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The legislative decree scheme for the transposition of Directive (EU) 2021/2167 (the “NPL Directive”)

On 29 February 2024, the public consultation process – initiated by the Treasury Department of the Ministry of Economy and Finance on the legislative decree scheme (the “**Draft Decree**”), aimed at the transposition into our legal system of the NPL Directive, with the scope to encourage the development of secondary markets for impaired loans originated by banks in the European Union and to promote the risk transfer from the banking sector to third parties – was concluded.

The NPL Directive should have been implemented by each Member State by the now-expired deadline of 29 December 2023. To date, only a few EU Member States have transposed it into their respective legal systems.

The Draft Decree intervenes on the Legislative Decree No. 385 of 1 September 1993 (the “**Consolidated Banking Act**”) by introducing, in Title V (governing financial activities in Italy), a new Chapter II, dedicated to (i) the purchase of non-performing loans originated by banks and other entities authorised to grant financing having their registered office in a Member State of the European Union and (ii) the management of such non-performing loans, on behalf of such purchasers, by the so-called managers of non-performing loans.

The purpose of this newsletter is to provide a general overview of the main innovations that will be introduced into the national legal system as a result of the transposition of the NPL Directive, concerning, in particular:

- (i) the right, for parties other than banks and other parties to which the activity of purchasing loans for valuable consideration is typically reserved¹, to purchase non-performing loans originated by banks or other entities authorised by the national legal system to grant financing;
- (ii) the introduction of a new figure of manager of non-performing loans;
- (iii) the provision of an “enhanced” right of disclosure for the benefit of the debtor, through the obligation to send a notice of assignment to each assigned debtor;
- (iv) the asset segregation of amounts paid to the servicer of non-performing loans by debtors; and
- (v) the cross-border activity.

The following considerations are based on the Draft Decree and should therefore be understood, pending the adoption of its final text, as not yet final.

This newsletter contains preliminary remarks and cannot, in any way, be regarded as an opinion in the context of specific transactions.

➤ **The expansion of the secondary market for the purchase of non-performing loans**

The main novelty introduced by the Draft Decree is the possibility for additional entities being “*natural or legal person, other than a bank, [...], in the course of its commercial or professional activity [...]*” to purchase non-performing loans originated by banks or other financial institutions authorized to grant financing under Italian law.

¹ Pursuant to the Decree of the Ministry of Economy and Finance No. 53 of 2 April 2015 (the “**Decree 53/2015**”), the purchase of receivables against consideration falls within the activities of granting financing in any form which, if exercised towards the public, are reserved to: (i) banks, (ii) financial intermediaries enrolled in the register provided for by Article 106 of the Consolidated Banking Act; (iii) entities authorised to recover claims pursuant to Article 115 of the Royal Decree No. 773 of 18 June 1931 (the “**Consolidated Act of Public Security**”), within the limits provided for by Article 2.2 of Decree 53/2015; (iv) alternative investment funds (AIFs) investing in receivables; and (v) special purpose vehicles incorporated pursuant to Law No. 130 of 30 April 1999 (the “**Italian Securitisation Law**”).

The final transposition of the NPL Directive will therefore entail an important derogation from the reserve of activity's principle established by Decree 53/2015, allowing any entity, other than a bank, to become a transferee of receivables (either in pool or on a single name basis), provided that the same (i) originate from banking activity or of other entities authorised by the national legal system to grant financing²; and (ii) have been classified as non-performing in accordance with the implementing provisions of the Bank of Italy³.

On the other hand, with regard to the outright purchase of non-performing loans by entities authorised to collect receivables pursuant to Article 115 of the Consolidated Act of Public Security (the “**115 Entities**”), the latter may continue to purchase non-performing loans, also departing from the currently applicable limits⁴, but will nevertheless be subject to the obligation to appoint the manager of non-performing loans, as set forth in the following paragraph. It is therefore conceivable that, in order to continue their typical activity, the 115 Entities will also need to register in the new register held at the Bank of Italy for managers of non-performing loans.

It is understood that the new provisions contained in the Draft Decree, once in force, will not apply to transactions involving (i) the purchase and management of performing loans or loans classified as “unlikely to pay”; (ii) non-performing loans originated by entities other than banks or other entities authorised to grant financing under Italian law, and (iii) non-performing loans originated by banks incorporated outside the European Union.

➤ The Manager of Non-performing Loans

The Draft Decree provides that the management of non-performing loans (including, *inter alia*, the activities of collection and recovery of payments owed by the debtor and the management of debtors' claims) will be entrusted by the purchaser of non-performing loans to a bank, to a financial intermediary registered in the register provided for by Article 106 of the Consolidated Banking Act or to the new figure of the manager of non-performing loans, pursuant to a specific management contract to be entered into in writing.

² Unlike NPL Directive, which limits the purchases of non-performing loans to those originated by banks, the Italian legislator has extended the possibility to acquire non-performing loans also to those originated by entities authorised to grant financings pursuant to Decree 53/2015.

³ While the NPL Directive refers to “non-performing exposures”, which include both non-performing loans and unlikely-to-pay exposures, the Draft Decree limits the possibility to purchase non-performing loans only, with the exclusion of unlikely-to-pay exposures.

⁴ Article 2 of Decree 53/2015 provides that: “Does not constitute granting of financings, in addition to cases of exclusion provided for by law: [...] b) the definitive purchase of receivables by companies holding a license for the extra-judicial debt collection activity pursuant to Article 115 of the Consolidated Act of Public Security, when the following conditions occur:

1) the receivables are purchased for recovery purposes and are transferred by:

(i) the banks or other financial intermediaries subject to the supervision of the Bank of Italy, which have classified the receivables as non-performing, or
(ii) entities other than those indicated in point (i) above, provided that the receivables owed by debtors who are in a state of insolvency, even if not judicially ascertained, or in substantially comparable situations, as ascertained by the competent corporate bodies; for this purpose, the existence of real or personal guarantees is not relevant;

2) financing received from third parties by the purchasing company does not exceed the total amount of the net assets;

3) the recovery of the receivables so purchased is carried out without entering into new financing agreements with the assigned debtors, the novation of the existing ones, the amendments of the contractual conditions; For these purposes, early repayment and postponement of payment terms are not relevant.”

The manager of non-performing loans must be a joint stock company with its registered office and general management in the territory of the Republic of Italy and must have a specific authorisation, which will be granted by the Bank of Italy upon the fulfilment of certain conditions (including the submission of a program concerning the initial activity, policies and procedures to ensure compliance with applicable provisions on debtor protection).

Once such authorisation is granted, the Bank of Italy will proceed to register the manager of non-performing loans in the special register to be established and maintained therein.

The failure to incorporate in the Draft Decree the figure, provided for in the NPL Directive, of the “*service provider*”, then generates some perplexity as to the ability of the manager of non-performing loans to delegate certain management activities to a third party.

➤ **Notice to assigned debtors**

The Draft Decree, without prejudice in any event to “*the application of the provisions of Article 58 of the Consolidated Banking Act with reference to the assignments as a block, as well as the other provisions on the effectiveness of the assignment of the agreement and the effectiveness of the assignment of the receivables vis-à-vis the assigned debtor and third parties provided for by the Italian Civil Code and any other applicable special laws*”, introduces a further protection in favor of the debtor, establishing the obligation for the manager of non-performing loans, the bank or financial intermediary listed in the register pursuant to Article 106 of the Consolidated Banking Act, to send to each debtor, after the assignment and, in any event, before the commencement of recovery procedures, a notice of assignment, the content and procedures of which are to be specified by the Bank of Italy.

This is therefore a strengthened notification, additional to the one provided for by the Italian Civil Code and special laws, which is, however, extended by the Draft Decree to the purchase of non-performing loans originated by banks or other entities authorised to grant financing (as better detailed above), as well as to assignments of receivables in the context of securitisation transactions pursuant to the Italian Securitisation Law.

➤ **Holding of funds**

The Draft Decree introduces a further important novelty, establishing a principle of asset segregation of sums paid by debtors to the managers of non-performing loans. These provisions appear to be borrowed from those, substantially similar, established by the Italian Securitisation Law with respect to current accounts opened by the servicer and any special servicer(s) (if any) in relation to those amounts credited because of the payment from the relevant debtor.

Pursuant to the new Article 114.7 of the Consolidated Banking Act, managers of non-performing loans may receive and hold funds paid by debtors for the purpose of their subsequent transfer to individual purchasers of non-performing loans, provided that such sums:

- (i) are credited to a separate account opened with a bank and held therein until they are transferred to the individual purchaser of the non-performing loans; and
- (ii) represent assets segregated in all respects from those of the manager of the non-performing loans. Actions by creditors of (i) the manager of non-performing loans and/or (ii) the bank where such sums are deposited and held, are not permitted on such segregated amounts.

In addition, actions by creditors of individual purchasers of non-performing loans are allowed to the extent of the sums due to them.

➤ **Cross-Border Operation**

The Draft Decree, in line with the guiding principles of the NPL Directive, is aimed at creating a harmonized cross border secondary market for non-performing loans within the European Union. In this respect:

- (i) purchasers of non-performing loans may purchase loans, even if they are non-residents, domiciled or headquartered in Italy (it being understood that, in the case of an entity residing outside the European Union, the latter must appoint its own representative having its residence, domicile or registered office in a Member State of the European Union);
- (ii) managers of non-performing loans incorporated in a Member State of the European Union may carry on their activities in another Member State, even without establishing branches, subject to notification of the relevant supervisory authority; and
- (iii) Italian managers of non-performing loans may also carry out their activities outside the European Union, subject to a proper authorisation by the Bank of Italy.

➤ Application of the Draft Decree and securitisation transactions

It is not yet entirely clear whether the provisions contained in the Draft Decree, once enacted, will apply to securitisation transactions.

In fact, the new Article 114.2 of the Consolidated Banking Act states that the provisions of Chapter II “[...] shall not apply to the management of non-performing loans carried out in the context of securitisation transactions pursuant to Law 130 (i.e. the Italian Securitisation Law), when the purchaser of non-performing loans is a securitisation special purpose vehicle referred to in Article 2.2 of Regulation (EU) 2017/2402”.

From this provision, it would be fair to conclude that non-performing loans purchase transactions carried out in the context of so-called “European” securitisations, i.e. those transactions that envisage a tranching of the risk, through the issuance of two or more classes of notes, are excluded from the scope of application of the regulations contained in the Draft Decree, while “domestic” securitisations governed by the Italian Securitisation Law, which envisage the issuance of a single class of securities, are covered.

Accordingly, in the context of single-tranche transactions, both the master servicer appointed to manage the collection of the receivables as well as to perform the cash and payment activities, and any special servicer delegated by it, would be required to comply with the provisions related to the manager of securitised non-performing loans (including the aforementioned authorisation requirements).

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