HAMILTON LLP

Office Locations

NEW YORK

One Liberty Plaza
New York, NY 10006-1470
T: +1 212 225 2000
F: +1 212 225 3999

WASHINGTON

2000 Pennsylvania Avenue, NW
Washington, DC 20006-1801
T: +1 202 974 1500
F: +1 202 974 1999

PARIS

12, rue de Tilsitt
75008 Paris, France
T: +33 1 40 74 68 00
F: +33 1 40 74 68 88

BRUSSELS

Rue de la Loi 57
1040 Brussels, Belgium
T: +32 2 287 2000
F: +32 2 231 1661

LONDON

City Place House
55 Basinghall Street
London EC2V 5EH, England
T: +44 20 7614 2200
F: +44 20 7600 1698

MOSCOW

Cleary Gottlieb Steen & Hamilton LLC
Paveletskaya Square 2/3
Moscow, Russia 115054
T: +7 495 660 8500
F: +7 495 660 8505

FRANKFURT

Main Tower
Neue Mainzer Strasse 52
60311 Frankfurt am Main, Germany
T: +49 69 97103 0
F: +49 69 97103 199

COLOGNE

Theodor-Heuss-Ring 9
50688 Cologne, Germany
T: +49 221 80040 0
F: +49 221 80040 199

ROME

Piazza di Spagna 15
00187 Rome, Italy
T: +39 06 69 52 21
F: +39 06 69 20 06 65

MILAN

Via San Paolo 7
20121 Milan, Italy
T: +39 02 72 60 81
F: +39 02 86 98 44 40

HONG KONG

Cleary Gottlieb Steen & Hamilton (Hong Kong)
Bank of China Tower, 39th Floor
One Garden Road
Hong Kong
T: +852 2521 4122
F: +852 2845 9026

BEIJING

Twin Towers – West (23rd Floor)
12 B Jianguomen Wai Da Jie
Chaoyang District
Beijing 100022, China
T: +86 10 5920 1000
F: +86 10 5879 3902

BUENOS AIRES

CGSH International Legal Services, LLP-
Sucursal Argentina
Avda. Quintana 529, 4to piso
1129 Ciudad Autonoma de Buenos Aires
Argentina
T: +54 11 5556 8900
F: +54 11 5556 8999

SÃO PAULO

Cleary Gottlieb Steen & Hamilton
Consultores em Direito Estrangeiro
Rua Funchal, 418, 13 Andar
São Paulo, SP Brazil 04551-060
T: +55 11 2196 7200
F: +55 11 2196 7299

ABU DHABI

Al Sila Tower, 27th Floor
Sowwah Square, PO Box 29920
Abu Dhabi, United Arab Emirates
T: +971 2 412 1700
F: +971 2 412 1899

SEOUL

Cleary Gottlieb Steen & Hamilton LLP
Foreign Legal Consultant Office
19F, Ferrum Tower
19, Eulji-ro 5-gil, Jung-gu
Seoul 100-210, Korea
T: +82 2 6353 8000
F: +82 2 6353 8099