



Banking and Finance Law

The Italian Floating charge

At last, by a measure dated 12 January 2023, the Italian tax authorities have set up the electronic registry for the entry into force of the so-called 'non-possessory pledge'.

Unlike the traditional pledge, this new security will allow businesses to create a security on movable (tangible and intangible) assets without the need to grant possession to the creditor - thus recognizing the possibility of continuing to use the pledged assets (raw materials, machinery, etc.) in the production process (floating charge).

The immediate consequence of the non-possessory nature of the pledge is the rotative effect of the security (eliminating the need for any further perfection formalities). The security is transferred either to the product resulting from the transformation, the consideration for the asset sale, or to the new asset purchased with such consideration, as the case may be, without any 'novating' effect on the security (thus avoiding any bankruptcy claw-back risk). For a non-possessory pledge to be created it is sufficient to specify the assets by indicating the elements that are useful for their identification as well as their overall value.

The whole system will be based on the electronic registry held and managed by the Italian tax authorities through which all operations will be carried out – registration, viewing, amendment, renewal and cancellation, all of which are going to be performed digitally.

As also provided for by the financial collateral directive (on financial instruments and cash), the legislator facilitates private enforcement and contemplates the continuation of enforcement even after a declaration of insolvency of the debtor. Specifically, a creditor will be allowed to proceed with either the direct sale, the appropriation, or the lease of the pledged assets (to the extent explicitly agreed). The lack of harmonisation of the recent civil justice reform with the rules on non-possessory pledges makes it unclear what would happen in the event of a challenge by the debtor. However, it seems that such a challenge should trigger the new

special procedure (*procedimento semplificato di cognizione*), which is much more streamlined and much faster than any ordinary proceedings (which is why the ‘private enforcement’ provisions set out in traditional pledge agreements have never been used in practice). Also, after the filing of a claim in bankruptcy a creditor will proceed with private enforcement without needing to be authorised by the bankruptcy judge.

Many expect the non-possessory pledge will probably replace the ‘special privilege’ (*privilegio speciale*), which is only available for medium and long-term debt transactions and the main issue of which is the archaic publicity and viewing system. The new electronic registry should provide a degree of visibility and legal certainty that the special privilege has not been able to offer. In fact, the latter has mainly been used either on an all-asset security or on a better-than-nothing basis, but the lack of case law testifies to its failure.

Although the non-possessory pledge was introduced in 2016, its implementation process has been long and still requires a final measure to be adopted by the tax authorities, concerning the payment of the relevant stamp duties, before coming into full effect. Its application will probably require some case-law clarifications (given the issue of coordination with the new regulation of civil proceedings and the fact that the legal system will be offering several security instruments for a single asset) and some explanations by the regulatory authorities (in relation to the potential impact on the capital requirements). Nevertheless, the non-possessory pledge is most likely to become a game changer for the financing of working capital.

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