

2019 Italian Growth Decree converted into Law: New Tax Incentives to Boost Securitisations of NPLs/UTPs and the Real Estate Market

July 2019



On 27th June 2019 the Italian Parliament converted into Law the Italian Law Decree No. 34 of 2019 (**Growth Decree**), provisionally enacted on April 2019.

Differently from other measures, the provisions of the Growth Decree introducing tax incentives to boost securitisations of non-performing and unlikely-to-pay receivables (**NPLs/UTPs**) and the real estate market have been amended by the Parliament to a very limited extent, and are therefore in force, as discussed in the following sections.

Brief summary of the tax incentives to boost securitisations of NPLs/UTPs and the real estate market

The incentives introduced by the Growth Decree to boost securitisations of NPLs/UTPs and the real estate market are as follows:

1. It allows for the establishment of a number of “Real estate owned Companies” (**ReoCos**) and “Leasing Companies” (**LeaseCos**) to support a single securitisation of NPLs/UTPs executed by a Law 130 “Special Purpose Vehicle” (**130 SPV**);
2. It clarifies that ReoCos and LeaseCos established to support securitisations of NPLs/UTPs can benefit from the same favourable income tax regime available to 130 SPVs;
3. It provides for the application of negligible transfer taxes upon purchase of real estate assets by ReoCos and LeaseCos established to support securitisations of NPLs/UTPs;
4. It provides for the application of negligible transfer taxes upon resale of real estate properties by ReoCos and LeaseCos established to support securitisations of NPLs/UTPs under certain circumstances;
5. It clarifies the legal framework applicable to a new type of securitisations for investments in real estate properties and registered movable assets;
6. It provides for the application of negligible transfer taxes upon acquisition of real estate properties by enterprises which will demolish, re-build and dispose of such properties within a ten-year period.

The decree also innovates certain aspects of the regulatory framework applicable to ReoCos and LeaseCos in securitisations of NPLs/UTPs, which are not covered by this note.

Tax incentives for ReoCos and LeaseCos

With the aim to foster the use of ReoCos and LeaseCos established to support the

securitisation of NPLs/UTPs, the Growth Decree amends the Italian securitisation law no. 130 of 1999 (**Securitisation Law**) and introduces several tax incentives, as summarized sub section II points 1 to 4 above.

ReoCos and LeaseCos are established for the purpose of purchasing, managing and developing the real estate properties underlying the portfolio of NPLs/UTPs acquired by 130 SPVs for the ultimate benefit of the 130 SPVs and their noteholders.

The legal framework applicable to ReoCos and LeaseCos in securitisations of NPLs/UTPs has been introduced in the Securitisation Law since 2017¹. However, over the last two years the operations of ReoCos and LeaseCos have been hindered by the lack of clarity as to their income tax treatment of proceeds realised by ReoCos and LeaseCos. A few requests of tax ruling have been filed by taxpayers to seek clarity on the income tax treatment of ReoCos, and in 2019 the Italian tax authorities took the view that the income realized by ReoCos from the management of their real estate properties is ordinarily subject to income taxation (see tax rulings no. 18/2019 and no. 56/2019). According to the tax authorities, since the real estate properties of ReoCos do not amount to a pool of assets segregated (*'patrimonio separato'*) by operation of law, then the income generated by such assets should be taxed in the hands of the ReoCos. The view taken by the Tax authorities has been strongly criticized by the vast majority of the tax commentators.

Income tax incentive

The Growth Decree now provides that assets, rights and amounts deriving from the management of real estate properties of ReoCos and LeaseCos, as well as any other right acquired in the context of the securitisation of NPLs/UTPs, amounts to a pool of assets segregated by operation of law (*'patrimonio separato'*). The explanatory report accompanying the

Growth Decree states that this provision is aimed at removing any doubts as to the applicability to ReoCos and LeaseCos of the same income tax regime applicable to 130 SPVs. As a result of this provision, all proceeds deriving from the acquisition, management and disposal of real estate properties carried out by ReoCos and LeaseCos should generally qualify as "off-balance sheet" items and should not be subject to corporate income tax (**IRES**) and regional tax on productive activities (**IRAP**).

Transfer tax incentives

From a transfer tax perspective, the Growth Decree introduces tax provisions whereby the acquisitions of real estate properties by ReoCos and LeaseCos are subject to transfer taxes (registration tax, mortgage and cadastral taxes) at negligible fixed amounts, irrespective of the nature of such properties.

Moreover, the same beneficial tax regime applies also to subsequent disposals of real estate properties made by:

- (i) ReoCos to:
 - (a) purchasers that carry on a business activity, on condition that the purchaser undertakes to transfer the relevant property within 5 years from the purchase², and
 - (b) individuals qualifying for the so-called "first-dwelling" beneficial tax regime;
- (ii) LeaseCos, in cases of termination of leasing agreements due to the lessees' behaviour, not limited to the lessees' default, and irrespective of the conditions sub (i)(a) or (i)(b).

Other incentives

The Growth Decree has also clarified that more ReoCos and/or LeaseCos can be established to support a single securitisation transaction. Even if this is not per itself a tax provision, this provision could for instance allow a better management of the VAT exposure arising from the management of the relevant real estate properties, with the possibility to segregate the acquisition of

¹ Article 60-sexies of Law Decree no. 50 of 2017 has introduced Article 7.1 in the Securitisation Law, which governs the legal framework applicable to ReoCos and LeaseCos.

² If such condition is not met, transfer taxes would apply at ordinary rates, together with a 30% tax penalty and interest for late payment of taxes.

properties subject to different VAT regimes (e.g. commercial properties, residential properties, etc.).

Securitisation of Real Estate Properties and Registered Movable Assets

At the end of 2018, Italian Law no. 145 of 2018 broadened the scope of the Securitisation Law and introduced a specific provision aimed at governing securitisations of real estate properties and/or registered movable assets. However, the relevant law provisions were unclear in many respects, and several uncertainties have prevented this new type of securitisations from being implemented.

The Growth Decree amends the Securitisation Law to clarify the legal framework applicable to securitisations of real estate properties and/or registered movable assets. As confirmed by the explanatory report to the decree, the new provision introduces a new kind of securitisation having as its underlying real estate assets or registered movable assets rather than receivables. This instrument is currently untested and will possibly require further guidelines from a legal and regulatory standpoint on its scope and extent of application. However, this new type of securitisations should be carefully considered as it may well prove to be an efficient tool for new investments in the Italian real estate market.

Following the amendments introduced by the Growth Decree, the Securitisation Law now clarifies that it is possible for 130 SPVs to be established to securitise proceeds deriving from the ownership (or other *in rem* or personal rights) over real estate properties and/or registered movable assets (**130 RESPV**). For this purpose, 130 RESPVs can issue asset-backed securities to fund the acquisition of such properties and/or registered movable assets (such as ships). By operation of law, the real estate properties and/or registered movable assets, together with proceeds deriving from the management and disposal of

such assets, constitute a pool of assets of the 130 RESPVs segregated in favour of the investors in the asset-backed securities.

The Growth Decree does not include any specific tax provisions for this new type of securitisations. However, the Securitisation Law clarifies that the rules for securitisations of receivables generally apply also to securitisations of real estate properties and/or registered movable assets. Accordingly, from an income tax perspective, all items of income deriving from the management and disposal of the real estate properties and/or registered movable assets should not be in principle subject to IRES and IRAP at the level of the 130 RESPVs. Moreover, there could be arguments to conclude that interest and other proceeds paid by the 130 RESPVs to non-Italian resident noteholders should benefit from the domestic withholding tax exemption for non-Italian investors generally applicable in respect of notes issued by 130 SPVs, provided that the relevant requirements are met. This is however a matter subject to a certain degree of subjective judgment since the relevant provisions are not entirely clear in that respect.

New tax incentives for the real estate industry

With the aim to stimulate the urban regeneration by fostering the renovation and development of residential buildings, the Growth Decree introduces certain tax incentives for enterprises that acquire real estate properties with the purpose of refurbishing, demolishing/re-building and subsequently transferring such properties within 10 years from the relevant acquisition.

In particular, purchases and subsequent disposals of real estate properties made by enterprises within 31 December 2021 benefit from the application of registration tax, mortgage and cadastral taxes at negligible fixed amounts (€ 200 each) provided that the following conditions³ are met:

³ If the enterprise does not redevelop and resale the residential building within the 10-year period, transfer taxes would apply at the ordinary rates, together with

a related 30% tax penalty and interest for late payment of taxes.

- (i) the purchasing enterprise demolishes/ re-builds the property, or carries out certain refurbishment works⁴ over the property (even without demolishing it), and subsequently transfers the property within 10 years;
- (ii) the reconstruction or refurbishment of the real estate properties is carried out in compliance with the anti-seismic rules and the new property is classified within energy classes "A" or "B".

⁴ See letters b), c) and d) of Article 3, paragraph 1, of Italian Presidential Decree No. 380 of 2001.



Roberto Egori
Partner
Tel: (+39) 02883935398
roberto.egori@linklaters.com



Andrea D'Etto
Associate
Tel: (+39) 02883935465
andrea.dettorre@linklaters.com



Sergio Merlino
Associate
Tel: (+39) 02883935201
sergio.merlino@linklaters.com



Alice Failla
Trainee
Tel: (+39) 02883935423
alice.failla@linklaters.com



Giogio Marchesi
Trainee
Tel: (+39) 02883935455
giogio.marchesi@linklaters.com



Luigi Spinello
Trainee
Tel: (+39) 02883935456
luigi.spinello@linklaters.com

For general enquiries please contact

Studio Legale Associato
in associazione con Linklaters LLP
Via Broletto, 9
20121 Milano

Tel: (+39) 02 8839 351
Fax: (+39) 02 8839 35201

linklaters.com

This publication is intended merely to highlight issues and not to be comprehensive, nor to provide legal advice. Should you have any questions on issues reported here or on other areas of law, please contact one of your regular contacts, or contact the editors.

© Linklaters Studio Legale Associato. All Rights reserved 2019

Studio Legale Associato is affiliated with Linklaters LLP, a limited liability partnership registered in England and Wales with registered number OC326345. Linklaters LLP is a law firm authorised and regulated by the Solicitors Regulation Authority. The term partner in relation to Linklaters LLP is used to refer to a member of the Linklaters LLP or an employee or consultant of Linklaters LLP or any of its affiliated firms or entities with equivalent standing and qualifications. A list of the names of the members of Linklaters LLP and of the non-members who are designated as partners and their professional qualifications is open to inspection at its registered office, One Silk Street, London EC2Y 8HQ, England or on www.linklaters.com and such persons are either solicitors, registered foreign lawyers or European lawyers. A list of the partners of Studio Legale Associato and their professional qualifications is available for inspection at the above offices or at www.linklaters.com/italianpartners. This document contains confidential and proprietary information. It is provided on condition that its contents are kept confidential and are not disclosed to any third party without the prior written consent of Linklaters. Please refer to www.linklaters.com/regulation for important information on our regulatory position.

We process your data in line with our Global Privacy Notice. You can view this at www.linklaters.com/en/legal-notices/privacy-notice.

To opt-out of receiving any marketing emails from us, or to manage your email preferences and the personal details we hold for you, please contact: marketing.database@linklaters.com.