



ITALY REAL ESTATE UPDATE

FEBRUARY 2014

NEW RULES ON THE PAYMENT OF PURCHASE PRICES IN REAL ESTATE ASSET DEALS

Paragraphs 63 through 67 of section 1 of the Law no. 147 of 27 December 2013 (the so-called “Stability Law”), introduced certain new provisions applicable to the payment of the purchase price in real estate transactions.

The aforementioned law, in a nutshell, introduces a system which, similarly to what occurs in certain foreign jurisdictions (for example, in France), introduces a layer to the direct transfer of the purchase price from the purchaser to the seller upon signing real estate and businesses transfer deeds. Accordingly, the price will necessarily be routed through the notary public notarising the transfer agreements.

Moving on to the details of the new provisions, it is paramount to draw the perimeter of the transactions which are affected.

Those transactions are any contract transferring the title or any other agreement transferring, establishing or cancelling *in rem* rights over (1) real estate properties or (2) going concerns. In the Italian legal framework such contracts entail the necessary intervention by a notary public to consummate the transactions.

Therefore, it seems that the rules at hand should regard only the sums transferred upon executing final deeds of transfer.

On the other hand:

- amounts to be paid prior to the consummation of the final deed of transfer (down payments or earnest moneys);
- amounts to be paid by the purchaser after the consummation of the deed of transfer (such as hire purchases – *vendita a rate*),

may be transferred directly to the seller, avoiding the temporary deposit in the notarial escrow accounts.

For the sake of completeness, please note that the previous versions of the Stability Law also provided that any amount below EUR 100,000 would have been paid directly to the seller but such provision has been deleted upon approval. Accordingly, the deposit on the notarial escrow account will occur irrespective of the value of the transaction.

The new system envisaged by the legislator sets forth that, upon consummation of the relevant transfer deed, the purchaser will transfer:

- notarial fees;
- out-of-pocket expenses;
- taxes applicable to the relevant transaction which the notary will be entitled to deposit with the tax authority as subject in charge of the payment (*sostituto di imposta*);
- the entire purchase price (or the balance payment),

into a specific escrow account opened with the notary. Please note that in the event that the transferred property participates to a condominium, the notary public will have to investigate whether there are service charges still due. Should this be the case, the notary public shall receive also any necessary amount to pay the unpaid service charges (in addition to any unpaid burdens).

The notary public will keep into this escrow account, together with any other amount received by the parties on the basis of fiduciary agreements, until the completion of the filing of the relevant deed with (i) the real estate registers (as far as asset deals are concerned) and (ii) the company registers (in the case of transfer of businesses), provided that there are no undisclosed encumbrances. Once such activities have been successfully completed, the appointed notary will transfer to the seller, without any delay, the consideration for the real estate asset or for the relevant going concern.

On the other hand, if the parties agreed to pay the purchase price upon fulfilment of one or more conditions, the notary public will release the purchase price to the seller once he will receive evidence – resulting from a public deed, a notarised private deed or according to any different instrument agreed upon by the parties – that the relevant event/s occurred.

As to its legal qualification, the notarial escrow account shall be construed as a separate pool of assets (the ordinary bank account of the notary, therefore, may not be used). The following ensues:

- any creditor of the notary will not be entitled to recover any amount due out of the escrow account; in other words the creditors shall not be entitled to seize the escrow account;
- in case the notary dies, the escrow account shall not be part of the notary's estate;
- if the notary is married and chose the community of property with the spouse, the amounts in the escrow account shall be disregarded to that extent.

Any interest accruing over the sums deposited in the notarial escrow account, net of the expenses required to operate the account itself, shall be allocated to refinance the special funds aimed at financing the Italian small and medium enterprises. At this stage it is not foreseeable how this withholding shall operate: one may maintain that it will be up to the banks operating the account to withhold the amount and to wire it to the relevant entity.

In light of the above and considering that the notarial escrow account has to be mandatorily used only for the amounts paid simultaneously with the execution of a deed of acquittance (*atto di quietanza*), the new provisions may be easily bypassed if the parties agree to pay the purchase price after the execution of the transfer deed.

Several consumers associations strongly opposed the new provisions stating that the real estate market, already afflicted by the financial downturn, will be once again encumbered (often properties are transferred either on a barter basis or exclusively to use the price to acquire a new asset). However, this new set of rules seems aimed at protecting the purchaser (moreover, banks often allow the drawdown of mortgage loan facilities only upon the filing of the deed with the real estate registers). Indeed, notaries have thirty days after the consummation of the deed to register them but most of the times such filing is completed on the same day or the day thereafter.

Under Italian law even though the execution of the contract causes the transfer of the title from the seller to the purchaser, the position of the purchaser may be compromised. In order for the transfer of the title to be opposable to third parties and thus to solve possible conflicts between subsequent purchasers of the same asset, the sale and purchase agreement must be filed (*trascritto*) in the relevant real estate registers. In such registers all events that regard a certain property, like sales and purchases, creations of mortgages, easements and use rights, as well as pending disputes regarding the property are filed (*trascritti*). Therefore, the purchaser usually verifies (directly or through a notary) with this office in order to check, on the one side, that the seller is actually entitled to dispose of the property or legally qualified to effect the transaction and, on the other side, that there exist no third party rights that could prejudice the use of the property.

Based on section 2644 of the Italian Civil Code, a right is not effective against the subject who effected a filing (*trascrizione*) on the property if it is registered subsequent to the filing (*trascrizione*) of such subject's right, even if the acquisition of the relevant right (*i.e.* the signing the relevant contract) had been made on a preceding date.

In other words, if a seller transfers the same asset to two parties (A and B) and A files (*trascrive*) his purchase deed prior to B, A prevails over B even if B had signed his purchase deed before A.

B would only be entitled to the reimbursement of the purchase price from the seller.

The additional protection involves also the scenario where a seller transferred the property on a certain date but prior to the filing by the purchaser such seller establishes – as surety for a debt – a mortgage over the transferred asset. The purchaser shall acquire a mortgaged asset even though – upon signing the transfer deed – there was no sign of such mortgage.

It is worth mentioning that, however, it is current market practice to deal with such hypothetical issues by (i) obtaining notarial surveys on the relevant assets immediately prior to the execution of the transfer deeds and (ii) filing the transfer deed with the relevant real estate registers immediately after the execution of the transfer deed.

Nevertheless, the unavoidable risk that, from the completion of the latest notarial report and until the filing of the transfer deed, an additional *bona fide* purchaser would trump the position of the purchaser who executed the transfer deed on a preceding date (by successfully filing the transfer deed prior to any other buyer), endured.

By the end of April 2014, a decree of the Italian prime minister, adopted after liaising with the Ministry of Finance and the Ministry of Justice and consulting with the association of Italian notaries, will detail the terms and conditions to apply the new provisions, including the details for the small and medium enterprises funds to be refinanced through the interests accruing over the notarial escrow accounts as well as such rules required to ensure the consistency of the aforementioned notarial escrow accounts. One of the most troublesome issues introduced by the new law, in fact, was the suspicion that each notary could charge high costs for the escrow accounts. Such rules should also govern such negative (though unlikely) scenarios where the purchase price cannot be released in favour of the seller because, prior to the filing with the relevant registers, the notary public discovered undisclosed encumbrances over the real estate properties. As a matter of fact, even though the Stability Law has been in force as from 1 January 2014, the new legal framework summarised above will be applicable only once the aforementioned decree shall be issued.

The provisions of the Stability Law commented above, in fact, gives rise to many questions, such as:

- Will there be specific (more favourable) economic conditions for the notarial escrow accounts?
- What will happen to the purchase price in the event the notary discovers undisclosed encumbrances?
- Will the notary be entitled to release his fees immediately after the deposit in the escrow account, pending the filing with the relevant registers?
- Why the notarial fees which need to be deposited in the escrow account shall be separated from the assets of the notary, and therefore not subject to seizure by his creditors?

Hopefully, the upcoming decree will answer or address all or at least some of such issues.

FOR ANY QUERIES REGARDING THIS SPECIFIC ISSUE OF THE NEWSLETTER, PLEASE CONTACT:

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