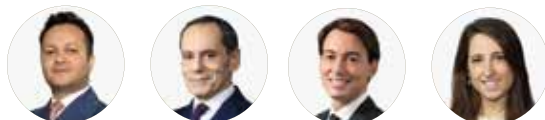


A new dawn for Italian law security



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With a new and modernised approach to legal rights, Italy may be set to give greater encouragement to direct lenders interested in participating in the market

After a prolonged legislative process that first began in 2016, Italian borrowers can finally file (and lenders benefit from) their requests for registration of a new revolutionary form of security over movable assets: the non-possessory pledge.

In its *Doing Business* 2016 report, the World Bank placed Italy at the very bottom of the strength of legal rights index. This unenviable record resulted from a few systemic weaknesses including the absence of non-possessory security interests over movable assets and the inability to enforce a security outside court.

From one viewpoint, the Italian code-related system that regulates security over movable assets has traditionally been based on dispossession (Article 2786 of the Italian Civil Code), whereby a pledge is created by either the physical delivery of the asset or the document allowing the exclusive availability thereof.

However, one can easily detect undesirable economic effects. Dispossession triggers an extra debt for the entrepreneur and may not dispose of the movable asset for productive purposes. This could inadvertently limit demand for credits to financing growth



projects, despite profitability.

Italy has always had a general rule for direct impact on the enforcement process when the parties cannot agree upon the ownership of the secured asset. Thus, international secured creditors have been somewhat dissuaded from approaching the Italian lending environment. Noting this, pre-NPP, the Italian government initially attempted to remedy this structural inefficiency by introducing:

- The special lien regulated by Article 46 of the Italian Legislative Decree No. 385/1993 (SL) and requires

registration only to bind third parties (versus dispossession).

- The regulation on financial collateral arrangements by means of Legislative Decree No. 170/2004, which seeks to make the conditions for the enforcement of a security over movable assets more flexible by providing self-protection mechanisms irrespective of court involvement.

Then came the NPP. Drawing inspiration from other jurisdictions, particularly the English law floating charge, the Italian government introduced the NPP by means of Law

Decree No. 59/2016, as amended and integrated by Law No. 119/2016. However, the availability of this new security has long been subject to the enactment of further regulation, which has only recently been approved.

Pursuant to Law Decree No. 59, entrepreneurs enrolled with the Italian Business Register can create an NPP to secure loans while allowing their businesses to run without operational impact.

The company's movable assets (which include commercial receivables but not registered assets), both existing and future, determined or determinable by also making reference to one or more product categories or to an overall value, can be subjected to the NPP.

The NPP showcases many of the English law floating charge's features, even going further in some contexts. The floating charge also 'floats' over the assets, thereby eliminating the need for dispossession. It can also be used to appoint an administrator if it is a 'qualifying' charge (ie, it covers all or substantially all of the company's movable assets, thereby simplifying out-of-court enforcement mechanisms). It does not, however, roll in the way of the NPP.

The final similarity between the floating charge and the NPP comes in the form of perfection. A floating charge is perfected in different ways for different assets, though it is broadly considered that registration will perfect security granted by an English company.

Desirable evolution

The NPP is a desirable evolution of the SL. In fact, while the enforceability of the latter requires registration of the relevant security agreement via the appropriate register, the NPP requires online registration of the security with the only electronic register managed by the Italian Revenue Agency, which is even easier to check for third parties (including would-be lenders).

Additionally, the SL does not provide for the rolling mechanism we see in the NPP, with the latter security

NPP: Key features

The main innovative features of the NPP are more in line with the English law floating charge, potentially going even further with its rolling security:

No more dispossession: The enforceability of the NPP against third parties is only subject to registration via the appropriate register.

Rolling security: The pledgor is entitled to deal with the pledged assets without affecting the security. The NPP would automatically extend to any product resulting from the transformation, the proceeds arising from the disposal of the pledged assets or the substitutive assets purchased with said proceeds without creating a new security.

Simplified out-of-court enforcement mechanisms: Pending an enforcement event, the secured creditor can either sell the pledged assets through competitive procedures, enforce or assign the pledged receivables, lease the pledged assets provided that the pledge agreement sets forth the criteria to determine the rent amount, or repossess the pledged assets provided that the pledge agreement sets forth the criteria to determine the value of the pledged asset.

“The non-possessory pledge showcases many of the English law floating charge’s features, even going further in some contexts”

automatically extending also to the proceeds arising from the disposal of the pledged movable asset, nor is it distinguished by the more modern enforcement mechanisms of the NPP.

A final key point to note is that while the SL remains available only to traditional banks (or other non-bank entities subscribing for notes issued by the company), Law Decree No. 59's silence as to lending entity requirements leaves the door open for private creditors to benefit from the NPP.

In a world where private credit is provided by sophisticated private capital from a broad international background, the modernisation of Italian security principles continues the ongoing theme of Italian law further opening its doors to the international lending community. If other European states have shown how direct lending can take hold, Italy can no longer be considered far behind. ■

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