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**As the entry into force draws near, we
look into the new non-possessory
pledge in Italian law**

In 2016 Italy introduced¹ new forms of security, including a pledge on movable goods which would not require physical delivery to the creditor, but would take effect by way of registration in a central repository held by the tax authority (the "Registry of Non-possessory Pledges", or "RNP"). We have covered this step [here](#). The operation of the register was laid out in secondary legislation², which has come into force in August 2021 and mandated the tax authority to put in place the IT system until April 2022, and develop the required technical specifications in the following thirty days.

This new form of security holds large promises for the commodities trade, and other industries which have struggled to take collateral in Italy in the traditional forms of a pledge or special lien. It has such flexibility and potential reach that it may play a role in most types of corporate lending, and impact the process and due diligence for credit analysis and M&A activity going forward.

Background

The non-possessory pledge was introduced after publication of the World Bank's 'Doing Business' report of 2016³, which ranked Italy poorly on its 'ease of doing business' scales. The rules on security impacted the 'enforcing contracts' and 'getting credit' rates, taking into account (a) the absence of non-possessory security over movable assets, (b) the absence of security extending automatically to assets acquired or coming into existence in future, (c) the absence of a central registry for filing of security with an electronic database, available online, and (d) the inability for lenders to enforce their security rights out of court.

The types of collateral available in Italian law were not sufficient to offset these deficiencies:

- an **ordinary pledge on movables** requires the delivery of possession to the creditor (or an independent custodian), in such way that the pledgor cannot use or access the asset without the creditor's cooperation. In theory this could be achieved with the goods remaining on the debtor's premises, but they would have to be stored in locked or guarded premises, and could not be accessed for industrial processing, marketing or other purposes. Also, there would need to be measures in place to identify the affected assets, and that they are charged with security in favour of the creditor
- a **revolving pledge** on movables allows the parties to replace or supplement the pledged goods with others, e.g. upon their sale or redemption, or a reduction in their value. However, the pledgor would still need to identify those goods with a 'date certain at law', and forfeit possession
- the banking law sets out a **special lien**⁴ which is non-possessory, and implemented by registration in a roll held by the courts having jurisdiction over the chargor's legal seat, and the place where the goods are held. The scope of this security is limited however, as it is available only to secure medium-long term loans (ie for a term of at least 18 months) or bonds or debt notes issued by Italian companies

¹ Law decree No. 59 of 3 May 2016, amended and converted with law No.119 of 30 June 2016 (the "**2016 law**")

² Decree No. 114 of 25 May 2021 of the Ministry of the Economy and Finance (the "**2021 decree**")

³ <https://www.doingbusiness.org/content/dam/doingBusiness/media/Annual-Reports/English/DB16-Full-Report.pdf>

⁴ *Privilegio speciale*, under article 46 of legislative decree No. 385 of 1 September 1993 (the "**special lien**")

- all existing forms of security on movable goods require a **specific description of the assets charged**. The security can extend to further assets during the life of the loan (revolving pledge, updated filing for the special lien), but this will again require an indication of the goods charged

The new rules introduce significant derogations from the ordinary rules on pledges and general principles on security. Parliament also delegated⁵ Government in 2017 to implement a wider reform of the Italian system of security and legal priorities. It is likely that the innovations brought with the non-possessory pledge will influence this wider review.

The tax authority also published⁶ a taxonomy for classification of the goods charged by a non-possessory pledge. There are 25 categories of goods, such as textiles, livestock and animal products, chemical goods, and the two broad categories of intangible goods (*beni immateriali*) and financial assets (*beni finanziari*).

Security for all businesses and types of debt

The new security is available to businesses (*imprese*) including companies and personal firms (*ditte*) enrolled with the business register. It is questionable that a non-possessory pledge can be created by foreign businesses, although it should be available for a branch registered in Italy of foreign legal entities. The 2021 decree clarified that both the pledgor and the debtor (if different) must be registered businesses.

All types of debt can be secured, as long as it pertains to the debtor's business. Unlike the special lien, the new security is available for short term loans, supply chain finance and all types of commercial debt.

What assets can be charged with a non-possessory pledge

All types of assets which pertain to the business can be pledged, except registered moveable goods (*beni mobile registrati*) such as road vehicles, aircraft and ships, which can be charged by way of mortgage through filing with registries held by specific public agencies. These are expressly excluded under the 2016 law.

Even assets which are under special registration regimes can be charged, such as the corporate capital of a *società a responsabilità limitata* (where an ordinary pledge would require filing with the Italian business register), a registered patent or trademark (filing with the Patents and Trademarks office of the Ministry of Economic Development), or financial assets (annotation in the accounts of the intermediary holding the collateral). The new security will not displace these or the many special security regimes introduced to support certain industries or districts⁷. Commentators discuss the coordination of filing formalities, but there is consensus that the new pledge can co-exist in parallel with ordinary or pre-existing types of security. We expect that creditors would seek both types of security, for defence and to gain flexibility in enforcement given the wider options afforded by a non-possessory pledge, as we discuss below.

Another innovation is that the goods charged need not to be identified specifically, and the pledge can cover future assets which have not yet come into existence or that are not yet owned by the pledgor. Commentators question if a non-possessory pledge can charge a party's unidentified assets (or its whole business), which would work in practice as a 'reservation' of

⁵ Law No. 155 of 19 October 2017, which we have covered [here](#)

⁶ Agenzia delle Entrate, provvedimento Prot. n. 262734/2021 of 12 October 2021

⁷ E.g. pledge on ham with protected designation of origin under law No. 401 of 24 July 1985; pledge on dairy products under 7 of law No. 122 of 27 March 2001; milk production quota under legislative decree No. 102 of 29 March 2004; revolving pledge on DOP and IGP agricultural and food products, wine and spirits under article 78 of law decree No. 18 of 17 March 2020

security over the whole of a debtor's assets up to the amount secured. We tend to share the view that a non-possessory pledge must at least specify the category (or categories) of the goods charged.

Priority by time

A non-possessory pledge takes priority on its entry into the RNP, which affords enforceability vs. any third parties, as well as in enforcement and insolvency proceedings.

There is one exception for loans granted specifically to finance the purchase of a given asset, which are secured with reservation of title or a pledge (ordinary or non-possessory). This protection will prevail over a pre-existing non-possessory pledge, on condition that the secured lender duly registers its own non-possessory pledge in the RNP, and notifies the holders of an earlier non-possessory pledge as shown in the RNP. This way, a non-possessory pledge will not disrupt a borrower's ability to fund instrumental assets by way of reservation of title, or other funding techniques used in supply chain finance.

In fact, this limitation should not infringe the value of the new security for lenders, as the sources of funding for a borrower's capital expenditure would in each case be regulated in the loan documentation, and creditors appearing in the RNP would in effect be put on notice of any assets acquired in this way.

Under the 2016 law where an asset charged with a non-possessory pledge is sold to a third party, if the sale is not prohibited under the pledge agreement the right of pledge is transferred onto the proceeds from the sale. That is, unless the pledge is revolving, and substitute assets are included in the pool of pledged goods. It is questionable that a creditor could recover the pledged goods in case of a sale which was not permitted (and a non-revolving pledge), as Italian law protects third parties who acquire possession of an asset in good faith. In theory a purchaser could verify the security from the RNP, but as discussed the pledged goods could be identified generically or by category. This means that it could in fact be impossible to gain awareness of the existing security from the RNP, in which case Italian law would probably uphold the purchase on grounds of good faith.

Similar concerns could arise with subsequent acquirors of title from a purchaser. Indeed, the RNP only records the creation of the security by the pledgor, but (unlike the land registry for real estate and buildings) there is no record of the transfer of title or other rights to the pledged goods.

The choice whether the pledge should be fixed or revolving, specific or generic, or whether a sale should be permitted will vary depending on the assets affected and their use and lifecycle. A detailed description of the pledged asset could be preferable for substantial machinery to be retained by the borrower for a long term. A generic indication could work best with commodities identified only by type and quantity, or inventory with frequent turnover.

As mentioned, an asset charged with a non-possessory pledge can also be charged with ordinary security, in the form of a possessory pledge or a special lien, where applicable. Any conflicts with the holders of ordinary security are again determined by the time of registration in the RNP. If this pre-dates the formalities for the traditional pledge (date certain at law, delivery of possession) or special lien (filing with roll held by the court), the non-possessory pledge will prevail, if subsequent it will rank junior to such ordinary security.

For a pledge over payment claims, priority over an ordinary pledge would be afforded by the date of entry in the RNP, which should take place before receipt by the debtor of the notice of the pledge with a date certain.

Registration

The 2021 decree has established the RNP as a register held by the Italian tax authority (*Agenzia delle Entrate*) in Rome, with the supervision of the Ministry of Justice. The RNP is held by a *conservatore* appointed by the director of the tax authority. The registry will probably be governed by articles 2673 and following of the civil code, which regulate the land registry (*conservatoria dei registri immobiliari*), also held by the tax authority.

The RNP is a unified registry for all filings in Italy, and can be accessed digitally. A request for registration of a non-possessory pledge is filed electronically along with a digital copy of the pledge agreement. This must be executed before a notary, or digitally in accordance with the Digital Administration Code⁸. The pledge agreement must also be filed for payment of registration tax, which should be payable in the rates usually to an ordinary pledge⁹.

The request must be executed digitally, and set out the maximum monetary amount secured by the pledge, a description of the secured claims, the charged goods (in detail or in general, as discussed) and whether they are present or future, and the category of the goods as per the tax authority's taxonomy.

Further, the registration should indicate whether the pledgor is permitted to dispose of the charged goods, or process them by transformation or commingling with other goods or materials. The request also specifies whether the secured creditor is permitted, following an event of default or other trigger for enforcement, to lease out the pledged goods to third parties, and/or retain them in discharge of the secured claims.

The request must also set forth whether there are existing security in other form on the assets charged. The parties are permitted to specify in the request for registration such further elements as they may deem useful to identify the goods or claims charged, or legal relationships which affect them. This may help identify the assets charged with certainty, which can be important for the strength of the security as discussed.

The input required for registration means that each secured creditor must obtain an Italian certified email address (PEC) and Italian tax code. For a pledge created as security for debt instruments issued by an Italian corporate, this requirement can be simplified with the appointment of a security representative (*rappresentante per le garanzie*) in accordance with article 2414-*bis* of the civil code, who would hold be entered in the RNP as holder of this security on account of the noteholders.

On completion of the registration or annotation, the holder (*conservatore*) of the RNP certifies the date and registration number of the request, which sets the date and order of priority. The law does not set out a term by which the registration or annotation must be effected, but the formalities are processed daily and in order of receipt by the office of the respective requests.

The registration takes effect for ten years, and can be extended by filing a new request within such ten-year term. If the deadline is missed the creditor can still apply for registration in the RNP with the initial file, but the ensuing non-possessory pledge will take priority from the date of this latter filing only.

The RNP is available to the public for digital consultation and to obtain excerpts, copies and certificates, for charges ranging from 3 to 35 euro (updated every two years). The office can

⁸ Legislative decree No. 82 of 7 March 2005 (the "**DAC**"), meaning by way of an 'advanced' or 'qualified' electronic signature in the meaning of the EU eIDAS Regulation, No. 910/2014 of the European Parliament and of the Council of 23 July 2014

⁹ A fixed tax of EUR 200 where the pledge secures the pledgor's own obligations only, or 0.5% of the value secured by the pledge (or the value of the assets charged) where the pledge secures the obligations of other persons

issue certificates of absence of charges, or certified copies of registration requests, and each request for documentation must specify the details of the debtor and/or pledgor, as well as the requestor's own identification.

Floating or fixed security

Italian law does not have express rules on floating rights of pledge, but Italian courts have recognised the effects of a revolving pledge (*pegno rotativo*), where the assets are supplemented or replaced during the life of the security. The main legal benefit is that the goods included later in the charged pool are treated as covered by the initial pledge, and priority (and any hardening or look-back periods for insolvency or claw-back purposes) dates back to the creation of the original security. With a traditional pledge, this won't generate uncertainty on the exact pool of assets charged, as they are delivered in possession to the creditor.

A non-possessory pledge can be 'revolving', and the 2021 decree requires applicants to specify in the registration request whether the pledge agreement includes a 'revolving' clause¹⁰. The non-possessory pledge also allows the parties to identify the pledged goods generally, such that all goods in a given class or category are pledged up to the value specified on registration. The pledge is also permitted to float on assets which replace those initially charged, whether they were identified specifically by category.

Unless the pledge agreement specifies otherwise, a pledgor is permitted to sell or otherwise dispose of the pledged goods, in which case the non-possessory pledge is transferred onto the proceeds from that sale or disposal. Clearly, this mechanism is alternative to the operation of a revolving clause, where the value of collateral is preserved by the inclusion of replacement goods, and the proceeds from the disposal remain unencumbered.

All this flexibility can have unintended consequences for creditors. As the transfer of the pledge from a given good to another is not subject to formalities, it can be difficult to identify exactly which assets are acquired by the pledgor in replacement of others, leading to uncertainty in the exact scope of collateral at any given time. Concerns could arise with a revolving pledge on a specific asset which is sold, if the parties identify do not specify the exact replacement, and formalise this with an updated entry in the RNP. A revolving pledge on the other hand protects the creditor from a risk of physical loss or damage, or a decrease in value of the goods pledged initially. It should be possible to regulate the scope of a non-possessory pledge with a revolving clause which is however subject to the creditor's specific consent in each case. That consent could be conditional on the replacement with goods for equal value, and an update of the entries in the RNP.

One general limitation which will probably affect non-possessory pledges is that the initial security cannot automatically extend to goods exceeding the value of the goods charged initially, unless a new pledge agreement is executed (and filed with the RNP) to charge that value in excess. This effect is intended for protection of third party creditors, which must rely on the entries in the RNP to evaluate which of a debtor's asset remain available to service their own claims. The law does not provide for the opposite effect (that the pledge automatically extend to cover more assets if the value of the initial pledged pool is reduced), but of course the

¹⁰ The 2016 law does not regulate this aspect, and the *patto di rotatività* described in article 3.2(s) of the 2021 decree probably includes those under Legislative decree No. 170 of 21 May 2004 (on financial collateral), that a pledge will extend to assets acquired by the pledgor during the life of the security (*clausola di integrazione*), or transfer from any assets which are released from the pledge (eg for the purposes of sale or disposal) to others which are added to the pledged pool to replace them (*clausola di sostituzione*)

parties can agree the pledgor's obligation to top up the pledged pool in that case, or as mentioned to identify the assets charged by category and value.

Enforcement

The 2016 law introduced ground-breaking options and flexibility in the enforcement of a non-possessory pledge, to allow creditors to take enforcement without having to resort to a court. The notice formalities are also simplified, as the process is initiated by a simple PEC email, unlike a possessory pledge which requires a notice by court bailiff.

Following the event of default or other trigger for enforcement, the creditor may take action following a notice to the debtor (and the pledgor, if different), and a written notice to any holders of another registered non-possessory pledge. Where enforcement is sought over claims, the written notice of enforcement must also be given to the debtor owing the pledged claims.

Then, without the need to await five days as prescribed for an ordinary pledge, the secured creditor may:

- sell the charged assets in a competitive procedure, also through a specialised intermediary. There is no need for a public tender but the sale must be adequately marketed, and published on the portal of judicial sales (*portale delle vendite pubbliche*). The value must be determined by an independent expert appointed by the parties (eg in the pledge agreement) or by the court on the secured creditor's request
- collect or sell the claims pledged for an amount sufficient to discharge the secured claims
- if agreed, lease out the pledged assets to third parties, and apply the rent collected in discharge of the secured claims. The pledge agreement must specify the methods and criteria to determine the rent and the secured claims
- if agreed, retain the pledged assets by acquiring their ownership (*appropriazione*) up to an amount sufficient to discharge the secured claims. Again, the agreement must specify in detail how the value of the pledged assets and secured claims are determined

In all cases the pledgor must be promptly informed in writing of the proceeds or value so realised. The creditor applies that amount in discharge of the secured claims, and must pay the excess to the pledgor.

The pledgor (and debtor, if different) can object to the enforcement before the court within five days of receipt of the notice of enforcement. The objection is heard in short-track proceedings on the merits, and will not suspend enforcement unless so determined by the court.

If the pledgor does not deliver the pledged goods within fifteen days of receipt of the notice of enforcement, the creditor can request a bailiff to take enforcement in accordance with the code of civil procedure. Unlike all other security, there is no need for a formal title for enforcement (*titolo esecutivo*, such as a court judgment or payment injunction) to engage the bailiff. The creditor can present a verbal request with evidence of registration in the RNP and the notice of enforcement.

The bailiff can appoint an expert valuer or accountant to identify the pledged assets, taking into account any incurred transformations and disposals. Where the pledge is transferred on the proceeds from a sale as discussed above, the bailiff can search the pledgor's own monetary claims vs. other parties, which can then be collected by the secured creditor.

In case of insolvency of the debtor or the pledgor, the secured creditor must await that the secured claims are admitted in the insolvency proceedings. Once this is achieved the secured creditor can proceed as described above. Unlike an ordinary pledge, the creditor must not await an order from the insolvency court to set the terms and date of the sale, and the insolvency administrator has no authority to step into the enforcement process.

The debtor owing the secured claims has three months from receipt of the notice of enforcement, to claim reimbursement for damages in case of breach of the agreed valuation criteria, or proceeds inconsistent with the market value of the assets. Clearly a risk of judicial review is inherent in any enforcement out of court, and the short time frame available to bring this challenge should work in favour of the secured creditors.

Comment

The legislative process for the non-possessory pledge is now complete, and the RNP should be open to the public from the day after publication of the and technical specifications. We cannot forecast exactly when the register will go live, but we do expect that this item should be given priority, given its potential and the current focus in the market on commodities and key equipment.

A security which does not require possession of the charged goods is also well suited for circulation, as a transferee creditor needs not to worry about taking physical control of those assets. Italian law also requires the pledgor's consent to delivery possession to a pledged asset to a transferee creditor, and clearly this would not be necessary with a non-possessory pledge. This inherent flexibility will probably support the use of this collateral in securitisations and other finance structures which rely on the transfer of receivables and security.

Given its breadth and flexibility, the strength of a non-possessory pledge will depend on the quality of the information used on registration, and the terms regulating its operation and scope. For most items which are suitable for physical delivery, a creditor may still prefer to establish a possessory pledge, or even both forms of protection where possible. For security over payment claims, the ordinary forms (pledge or assignment) can also be more effective, as they involve the awareness of the debtor owing the claims.

As with all material innovations, it will take some time (and court decisions) to form a comprehensive view of the effects and practical implications of this new security. We expect that it will be popular for assets which could not be charged with a possessory pledge, such as rolling stock and high turnover commodities. The new security is also well suited for structured trade financing, especially borrowing base loans where the amount available for the borrower to draw down is dependent on the size and value of the inventory from time to time which is charged with security for the lender.

The fully digital RNP will afford greater control to the lenders, and prompt access to information on the size and title to a financed inventory, and which security is in place. At this time several industries are also innovating and updating their processes to deploy distributed ledger technology (DLT) in the management of supplies and inventories. A combination of the new security with blockchain (eg as a shared tool to specify which assets are pledged from time to time) could bring much improvement in response time and transaction costs, and ultimately access to credit for Italian businesses.

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