

ITALIAN STATE GUARANTEE FOR NPL SECURITISATIONS: IMPLEMENTING DECREE IS APPROVED

Decree of the Ministry of Economy and Finance containing implementing provisions (the "**Implementing Decree**") for State guarantees for securitisations of non-performing loans (*Garanzia Statale sulla Cartolarizzazione delle Sofferenze*) ("**GACS**") was approved on 3 August 2016. The GACS was first introduced by Article 13 of Decree no. 18 of 14 February 2016, as amended and converted by Article 1, paragraph 1 of Law no. 49 of 8 April 2016 (the "**February Decree**").

In this Finance Law Alert we describe the main provisions contained in the new Implementing Decree.

Commentary to the main provisions of the Implementing Decree

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ARTICLE 2 – STRUCTURE OF THE TRANSACTION

Article 2 of the Implementing Decree describes the features that the securitisation transaction must have in order to be eligible for a GACS. The purchase price for the receivables to be transferred to an Italian securitisation vehicle (the **SPV**) must be no higher than the aggregate gross value (net of any adjustments and gross of any collections received between the cut-off date and the transfer date), as evidenced by the transferring entity (the **Transferor**) based on its accounting records. In addition, the receivables being securitised must have been classified and reported as non-performing (*in sofferenza*) on a date prior to their transfer date.

ARTICLE 3 – SENIOR NOTES

Article 3 of the Implementing Decree specifies that the senior-ranking notes to be guaranteed (the **Senior Notes**) must not be subordinated (in a post-default or post-acceleration scenario) as to principal or interest in accordance with the applicable priority of payments to any other non-guaranteed classes of the same issue. We note that Article 7 of the February Decree already specifies that the Senior Notes may not be subordinated pre-enforcement or pre-acceleration. Article 3 also specifies that the GACS may be issued for the benefit of one or more tranches of Senior Notes issued under the same securitisation transaction.

ARTICLE 4 – ORDER OF PRIORITY OF PAYMENTS

Article 4 of the Implementing Decree describes in greater detail the operation of the order of priority of payments, making it clear that the recoveries and collections deriving from the portfolio and received by the SPV will be used for the payment of amounts due to the noteholders and other costs or expenses associated with the transaction.

Article 4 further clarifies that following the occurrence of an event requiring the application of the post-enforcement priority of payments or, where applicable, the post-acceleration priority of payments as specified in the terms and conditions of the notes and the transaction documents, there may not be payments ranking higher in priority to the senior Notes other than those provided for in Article 7 of the February Decree.

ARTICLE 5 – ELIGIBILITY OF THE TRANSACTION FOR THE GACS

Article 5 concerns the eligibility conditions for the GACS. In particular, the terms and conditions of the notes and the transaction documents must provide that:

- (A) the failure to pay interest on the Senior Notes and the enforcement of the guarantee do not trigger an acceleration of payments due by the SPV;
- (B) the following amendments cannot be made without the express consent of the Ministry of Economy and Finance (the **MEF**):
 - (i) amendment of the nominal or principal amount of the Senior Notes;
 - (ii) increase of the interest rate applicable to the Senior Notes or, if interest on the Mezzanine Notes ranks senior to repayment of principal of the Senior Notes, the Mezzanine Notes;
 - (iii) amendment of the maturity date of the Senior Notes;
 - (iv) amendment of trigger events, being the events which entitle the holders of the Senior Notes to accelerate payments due by the SPV or apply the post-acceleration or post enforcement payment priorities;
 - (v) any amendment of the terms and conditions of the notes and the transaction documents which causes a downgrading of the Senior Notes;
 - (vi) any amendment of the terms and conditions of the notes and the transaction documents regarding how the GACS is enforced, as described in Article 11 of the February Decree;

(C) data on the performance of portfolio and the transaction is periodically sent in electronic format to CONSAP S.p.A. (**CONSAP**) and the independent entity (nominated by the MEF) (the **Independent Entity**).

In addition, the rating agencies rating the Senior Notes must be provided with the following information:

- (i) the expected cash flows, including cash flows related to any hedging contracts;
- (ii) the fees due to the servicer (being the entity in charge of collecting the receivables);
- (iii) the method of payment of interest on the notes;
- (iv) the consideration paid for the guarantee;
- (v) any other costs of the securitisation;
- (vi) the sizing of the classes of notes other than the Senior Notes;
- (vii) information, both quantitative and qualitative, on the servicer;

Finally, the Transferor must ensure that all information necessary for assessing that the guarantee has been issued in compliance with the required criteria are provided to the Independent Entity.

ARTICLE 6 – JOINT APPLICATION FOR MULTI-ORIGINATOR DEALS

Article 6 specifies that in the case of multi-originator securitisation transactions where there is more than one Transferor, the request for a GACS must be made jointly by all the Transferors.

ARTICLE 7 – APPLICATION FOR THE GUARANTEE AND RELATED PROCEDURE

Article 7 contains the procedure for the submission of the application for a GACS. In particular, Transferors must send to the MEF and CONSAP, by certified e-mail (pec), their application using the form published on the MEF and CONSAP websites, accompanied by the following documentation:

- a) the prospectus of the securitisation and ISIN codes of the Senior Notes to be guaranteed;
- b) the terms and conditions of the notes and the transaction documents;
- c) documents confirming the issue of the credit ratings (eg. new issue report, pre-report or similar);
- d) calculation of the cost of the guarantee, as determined on a date falling not earlier than the 15th business day prior to the date of application;

- e) undertaking letter from the Transferor(s) (signed by the legal representative) agreeing to transmit promptly documents evidencing the subscription/transfer of the junior notes and mezzanine notes (if any), in order to achieve derecognition of the portfolio for accounting purposes, together with appropriate certification of the Transferor's auditors;
- f) undertaking letter from the Transferor(s) (signed by the legal representative) agreeing to communicate, or to procure the communication to CONSAP of any amendment of the terms and conditions of the notes and the transaction documents.

CONSAP will not process any guarantee applications unless submitted as described above.

CONSPAP shall process applications, in order of receipt, within 15 working days, evaluating compliance with the requirements and conditions contained in the February Decree and the Implementing Decree. The outcome of application process will be promptly communicated to the MEF in order that it may adopt a decree granting the guarantee (each, a **Guarantee Decree**).

Of particular relevance is the provision that provides for the transfer of junior notes and (if any) mezzanine notes for the purpose of de-recognition as a condition precedent for the effectiveness of guarantee. This makes it possible to have certainty for the granting of the guarantee (although its effectiveness remains conditional) before the sale of the junior and mezzanine notes.

If the conditions above are not realised within 12 months from the date of the Guarantee Decree, the request must be resubmitted.

Lastly it is provided that CONSAP shall forward to the Independent Entity, for the purposes of art. 3, paragraph 3 of the February Decree, a copy of applications for granting of the guarantee and related materials.

ARTICLE 8 – INEFFECTIVENESS OF THE GUARANTEE

Article 8 addresses the circumstances where the guarantee could be declared ineffective by order of the MEF in accordance with Law No. 241/1990, and taking into account the findings of an investigation to be carried out by CONSAP. The MEF will be entitled to act against the Transferor where the GACS was issued on the basis of statements which were subsequently found to be untrue, inaccurate or incomplete. In the following circumstances, the GACS will be declared void:

- a) where the appointment of the servicer is terminated by the SPV or the noteholders causing a deterioration in the credit rating of the Senior Notes; and
- b) where the terms and conditions of the notes and/or the transaction documents are amended other than in accordance with the provisions of the February Decree and the Implementing Decree.