THE LEGAL PERSPECTIVE

Real estate investment in Italy

DLA PIPER

Some peculiarities of the country Italian real estate market

While 2022 represented one of the best historical performances of the Italian real estate market with a volume of the investments approaching EUR12 billion, an increase of 20 percent compared to 2021, 2023 saw a significant contraction in investments mainly due to the rising interest rates that made access to credit more difficult. In fact, 2023 saw the volume of real estate investment in the Italian market stand at around 6.2 billion.

The sector in which the greatest number of investments were recorded in 2023 is logistics, followed by the office and hospitality sectors.

The varied scenario of which the Italian real estate market is composed requires a specialized approach and, in this respect, real estate is a key practice area for DLA Piper which is carrying out a sector approach in order to provide its clients with the highest level of legal assistance in respect of all the areas involved in real estate investments such as, town planning, environmental, corporate, finance, tax, restructuring and investment funds.

This guide provides an overview into how the legal system in Italy operates and is aimed at covering the basics relating to investing in the Italian real estate market as a foreign investor. It is intentionally not an exhaustive guide.

Contents

Some peculiarities of the country Italian real estate market 2

1. Ownership of real estate 4

1.1 Property rights 4
1.2 Co-ownership and condominium 5
1.3 Restrictions 5

2. Acquisition of ownership 6

2.1 Formal requirements 6
2.2 Registration 6
2.3 Asset deals 6
2.4 Share purchases 7
2.5 Real estate investment funds and SICAFs 7

3. Other rights to property 11

3.1 Mortgages, pledges, privileges 11
3.2 Easements 11
3.3 Pre-emption rights 12
3.4 Condemnation (compulsory purchase) 12

4. Zoning and planning law permits 13

5. Environmental aspects 14

6. Leases 14

6.1 General overview 14
6.2 Property lease agreements 14
6.3 Business lease agreements 14
6.4 Main terms and conditions in lease 14
6.5 Public sector tenants 15

7. Tax 16

7.1 Taxation on acquisition 16
7.2 Property taxes (IMU) 16
7.3 Taxation of rental income from real estate on-going taxation for the owner of real estate 16
7.4 Taxation on distributions 17
7.5 Taxation on disposals 17
7.6 Real estate funds 18
7.7 SICAF 19

8. Real estate finance 20

8.1 Interest rate risks 20
8.2 Security interests and collateral agreements 20
8.3 Taxation and fees on The Creation of Security 21
8.4 Lending activity 21
8.5 Corporate rules 21

Glossary 22

Contacts 23

About DLA Piper 23

1. Ownership of real estate

1.1 Property rights

In Italy there are various types of rights relating to real estate assets:

Absolute freehold or full ownership (piena proprietà) – the right to fully and exclusively enjoy and dispose of the property. It is the broadest right which may be held in real estate.

Right to build (diritto di superficie) – the right to build and maintain a building on or underneath a third party's property, granted for a specific or indefinite period of time. In case the right to build is granted for a specific period of time, when the latter expires, the landowner becomes the legal owner of the building, which has been built on or under the ground while, when the right to build is granted for an indefinite period of time (tempo indeterminato), the beneficiary of such right permanently acquires the ownership of what has been built on or under the ground. In this case, it is possible to sell the title to the built property even without owning the title to the underlying land (where the seller is a public authority the sale will be for a maximum 99 year term).

Beneficial interest (diritto di usufrutto) – the right to enjoy a third party's real estate asset for a specific period of time. This cannot be longer than the lifetime of the beneficiary if the latter is an individual, or more than 30 years if the beneficiary is a legal entity. The beneficiary can use the real estate asset in the same way as an owner, including having the right to collect interest or to grant leases, provided that the original economic intended use of the real estate asset is maintained.

Right of use (diritto d'uso e di abitazione) – the right to use real estate in order to meet the needs of the person holding the right and those of his immediate family.

Emphyteusis or long lease (*diritto di enfiteusi*) – a right to enjoy a property owned by a third party with rights similar to those granted to the full owner. The leaseholder pays a rent to the bare owner, must enhance the property and is granted the right to become full owner by paying a certain amount. This right may be perpetual or granted for a specific period of time (in the latter case its duration cannot be lower than 20 years). This right is rare in common practice.

Easement (*servitù*) – an encumbrance (*onere*) burdening a property in order to provide another property, owned by a different person/entity, with a direct advantage (*utilità*).

These rights are all classified as in rem rights (*diritti reali*), as further detailed below.

1.2 Co-ownership and condominium

Property rights, including the right of full ownership of real estate, may be co-owned by two or more persons, companies and/or other legal entities.

Co-ownership can also take the form of condominium: usually in relation to housing but also, in certain cases, to shopping malls where different units in the same building and/or different buildings in the same real estate complex are owned by different owners but some of the areas and services are used by the owners collectively.

The members of the condominium have a right of co-ownership over the common assets which are proportionate to the value of their respective interests in relation to the value of the entire building/real estate complex. The rights of co-ownership in a condominium are expressed in "millesimi" (i.e: participation interests calculated on the basis of 1/1,000) and listed in a "millesimal chart"; the millesimal quota represents the value of the voting rights of each member of the condominium.

The co-owners may adopt condominium regulations (mandatory where the co-owners are more than ten) laying down rules governing, for instance, the use of the common areas and the common plant, the allocation of relevant expenses and the management of the condominium.

The right of co-ownership may only be transferred together with a transfer of the owner's interest.

1.3 Restrictions

In general, there are no restrictions on the purchase of real estate assets by foreign investors. However, certain limitations may be imposed: (i) by the Foreign Ministry (Ministero degli Affari Esteri). when a real estate investment is made by a citizen or company having citizenship of a foreign country in which an Italian citizen or company could not make a real estate investment according to the local legislation (so called reciprocity condition); and (ii) by the Presidency of the Council of Ministers (Presidenza del Consiglio dei Ministri) when a real estate investment concerns real estate assets used for certain strategic and of national interest activities.

In rare cases mandatory pre-emption rights apply to the sale of real estate assets. (See paragraph 3.3 **"Pre-emption Rights"**).

There are other restrictions on sales by an individual in a family context.

2. Acquisition of ownership

Investments in real estate in Italy can be made in various forms. There are two main alternative structures available:

- Asset purchase, and
- Acquisition of the shares in the asset owning corporate vehicle (i.e., a share purchase).

2.1 Formal requirements

A deed of transfer must be made in writing and authenticated by a public notary in order to be filed (**trascritto**) with the Real Estate Register (**Conservatoria dei Registri Immobiliari**).

Preliminary contracts must take the same form as the final deed of transfer and therefore must also be in writing.

The content of the contract is negotiable but must include the price; the identity of the property or of the quotas/shares to be transferred in the case of a share purchase; details of the relevant building permits; and rules regarding the allocation of risks and benefits relating to the property.

When the contract is signed in front of a public notary, the means of payment, details of the real estate agent involved and the agency fee must be indicated in the notarial deed.

2.2 Registration

Although it is not a requirement for validity, deeds are usually filed with the publicly available Real Estate Register (**Conservatoria dei Registri Immobiliari**) held by each Municipality. This avoids conflicts with future buyers and third parties.

The register records information relating to the property, including sales and purchases, mortgages, easements, rights of use and all the in rem rights, as well as any pending registered disputes.

The purpose of the filing (trascrizione) is to resolve possible conflicts between entities which have acquired the same right in rem. Indeed, deeds creating or transferring in rem rights are not effective against entities which acquired the same rights, even later, but have filed earlier the deed by which they acquired them.

A filing can benefit from these rules only if the previous acquisition deed has also been properly filed (the rule of "continuity of filings", i.e. an uninterrupted chain of ownership).

Preliminary agreements relating to an existing property or to a property under construction can also be registered in order to protect the buyer against any subsequent filing of third parties' rights or a second sale of the same asset. This protection stops one year after the completion date specified in the preliminary agreement and, in any event, three years after the registration of the preliminary agreement.

The filing of a preliminary agreement does not have the same effect as a final agreement, but it gives retrospective effect to the final agreement as from the date of filing of the preliminary agreement (the "booking effect" – **effetto prenotativo**).

Real estate assets are also registered in the Cadastre Register, which is held by the Municipality in which the property is located, and consists of the Land Cadastre, in which undeveloped lands are recorded, and the Building Cadastre in which buildings are recorded. Both land and buildings must be registered and after registration are attributed a "cadastral income". This forms the basis for calculating the municipal property tax (IMU IUC see paragraph 7). Cadastral income can be subject to review by the relevant authority.

2.3 Asset deals

Investors usually prefer asset deals, since this structure allows the latter not to inherit any risks not directly related to the property and allows the real estate assets to be acquired without further material or people.

In Italy an asset deal may be structured as: (a) an acquisition of a real estate asset; or (b) an acquisition of an on-going business (ramo d'azienda).

In the purchase of an on-going business, the purchaser is legally obliged to step into existing contractual relationships and to take over certain liabilities as part of the public law authorisation for the carrying on of the business.

Usually, the parties to the transaction enter into an agreement such as a letter of intent or heads of terms, providing the potential buyer with an exclusivity period in which to carry out the due diligence.

Before buying a property it is necessary to be aware of:

- Its history;
- The legal title held by the seller, and any defects or problems with it;
- Planning permissions that allowed it to be built;
- Agreements with neighbours;
- Possible encumbrances;
- Environmental issues; and (for on-going business sales);
- Commercial authorisations and other necessary public permits;

All the contracts concerning the business, including employment agreements.

Normally, public notaries carry out a search on title in the Real Estate Register. The notary's report is usually part of the legal due diligence and includes an investigation into the existence of any third party rights as well as the seller's title to the property. An investor will usually appoint a notary public to provide an updated twenty year notarial report (relazione notarile ventennale), which is the only document giving legally conclusive evidence of legal title to the property and the relevant encumbrances.

Title insurance is new in Italy, and not common practice.

Generally it is for the buyer to satisfy itself about the issues covered in due diligence but the seller can be asked about key issues of concern which may affect the value, occupation or use of the property.

Misrepresentation by the seller may lead to termination of the agreement, the payment of damages, a reduction in the price or, where appropriate, the seller being required to rectify any specific defects.

By law, the seller guarantees that it has title to the property, and that the property is free from any third party rights and from any defects that might prevent the agreed use of the property or have a negative impact on its value. Breach entitles the buyer to request the termination of the agreement with a full refund of the price, as well as payment of any additional damages. Alternatively the buyer may ask for a reduction in the price. When the seller has breached its warranty on the absence of defects, the presence of the latter must be notified within eight days of discovery and a one year limitation period applies from the date the buyer takes possession of the property.

Most statutory warranties are negotiable. Current practice is to limit the extent of the warranties and to place more importance on the role of due diligence by excluding liability for any issues disclosed through due diligence.

In new properties, the buyer has a ten year warranty under statutory law. The developer is liable if the structure collapses or suffers from serious defects.

2.4 Share purchases

A vendor may want to obtain specific tax benefits by selling the shares of the corporate vehicle instead of selling the property directly. Most double tax treaties signed by Italy exempt the profit derived from the sale of shares from taxation in Italy if the selling shareholder is not tax resident in Italy.

It may also be that the corporate vehicle was used for development activities and that the vendor wishes to transfer all liabilities deriving from the development to the purchaser by selling the corporate vehicle as such. Sales of the corporate vehicle instead of the property itself are becoming increasingly popular in the Italian real estate market.

In these situations, it is highly advisable for the investor to appoint professionals in order to carry out legal and technical due diligence covering all legal aspects relating to the shares of the target company, existing debts, receivables, liabilities, contracts executed by the target company, financial statements, and the company books.

In relation to the corporate governance of Italian corporate vehicles, be aware of the following:

- In a limited liability company (S.r.l.) considerable flexibility can be agreed in the by-laws and voting and profit rights can be freely allocated. The holders of the quotas can appoint and remove directors and may also have approval rights over management decisions. The directors are responsible for day to day business decisions. The company can be managed by either a sole director or a board of directors. A board of statutory auditors is required if (i) certain thresholds relating to turnover and number of employees are exceeded for two years, or (ii) the S.r.l. is required to prepare consolidated financial statements, or (iii) the S.r.l. is the controlling entity of a company which is subject to accounting control. Unless the contrary is stated in the articles of incorporation, the S.r.l. will be audited by a single statutory auditor.
- In a joint stock company (S.p.A.) different categories of shares with different rights can be created. Voting and profit rights can be freely allocated. An S.p.A. can be managed in any of the following ways: (i) by a sole director or a board of directors appointed by the shareholders' meeting (the traditional system); (ii) by a supervisory board (appointed by the shareholders' meeting) and a management board (appointed by the supervisory board)(the two tier system); or (iii) by a board of directors appointed by a shareholders' meeting and an executive committee of the board (appointed by the board of directors) (the one tier system). The appointment of statutory auditors is mandatory. The shareholders may choose to appoint a board of statutory auditors comprising either three or five permanent members, in which case two alternate members must also be appointed.

2.5 Real estate investment funds and SICAFs

2.5.1 REAL ESTATE INVESTMENT FUNDS

Real estate investment funds (**fondi di investimento immobiliari**) are quite common as an instrument to invest in real estate assets, especially by institutional investors.

According to the Directive 2011/61/EU on alternative investment fund managers (**"AIFMD"**) and to the Legislative Decree 58/1998 – the so called Unified Financial Act, (**"UFA"**), an Italian real estate investment fund is a closed end alternative investment fund (**"AIF"**), i.e., it is a scheme established and managed by a manager as a segregated pool of assets divided into units and collected, through one or more issues of units, among a plurality of investors, managed as a whole in the interest of the unit holders and independently from them. It is invested mainly in real estate on the basis of a predetermined investment policy.

An Italian real estate investment fund whose units can be subscribed (or purchased) only by professional investors and by the other investors identified by the Decree of the Ministry of Finance no. 30 of 5 March 2015 is described as "reserved".

A reserved real estate investment fund may be established and managed by an Italian management company which is licensed by the Bank of Italy or by an authorised entity resident in an EU member state.

Italian reserved real estate investment funds must be managed in accordance with a predetermined investment policy and must:

- Invest an amount equal at least to 2/3 of their total value in: (i) real estate assets; (ii) rights in rem over real estate assets (iii) equity interests in real estate companies (**"società immobiliari"**); (iv) other real estate AIFs.
- Invest any remaining 1/3 of their total value in other legally permissible assets.

They cannot directly carry out any building activity.

There are risk concentration rules aimed at limiting the stable investment of the fund's assets in single properties. These risk concentration limits can be derogated from in the case of reserved funds, but a de facto minimum level of diversification of risks must be ensured.

Investors participate in a real estate fund by subscribing or purchasing units. Several unit classes can be issued, provided that investors subscribing the same unit class are granted the same powers and duties.

2.5.2 SICAF

An Italian real estate SICAF is a closed end AIF under the AIFMD and the UFA, i.e. it is a scheme established as a joint stock company (S.p.A.) with fixed capital and a registered office located in Italy, having as its exclusive corporate purpose the investment of the assets collected through the issue of shares (or other equity instruments), among a plurality of investors, managed as a whole in the interest of its investors and independently from them.

It is invested mainly in real estate on the basis of a predetermined investment policy.

SICAFs are subject, in general, to the same regulations provided for other AIFs with respect to, inter alia, investment activity, risk concentration limits, plurality of investors, etc., of course adjusted to the different nature of the SICAF (ie an AIF constituted under statute) as opposed to other AIFs constituted under the law of contract.

The establishment of a SICAF must be authorised by the Bank of Italy.

2.5.3 SECURITIZATIONS

Background

The concept of "securitisation of real estate and registered movable assets" (cartolarizzazioni immobiliari e di beni mobili registrati) has been introduced by Italian Budget law no. 58 of 28 June 2019 which has amended Law 30 April 1999 No. 130 (the "Law 130" or the "Securitisation Law") introducing, inter alia, the articles 7, paragraph 1, letter b-bis and 7.2 of Law 130 (the "**Real Estate Securitisation**" or the "**7.2 Securitisation**").

Standard structure

In brief, the structure of a standard Real Estate Securitisation entails:

A. the transfer of one or more real estate assets (of any type) (the "Properties") by one or more entities (the "Sellers") to an "orphan" special purpose vehicle incorporated under article 7.2 of the Law 130 (the "SPV 7.2");

B. the issue of one or more classes of partly paid asset-backed notes by the SPV 7.2 (the "Notes"), having the relevant Properties as underlying assets and subscribed by qualified investors (the "Noteholders"), to finance the acquisition of the Properties and (if needed) the relevant development/valorisation (such as capex). In order to timely acquire the Properties before the issuance of the Notes, the Noteholders usually fund the SPV 7.2 through an advance payment («versamento in conto futura sottoscrizione») in relation to the Notes which will be off-set, on the relevant issue date, with the subscription prices of the Notes;

C. the segregation of the proceeds deriving from the Properties, so that all the amounts paid to the SPV 7.2 (e.g., sale proceeds, rents or insurance proceeds) are used exclusively towards payments due under the Notes and/or under the Loan(s) (as defined below), if any, granted to the SPV 7.2 to finance the acquisition of the Properties and to pay the Real Estate Securitisation costs; and

D. the appointment by the SPV 7.2 of an asset servicer (the "Asset Servicer"), in addition to the other usual securitisation agents (e.g., servicer, account bank, corporate servicer, calculation agent and paying agent) which will be in charge of the management and/or administration of the Properties.

It should be noted that, without prejudice to the above, the funding structure is flexible and the financing of the Properties through the issuance of the Notes could be also financed (i) by way of a loan granted to the SPV 7.2 by an authorized/licensed entity (the "Loan") or through a mixed structured involving the issuance of Notes and the granting of a Loan. In these cases, the relevant lender will benefit, mutatis mutandis, from the same segregation regime set out in the Law 130 in relation to the Noteholders.

With particular reference to point (d) above and within the framework of the Real Estate Securitisation, pursuant to Law 130:

- the SPV 7.2 shall appoint a bank or a financial intermediary registered in the Bank of Italy register provided for under Article 106 of the Legislative Decree 385/1993, as amended and supplemented from time to time, for the purpose of carrying out activities related to the "collection of assigned receivables and cash and payment services," as well as for verifying the compliance of the transaction with applicable law and the offering prospectus" (the "Servicer"); and
- the SPV 7.2 shall appoint (for the benefit of the Noteholders) an Asset Servicer with adequate expertise and the necessary qualifications or authorisations in compliance with applicable legal provisions. The Asset Servicer shall be entrusted with management or administrative duties and shall be granted (if so decided by the Noteholders) representation powers in relation to the Properties in the interest of the Noteholders.

From a practical point of view, the Servicer and the Asset Servicer are generally selected by the Noteholders during the set-up phase of the Real Estate Securitisation and, in many cases, the Asset Servicer is an entity which acts as (or is an affiliate of an entity acting as) Noteholder.

By way of clarification, any investor which has subscribed the Notes in the primary market can sell the Notes to other qualified investors in the secondary market and, therefore, the new noteholder would benefit of the transaction documents of the Real Estate Securitisation.

The following additional characteristics should also be taken into consideration with reference to a Real Estate Securitisation:

1) **asset segregation**: as described above, by express provision of Law 130, the proceeds deriving from the Properties are segregated and used exclusively for: (i) covering costs and expenses related to the Real Estate Securitisation; (ii) making payments due on the Notes and/or under the loans Loan(s) (if any); and (iii) potentially financing capex or other costs related to the Properties. With particular reference to the "ring-fencing" provisions set out under Law 130, it should be noted that, following the acquisition of the Properties by the SPV 7.2:

2) **the Properties** (and any proceeds thereto) form segregated assets (patrimonio separato) ("Segregated Assets") from the assets of the SPV 7.2 and from those relating to any other real estate securitisation transactions carried out by such SPV 7.2;

3) **on each of the Segregated Assets** no actions are permitted by creditors other than the Noteholders or (if any) the hedging counterparties involved in the Real Estate Securitisation or the agents of the SPV 7.2; and

4) **the SPV 7.2's payment obligations** towards the Noteholders (as well as towards any other creditor in the context of the Real Estate Securitisation) shall be exclusively satisfied by using the Segregated Assets.

5) **direct control over Property** management and governance: the Noteholders exercise direct control over the management of the Properties, albeit delegated to the Asset Servicer pursuant to an asset management agreement agreed also with the Noteholders. Decisions regarding the Real Estate Securitisation are made by the Noteholders which are the only entities that can instruct the SPV 7.2 and the governance rules are detailed in the terms and conditions of the Notes;

6) **exclusivity**: pursuant to Article 7.2, paragraph 1 of Law 130, the SPV 7.2 carrying out a Real Estate Securitisation shall carry out exclusively securitisation transactions of such nature;

7) **non-application of the EU Securitisation Regulation**: the EU Securitisation Regulation (i.e. Regulation (EU) 2017/2402) should not apply to a Real Estate Securitisation considering that:

   i) the Properties would not fall under the concept of "exposure" and therefore investors would not suffer a "credit risk associated with an exposure or a pool of exposure" as required by Article 2(1) of the EU Securitisation Regulation;

   ii) the payment obligations of the SPV 7.2 rely on the proceedings deriving from the Properties and therefore such payment obligations would not be "dependent upon the performance of the exposure or of the pool of exposure" as required by Article 2(1), letter (a) of the EU Securitisation Regulation; and

   iii) a Real Estate Securitisation should qualify as "specialised lending transaction" and therefore it shall be included under the exemptions set out in letter (c) of the definition of "securitisation" included in the EU Securitisation Regulation.

This means that also in case of segmentation of the risk relating to the Real Estate Securitisation, the risk retention requirements set out in the EU Securitisation Regulation do not apply to a Real Estate Securitisation;

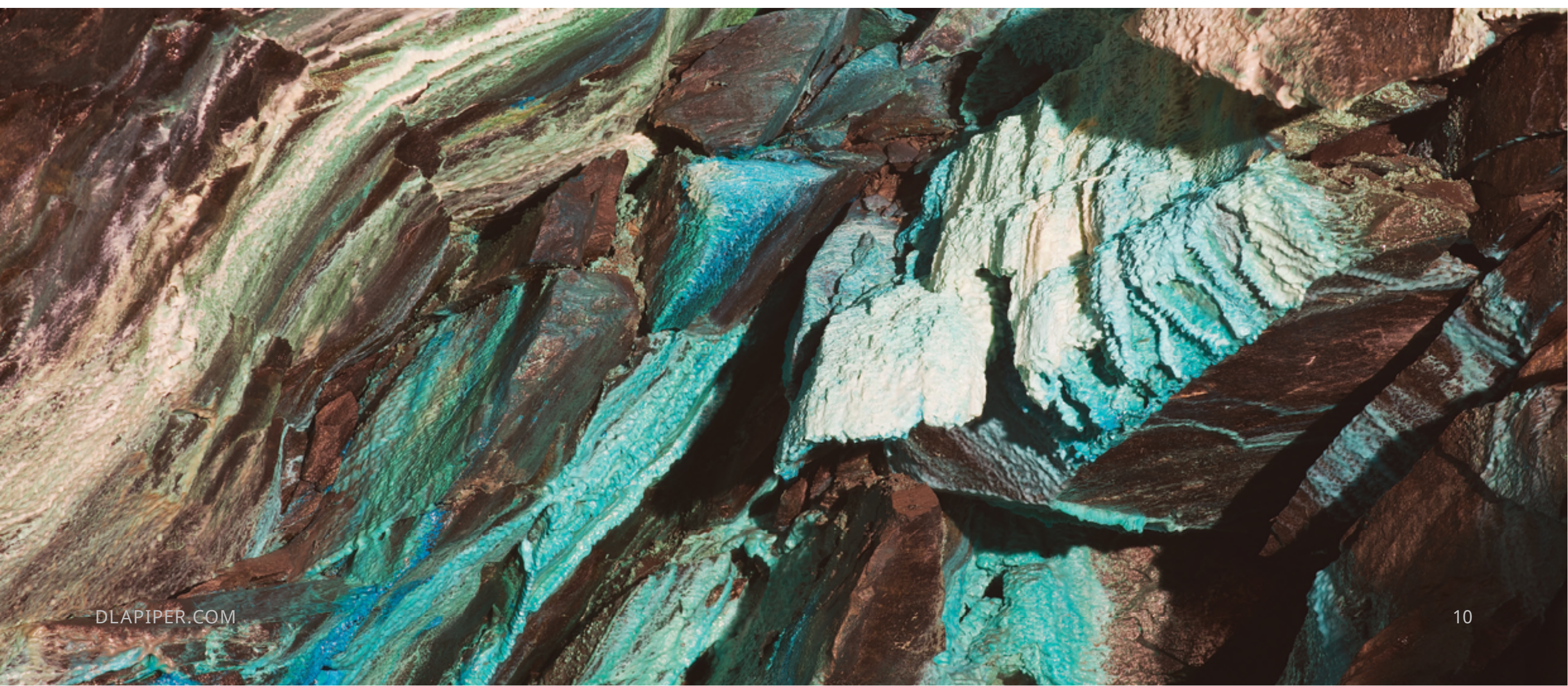
8) **tax considerations**: based on the current Italian tax rules and the most recent position of the Italian tax authority (Italian tax authority position no. 132/2021):

   - the SPV 7.2 is not subject to Italian corporate income taxes on the amount of proceeds potentially realised in the context of the Real Estate Securitisations: proceeds deriving from the management/sale of the Segregated Assets are accounted "below the line" (sotto la linea) as they relate to segregated assets and, therefore, should not be included in the SPV 7.2's IRES tax base. The presence of the "segregated assets" excludes the profile of the relevant income for tax purposes, pursuant to Article 83 of the TUIR (i.e., Italian Consolidated Income Tax Act 1986/917, as amended and supplemented from time to time);

   - corporate income taxes are only applicable on the residual amount (if any) after the full satisfaction of the Noteholders and the other SPV 7.2's creditors once the Real Estate Securitisation has ended;

   - the SPV 7.2 is subject to the ordinary VAT regime on acquisition of real estate assets (4% mortgage and cadastral taxes would be applicable upon acquisition of commercial properties (beni immobili strumentali), unless deriving from resolved financial leasing agreement, if certain conditions are met); and

   - interest amounts paid on the Notes are subject to the specific tax treatment provided for securitisation transaction under Legislative Decree no. 239/1996). This implies that white-listed institutional investors, white-listed resident noteholders and beneficial owners of the Notes will be exempt from any Italian withholding tax upon distribution of interest.



3. Other rights to property

3.1 Mortgages, pledges, privileges

A mortgage (*ipoteca*) is an in rem security right (diritto reale di garanzia) which burdens real estate assets and, in particular, it is the most common form of security over real estate (which includes the land, buildings erected on it and fixtures which form part of those buildings).

The creditor holding a receivable secured by a mortgage is entitled to start an expropriation procedure (espropriazione) and to be preferred over others on the proceeds of the sale of the property in such procedureconcerning the burdened property. Indeed, following the enforced sale, the proceeds are distributed amongst all creditors in the enforcement procedure, after prior payment of the beneficiary of the mortgage.

A mortgage may burden not only the right of full ownership over real estate, but it may be established also over certain other real estate rights, e.g., rights to build (**diritti di superfice**), beneficial interests (**diritti di usufrutto**), bare ownership (**nuda proprietà**).

A mortgage may be established by means of a voluntary deed of the debtor (or of a third party over its properties) (**ipoteca volontaria**) but in certain cases the law expressly entitles a creditor to establish a mortgage over the properties of the debtor (**ipoteca legale**), most importantly the right granted to a seller of a real estate asset in order to secure the payment of the price.

Mortgages must be executed by deed in front of a Notary Public and must be filed (**iscritta**) with the relevant land registry in order to be validly established.

Judicial awards and orders of payment issued by a Court entitle the creditor to establish a mortgage over the properties of the debtor (**ipoteca giudiziale**). Establishment of the mortgage will be validly completed upon filing with the land registry.

A property may be burdened by more than one mortgage, in which case, a claim regarding the credit secured by the senior mortgage (first ranking mortgage) has priority over those concerning receivables secured by junior mortgages established subsequently (classified as mortgages of second ranking, third grade, fourth grade etc.).

Being an in rem right, mortgages do not terminate automatically in the event of transfer of the properties burdened by the same, indeed they "follow" the property and stay with the same (so called **ius sequelae**).

Unlike a mortgage, a pledge (pegno) is an in rem security right (diritto reale di garanzia) which burdens only movable assets and not real estate assets. Finally, various claims, collectively referred to as privileges (privilegi) have statutory priority against the claims of other creditors in relation to the proceeds of a debtor's property, e.g., the State for direct and indirect taxes.

In principle, pledges prevail over privileges over movables, and special privileges over real estate assets and immovable properties prevail over mortgages.

3.2 Easements

An easement (**servitù prediale**) consists of an encumbrance (**onere**) burdening a property in order to provide another property, owned by a different person/entity, with a direct advantage (**utilità**); indeed easements require the existence of a relationship between two properties, the burdened one (**fondo *servente***) and the benefited one (**fondo dominante**), without prejudice to the possibility of establishing reciprocal easements between the burdened properties.

A non-exhaustive list of the most common type of easements includes rights of way (**servitù di passaggio**) which could be with vehicles and/or pedestrian (**carraio e pedonale**) and which generally allow passage through part of one property to reach another, electric pipeline easements (generally in order to allow the main electric operators to place, maintain and operate electric booths and pipelines for the distribution and supply of electricity); gas pipeline easements, etc.

Being in rem rights, easements can be enforced vis à vis third parties, and they do not terminate in the event of the transfer of the properties affected (adversely or usefully) by the same, indeed they "follow" the property and stay with the same (**ius sequelae**).

Typically easements are established by means of a contract entered into by the owners of two properties, but they could be also established by means of an administrative measure or judicial awards.

The agreements which establish easements must be in writing and, in order to be effective vis à vis third parties (e.g. the buyer of the affected properties), must be executed by means of a notarial deed and filed (**trascritti**) with the land registry.

It is also possible to affect a property by establishing personal rights over the property in favour of a person/entity, rather than in favour of another real estate asset. Such rights would be not considered as in rem rights, but as personal rights (**diritti personali**), not enforceable vis à vis third parties and having no automatic ius sequelae in the case of a transfer of the affected property.

For an investor it is advisable to determine whether any easements adversely affect the target property, or whether the latter property is granted easements in its favour or also. Consideration must also be given to whether the implementation of a planned investment such as the development of land or the enhancement of a shopping mall requires the establishment of easements in favour of the purchased property.

3.3 Pre-emption rights

In rare cases mandatory pre-emption rights apply to the sale of real estate assets.

In the case of commercial lease agreements (lease agreements for non-residential use) tenants carrying out activities involving direct contact with the public (as users and consumers) have a pre-emption right if the landlord intends to sell the property they are leasing during the term of the lease; in particular, tenants are entitled to purchase the premises on the same terms and conditions.

In Italy some real estate assets are considered protected because of their historical or landscape value. In this case the building or area will be subject to a number of legal burdens, and any work involving the property is subject to the prior authorisation of the competent public authority (**Soprintendenza**). Moreover the State has a preemption right over properties with historical or landscape value. Deeds of conveyance relating to such properties therefore have to be mandatorily served on the relevant public authority and are conditional upon the non-exercise of the state's pre-emption right.

Furthermore, in the event of a transfer of agricultural land which are let to small independent farmers (coltivatori diretti) pursuant to a lease of agricultural land, the tenant is granted with a pre-emption right ("agricultural pre-emption right"), provided that certain requirements are met.
In addition, the agricultural pre-emption right is also granted to "direct farmers" owning adjoining land.

3.4 Condemnation (compulsory purchase)

Condemnation is possible but only where specific permission is granted in accordance with the law. Moreover, expropriation is only allowed if this is in the public interest and in such cases the State must pay compensation to the parties involved.

4. Zoning and planning law permits

In Italy, the competences on zoning, planning and building matters are shared between four different levels of government, the State, the Regions, the Provinces and the Municipalities.

The State, which is responsible for guidance and coordination, sets the general rules and guidelines for planning and building law, which are then implemented at regional, provincial or municipal level.

The Municipalities are the central point in the definition of programmes for development and transformation of land. They approve the General Town Planning Instrument (which has different names, depending on the regional laws).

Each building must be compliant with the General Town Planning Instrument provided at the municipal level.

As to the designated use, buildings constructed legitimately before the coming into force of the General Town Planning Instrument are legitimate even if not in compliance with the new General Town Planning Instrument and can be maintained, but not modified.

The changes in the use, that involve a transfer from one use category to another (the principal categories are: residential, commercial, industrial, offices) require the issuing of a building title and the payment of related fees. On the other hand, changes that involve a change within the same category and that do not need main refurbishment works do not require any fee payment.

Generally speaking, any construction activity is subject to the obtainment of a building title. There are three types of building titles (minor works do not need a building title but the Municipality must be notified):

- The building permits, ie administrative licenses issued by the Municipality;
- The SCIA – certified declaration of commencement of works (**segnalazione certificata di inizio attività**), ie a communication filed by the developer with the Municipality (and signed by an architect or an engineer, who shall attest that the works to be carried out are compliant with relevant regulations) and by means of which the developer merely communicates to the local competent administration its intention to begin the construction works. Works can be started immediately after the filing, save for the power of the Municipality to control the existence of the legal requirements to perform the declared activities, in the subsequent 30 days;
- The CILA communication of commencement of works (**comunicazione di inzio lavori asseverata**), ie an instrument similar to the SCIA, related to works with a minor impact.

Building titles related to new buildings or refurbishment works (**ristrutturazione edilizia**) are subject to the payment of a fee (contribution on construction cost) to the Municipality.

Buildings of historical or landscape value are subject to special rules.

Under Italian law, in order to carry out a retail activity the operator needs a trade license granted by the Municipality or by the Region, depending on the surface of the sales area.

5. Environmental aspects

According to the Italian legislation, specifically Legislative Decree 152/2006 (the Environmental Code), a Strategic Environmental Assessment (valutazione ambientale strategica – "VAS") may be required for developments that involve a change to the General Town Planning Instrument, in order to verify the sustainability of the plan or programme from an environmental point of view.

In addition to the above, the Environmental Code also provides for a list of developments that may have an impact on the environment and for which the execution of an Environmental Impact Assessment (valutazione di impatto ambientale – "VIA") is required for purpose of providing an overall assessment of the environmental impact of each project and of its execution.

6. Leases

6.1 General overview

Commercial lease agreements can be:

- Property lease agreements (**contratti di locazione**); or
- Business lease agreements (**contratti di affitto d'azienda**).

6.2 Property lease agreements

Property leases are generally divided into (i) non-residential (also referred to as commercial) leases i.e. for offices, retail space, hotels, etc); and (ii) residential leases.

The Italian Tenancy Law contains certain provisions in favour of the tenant that cannot be derogated by the parties (e.g., relating to the duration of the lease, ISTAT indexation, tenant's withdrawal right for serious reasons, tenant's pre-emption right in case of sale or new lease of the property, tenant's rights to automatically sublet or assign the lease in case of sale or lease of the business, etc) that may not be departed from in favour of the landlord, but only in favour of the tenant. Any contractual deviation from these which is less favourable to the tenant, even if explicitly accepted, would be declared null and void and automatically replaced by the mandatory provision of the Tenancy Law.

As regards non-residential lease agreements entered into after 11 November 2014 (and pre-existing leases subject to amendment agreements) with a yearly rent higher than EUR250,000 (excluding those regarding buildings with a historical value confirmed by a local administrative order), the parties are free to expressly agree terms and conditions which depart even if they favour the landlord from the mandatory provisions of the Tenancy Law.

Since the execution of a business lease agreement instead of a property lease agreement traditionally relied on the wider freedom granted to the parties in the negotiation of the contractual terms and conditions, it is clear that this advantage currently only applies to non-residential lease agreements with a rent to equal or lower than EUR250,000.

6.3 Business lease agreements

If the leased assets are a 'going concern' or 'business branch' (**azienda or ramo d'azienda**), and the parties execute a business lease agreement (contratto di affitto di azienda), the above mentioned mandatory provisions of the Tenancy Law do not apply.

The choice to use either a going concern or a property lease contract is also based on the type of business activity carried out by the relevant operator. Property lease contracts are used either (a) when specific individual pre requisites are required by the applicable laws and regulations for the issuance of the relevant trade authorisation and such pre-requisites do not exist in relation to the landlord only; or (b) when the activity carried out does not require a trade authorisation (such as, by way of example, the following service activities: banks, pharmacies, solarium, beauty centre, hairdresser etc). Pursuant to section 2555 of the Italian Civil Code and the relevant case low, a going concern is a unitary and organised complex of movable and immovable assets, linked by an interdependence and complementary relationship, which are necessary to carry out the enterprise.

In any case, should a business lease agreement not actually have as its object a genuine going concern, the risk is that it may be re classified as a property lease agreement, to which the mandatory provisions of the Tenancy Law apply.

A further risk is in relation to the employees that may be hired by the tenant during the lease. According to mandatory provisions of law the employment contracts in place upon expiration or termination of the contract would be automatically transferred to the landlord.

6.4 Main terms and conditions in lease

DURATION

A minimum term of 6 (six) years applies for commercial leases (except where the activity to be carried out in the premises is temporary) and 9 (nine) years for hotel leases. If the parties agree a term lower than the legal minimum, the term is automatically replaced by the minimum statutory term. Parties are free to agree longer leases.

Upon expiration, the contract is automatically renewed on the same terms and conditions for another term unless either party gives notice not to renew at least 12 months (or 18 months in the case of hotels) in advance. On the first expiration the landlord can only refuse to renew in very limited circumstances, while at the end of the second term there are no restrictions on the landlord's right to refuse a renewal.

This minimum duration and the provisions concerning automatic renewal of the lease may be departed from if the yearly rent exceeds EUR250,000.

Residential leases must have a minimum term of at least 4 (four) years. When the initial term expires these leases are automatically renewed for a further period of four years on the same conditions, unless the parties agree otherwise.

WITHDRAWAL

The landlord is not entitled to withdraw from the property lease agreement before the expiration date and any contractual withdrawal right in favour of the landlord would be inconsistent with the Tenancy Law and, therefore, null and void.

The tenant is entitled to withdraw from the property lease agreement before the expiration date if there are "serious reasons" (gravi motivi) by giving six months' prior notice; these serious reasons have been defined by the case law as unforeseeable and supervening events outside the control of the tenant. The parties may also provide the tenant with a contractual.

Withdrawal right, entitling the same to freely withdraw from the lease agreement before its expiration.

These restrictions do not apply if the yearly rent exceeds EUR250,000.

RENT AND RENT REVIEW

The parties are free to determine the amount of the rent.

According to the Tenancy Law, rents may be adjusted annually by a maximum of 75% of the variation in the ISTAT index (a measure of consumer price inflation) (or 100% where the duration of the lease exceeds the minimum term provided for by law).

These limitations do not apply if the yearly rent exceeds EUR250,000.

OPERATING EXPENSES

Generally, expenses for any common services provided by the landlord are paid by tenants in proportion to the size of their units relative to the total rentable area of the property.

The costs of the utilities are usually paid by tenants on the basis of their specific usage and requirements.

MAINTENANCE, REPAIR AND RENOVATION AT END OF LEASE

Generally the tenant is responsible for minor repairs and ordinary maintenance while the landlord is responsible for extraordinary maintenance, unless otherwise set out in the contract. In any case, according to the prevailing case law, the costs of extraordinary maintenance of the structural parts of the property are borne by the landlord.

The tenant has the right to be compensated for any improvements made during the lease, so leases usually state that the landlord can require the tenant to remove any additions and improvements at its own cost at the end of the lease.

SUBLEASING AND ASSIGNMENT

Under the Tenancy Law, the tenant is entitled to sublet the unit or to assign the lease in the event that the sublease or assignment takes place in the context of a sale or lease of the going concern of the tenant, which the property lease agreement is a part of.

There is no such requirement if the yearly rent exceeds EUR250,000.

TERMINATION

Lease agreements generally provide termination clauses setting out the conditions which, if breached by the tenant, would allow the landlord to regard the lease as terminated.

If the tenant does not hand over the premises once the lease contract expires or it is terminated, the landlord must obtain a court order to recover possession. This can take several months.

SALE OF LEASED PROPERTY

The landlord may transfer the ownership of the leased premises and this does not automatically trigger an early termination of the lease and a clause providing for the termination of the contract in the case of a transfer would be null and void if the Tenancy Act applies.

PRE-EMPTION RIGHTS AND GOODWILL INDEMNITY

If the activity carried out by the tenant involves contact with the general public as users and consumers) then:

- should the landlord decide to sell the leased premises during the term of the lease or to re lease it at the expiration of the property lease agreement, the tenant is entitled, as the case may be, to a pre-emption right to purchase the premises or to lease it from the new owner on the same terms and conditions;
- upon termination of the lease (except in certain cases as, for instance, exercise of the withdrawal right, or of the non renewal right, by the tenant; or termination due to tenant's breach of the contract) the tenant is entitled to be paid an amount equal to 18 times the last monthly rent paid (21 times in the case of a hotel) (a "goodwill indemnity"). If the premises are let within a year to a tenant carrying out the same or similar activities, a further indemnity of the same amount is payable to the former tenant.
- These provisions may be departed from in favour of the landlord if the yearly rent exceeds EUR250,000.

6.5 Public sector tenants

Please be aware that in recent years the Italian Government has approved certain specific provisions in favour of public sector tenants (for example, in relation to rent reductions; rent adjustments; withdrawal rights); therefore in such a case legal assistance by a real estate expert lawyer would be particularly recommended.

7. Tax

7.1 Taxation on acquisition

The buyer normally pays the transfer tax but both the seller and the buyer are liable for the payment and for any assessment by the tax authorities.

VAT is also paid by the buyer, who can generally reclaim it by offsetting the VAT due to the tax authorities against its output operations. In some circumstances, a VAT credit can also be obtained.

EU resident entities may request a refund of VAT paid if certain conditions are met. If the entity is not resident in the EU then it must register for VAT in order to recover any VAT incurred.

7.1.1 RESIDENTIAL REAL ESTATE

Sales of residential real estate are normally exempt from VAT. Residential sales are only subject to VAT if the seller is a construction company that has procured or renovated the property less than five years before the sale takes place, or after five years if the construction company elects in the deed of sale for VAT to be payable. VAT is payable at the rate of 10% (22% if the real estate is registered as a luxury dwelling).

7.1.2 COMMERCIAL REAL ESTATE

The sale of commercial real estate (including offices and industrial property and sales of retail properties and hotel buildings separately from any associated businesses) is subject to VAT at the current rate of 22% (10% in the case of renovated properties) if:

- The seller is a construction company that procured or renovated the property less than five years before the sale; and
- (In any event), if the seller elects in the relevant transfer deed for the VAT regime to apply.

Sales of commercial property, whether or not they are exempt from VAT (except where the seller is an individual), are subject to the following transfer taxes:

- registration tax of EUR200;
- cadastral tax at 1%; and
- mortgage tax at 3%.

Mortgage and cadastral taxes rates are reduced to 1.5% and 0.5% respectively in case one of the parties is an Italian real estate investment fund. Where real estate is acquired by way of shares in the corporate vehicle holding the asset, the transaction is normally VAT exempt. The transfer will, however, be subject to a registration tax of EUR200.

7.1.3 GOING CONCERN

In the case of retail property or hotels, if any licenses or other intangible assets are included in the sale, then the buyer is regarded as purchasing a going concern, since the building is part of a business and the activities on the premises are carried out by means of authorisations held by the owner.

The sale of a going concern is not subject to VAT, although registration tax applies as follows:

- real estate: 9% (15% in case of not buildable land) applied to the net value of the property;
- other assets (not including receivables): 3% of the net value.

The sale of real estate as a going concern is subject to mortgage tax and cadastral tax payable at a fixed amount of EUR200 each.

7.2 Property taxes (IMU)

IMU (property tax) is a wealth tax related to the possession of real estate and is calculated on the basis of the cadastral income (rendita catastale) which is set by the competent local tax authority in whose jurisdiction the property is located, on the basis of certain legally established parameters.

Each municipality is authorised to set the IMU bracket within a range from 0.46% to 1.06%. The IMU due annually is the result of applying the relevant rate within that range to the cadastral value of the property.

As the relevant legislation has been completely amended at least three times in recent years, we strongly recommend engaging professional advice to understand the current status of property taxation.

7.3 Taxation of rental income from real estate on-going taxation for the owner of real estate

7.3.1 INVESTMENT VIA AN ITALIAN CORPORATE VEHICLE

If the real estate is leased to tenants, the rental income generated is subject to corporate tax (IRES) at the rate of 24% and regional tax (IRAP) ordinarily levied at the rate of 3.9% although the effective tax rate depends upon the Italian region in which the company is located.

Taxable income for IRES purposes is the net revenue after the deduction of costs, as shown in the annual profit and loss account. With some minor exceptions, all costs relating to the activities of a company can be deducted, including interest (as long as this exceeds interest receivable), up to an amount equal to 30% of EBITDA (not including depreciation and financial lease payments) and IMU on commercial building.

10% of IRAP paid and IRAP due on the cost of employees is deductible for IRES purposes.

Depreciation of property is deductible to the extent allowed by law. In certain circumstances, taxable income can be mitigated for IRES purposes by using appropriate leverage. In particular, interest due on loans which are secured by mortgages over real estate for 'letting' is not subject to the 30% threshold and is therefore fully deductible.

The income subject to IRAP is the amount of revenue after the deduction of costs, as shown in the annual profit and loss account. However, not all costs related to the company's activities can be deducted, including interest payments, the cost of employees, IMU and IRES payments.

7.3.2 INVESTMENT VIA AN ITALIAN PARTNERSHIP

An Italian partnership is a transparent entity for tax purposes. Consequently, income deriving from investments is taxed at the level of individual partners, even if this is not distributed as dividends.

Interest is 100% deductible for the purposes of computing the partnership taxable income to be transferred and taxed at the level of the partner (they are not subject to the 30% EBITDA threshold limitation). 10% of IRAP and IRAP due on the cost of employees is deductible from the partnership taxable income.

In the case of non-resident corporate partners, the income is taxed as business income at the level of the partner at the rate of 24%.

Regional tax (IRAP) at the rate of 3.9% applies at the level of the partnership. The income and allowable deductions for the purposes of IRAP are the same as for corporate vehicles.

IMU applies to partnerships in the same way as it does to corporate vehicles.

7.3.3 INVESTMENT WITHOUT A PERMANENT ESTABLISHMENT IN ITALY

In the case of investments without a permanent establishment in Italy (please note that, in contrast to the position in some countries, owning Italian real estate does not automatically give rise to a permanent establishment in Italy), the income derived from letting property is subject to corporation tax (IRES) payable at the rate of 24%. 95% of the gross income derived from letting is taxable and no depreciation or other costs can be deducted. Interest on loans secured on the property is not deductible for tax purposes.

Investors without a permanent establishment in Italy are subject to IMU in the same way as Italian entities.

7.4 Taxation on distributions

7.4.1 INVESTMENT VIA AN ITALIAN CORPORATE VEHICLE

The distribution of dividends to a shareholder in an Italian company is not subject to withholding tax if the shareholder has its registered office in Italy, or if it is a foreign entity with a permanent establishment in Italy. If the shareholding is held by a non-resident entity, withholding tax normally applies at the rate of 26%.

Nevertheless, if the foreign company is resident in another European country, the withholding tax rate is lowered to 1.20%.

Withholding tax may also be reduced by a tax treaty between Italy and the investor's home country.

Provided all the requirements of the EU Parent Subsidiary Directive are met (eg a shareholding of at least 10% has been held for at least a year etc), no withholding tax will be payable.

7.4.2 INVESTMENT VIA AN ITALIAN PARTNERSHIP

In the case of Italian partners, no taxation applies prior to distribution, since the income is taxable at the level of the individual partners under a tax transparency regime, once accrued.

Non-resident partners are subject to tax in Italy on their share of the partnership's worldwide income. Non-resident partners must therefore submit a tax return for corporate or individual income tax purposes. In this case any other income derived from Italy (and not subject to a substitute or final withholding tax) will also be taken into account.

7.4.3 INVESTMENT WITHOUT A PERMANENT ESTABLISHMENT IN ITALY

Once the profits have been taxed in Italy they can be transferred to the foreign parent company without any further taxation.

7.5 Taxation on disposals

7.5.1 INVESTMENT VIA AN ITALIAN CORPORATE VEHICLE

Profits on the sale of property are subject to corporate tax (IRES), regardless of how much time has elapsed since its acquisition. The profit is the difference between the book value of the property at the time of the sale (as reduced by depreciation) and the agreed purchase price. In some cases it is possible to spread the liability for tax on capital gains over a period of five years.

Capital gains realised from the sale of property are also generally subject to regional tax (IRAP) at the rate of 3.9%, unless the sale is considered to be an 'extraordinary activity' (ie outside the normal activities of the company).

If the property is sold as a going concern (ie if it is a real estate asset including licences and other intangible assets), the sale is not subject to IRAP.

In case of share deal (ie if the foreign investor sells the Italian corporate vehicle), the capital gain upon sale would be subject to taxation in Italy at the rate of 26%, unless the applicable DTT provides for the taxation in the Country of residence of the seller. Starting from 2023, the same taxation would be applicable also in case of indirect sale of the Italian corporate vehicle. Participation exemption regime (allowing the exemption of 95% of the capital gain) can be applied in certain circumstances, but not if the Italian corporate entity is a real estate company.

Capital gain realised upon sale of an Italian corporate vehicle by an investment fund set up in an EU Country are not subject to any taxation in Italy, under the condition that the investment fund or its management company is subject to surveillance authorities in its country of set up.

Financial transactions tax (Tobin Tax) is payable by the buyer of shares in an Italian resident joint stock company, even if the buyer and the seller are not Italian residents. This tax is levied at a rate of 0.2% on the agreed price. Tobin Tax is not levied on the sale of quotas of a limited liability company.

7.5.2 DIRECT INVESTMENT BY A FOREIGN COMPANY WITHOUT A PERMANENT ESTABLISHMENT IN ITALY

Capital gains derived from the sale of real estate are not subject to corporate tax (IRES) if the property is sold more than five years after its acquisition. If the sale occurs within five years, IRES applies at the rate of 24%. Since depreciation is not permitted in the absence of a permanent establishment, taxable gains comprise the difference between the acquisition cost at the time of purchase and the price agreed for the sale of the property.

7.5.3 INVESTMENT VIA AN ITALIAN PARTNERSHIP

Since an Italian partnership is a transparent entity for tax purposes, any income deriving from the sale of real estate is taxed at the level of the individual partners even if this is not distributed. If the partner is a non-resident corporation, income is taxed at partner level at the rate of 24%.

Capital gains are excluded from the IRAP taxable basis of a partnership, unless its normal business activities include the sale of real estate. If this is the case, capital gains would be included in the IRAP taxable basis.

If the property is sold as a going concern (i.e. if it is a real estate asset including licences and other intangible assets), the sale is not subject to IRAP.

7.6 Real estate funds

7.6.1 TAXATION ON ACQUISITION

Mortgage and cadastral taxes applicable on the acquisition of non-residential buildings are reduced to half when one party to the transaction is a real estate investment fund. This means that mortgage and cadastral taxes on the acquisition of instrumental buildings are applied at the rate of 1.5% and 0.5% respectively.

7.6.2 TAXATION OF RENTAL INCOME FROM REAL ESTATE – ON-GOING TAXATION FOR THE OWNER OF A REAL ESTATE

Real estate investment funds are fully exempt from corporate (or individual) income taxes (they are not subject to IRES or IRAP). In other words, rental fees generated by the fund are not subject to taxation in Italy at the level of the fund itself.

IMU is payable by real estate investment funds.

7.6.3 TAXATION ON DISTRIBUTION

Proceeds distributed by a real estate investment fund, whose units are held by Italian institutional investors such as asset management companies or pension funds, or by Italian non institutional investors owning less than 5%, are subject to a 26% withholding tax distributed by the relevant management company to unit holders. This is payable as a final withholding tax if the investor is an individual, or as an advance payment of tax if the investor is a corporate entity. Conversely, the mechanism mentioned above is not applied to those real estate investment funds more than 5% of whose units are held by Italian non-qualified investors. Such funds are taxed on the basis of a 'transparency regime' pursuant to which the income generated by the fund is taxed directly vis à vis the unit holders irrespective of the distribution of the income.

As far as non-resident investors are concerned, if the foreign investor is a specific qualified investor (eg funds, pension funds, other sovereign entities) resident in a 'white list' country, no withholding tax is due on the fund's distributions, otherwise income is subject to a 26% withholding tax, potentially reduced by the applicable tax treaty, regardless the amount of the units held into the Italian real estate investment fund.

7.6.4 TAXATION ON DISPOSALS

Capital gains from the sale of property are included in the fund's net income and taxed at the level of the investors when the income is distributed or upon redemption of the units.

7.6.5 TAXATION ON SALE OF THE UNITS

The potential capital gain realised by foreign investors upon disposal of the units of the fund would be considered as capital gain, for the difference between the sale price and the unit value.

Capital gain realised by an Italian investors upon sale of the units would be subject to:

- 26% substitute tax, in case of investors (i) not holding the units in the ordinary course of their business;
- 24% corporate income tax, if the investor holds the units in the ordinary course of its business activity.

Capital gain realised upon the sale of the units of the fund by a foreign investor would not be subject to taxation, if the investor is resident in a country allowing an exchange of information with Italy or in the case of certain specific "institutional investors".

Foreign investors other than those above would be subject to 26% substitute tax, eventually reduced by the provisions included in the double taxation treaty existing and applicable, if any (for instance it may provide that the capital gains realised upon the disposal of participations are taxable only in the country in which the seller is resident).

In case of liquidation or redemption of the units, the difference between the unit value and the acquisition/ subscription value would be considered as proceeds from the fund and taxed accordingly.

7.7 SICAF

7.7.1 TAXATION ON ACQUISITION

Mortgage and cadastral taxes applicable upon the acquisition of not residential buildings are reduced to half when one of the parties to the transaction is a SICAF. This means that mortgage and cadastral taxes upon the acquisition of instrumental buildings are applied at the rate of 1.5% and 0.5% respectively.

7.7.2 TAXATION OF RENTAL INCOME FROM REAL ESTATE – ON-GOING TAXATION FOR THE OWNER OF REAL ESTATE

SICAFs are fully exempt from corporate (or individual) income taxes (they are not subject to IRES or IRAP). This means that the following proceeds are not subject to taxation at the level of the SICAF: (i) proceeds deriving from the letting of real estate; (ii) potential capital gain on a sale of real estate; (iii) dividends deriving from any participation in a real estate company held by the SICAF.

IMU also applies to SICAFs.

7.7.3 TAXATION ON DISTRIBUTIONS

Dividends distributed by SICAFs during the investment to foreign investors are not subject to withholding tax upon distribution if received by certain foreign investors (eg: pension funds and collective investment undertakings established in foreign States or territories included in the White List, compliant with certain requirements provided by the applicable laws).

Dividends distributed by the SICAFs during the investment to foreign investors other than those above, are subject to 26% withholding tax, or to the lower double tax treaty rate where in force and applicable (ordinarily 10% withholding tax).

7.7.4 TAXATION ON DISPOSALS

Capital gains from the sale of real estate by a SICAF are not subject to taxation at the level of the SICAFs and are taxed at the level of the investors.

7.7.5 TAXATION ON EXIT FROM THE INVESTMENT

Italian law provides that gains from the sale of units in SICAFs realised by Italian investors:

- are subject to 26% substitute tax in the case investors not holding the units in the ordinary course of their business;
- 24% corporate income tax, if the investor holds the units in the ordinary course of its business activity.

Gains from the sale of units in SICAFs realised by foreign investors are not subject to taxation, if the investor is resident in a country allowing an exchange of information with Italy (White Listed Countries) or in the case of some specific institutional investors. Otherwise, a 26% substitute tax would be applicable.

The tax regime described above may be affected by the provisions of a relevant double taxation treaty.

8. Real estate finance

8.1 Interest rate risks

Commercial property financing is possible with long-term and short-term loans. With particular reference to the case of long-term loans, there is a risk of rising interest rates. A decisive counter-measure is the selection of fixed interest periods.

However, the risk of interest rate fluctuation still exists at the time of the extension of a loan or upon the conclusion of follow-up financing.

This risk can be hedged against by using derivative instruments, particularly interest rate swaps or interest rate caps.

The most common type of interest rate swap is a plain vanilla swap, which may be available through the lending institution itself or a third-party financial institution. Within the scope of the Plain Vanilla Swap the borrower agrees to pay a fixed rate to the counterparty, while receiving a floating rate indexed to a reference rate (e.g. three-month Euribor)[1].

Upon the termination of the derivative instrument, the parties will set-off their respective position and only the party which results to have a claim against the other, following the set-off, shall be entitled to receive the relevant net amount.

Another common instrument to hedge interest rate risks is an interest rate cap. Under such instrument, the hedging counterparty (typically the lending bank or another financial institution) will make payments to the buyer of the cap (typically the borrower) if interest rates rise above an agreed rate. The payment to be made is calculated by reference to a notional principal sum over an agreed term. In return, the buyer pays the seller a upfront premium entering into the cap. The buyer, in return for the premium, is able to insure against the consequences of interest rates rising above a pre-determined level but can still take advantage of falls in rates.

Using such instruments, the borrower may eliminate or reduce the risk of rising interest rates; concurrently the advantage of sinking interest rates is given up and now lies with the counterparty.

8.2 Security interests and collateral agreements

As anticipated above, the most common form of security interest over real estate is a mortgage (ipoteca); if an investor intends to buy real estate borrowing money from a lender (usually a bank), the lender will normally require a mortgage over the property.

It is also common for the shareholder(s) in a borrowing company to grant a pledge (pegno) over the shares in the property-owning company, and for borrowers to grant:

- a pledge over, inter alia, each bank account held by the borrower itself in relation to the relevant transaction;
- an assignment by way of security of the rent receivables (and relevant guarantees);
- an assignment by way of security of any other receivables (arising from e.g. construction contracts, insurance policies, sale and purchase agreements, etc.); and
- a loss payee clause and assignment of the receivables deriving from insurance policies relating to the real estate investment).

Generally speaking, under such security arrangements, the security provider usually retains the benefit of the pledged assets (for example, (1) in the case of a pledge over bank accounts, the pledgor may usually continue to use the sums credited on the bank accounts, unless the relevant sums are to be applied towards prepayment under the loan) in accordance with the provisions of the relevant loan agreement; (2) in the case of an assignment of receivables by way of security the assignor continues to collect the relevant payments from the assigned debtor; and (3) in the case of a pledge over shares, the pledgor maintains the right to dividends and to vote in the shareholders' meetings of the pledged company) until an event of default under the secured financing occurs. However, please note that this is not an absolute rule and it is subject to relevant exceptions.

In addition, if the relevant loan agreement is entered into between an entrepreneur and a bank (or other entity authorized to grant loans to the public in Italy), the relevant loan can be also secured by a transfer of the relevant immovable property in favor of the lender (or any of its) (so-called "patto marciano"). The effectiveness of such transfer is effective upon (i) occurrence of a payment default under the loan agreement and (ii) payment to the owner of the property of an amount (if any) equal to the difference between (x) the estimated value of the property (such estimate to be carried out by an expert appointed by the Court) and (y) the amount of the outstanding debt (plus transfer costs). The relevant transfer agreement (patto marciano) shall be entered into before a public notary and must be filed with the Real Estate Registers.

Upon the occurrence of the event of default, the lender is required to notify the debtor (and, if different, the holder of the property) the amount of the outstanding credit and after sixty days an independent expert (which shall evaluate the value of the property) is appointed by the relevant Court. Within sixty days of the appointment, the expert communicates the sworn appraisal report.

1. No cash is exchanged and the cash flows are treated as accounting flows until the derivative instrument is terminated.

8.3 Taxation and fees on The Creation of Security

The following taxes and fees are payable in relation to the granting of security over real estate:

- notaries' fees are payable in fairly substantial amounts in respect of any security document executed as a notarial deed, and such fees vary in proportion to the secured amount[2] ;
- nominal stamp duty;
- registration tax: (i) EUR200, if the grantor is securing its own obligations; (ii) 0.5% of the secured amount (or, in relation to shares, the value of the shares, if lower), if securing third parties' obligations[3];
- mortgage tax is payable at 2% of the secured amount; and
- cadastral tax is payable at 1% of the secured amount.

To avoid paying all of these taxes it is in some cases possible to apply the *imposta sostitutiva* ("**Substitute Tax**"). This is an umbrella tax (currently) at a flat rate of 0.25% of the principal amount of the loan from time to time effectively drawn down (Substitute Tax is normally retained by the bank from the advance) but only applies where certain conditions are met and only to particular types of financial transactions, as follows: (i) the loan has a contractual duration of at least 18 months and one day; (ii) the loan is advanced by EU banks or Italian branches of EU banks, securitization vehicles, insurance companies set up and authorised in a EU Member Country or collective investment schemes set up in a EU Member Country or in a EES Country included in the white list and (iii) the facility agreement is executed in Italy.

8.4 Lending activity

Italian law reserves the right to carry out lending activities to certain duly authorised entities (ie banks and financial intermediaries).

A lending activity is deemed to be carried out vis à vis the public when it is carried out (i) on a professional basis and (ii) in respect of third parties[4].

8.5 Corporate rules

8.5.1 FINANCIAL ASSISTANCE RULES

Pursuant to Article 2358 of the Italian Civil Code (in relation to joint stock companies (S.p.A.)) and to Article 2474 of the Italian Civil Code (in relation to limited liability companies (S.r.l.)), no company can grant loans or security interests or issue guarantees in favour of any third party for the acquisition or the subscription of its own shares (or quotas, for limited liability companies)[5].

This prohibition includes all forms of financing, either direct or indirect, any refinancing of existing loans granted for acquisition purposes, and all loans, security or guarantees granted by a company for the benefit of third parties. The rule is interpreted very broadly by the Italian courts and also applies to transaction where the prohibited result is reached only indirectly (in order to avoid elusions of the rule). Accordingly, in a transaction structured as a "share deal", the loan granted for the acquisition of the relevant Italian target company cannot be secured by the asset of the same target company.

8.5.2 CORPORATE BENEFIT RULES

To the extent that security or guarantees are provided by a group company, each group company must itself have a specific and economic interest in guaranteeing/securing the financial obligations of its parent company.

As the subsidiary must have an autonomous interest in granting a security or guarantee, the granting of such security or guarantee should be assessed against (and justified in light of) the benefits the subsidiary itself receives from the transaction in which context the security or guarantee is granted (a typical example relates to a holding company being able to incur financial indebtedness and then on-lending part of the proceeds obtained to the subsidiary at more favourable terms than those the latter would have been able to obtain on its own on the market.

The existence of a corporate benefit is a pure business decision and as such it is a matter for the directors to resolve upon (this is based on the so-called "business judgment rule"). There is no objective test to certify the existence of a corporate benefit and it should be evaluated on a case-by-case basis.

Breach of the rules relating to corporate benefit may entail a liability of the relevant directors, but, as a general rule, should not invalidate the guarantee/security interests granted by the company, to the extent the relevant agreements were executed by duly empowered representatives of the latter and without any fraudulent intent.

8.5.3 SHAREHOLDERS' LOAN REPAYMENT

According to section 2467 of the Italian Civil Code, the repayment of a shareholders' loan in favour of a company is subordinated to the previous satisfaction of the claims of other creditors of the same company, to the extent the shareholders' loan was granted in a moment in which, also in consideration of the type of activity carried out by the borrowing company, an excessive unbalance exists between the financial indebtedness and the net worth of the latter or in a financial situation in which a capital contribution would have been reasonable (i.e., rather than a shareholders' loan).

2. Please note that certain security needs to be acquired by means of a notarial deed, while for other this formality is not strictly necessary under Italian law.

3. This is just an indicative rule which is not valid for all kinds of collateral. Specific advice should be sought to assess the potential tax burden in relation to each specific transaction.

4. Such requisites are interpreted in a particular restrictive way by Italian case law and the breach of such rules may entail criminal liability, so particular attention should be paid in structuring a loan to be granted by non-banking entities. However, certain kinds of loans are characterised as permitted by express provisions of law or regulation – the most notable of these being shareholders and intra-group loans.

5. In reality, it should be noted that in the case of joint-stock companies, the same Article 2358 of the Italian Civil Code provides for an articulated procedure which, if correctly carried out, would allow the granting of financial assistance in favour of a company acquiring or subscribing for the share capital of a target (so-called "whitewash"). This procedure, however, is quite complex and costly and is rarely used in the market practice.

Glossary

TERM	EQUIVALENT
Piena proprietà	Absolute freehold or full ownership
Diritto di superficie	Right to build
Diritto di usufrutto	Beneficial interest
Diritto d'uso e di abitazione	Right of use
Conservatoria dei Registri Immobiliari	Land registry
Società a responsabilità limitata	limited liability company – Srl
Società per azioni	Joint stock companies – SpA
Trascrizione	Filing
Diritti reali	In rem rights
Servitù prediali	Easements
Ipoteca	Mortgage
Nuda proprietà	Bare ownership
Diritto di enfiteusi	Emphyteusis
Contratto di locazione	Property lease agreement
Contratto di affitto d'azienda	Business lease agreement
Fondi di investimento immobiliari	Real Estate Investment funds

Contacts

Milan

DLA Piper
Studio Legale Tributario Associato
Via della Posta, 7
20123
Milan, Italy
T +39 02 80 61 81
F +39 02 80 61 82 01

Rome

DLA Piper
Studio Legale Tributario Associato
Via dei Due Macelli, 66
00187
Rome, Italy
T +39 06 68 88 01
F +39 06 68 88 02 01

About DLA Piper

With more than 600 lawyers globally, DLA Piper's real estate group has one of the world's largest real estate practices and is consistently top ranked around the world. As real estate has developed into a truly global industry, the ability to quickly and efficiently provide legal services in structuring cross border investments and transactions is paramount. DLA Piper clients value the team's global resources, regional strength and local delivery, and include private and public companies, institutional investors and government entities.

dlapiper.com

This is an internal publication and should not be made available externally without the express permission of the document owner. Copyright © 2025 DLA Piper. All rights reserved.
Mar 13 2025 | A27649-1