Study on the feasibility of reducing obstacles to the transfer of assets within a cross border banking group during a financial crisis

National Report
ITALY

By

Roberto Ferretti
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Part I - National regulation

Please provide a presentation of your national regulation (law, cases,...) and attach it as Annex A and B to this document :

- the relevant legal texts and cases in English (of summarized in English).
- If possible, examples of transfer of assets agreements.

For each question, please first consider:

- your national Civil Law, Company Law, and Insolvency Law
- and on a second time explain if there are specific regulations for Banking groups
- on a third time explain if there are specific regulations for cross-border transfer of assets.

1. Summary

- Generally speaking, is the transfer of assets allowed (could you please precise briefly under which conditions):

  In crisis situation:

  [Notice - What follows is based on the assumption that the relevant companies are not subject to any bankruptcy proceedings and have not entered into any collective agreement with their creditors for the restructuring of their debt when the transfer is performed].
- from parent to subsidiary

In principle, yes, but:

- if the transfer takes the form of shareholder’s financing and,
  - in consideration of the type of business carried out by the subsidiary, there is an excessive debt imbalance compared to net corporate assets of the company, or
  - Exact meaning of excessive debt imbalance and possible obstacles to a prompt transfer of assets.

[RF] The provision referred to above is provided for by Articles 2497-quinquies and 2467 of the Italian Civil Code (both quoted in Annex A). Those Articles entered into force beginning of 2004. Thus, only a limited number of court decisions concerning them are available so far.

According to the report accompanying Legislative Decree no. 6 of 17 January 2003 [New Italian Law on Joint Stock Companies (S.p.A.) and Limited Liability Companies (S.r.l.)], which added the new provisions to the Civil Code, the provisions in question are aimed at postponing with respect to other debts of the company the reimbursement of shareholders’ financing having the substance of an equity contribution. The report also says that in practice it is extremely difficult to set quantitative criteria to distinguish between actual shareholders’ financing and “disguised contribution”, having only the form of financing. Taking this into account, the report conclude that the new provision must be interpreted “reasonably” having also in mind the standard practice in the relevant industry at the time when the financing is granted.

The case law clarified that the statutory provision referred to above applies to financing having the purpose of “replacing” an equity contribution in
circumstances where the company is thinly capitalized (see Supreme Court decision no. 16393 of 24 July 2007). In addition, this assessment must be made based on the overall situation of the financed company at the time of the financing, in comparison with the standard practice in the relevant industry (see Tribunal of Milan, 24 April 2007).

As regards possible obstacles to a prompt transfer of assets, it must be noted that these could consist in postponement of reimbursement of financing with respect to other creditors. In addition, if such reimbursement occurred in the year prior to the declaration of the financed company’s bankruptcy, it must be returned, as stated by Article 2497-quinquies of the Civil Code

- the latter is in a financial situation where a contribution would be reasonable,

reimbursement of the financing is postponed with respect to payment to other creditors and, if it occurred in the year prior to the declaration of the financed company’s bankruptcy, it must be returned (see Article 2497-quinquies of the Civil Code quoted in Annex A);

- if it does not respect the arm’s length principle/normal market conditions dealing and the parent company (transferor) goes bankrupt, the transaction could result in a criminal offence pursuant to Articles 2634 of the Civil Code (Misappropriation of funds) and 216 and 223 of the Bankruptcy Law (Bankruptcy offences) (also quoted in Annex A), unless the directors give sufficient evidence that the transaction resulted in actual compensative financial benefits for the parent company. Could we be more precise, and impact in terms of timely transfer of assets in crisis
[RF] We can find two statutory provisions in the Italian legal framework in force expressly making reference to “compensative benefits”.

- The first one is Article 2497, paragraph 1, of the Italian Civil Code (quoted in Annex A), which states that controlling companies cannot be held liable vis-à-vis minority shareholders and creditors of the controlled entity insofar no detriment emerges in the overall results of the management and coordination performed by the controlling entity or when the detriment has been entirely eliminated even as a result of operations performed for that purpose.

- The second one is the criminal provision contained in Article 2634 of the Civil Code (also quoted in Annex A), which states that profit deriving from a transaction for an associated company or for the group is not illegal, if offset by achieved or justifiably foreseeable benefits, arising from the association or membership of the group.

It must also be underlined that the Italian case law has tried to clarify the concept of financial benefit. A sample of the decisions considering this issue is set out in Annex A (in Section Bankruptcy Law, Sub-section Case Law).

In general terms, the key elements pointed out by the jurisprudence (also before the entry into force of the new provisions) can be summarised as follows:

- Compensative benefits exist and are relevant for the purposes of excluding the liability of the directors of the transferor insofar the indirect benefits deriving for the latter from the transaction can be shown capable of effectively offsetting the immediate negative effects, so as to prevent the operation from impacting on the rights of the company’s creditors (see Supreme
Court’s decision no. 36764 of 24 May 2006; see also Tribunal of Monza’s decision of 17 June 1999);

- The mere hypothesis of the existence of compensative benefits is not enough for the purposes of excluding liability: the director is required to produce and prove the supposed indirect benefits, connected to the overall benefit of the group, and their capacity to immediately and effectively offset the negative effects of the transaction carried out (see Supreme Court’s decisions no. 26325 of 11 December 2006, no. 16707 of 24 August 2004 and no. 38110 of 23 June 2003; see also Supreme Court’s decision no. 38110 of 23 June 2003 and Tribunal of Rome’s decision of 5 February 2008);

- On the other hand, some isolated decisions adopt a wider approach and highlight that the immediate negative effects of the transaction for the transferor can also be offset against the compensative benefits of the group as a whole (see Administrative Tribunal of Rome’s decisions no. 777 of 2 February 2007 and no. 563 of 25 January 2007).

I thought that specific legal arrangements were in place for banking groups. [RF] This is correct. Please refer to Section Banking Law of Annex A.

- from subsidiary to parent

In principle, yes, but:

- the relevant Board resolution must be analytically justified, with clear indication of the reasons and interests whose evaluation led to the decision. In addition, an adequate account thereof shall be given in the directors’ report accompanying the annual accounts (see Article 2497-ter of the Civil Code, quoted in Annex A);
• if the transfer causes detriment to the integrity of the subsidiary’s assets, the mother company could be held liable by minority shareholders and company’s creditors, unless no detriment emerges in the overall results of the management and coordination or when the detriment has been entirely eliminated even as a result of operations performed for that purpose; such action can be brought only in the event that minority shareholders and company’s creditors only if they have not been satisfied by the subsidiary (see Article 2497 of the Civil Code).

• if it does not respect the arm’s length principle/normal market conditions dealing and the subsidiary (transferor) goes bankrupt, the transaction could result in a criminal offence pursuant to Articles 2634 of the Civil Code (Misappropriation of funds) and 216 and 223 of the Bankruptcy Law (Bankruptcy offences) (also quoted in Annex A), unless the directors give sufficient evidence that the transaction resulted in actual compensative financial benefits for the subsidiary.

- from subsidiary to another subsidiary

See point “from subsidiary to parent” above.

In going concern situations:

See “in crisis situation” above.

- from parent to subsidiary

- from subsidiary to parent

- from subsidiary to another subsidiary

Are there specific regulations for cross-border transfer of assets?

No specific regulation in the areas covered by this report exists.

• Are there any specific rules in Banking Law in relation to transfer of assets?

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Yes. Please refer to Section Banking Law of Annex A.

In addition, the transfer should obviously not jeopardize the ability of the transferor and the whole group to comply with the prudential framework in force and, in particular, with the regulatory capital requirements.

- from parent to subsidiary
- from subsidiary to parent
- from subsidiary to another subsidiary

Are there specific regulations for cross-border transfer of assets?

No specific regulation in the areas covered by this report exists.

2. Scope

Does the notion of company groups exist?

- Generally speaking in corporate Law? (If it exists, please give a definition, conditions and the main applications?) But there is something specific for banking groups

[RF] This is correct. Please refer to the answer to the question “Are there specific regulations for banking groups” on page 7.

(please explain briefly the insolvency procedures applicable to groups of companies)...

[RF] The matter is quite complex and requires some time to be dealt with appropriately. I will provide Mr. Leplat with a brief outline of those procedures by separate document as soon as possible next week.

In the Italian legal system no general definition of company group exists.
Instead, Article 2359 of the Italian Civil Code defines controlled and affiliates companies as follows.

Considered as **controlled companies** are:

1) companies in which another company holds the majority of votes that can be exercised in the ordinary shareholders’ meeting;

2) companies in which another company has sufficient votes to exercise a dominant influence in the ordinary shareholders’ meeting;

3) companies that are under the dominant influence of another company by virtue of particular contractual obligations with it.

For the application of points 1) and 2) above, the votes belonging to controlled companies, to fiduciary companies and to intermediaries are calculated; the votes on behalf of third parties are not calculated.

Considered as **affiliated companies** are those on which another company exercises a notable influence. Such influence is presumed when at least one-fifth of the votes can be exercised in the ordinary shareholders’ meeting, or one-tenth if the company’s shares are listed on regulated markets.

In addition, pursuant to Article 2497-sexies of the Civil Code, for the purposes of the application of the provisions on management and coordination of companies (cf. Articles 2497 et seq. quoted in Annex A), it is presumed, unless otherwise proved, that the management and coordination of a company is carried out by the companies or agencies that consolidate their balance sheets with them or that control them pursuant to Article 2359 referred to above.

- Is there in your national law a definition of “group interest” that specifically allows or facilitates intra-group transfer of assets?
Yes. Please refer to Articles 2497, paragraph 1, and 2634, paragraph 3, of the Italian Civil Code, quoted in Annex A. [RF] As previously clarified, the legal provisions referred to above state that:

- controlling companies cannot be held liable vis-à-vis minority shareholders and creditors of the controlled entity insofar no detriment emerges in the overall results of the management and coordination performed by the controlling entity or when the detriment has been entirely eliminated even as a result of operations performed for that purpose, and

- profit deriving from a transaction for an associated company or for the group is not illegal, if offset by achieved or justifiably foreseeable benefits, arising from the association or membership of the group.

Needless to say that those provisions apply to situations where the transfer does not respect the arm’s length / normal market conditions principle.

Consequently, the interest of the group can be relevant for the purposes of excluding:

- liability of the controlling company vis-à-vis minority shareholders and creditors of the controlled company, and/or

- criminal and civil liability of the directors of the transferor, as far as actions put in place to achieve it directly or indirectly trigger that the detriment deriving from the transfer is entirely eliminated and offset by benefits deriving from belonging to the group.

- Are there specific tax issues that need to be addressed in intra-group transfers of assets?
Yes, in particular with respect to the application of the transfer pricing provisions.

- Are there specific regulations for banking groups?

Article 23 of the Banking Law contains a further definition of control applicable to banks and banking groups. Please refer to the text of such Article quoted in Annex A.

[RF] Article 23 only defines the notion of control for the purposes of the application of the statutory provisions on holdings of capital in banks and, thus, for the purpose of assessing which companies fall within the scope of a banking group.

More precisely, the composition of banking groups is defined by Article 60 of the Banking Law, which states that “a banking group shall be composed of either of the following:

a) an Italian parent bank and the banking, financial and instrumental companies it controls;

b) an Italian parent financial company and the banking, financial and instrumental companies it controls, where such companies include at least one bank and the banking and financial companies are of decisive importance, as established by the Bank of Italy in compliance with the resolutions of the Credit Committee”.

In turn, the definition of “parent undertaking” is set out in Article 61, paragraph 1, of the Banking Law, which states as follows: “The parent undertaking shall be the Italian bank or the financial company having its registered office in Italy which controls the component companies of the banking group and which is not, in turn, controlled by another Italian bank or by another financial company having its registered office in Italy which can be considered a parent undertaking”. 
Consequently, we can conclude that the provision of Article 23 of the Banking Law does not immediately affect the timely transfer of assets between companies belonging to the same banking group.

- Please specify any relevant information relating to intra-group transfer of assets that has not been dealt with in the previous questions and that would be useful for the study.

3. Conditions and sanctions

a) Authorization

- Do decisions to transfer assets have to follow specific approval procedures such as the approval of the board of directors or the transferor or transferee or the approval of shareholders obtained through a special meeting of shareholders?

In general (and as stated above), pursuant to Article 2497-ter of the Italian Civil Code, the decisions of companies that are subject to management and coordination, when influenced thereby, must be justified, with clear indication of the reasons and interests whose evaluation led to the decisions. An adequate account thereof shall be given in the directors’ report accompanying the financial statements.

[RF] The impact of the statutory provision referred to above can be summarised in a duty on the directors of the controlled entity to:

- approve the transfer by means of a specific board resolution analytically mentioning the reasons and interests whose evaluation led to the decision, and

- give an adequate account thereof in the directors’ report accompanying the financial statements.
Such duty arises only in the event that the decision to carry on the transaction was influenced by the circumstance that the controlled entity is subject to the management and coordination by the controlling company.

Could you explain briefly the content of those legislation? (We also added questions ) under article 136.

[RF] See above.

With respect to banking groups, please refer to Articles 53 and 136 of the Italian Banking Law and the related implemented provisions, quoted in Annex A.

- Do transfers of assets need to be approved by other third parties or supervisory authorities?

The Supervisory Instructions for Banks issued by the Bank of Italy (see circular letter No. 229 of 21 April 1999, as amended) state that transactions under Article 58 of the Banking Law (i.e. transfer of businesses, parts of businesses, goods and legal relationships identifiable en bloc) whose value exceed 10% of the regulatory capital of the assignee are subject to the preliminary approval by the Bank of Italy.

The subsequent communication of the Bank of Italy dated December 2000 clarified that also transactions whose value exceeds 5% of the regulatory capital of the assignor must be approved by the supervisor.

In December 2007, the Bank simplified the implementing provisions referred to above as follows:

- the assignee must seek for Bank of Italy’s prior approval if the transaction involves banks not belonging to the same group and its value exceeds 10% of the supervisory capital of the assignee;
- any transaction under Article 58 of the Banking Law exceeding 5% of the regulatory capital of the assignee must be communicated to the Bank of Italy after their execution.

Intercompany transfers of assets not falling under the application of Article 58 of the Banking Law but within the definition of “group reorganization” must be communicated to the Bank of Italy both before the transfer and after it (see Supervisory Instructions for Banks, Title I, Chapter 2, Section V, and the subsequent communication of the Bank of Italy dated December 2007 referred to above). For this purpose, “group reorganization” means any merger, acquisition, contribution or transfer
of shares, incorporation of sub-holdings and amendment to the bylaws of the companies belonging to the group fostered by the mother company and being part of a unitary plan.

Furthermore, the transfer of single contracts must be approved by the other party, pursuant to Article 1406 of the Civil Code, unless the transfer had been pre-approved by the said party, pursuant to Article 1407.

Instead, transfer of contracts (not having a personal or fiduciary nature) and receivables is an automatic effect of the transfer of the businesses and parts thereof to which they refer, pursuant to Articles 2558 and 2559 of the Civil Code.

- Do transfers of assets have to be notified to other third parties or supervisory bodies or published?

Pursuant to Article 58, paragraph 2, of the Banking Law referred to above, the assignee bank shall give notice of the effected assignment by way of entry in the Register of Enterprises and publication in the Official Journal of the Italian Republic. The Bank of Italy may establish additional forms of publication.

As for the effect of the publication in the Official Journal, please refer to paragraphs 3 to 6 of said Article 58, quoted in Annex A.

If the transfer takes the form of transfer or the lease of business or part of business, it must also be registered in the Register of Enterprises, pursuant to Article 2556, paragraph 2, of the Civil Code.

- Would a specific agreement incorporating the terms and conditions of the transfer between transferor and transferee and executed by their authorized representative be required?

The form of transfer agreements depends on the nature of the assets to be transferred. Basically, when immovables, businesses and parts of businesses as concerned, the transfer needs to be executed by means of a written and notarized agreement (public deed or private deed with legalized signatures).

- Are there differences between transfers in going concern situations / transfers in crisis situations?

No, apart from the potential liability of the management (see above).
b) Counterpart for the asset transfer

- Is the transfer of assets treated differently by your national Law:
  
  - if it respects the arm’s length principle/normal market conditions dealing (please explain what is considered as arm’s length)

  **There is no specific provision concerning the treatment of the transfer of assets complying with the arm’s length principle.**

  This is normally defined by making reference to contractual terms and conditions that would have been agreed upon by independent and on an equal footing contracting parties on the market.

  Tax provisions also refer to the “normal value” of goods and services provided (see for example Article 110 of the Italian Consolidated Act. Presidential Decree No. 917 of 22 December 1986, as amended).

  Please also refer to the case law quoted in Annex A.

  - if it is agreed under preferential conditions or disadvantageous to the transeree but advantageous to transferor and the group as a whole

    **See below.**

  - if there is no counterpart/compensation for the transfer

    *Apart from fiscal issues, the transfer under preferential conditions or without any counterparts could trigger civil and criminal liability of the director of the transferor (please refer to Annex A on this).*

  - if the transfer is included in a loan or credit agreement between transferor and transferee.

    **No specific provision applies here.**
• Are there differences between transfers in going concern situations / transfers in crisis situations?

**See above.**

c) Compulsory counterparts and guarantees

• Is there any compulsory counterpart or guarantee that transferee should provide to transferor?

**No.**

• Please specify any other relevant information relating to the conditions to be met for a transfer of asset to be authorized that has not been dealt with in the previous question and that would be useful for the study

d) Financial capacities of the transferor and the transferee

• Does the decision to transfer have to comply with conditions relating to the financial capacities/health of the transferor/transferee?

**No, apart from what has been stated above.**

• What are the consequences when the transfer has occurred but those conditions have not been respected?

**See above.**

• Are there any conditions relating to the consequences of the transfer on the financial situation of the group?

**No, apart from what has been stated above.**

• What is the rank of claim of the transferor in case of insolvency proceedings of the transferee? Please specify any other relevant information relating to Financial
capacities of the transferor and the transferee that has not been dealt with in the previous question and that would be useful for the study

As a rule, the claims of the transferor are not privileged, unless specific guarantees have been provided.

On the other hand, if the transfer takes the form of shareholder’s financing (from parent to subsidiary) and,

- in consideration of the type of business carried out by the subsidiary, there is an excessive debt imbalance compared to net corporate assets of the company, or In practice, what does this mean?

[RF] Please refer to reply on pages 5 et seq. above.

- the latter is in a financial situation where a contribution would be reasonable,

reimbursement of the financing is postponed with respect to payment to other creditors and, if it occurred in the year prior to the declaration of the financed company’s bankruptcy, it must be returned (see Article 2497-quinquies of the Civil Code quoted in Annex A).

- Are there differences between transfers in going concern situations / transfers in crisis situations?

See above.

e) Information and transparency

- Does specific information have to be communicated on the transfer to:

  - supervisors

    Yes. See Section “Banking Law” of Annex A, under Article 58 of the Banking Law.

  - shareholders
Yes, in the event that the transfer needs to be approved by a specific resolution of the shareholders’ meeting (e.g., in the event that the transferee launch a capital increase).

- employees

Yes, if the transfer implies that fifteen or more employees are moved from one entity to the other (as in the event of transfer of businesses or parts thereof).

More precisely, under Article 47 of the Law No. 428/1990:

- transferor and transferee must notify the trade unions of their intention to, respectively, assign and acquire the business;

- such notification must be filed at least 25 days before the execution of the transfer; in case the parties enter into binding agreements before such execution, the notification must be performed at least 25 days before the conclusion of this agreement.

- third parties (specify who can have an access to this information and how)

Any agreement having as subject matter the transfer or lease of businesses and parts thereof must be filed with the Register of Enterprises within thirty days of its execution.

- If yes should this information be communicated before the transfer or after it :

  - supervisors

  Before/After

  Either before the transfer or after it or both before and after, depending on the nature of the transaction. Please refer to Section “Banking Law” of Annex A, under Article 58 of the Banking Law.

- shareholders

  Before/After
Before.
- employees

Before/After

Before.
- third parties (specify who can have an access to this information and how)

Before/After

After.

- Please specify any other relevant information relating to Information and transparency that has not been dealt with in the previous question and that would be useful for the study

f) Sanctions

- When a transfer of assets has occurred what are the sanctions (civil liability of the manager or the supervisory authorities, nullity, criminal penalty, ...) that may be incurred: Conditions? To what extent this is detrimental for a timely transfer of assets?

[RF] As regards the conditions to be met for the liabilities referred to below arise, please refer to the previous sections of this document.

As regards the second part of the question, it is not fully clear to me. May I ask you to clarify?

- under Insolvency Law

Liability for damages and criminal liability

- under Civil Law

Liability for damages

- under Company Law
Liability for damages and criminal liability

- under Banking Law

Administrative sanctions imposed by the competent supervisory authority.

- under Criminal Law

- Other

g) Third parties

Supervisory authorities

- What is the role of the supervisory authorities in case of a transfer of assets (right to be informed, have to give an authorization...)? Please distinguish the home/host supervisory authorities.

Please refer to the Section "Banking Law" of Annex A.

In addition, it must be underlined that, if the transferor or the transferee has established a branch in another member state and the transfer triggers a change in any of the particulars communicated pursuant to points (b), (c) or (d) of Article 25(2) of the directive 2006/48/CE, the bank having established the branch must give written notice of the change in question to the competent authorities of the home and host member states at least one month before making the change, so as to enable the competent authorities of the home Member State to take a decision pursuant to Article 25 of the same directive and the competent authorities of the host Member State to take a decision on the change pursuant to paragraph 1 of Article 26.

- Are there any conditions or consequences relating to solvency ratios (implementation of Bale I and II notably)?
Transfer should obviously not be detrimental to the ability of the relevant entities and of the group as a whole to comply with the applicable capital requirements.

On the other hand, it should be considered that the transfer can impact the position of the relevant entities for prudential purposes either positively or adversely (for example, in the event that intercompany loans are put in place, or the transferee receives a capital injection, or receivables against third parties or securities triggering the assumption of a market risk are transferred from one entity to the other, etc.).

- Are there differences between transfers in going concern situations / transfers in crisis situations?

  The distinction is not expressly set out in the applicable regulatory framework. On the other hand, the Italian regulator normally adopt a smoother and more flexible approach when transfers have the purpose to avoid or fix crisis situations. Are there examples (in the context of the survey, i.e timely transfer of assets in crisis)?

  To my knowledge, Italian regulators usually do their best to facilitate transactions aimed at avoiding or solving crisis situations, insofar they have a sufficient level of comfort as regards the transaction concerned and the compliance thereof with the applicable regulatory framework. In particular, regulators try to reduce to the maximum possible extent the timeframe needed for the administrative proceedings in connection with those transactions (authorisations, notifications, etc.).

- Please specify any relevant information relating to the supervisory authorities that has not been dealt with in the previous questions and that would be useful for the study

Minority shareholders
- Does a minority shareholder of the transferor have any right concerning the transfer:

  - before the transfer or the decision to transfer (e.g. right of opposition, right of approval, right to be informed...),

    **No, unless the transfer has to be approved by the shareholders’ meeting.**

  - after the transfer (e.g. Right to have the transfer annulled when transfer disadvantageous to transferor, request for an audit...).

    **Yes. Minority shareholders of the subsidiary have the right to be indemnified pursuant to Article 2497 of the Civil Code. Please refer to Section “Company Law” of Annex A.**

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**Creditors**

- Do Creditors of the transferor have any rights concerning the transfer:

  - before the transfer or the decision to transfer (e.g. Right of opposition, acceleration rights, or right of approval, right to be informed...),

    **No.**

  - after the transfer (right to have the transfer annulled for fraud when transfer disadvantageous to transferor and aimed at fleecing creditors...)

    **Yes. Creditors of the subsidiary have the right to be indemnified pursuant to Article 2497 of the Civil Code. Please refer to Section “Company Law” of Annex A.**

Moreover, in the event that the transferor is subject to bankruptcy proceedings, the transfer could be revoked...
pursuant to Articles 64 et seq. of the Italian Bankruptcy Law (please refer to Section “Bankruptcy Law” of Annex A).

Employees

- Do Employees of the transferor have any right concerning the transfer:
  - before the transfer or the decision to transfer (e.g. Right of opposition, acceleration rights, or right of approval, right to be informed...),
  
  Yes. Please refer to Section “Information and Transparency” above.

- after the transfer (right to have the transfer annulled when transfer disadvantageous to transferor and likely to result in redundancies...)

In case of transfer of businesses or part thereof, the labour relation continues with the transferee and the employee retains all rights deriving from it. The transferor and the transferee are jointly and severally liable for all claims that the employee had at the time of the transfer.

Deposit holders

Not relevant

- Regarding the directive 94/19: Who provides the deposit guarantee (the government, national bank, insurers...)? For which amount?

Italian banks are obliged to join one of the depositor guarantee schemes established and recognized in Italy. Branches of EC banks operating in Italy may join an Italian guarantee scheme for the purpose of supplementing the protection offered by the guarantee
scheme of their home member state. Branches of non-EC banks authorized in Italy shall join an Italian guarantee scheme unless they participate in an equivalent foreign guarantee scheme.

Guarantee schemes shall be private-law entities. The financial resources for the pursuit of their purposes shall be provided by participating banks.

Guarantee schemes shall make payments in cases of compulsory administrative liquidation of banks authorized in Italy. For branches of EC banks in Italy which are members of an Italian guarantee scheme on a supplementary basis, payments shall be made where the guarantee scheme of the home member state has intervened. Guarantee schemes may provide for additional cases and forms of intervention.

Guarantee schemes shall protect depositors of EC branches of Italian banks; they may also provide protection for depositors of non-EC branches of Italian banks.

Claims relative to repayable funds acquired by banks in the form of deposits or other forms and to bankers' drafts or other similar credit instruments shall be eligible for payment.

The maximum payment for each depositor may not be less than two hundred million lire (103,291 euro).

- Is there a specific regulation concerning the deposit guarantee in case of a transfer of assets in another Member State?

  No.

- If a transfer of assets including deposited funds occurs, does the deposit insurer or guarantor have to be notified?

  No, but all banks and branches participating in the Italian Interbank Deposit Protection Fund must file with the latter on a periodic basis updated information in relation to their business (see Article 26 of the Bylaws of the Fund).
- Do Deposit holders of the transferor have any right concerning the transfer:
  - before the transfer or the decision to transfer (e.g. Right of opposition or right of prior approval)

  **No.**

  - after the transfer (e.g. right to have the transfer annulled as deposited funds not part of transferor’s assets but belong to deposit holders...)

  **See Section “Creditors” above.**

**Member State**

- In case of transfer of assets to/from a transferee/transferor located in another Member State, has the host/home Member State any right or obligation?

  **No.** **What does this mean? The 10% rule would not apply for a parent located in another Member State?**

  **[RF] In principle, in case of cross-border transfer the same rules applicable to domestic transfers would apply.**

**Others**

- Please specify any other relevant information relating to third parties that has not been dealt with in the previous question and that would be useful for the study

  - h) Private international law
• What is the applicable law in case of transfer of assets:

• If the transferor located in your member state and the transferee in another member state?

• If the transferor located in another member state and the transferee in your member state?

Private international law profiles of the transfer are subject to the Convention on the Law Applicable to Contractual Obligations, opened for signature in Rome on 19 June 1980 (80/934/EEC) and implemented in Italy through the Law No. 975 of 19 December 1984, and, starting from 17 December 2009, to the provisions of the Regulation (EC) No. 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I).

Non-contractual obligations shall be subject to the provisions of the Regulation (EC) No. 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

In addition, it must be underlined that, pursuant to Article 25 of the Italian Law No. 218 of 1995 (Reform of Private International Law) companies and other legal persons are governed by the law of the state in which they have been incorporated or formed.

Property and other rights in rem are governed by the law of the state in which the property is situated (see Article 1 et seq. of the Law No. 218 of 1995).

Finally, under Italian law there is no express provision for the law applicable in cases of conflict concerning insolvency. Council Regulation (EC) No. 1346/2000 is referred to for uniform rules on conflict of laws between the EU member states.
• Please specify any other relevant information relating to Private international law that has not been dealt with in the previous question and that would be useful for the study

Part II - Evaluation of potential solutions

The purpose of this second part is to analyze potential solutions to remove obstacles to asset transferability. Different categories of solutions will be proposed.

We first would like to know which parts of your legislation would need to be amended in order to implement the solution.

Second, we would like to have your personal opinion about the feasibility of the solutions regarding the legislation in your Member State.

After that, we would like know if you consider that this solution is satisfactory and we would like you to explain why.

Lastly, we would like to know what legal obstacles still remain in your Member State.

Regarding those proposals, please consider that a transfer of assets from the subsidiary to the parent company in a crisis situation should not be considered as a transfer at arm’s length.

1. Transfers from the parent company to the subsidiary or from the subsidiary to the parent at arm’s length:

Proposal n°1

Community legislation allows:

- any kind of transfer from the parent company to the subsidiary and
transfers from the subsidiary to the parent at arm’s length.

Possible consequences or conditions:

- Any restriction to those transfers have to be removed by Members States
- After the transfer, specific information about the transfer have to be communicated to supervisors and shareholders

Questions

i) Please provide a summary of the national measures that should be revised in order to reach this result.

In order to eliminate any preliminary obstacles to the transfer at arm’s length, the following amendment to the legal and regulatory framework should be put in place:

Contract Law

a. With reference to transfer of assets implying the transfer of single contractual relationships with third parties (other than legal relationship identifiable en bloc falling under Article 58 of the Banking Law), it could be advisable to amend Article 1406 of the Civil Code in order to avoid the preliminary approval by the contracting party.

Company Law

a. Taking into account that the transfer would be in any case at arm’s length and that exhaustive information would be provided after it, it could be evaluated the opportunity to lighten the duty on the directors of the subsidiary to analytically justify the relevant Board resolution, pursuant to Article 2497-ter of the Civil Code.
b. With specific reference to transfers taking the legal form of intercompany lending from parent to subsidiary, Article 2497-quinquies and 2467 of the Italian Civil Code should be amended in order to eliminate the risk of the reimbursement of the loan being postponed – if certain conditions are met – with respect to other creditors or having to be returned if it occurred in the year prior to the declaration of the subsidiary’s bankruptcy (see Part I, Summary).

c. As regards companies having one sole shareholders, Article 2362, paragraph 5, of the Civil Code (Sole Shareholder) should be amended (or derogated) in order to ensure full enforceability of the transfer against the creditors of the transferee. Please note that such statutory provisions states as follows: “the company’s contracts with the sole shareholder or transactions in favor of the sole shareholder can only be opposed to the company’s creditors if they result from the book of shareholders’ meetings and from resolutions taken by the board meeting or by a written document with a definite date that is prior to the attachment”.

d. In the event that either the transferor or the transferee (or both) are companies whose shares are listed on a regulated market or issuers of shares widely distributed among the public, it could be necessary to amend Article 2391-bis of the Civil Code (Transactions with related parties) and the implementing provisions to be issued by Consob (see by way of an example the Consultative document of 9 April 2008, attached hereto in pdf format), in order eliminate any limit possibly provided by the latter.

e. Instead, there would be no need for further specific provisions on the information to be mandatorily provided to the shareholders of the companies involved in the transfer because such duty is already provided for by statutory provisions governing financial statements (see, for example, Article 2428, paragraph 3, no. 2, of the Civil Code, which states that the directors’ report accompanying the financial statements must indicate the “relationships with controlled, affiliated, controlling companies and companies submitted to the control of the latter”; see also Articles
154-bis, paragraph 5, letter f, and 154-ter, paragraphs 4 and 6, of the Consolidated Law on Finance – Legislative Decree no. 58 of 24 February 1998 – as regards financial transparency in relation to transactions with related parties involving companies listed on regulated markets). As regards the information to be provided to the public by companies listed on a regulated markets, please refer to Article 71-bis of the Consob regulation on issuers (no. 11971/1998 as amended), which states that, in the event of transactions with related parties, including those concluded via subsidiaries, that, in view of the financial instruments involved, the consideration or the manner or time of their conclusion, may affect the security of the company’s assets or the completeness and correctness of information on the issuer, including that of an accounting nature, issuers of shares shall make an information document prepared in conformity with Annex 3B [to the regulation] available to the public. This obligation shall not apply where the information has been included in the press release, if any, issued pursuant to Article 66 or in the information document referred to in Articles 70 and 71 of the same regulation.

Bankruptcy Law

a. Articles 66 and 67 of the Bankruptcy Law should be amended in order to exclude the risk of the transfer or the related payments being clawed-back (revoked).

Banking Law

a. As regards intercompany transfers of assets falling within the definition of “group reorganization” obligation to preliminary communicate them to the Bank of Italy should probably be repealed (see Supervisory Instructions for Banks, Title I, Chapter 2, Section V, and the subsequent communication of the Bank of Italy dated December 2007 referred to in Part I). Please note that, for this purposes, “group reorganization” means any merger,
acquisition, contribution or transfer of shares, incorporation of sub-
holdings and amendment to the bylaws of the companies belonging
to the group fostered by the mother company and being part of a
unitary plan.

b. It should be noted that, pursuant to Article 58 of the Italian
Banking Law, only transfers:

- taking the form of (i) transfer of businesses or parts of
  business, or (ii) goods and legal relationships identifiable en
  bloc, and

- whose value exceed 5% of the regulatory capital of the
  transferee

must be communicated to the Bank of Italy. This provision should
be amended to include in the scope of the mandatory
communications to the Bank of Italy any intercompany transfer,
regardless of their legal nature and value.

c. In addition and with specific reference to the case where the
transfer takes the legal form of intercompany financing, Articles 53
and 136 of the Banking Law and the related implementing
provisions should be amended in order to:

- Eliminate or review, as the case may be, the limits for
  assumption of risk exposures vis-à-vis related parties
  provided for by the latter;

- Eliminate the need for a resolution adopted unanimously by
  the administrative body and the favourable vote of all the
  members of the control body.

ii) In order to determine the feasibility of this solution, please explain precisely
whether those modifications would entail

- frictions or even a disruption of your legal system or
• entail substantial modifications but no major frictions with established legal principles or

• merely minor changes.

Only minor changes would in principle be required.

iii) Please precise if this solution does satisfactorily take into account interests of parent companies, subsidiaries, minority shareholders, creditors, deposit holders, employees, supervisory authorities or Member States as a whole

Provided that a more detailed analysis should be carried out, I would say that this solution could satisfactorily take into consideration the interests of all the stakeholders, with the only exception of cases where a transfer in preferential conditions would be needed to fix a crisis situation.

iv) Please precise whether legal obstacles remain and how they could be removed in banking, insolvency and company law).

This solution would not trigger any change in the legislation in relation to transfers in preferential conditions.
2. Transfers from the subsidiary to the parent company (in preferential conditions)

a) Prior and overall agreements

Proposal n°2:

Similar EU instrument:


Proposal:

For this proposal, please consider that an EU instrument has been adopted, which provides that a group agreement under which the parent company and some of the entities of the group can mutually commit themselves to transfer assets in a crisis situation has to be allowed by the Member States. This agreement is endorsed by each legal entity being a party to the agreement. This agreement guarantees financial support from the parent to the subsidiary and from the subsidiary to the parent. This agreement could only be voluntary because of the freedom of contracts, the limited liabilities of companies and minority shareholder rights.

This agreement is submitted to the supervisory authorities. A group-wide view of solvency and liquidity would be a useful part of the supervisory assessment of an
intra-group transfer. This group-wide approach will be required as part of the review of the CRD on 'colleges'.

The agreement may already be submitted when the subsidiary asks for authorization to take up and pursue the business of credit institutions. This agreement may also be submitted when the subsidiary asks for authorization and will be considered as a modification to the conditions of the authorization to take up and pursue the business of credit institutions.

Possible consequences or conditions:

- The capital adequacy rules is still respected after the transfer
- The transfer does not endanger the transferor’s solvency
- The amount of the transfer is to be reimbursed by the transferee to the transferor. In case of insolvency, the creditors of the transferor will be reimbursed before the creditors of the transferor up to the amount of transfers that occurred
- After each transfer, the transferor informs supervisors and the shareholders during the ordinary General Assembly meeting following the transfer
- If the good faith, competence and prudence of the transferor's management is not in question and if the transfer fulfils all the conditions specified above, then the transfer cannot be challenged under Insolvency Law.

Questions

i) Please provide a summary of the national measures that should be revised in order to reach this result.

In principle, the same amendments referred to under Proposal no. 1 above (to be fine-tuned taking into account the differences between the two proposals) should be put in place.
In addition, Articles 2634 of the Civil Code (Misappropriation of funds) and 216 and 223 of the Bankruptcy Law (Bankruptcy offences) (quoted in Annex A) should be amended in order to eliminate any risk of criminal liability for the directors of the transferor in cases where the transfer is in preferential conditions or without any consideration (see Part I, under Summary).

Further, Article 2497 of the Civil Code should be amended in order to protect the parent from any liability vis-à-vis minority shareholders and creditors of the subsidiary for damages possibly deriving from the transfer (for additional information on this, please refer to the text of the article quoted in Annex I).

Article 64 of the Bankruptcy Law should be amended to avoid the risk of transfers without counterpart being declared not enforceable against bankruptcy proceedings involving the transferor, if any.

Lastly and with specific reference to the case of insolvency of the transferor, specific provisions should be added in the Banking Law (more precisely in the Chapter concerning the compulsory administrative liquidation of banks) providing for the right of the creditors of the transferor to be reimbursed before the creditors of the transferor up to the amount of transfers that occurred.

ii) In order to determine the feasibility of this solution, please explain precisely whether those modifications would entail

- frictions or even a disruption of your legal system or

- entail substantial modifications but no major frictions with established legal principles or

The modifications referred to above would probably introduce major changes in (or derogations to) the legal framework applicable to bankruptcy proceedings, transactions with related parties and management and coordination activity.

Also, it could substantially affect the principle of autonomy of the companies belonging to a group.
• merely minor changes.

iii) Please precise if this solution does satisfactorily take into account interests of parent companies, subsidiaries, minority shareholders, creditors, deposit holders, employees, supervisory authorities or Member States as a whole

Provided that a more detailed analysis should be carried out, I would say that this solution could satisfactorily take into consideration the interests of all the stakeholders.

iv) Please precise whether legal obstacles remain and how they could be removed in banking, insolvency and company law).
b) Strong guarantees covering the risk of outstanding payment

Proposal n°3

Similar EU instrument:


Proposal:

For this proposal, please consider that an EU instrument has been adopted, which provides that a group agreement under which the parent company and some of the entities of the group can mutually commit themselves to transfer assets in a crisis situation has to be allowed by the Member States. This agreement is endorsed by each legal entity being a party to the agreement. This agreement guarantees financial support from the parent to the subsidiary and from the subsidiary to the parent. This agreement could only be voluntary because of the freedom of contracts, the limited liabilities of companies and minority shareholder rights.

This agreement is submitted to the supervisory authorities. A group-wide view of solvency and liquidity would be a useful part of the supervisory assessment of an intra-group transfer. This group-wide approach will be required as part of the review of the CRD on 'colleges'.

The agreement may already be submitted when the subsidiary asks for authorization to take up and pursue the business of credit institutions. This agreement may also be submitted when the subsidiary asks for authorization and
will be considered as a modification to the conditions of the authorization to take up and pursue the business of credit institutions.

Possible consequences or conditions:

- The capital adequacy rules is still respected after the transfer
- The transfer does not endanger the transferor’s solvency
- The amount of the transfer is to be reimbursed by the transferee to the transferor. In case of insolvency, the creditors of the transferor will be reimbursed before the creditors of the transferor up to the amount of transfers that occurred
- After each transfer, the transferor informs supervisors and the shareholders during the ordinary General Assembly meeting following the transfer
- If the good faith, competence and prudence of the transferor's management is not in question and if the transfer fulfils all the conditions specified above, then the transfer cannot be challenged under Insolvency Law.

Questions

i) Please provide a summary of the national measures that should be revised in order to reach this result.

In principle, the same amendments referred to under Proposal no. 1 above (to be fine-tuned taking into account the differences between the two proposals) should be put in place.

Further, Article 2497 of the Civil Code should be amended in order to protect the parent from any liability vis-à-vis minority shareholders and creditors of the subsidiary for damages possibly deriving from the transfer (for additional information on this, please refer to the text of the article quoted in Annex I).
Article 64 of the Bankruptcy Law should be amended to avoid the risk of transfers without counterpart being declared not enforceable against bankruptcy proceedings involving the transferor, if any.

With specific reference to the case of insolvency of the transferor, specific provisions should be added in the Banking Law (more precisely in the Chapter concerning the compulsory administrative liquidation of banks) providing for the right of the creditors of the transferor to be reimbursed before the creditors of the transferor up to the amount of transfers that occurred.

Lastly, changes in the legislation would be required to allow the “possible conditions” referred to above and in particular the following:

- definition of criteria for collateral eligibility;
- protection against the effect of insolvency proceedings possibly involving the collateral provider;
- harmonisation of conflict of laws rules.

ii) In order to determine the feasibility of this solution, please explain precisely whether those modifications would entail

- frictions or even a disruption of your legal system or
- entail substantial modifications but no major frictions with established legal principles or
- merely minor changes.

Please refer to Proposal no. 2 above.

iii) Please precise if this solution does satisfactorily take into account interests of parent companies, subsidiaries, minority shareholders, creditors, deposit holders, employees, supervisory authorities or Member States as a whole

Please refer to Proposal no. 2 above.
iv) Please precise whether legal obstacles remain and how they could be removed in banking, insolvency and company law


c) Liability of the parent company for the subsidiary’s debts

Prior question

Firstly, please indicate if in your Member State, the parent company can be held jointly and severally liable for the subsidiary’s debts and why:

-due to the specific legal form of the subsidiary where the shareholders are systematically liable for all decisions

In principle, no.

As clarified in Annex I, in Italy banks must have the legal form of a “società per azioni” (joint stock company) or a società cooperativa per azioni a responsabilità limitata (Co-operative stock company with limited liability). Both of those legal forms imply that members are in principle limitedly liable for the company’s debts.

Exceptions to this principle are set out in Article 2325, paragraph 2, of the Civil Code (quoted in Annex I) for the case where joint stock companies have one single shareholder.

Is to be noted that banks incorporated in the form of Co-operative stock company with limited liability never may have one single shareholder (for further information, please refer Article 30 of the Banking Law, applicable to “banche popolari”, and Article 34 of the same Law, applicable to “banche di credito cooperativo”, both quoted in Annex I). Nonetheless, Article 2325, paragraph 2, of the Civil Code could in theory apply in cases where those co-operative banks cease to have a plurality of members by virtue of Article 2519 of the Civil Code, which states that co-operative companies are subject to the provisions applicable to joint-stock
companies if they are consistent with the special provisions provided for co-operative companies.

On the other hand, we must recall here Article 2497 of the Civil Code, which provides for the liability of the parent for decisions being disadvantageous to the subsidiary as follows:

“Companies or agencies that carry out company management and coordination, and act in their own entrepreneurial interest or in the entrepreneurial interest of others in breach of principles of correct corporate and entrepreneurial management of such companies, are directly liable to the quotaholders for jeopardizing profitability and the value of the equity holding, as well as to the company’s creditors for detriment caused to the integrity of the company’s assets. They are not liable when no detriment emerges in the overall results of the management and coordination or when the detriment has been entirely eliminated even as a result of operations performed for that purpose.

Whoever has taken part in the damaging event is jointly liable and, within the limits of the benefit obtained, whoever has knowingly obtained benefits from that event.

The quotaholder and the company’s creditor can act against the company or the agency that exercised the management and coordination only if they have not been satisfied by the company subject to the management and coordination.

In the event of bankruptcy, compulsory administrative liquidation and extraordinary administration of companies subject to the management and coordination of others, the action to which the creditors thereof are entitled is exercised by the receiver or by the liquidation commissioner or by the extraordinary commissioner”.

-due to preferred shares under which the shareholder is systematically liable for some or all decisions of the company

No. This kind of shares does not exist in the Italian legal framework applicable to banks.
Proposal 4

Then, for this proposal, please consider that a EU instrument has been adopted and creates an automatic liability:

- by means of a specific type of company where the shareholders are systematically liable for all decisions that are disadvantageous for the company
- or by means of a preferred shares under which the shareholder is systematically liable for some or all decisions of the company

Questions

i) Please provide a summary of the national measures that should be revised in order to reach this result.

The provisions referred to above under “Prior question” should be amended in order to achieve the desired results.

ii) In order to determine the feasibility of this solution, please explain precisely whether those modifications would entail

- frictions or even a disruption of your legal system or
- entail substantial modifications but no major frictions with established legal principles or

Yes, as long as the creation of preferred shares is concerned.

Instead, as regards the liability of the parent company under Article 2497 of the Civil Code, only minor changes should be introduced with specific reference in order to enlarge the scope of the liability of the parent company.

- merely minor changes.
iii) Please precise if this solution does satisfactorily take into account interests of parent companies, subsidiaries, minority shareholders, creditors, deposit holders, employees, supervisory authorities or Member States as a whole.

See below.

iv) Please precise whether legal obstacles remain and how they could be removed in banking, insolvency and company law).

This solution could be of some help in the event that a subsidiary is in a crisis situation, but would not ease the solution of financial crisis hitting the parent.

In addition, this solution would imply that the protection of the creditors and minority shareholders of the subsidiary would imply a court decision stating that the parent is liable for some decision taken by the subsidiary. This could require some time to be achieved.

In addition, there could be some discussions as to the notion of the “negative decision”, which could negatively affect the overall reliability and certainty of the applicable legal framework.
d) Improving transferability transfer through the introduction of a new concept of "banking group"

Proposal n° 5

Similar EU instrument:

Draft of the Ninth Company Law Directive for the conduct of groups containing a public limited company as a subsidiary


Under the “Company Law Action Plan” dated May 2003, the European Commission recommended specific rules on the enforcement of the group policy, for which Member States are required to draft a "frame agreement" for group companies that allows them to adopt a coordinated group company policy, as long as the interests of the companies' creditors are protected. This initiative has not been pursued. There might be merit in further investigating whether the definition of banking groups might remove obstacles in terms of banking law.

In that respect, a draft Ninth Company Law Directive on the conduct of groups containing a public limited company as a subsidiary was presented in December 1984 for consultation. The Commission did not pursue this work. The Directive was intended to provide a framework in which groups are managed on a sound basis whilst ensuring that interests affected by group operations are adequately protected. Particular reference was made to the possibility to transfer assets while protecting the interests of different parties. Under the 9th Directive project, the legal recognition of the 'group' went hand in hand with specific steps to protect minority shareholders and creditors. It must be noted that a banking group would be a contract freely entered into. As contemplated in 1984 under the 9th Directive on company law, if a banking group does not wish to submit to a group regime, it will have to respect the economic interests of the subsidiary.
Proposal:

For this proposal, please consider that the idea of “group company” has been adopted by an EU instrument.

The managers of the subsidiaries will be obliged to follow instructions even if the subsidiaries will thereby incur financial losses. These managers must therefore not be held liable vis-à-vis their own companies. This power of management is accompanied by the right to use the financial resources of the subsidiary, since the economic advantage of the group can be maximized only where there is a complete integration of the two entities.

Once the agreement is concluded, transfers of assets are allowed between the members of the group.

Possible consequences or conditions:

- The constitution of the group is submitted to the supervisory authorities.

- In case of insolvency, there is a possibility for creditors to file their claims with any of the companies of the group

- In case of insolvency, the creditors of the transferor will be reimbursed before creditors of the transferor up to the amount of transfers that occurred and the possibility for creditors to file their claims to any of the companies concerned by the transfer

Questions

i) Please provide a summary of the national measures that should be revised in order to reach this result.

This solution would imply a substantial review of all the provisions governing groups of companies.
In order to avoid major frictions between the legal framework applicable to banking groups and the general legal framework applicable to group of companies, the review should be carried out at this more general level and in such a way to ensure full harmonisation amongst the various legal systems of the member States.

In addition, this solution would probably trigger a substantial review of the prudential framework applicable to banks, insurance companies, investment firms, asset management companies and other financial institutions at an individual level, as well as of the framework for financial conglomerates, taking into account that each of the companies belonging to a group would be liable vis-à-vis creditors of the others.

Also provisions governing cross-border and group insolvency and conflict of laws should be re-drafted in order to ensure full consistency with the new approach.

ii) In order to determine the feasibility of this solution, please explain precisely whether those modifications would entail

- frictions or even a disruption of your legal system or

This solution would entail an “overall re-foundation” of the legal framework governing group of companies, whose impact should be carefully evaluated. To this end a deeper and more detailed analysis would be necessary.

- entail substantial modifications but no major frictions with established legal principles or

- merely minor changes.

iii) Please precise if this solution does satisfactorily take into account interests of parent companies, subsidiaries, minority shareholders, creditors, deposit holders, employees, supervisory authorities or Member States as a whole

It seems to me that this solution would imply that the relevant legal framework should be re-drafted and construed around the concept of group rather that around that of single company. On other words, the
group would be seen as the expression of a single business and the various companies forming it would be considered substantially as if they were departments of one single business. I would define this process as a “Copernican revolution” in company law.

In light of this, it is extremely difficult for me to evaluate the impact of the solution, also in relation to the protection of the interests of the various stakeholders.

iv) Please precise whether legal obstacles remain and how they could be removed (in banking, insolvency and company law)

See above.

e) Other solutions

Proposal n° 6

Supervisors of the transferor and the transferee can jointly authorize transfers of assets without any counterpart if:

- The transferee is facing difficulties but no insolvency proceeding has been opened;

- The transfer does not jeopardize the solvency of the transferor.

Possible consequences or conditions:

- Transfer cannot be challenged by the national company Law, criminal Law or insolvency law because of the special resolution regime for banks/early interventions;

The legislation ensures the entity providing a transfer a priority right in case of insolvency proceeding of the transferee.

Please feel free to suggest other solutions here.
ANNEX A National regulations relevant in assets transfers between banks belonging to the same banking group

Civil Law

Statutes

Pursuant to Article 2556 of the Civil Code, the transfer of businesses and parts thereof must be executed by means of a public (notarial) deed or a private deed with legalized signatures.

In additions, deeds of transfer must be filed with the competent Register of Enterprises for registration within thirty days of the execution.

Company Law

Statutes

Article 2325 of the Civil Code (Liability)

In a joint stock company only the company is liable for corporate obligations with its assets.

In the event of the company’s insolvency, for corporate obligations that arose during the period in which the shares result to be held by one person only, such person is liable without limitation when the contributions had not been made as set forth in Section 2342, or when publication had not been made as set forth in Section 2362.

Article 2342 of the Civil Code (Contributions)

Unless otherwise set forth in the deed of incorporation, the contribution shall be in cash.
Upon signature to the deed of incorporation, at least (25%) twenty five percent of the contribution in cash must be deposited in a bank or, in the event of incorporation with a unilateral deed, the entire amount of the contribution must be deposited in a bank.

Contributions in kind and credits are governed by Sections 2254 and 2255. The shares related to such contributions must paid in full at the time of subscription.

**If the event that plurality of shareholders ceases, payments still due must be made within ninety days.**

The rendering of work or of services cannot be the object of contributions.

**Article 2362 of the Civil Code (Sole Shareholder)**

When the shares appear to belong to one person or there is a change in the sole shareholder, the directors shall file a declaration for entry in the registry of enterprises containing the surname and name or corporate name, the date and place of birth or the date and place of the company’s establishment, the domicile or headquarters and citizenship of the sole shareholder.

When the plurality of shareholders is constituted or reconstituted, the directors shall deposit a pertinent declaration for entry in the registry of enterprises.

The sole shareholder, or the party who ceases to be the sole shareholder, shall provide for the publicity set forth in the preceding paragraphs.

The declarations of the directors set forth in the preceding paragraphs shall be filed within thirty (30) days from registration in the shareholders’ book and must indicate the registration date.

**The company’s contracts with the sole shareholder or transactions in favor of the sole shareholder can only be opposed to the company’s creditors if they result from the book of shareholders’ meetings and from resolutions taken by the board meeting or by a written document with a definite date that is prior to the attachment.**

**Article 2497 of the Civil Code (Liability)**
Companies or agencies that carry out company management and coordination, and act in their own entrepreneurial interest or in the entrepreneurial interest of others in breach of principles of correct corporate and entrepreneurial management of such companies, are directly liable to the quotaholders for jeopardizing profitability and the value of the equity holding, as well as to the company’s creditors for detriment caused to the integrity of the company’s assets. They are not liable when no detriment emerges in the overall results of the management and coordination or when the detriment has been entirely eliminated even as a result of operations performed for that purpose.

Whoever has taken part in the damaging event is jointly liable and, within the limits of the benefit obtained, whoever has knowingly obtained benefits from that event.

The quotaholder and the company’s creditor can act against the company or the agency that exercised the management and coordination only if they have not been satisfied by the company subject to the management and coordination.

In the event of bankruptcy, compulsory administrative liquidation and extraordinary administration of companies subject to the management and coordination of others, the action to which the creditors thereof are entitled is exercised by the receiver or by the liquidation commissioner or by the extraordinary commissioner.

Article 2497-ter of the Civil Code (Justification of decisions)

The decisions of companies that are subject to management and coordination, when influenced thereby, must be justified, with clear indication of the reasons and interests whose evaluation led to the decisions. An adequate account thereof shall be given in the report indicated in Section 2428 [i.e. in the directors’ report on the company’s situation and on the performance of the management accompanying the annual accounts].

Article 2497-quinquies of the Civil Code (Financing in management and coordination)

Section 2467 is applicable to financing made available to the company, by whoever exercises the management and coordination on its own behalf or by other organisations subordinate to it.

Article 2467 of the Civil Code (Quotaholders’ financing)

Reimbursement of the quotaholders’ financing to the company is postponed with respect to payment to other creditors and, if it occurred in the year prior to the declaration of the company’s bankruptcy, it must be returned.

For the purpose of the preceding paragraph, quotaholders’ financing to the company shall mean financing, regardless of the form in which it was made, that was granted at a time when, in consideration of the type of business carried out by the company, there was an
excessive debt imbalance compared to its net corporate assets or when the company was in a financial situation in which a contribution would have been reasonable (¹).

**Article 2497-sexies of the Civil Code (Presumptions)**

For the purposes of this Chapter, it is presumed, unless otherwise proved, that the management and coordination of a company is carried out by the companies or agencies that consolidate their balance sheets with them or that control them pursuant to Section 2359.

**Article 2497-septies of the Civil Code (Co-ordination among companies)**

The provisions of this Chapter are also applicable to whoever carries out the management and coordination of companies by virtue of a contract with such companies, or of provisions of their articles of association.

**Case Law**

Supreme Court, 24 August 2004, no. 16707. In the area of the liability of directors of stock companies in relation to the company, belonging to a corporate group, the question arises (and regardless of Article 2497 of the Civil Code as related by Article 5 of Law 6 of 2003) of the compensatory benefits deriving from the actions of a director reflecting on the company as a consequence of belonging to a group able to neutralise, wholly or partly, the detriment caused directly to the company; however, the mere hypothesis of the existence of such benefits is not enough, for the purposes of excluding liability correspondingly: the director is required to produce and prove the supposed indirect benefits, connected to the overall benefit of the group, and their capacity to immediately and effectively offset the negative effects of the transaction carried out (in Società 2005, 164 note CIAMPOLI; Banca borsa tit. cred. 2005, II, 373 note CARIELLO).

**Company Criminal Law**

(¹) It must be noted that Article 2467 of the Civil Code does not apply to banks unless they are subject to the direction and coordination activity of a mother company pursuant to Article 2497-quinquies. In facts, Article 2467 only applies to limited liability companies (società a responsabilità limitata), whereas banks must have the legal form of a “società per azioni” (joint stock company) or a società cooperativa per azioni a responsabilità limitata (Co-operative stock company with limited liability).
**Statutes**

**Article 2634 of the Civil Code (Misappropriation of funds)**

The penalty for directors, chief executives and receivers who, having an interest in conflict with that of the company for the purpose of gaining for themselves or others an illegal profit or other benefit, carry out or contribute to deciding upon the disposal of corporate assets, intentionally causing pecuniary damage to the company, is from six months to three years in prison.

The same penalty shall apply if the act is committed in relation to assets owned or administered by the company on behalf of third parties, causing pecuniary damage to those third parties.

**In any case, profit for an associated company or for the group is not illegal, if offset by achieved or justifiably foreseeable benefits, arising from the association or membership of the group.**

Crimes contemplated by the first and second paragraphs are dealt with as actions by the person offended against.

**Case Law**

See Bankruptcy Law – Case Law.

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**Bankruptcy Law**

**Statutes**

**Article 64 of the Bankruptcy Law (Royal Decree No. 267 of 16 March 1942 (Acts Without Compensation))**

Acts without compensation have no effect with respect to creditors, if they are performed by the bankrupt in the two years before the declaration of bankruptcy, with the exception of gifts of use and acts performed in performance of a moral duty or for public benefit, since the gratuity is proportionate to the assets of the donor.

**Article 66 of the Bankruptcy Law (Clawback Action)**
The receiver may ask that acts performed by the debtor to the detriment of creditors be declared ineffective, in accordance with the Civil Code.

The action is brought before the bankruptcy court, both in relation to the immediate counterparty, and the counterparty’s lawful claimants in cases where it can be brought against them.

**Article 67 of the Bankruptcy Law (Acts for Valuable Consideration, Payments, Guarantees)**

Unless the other party proves that it did not know about the insolvency of the debtor, the following shall be revoked:

1) acts for valuable consideration performed in the year prior to the declaration of bankruptcy, in which the services performed or the obligations assumed by the bankrupt exceed a quarter of what was given or promised to the bankrupt;

2) acts extinguishing expired and collectable pecuniary debts not executed with money or other normal means of payment, performed in the year prior to the declaration of bankruptcy;

3) the pledges, antichreses and voluntary mortgages constituted in the year prior to the declaration of bankruptcy for pre-existing, not overdue debts;

4) the pledges, antichreses and judicial mortgages constituted in the six months prior to the declaration of bankruptcy for overdue debts;

If the receiver proves that the other party knew about the insolvency of the debtor, the payments of liquid and collectable debts, contracts for valuable consideration and those constituting a right of seniority for debts, including of third parties, created at the same time, if executed up to six months prior to the declaration of bankruptcy, shall also be revoked;

The following shall not be subject to a revocation action:

a) payments of goods and services made in the carrying out of the business of the company in the terms of use;

b) remittances to a bank account, provided that they do not reduce the debt exposure of the bankrupt with respect to the bank in a significant and lasting way;

c) sales and the preliminaries to sales recorded pursuant to Article 2645-bis of the Civil Code, the effects of which have not ceased pursuant to the third paragraph of that provision, finalised at a fair price and with respect to residential property, intended as the principal residence of the purchaser or his or her relatives and relatives by marriage up to the third degree;

d) the acts, payments and guarantees granted the debtor’s goods so long as they are put in place in implementation of a plan that appears to permit the reorganisation of the company’s debt exposure and ensure the rebalancing of the financial situation, and the reasonableness of which is attested to by a professional who is a registered auditor and
who meets the requirements set out in Article 28a) and 28b) pursuant to Article 2501-bis, fourth paragraph, of the Civil Code;

e) the acts, payments and guarantees put in place in implementation of special management arrangements, and of receivership, as well as the agreement approved pursuant to Article 182-bis (4);

f) payments of the consideration for work carried out by employees and other workers, including non-permanent workers, of the bankrupt;

g) payments made at the due date of liquid and collectable debts to obtain services instrumental for accessing insolvency proceedings of receivership and special management.

The provisions of this article shall not apply to the issuing institution, to transactions of credit on the pledge and land credit; without prejudice to the provisions of the special laws.

**Article 69-bis of the Bankruptcy Law (Lapse of Action)**

Revocation actions regulated by this section may not be brought after three years from the declaration of bankruptcy and in any case after five years from the discharge of the bankruptcy.

**Article 70 of the Bankruptcy Law (Effects of Revocation)**

The revocation of the payments through specialist intermediaries, multilateral compensation procedures or compensation procedures by companies envisaged by Article 1 of Law 1966 of 23 November 1939, shall be effective in relation to the recipient of the service.

A person who, through the effect of the revocation set out in the above provisions, has repaid what he or she had received, is admitted to bankruptcy liability proceedings for any amounts that may be due to him or her.

Should the subject of the revocation be acts extinguishing liabilities arising from bank accounts or in any case ongoing and repeated, the third party shall repay a sum equal to the difference between the maximum amount reached by its claims in the period for which knowledge of the state of insolvency is proven, and the residual amount thereof at the date at which the insolvency proceedings began. This shall be without prejudice to the right of the defendant to insert into the liabilities a credit in the amount of what has been repaid.

**Article 216 of the Bankruptcy Law (Bankruptcy Offence)**

A business operator who declares bankruptcy is sentenced to three to ten years’ imprisonment if he or she:
1) diverts, conceals, covers up, destroys or disperses, wholly or partly, his or her assets or, in order to cause detriment to creditors, sets out or identifies non-existent liabilities;

2) removes, destroys or falsifies, wholly or partly, the books or other accounting records, or kept them in such a way as to make reconstruction of the assets or business transactions impossible, for the purpose of gaining for themselves or others an illegal profit or causing detriment to creditors.

The same penalty shall apply to the business operator who declares bankruptcy and, during the bankruptcy process, commits one of the offences set out in subsection 1) of the paragraph above or removes, destroys or falsifies the books or other accounting records.

The penalty for a bankrupt who, before or during the bankruptcy proceedings, makes payments or counterfeits seniority rights for the purposes of favouring, to the detriment of creditors, one of them, is from one to five years imprisonment.

Without prejudice to other additional penalties set out in Item III, Title II, Book I of the Criminal Code, the sentence for one of the events set out in this Article is prohibition from running a commercial company, or holding an executive position in any company, for ten years.

**Article 223 of the Bankruptcy Law (Fraudulent Bankruptcy Offences)**

The penalties established in Article 216 shall apply to directors, chief executives, statutory auditors and receivers of bankrupt companies who have committed any of the offences set out in the abovementioned Article.

The penalty set out in the first paragraph of Article 216 shall apply to the abovementioned persons, if:

1) they have caused, or contributed to causing, the failure of the company, committing any of the offences set out in Articles 2621, 2622, 2626, 2627, 2628, 2629, 2632, 2633 or 2634 of the Civil Code;

2) they have caused the bankruptcy of the company through fraud or the effect of fraudulent transactions.

In any case the provisions of the last paragraph of Article 216 shall also apply.

**Case Law**

Supreme Criminal Court, 15 February 2008, no. 7326. In the “inter-group transactions”, the transfer of resources to a company in financial difficulty and without exchange constitutes presumption of bankruptcy offences by misappropriation.

Supreme Criminal Court, Section V, 22 February 2007, no. 11019. In the area of bankruptcy offences in relation to corporate assets, the situation of fraudulent causation
of the bankruptcy (Article 223, paragraph 2, no. 2 L. fall.) – and not that pursuant to Article 223, paragraph 2, no. 2 L. fall. in the reference to the offence regulated by Article 2634 of the Civil Code (misappropriation of funds) – is added to by the assumption of obligation encumbering the assets of the company, and more specifically the issue of guarantees (in this case banking guarantees) in favour of other companies in the group about which the state of difficulty is known, for exorbitant amounts from the whole of the guarantor company’s assets with that determining the bankruptcy, given that it is an act which – imputing, with prior evaluation, an immediate and disproportionate financial sacrifice to the guarantor company with a view to wholly risky benefits or with little likelihood of success – is incompatible with the correct expression of the power of administration and, therefore, beyond the punitive scope of Article 2634 of the Civil Code, whereas it falls within the anticipatory scope of Article 223, second paragraph, no. 2, L. fall, which sanctions, as a last resort, fraudulent conduct against creditors, so long as it is on condition that causally related to the bankruptcy of the company and defined by intrinsic illegality with respect to the criteria of proper management and more specifically conduct inherently extraneous to corporate interests, to which the corporate body is fundamentally directed for reasons not permitted by law.

Supreme Criminal Court, Section V, 24 May 2006, no. 36764. In the area of bankruptcy offences by misappropriation, in evaluating as misappropriation an operation by one of the associated companies that decreases assets without apparent consideration, account should be taken of the relationship of the group, a crime being excluded if, with prior evaluation, the indirect benefits for the bankrupt company can be shown capable of effectively offsetting the immediate negative effects, so as to prevent the operation from impacting on the rights of the company’s creditors.

Supreme Court, 24 August 2004, no. 16707. In the area of the liability of directors of stock companies in relation to the company, belonging to a corporate group, the question arises (and regardless of Article 2497 of the Civil Code as related by Article 5 of Law 6 of 2003) of the compensatory benefits deriving from the actions of a director reflecting on the company as a consequence of belonging to a group able to neutralise, wholly or partly, the detriment caused directly to the company; however, the mere hypothesis of the existence of such benefits is not enough, for the purposes of excluding liability correspondingly: the director is required to produce and prove the supposed indirect benefits, connected to the overall benefit of the group, and their capacity to immediately and effectively offset the negative effects of the transaction carried out (in Società 2005, 164 note CIAMPOLI; Banca borsa tit. cred. 2005, II, 373 note CARIELLO).

Banking Law

Statutes and implementing provisions

Article 30 of the Banking Law (Members [of banche popolari])

1. Each member shall have one vote regardless of the number of shares held.
2. **No person may hold shares in excess of 0.50 per cent of the share capital.** The bank, upon learning that the limit has been exceeded, shall give notice to the holder of the violation of the prohibition. Shares in excess of the limit must be divested within one year of notice; upon expiry of such limitation period, related property rights matured up to the divestiture of the excess shares shall be acquired by the bank.

3. The prohibition established by paragraph 2 shall not apply to Undertakings for Collective Investment in Transferable Securities, for which the limits established by the provisions specifically applicable to each category of undertaking shall apply.

4. **The minimum number of members may not be less than two hundred.** Where the number of members falls below the minimum, the membership must be replenished within one year; in the event of non-compliance the bank shall be placed in liquidation.

5. Resolutions of the board of directors refusing applications for admission to membership must state the reasons therefor, taking account of the interests of the cooperative, the provisions of the bylaws and the spirit of the cooperative form. The board of directors shall re-examine an application for admission upon request of the board of arbiters, constituted pursuant to the bylaws and complemented by a representative of the applicant. The request for re-examination must be presented within thirty days of receipt of notice of the resolution and the board of arbiters shall announce its decision within thirty days of the request.

6. Without prejudice to the provisions of paragraph 2, persons whom the board of directors have refused to admit to membership may exercise property rights attaching to shares held.

**Article 34 (Members [of banche di credito cooperativo])**

1. The minimum number of members of a banca di credito cooperativo may not be less than two hundred. Where the number of members falls below the minimum, the membership must be replenished within one year; in the event of non-compliance the bank shall be placed in liquidation.

2. To be a member of a banca di credito cooperativo it is necessary to reside, have a place of business or engage in a continuing activity in the area of the bank’s operations.

3. Each member shall have one vote regardless of the number of shares held.

4. No member may hold shares having a total face value of more than fifty thousand euro.

5. [Repealed]

6. Article 30, paragraph 5, shall apply.

**Article 53 (Regulatory powers)**

1-3. [Omissis].
4. The Bank of Italy, in compliance with the resolutions of the Credit Committee, shall issue regulations establishing conditions and limits on the acquisition of risk assets by banks in respect of persons in a position to exercise directly or indirectly an influence over the management of the bank or the banking group or persons that are connected with them. Where such a conflict of interest should exist, the Bank of Italy may establish specific conditions and limits on the acquisition of risk assets.

4-bis. [Repealed].

4-ter. The Bank of Italy shall specify the cases in which failure to comply with the conditions referred to in paragraph 4 shall result in the suspension of the administrative rights attaching to the holding.

4-quater. The Bank of Italy, in compliance with the resolutions of the Credit Committee, shall regulate conflicts of interest between banks and the persons referred to in paragraph 4 relative to other types of financial relationship.

Article 136 (Obligations of banks' corporate officers)

1. Persons performing administrative, managerial or control functions in a bank may not contract obligations of any kind or enter directly or indirectly into purchase or sale agreements with the bank which they administer, manage or control without a prior resolution adopted unanimously by the administrative body and the favourable vote of all the members of the control body, without prejudice to the obligations established by the Civil Code concerning the interests of directors and transactions with related parties.

2. The same provisions shall apply to persons performing administrative, managerial or control functions in a bank or company belonging to a banking group with regard to the obligations and agreements referred to in paragraph 1 entered into with such company and to loans contracted with other companies or banks belonging to the group. In such cases the obligation or agreement must be approved in the manner provided for in paragraph 1 by the governing bodies of the contracting company or bank and have the consent of the parent undertaking.

2-bis. For the purposes of the application of paragraphs 1 and 2, obligations contracted with companies controlled by the persons referred to in such paragraphs or at which such persons perform administrative, managerial or control functions, as well as with companies controlled by or controlling such companies shall be considered. The provisions of this paragraph shall not apply to obligations contracted between companies belonging to the same banking group or between banks in respect of transactions on the interbank market.

Could you define what “obligations” means in this context? Does it refer to the general definition (as the obligations of a contract) or to a specific kind of shares? Furthermore, what does the notion of “transactions on the interbank market” refer to? Does this mean in your opinion that the transfer of assets between two member of the same group is not concerned by this rule?
Paragraph 2-bis was added to Article 136 of the Banking Law and of 2005 (by Law no. 262 of 28 December 2005). In addition, the related implementing provisions were approved by the Credit Committee on 29 July 2008.

Consequently, there are still no court decisions interpreting the provisions therein or any consolidated practices related to them.

In my humble opinion, by “obligations” Article 136 of the Banking Law refer to any risk exposures vis-à-vis physical and moral persons recalled therein. My interpretation is grounded on the wording of the Credit Committee resolution implementing Article 136 of the Banking Law. In any case, when the Bank of Italy will issue the regulation further implementing Article 136, we will have a clearer definition of such word.

As regards the definition of “transactions on the interbank market”, I would say that it refers to risk exposures

3. Non-compliance with the provisions of paragraphs 1, 2 and 2-bis shall be punished by imprisonment for a term of between one and three years and by a fine of between 206 and 2,066 euro.

Related implementing provisions

Credit Committee resolution No. 277 of 29 July 2008, Provisions on risk exposures and conflicts of interests of banks and banking groups vis-à-vis persons connected with them, pursuant to Article 53, paragraphs 4 and 4-quarter, of the Banking Law (see above). The resolution supersedes and repeals the previous one (No. 240 of 22 February 2006).

The resolution provides for the following limits to risk exposures towards persons that are connected with banks and banking groups:

- global limit at a consolidated level (or at an individual level for banks not belonging to a group: to be set by the Bank of Italy (but not exceeding 20% of consolidated supervisory capital);
- individual limit for banks belonging to groups: to be set by the Bank of Italy (but not exceeding 20% of the individual supervisory capital);
- weighting of the risk exposures to be set by the Bank of Italy.

The resolution set additional requirements as for the approval of the taking of risk exposures towards connected persons and the related internal controls:

- the relevant resolution must be adopted following rules and procedures ensuring an objective assessment;
- the relevant resolution must be appropriately motivated as regards the arm’s length nature of the transaction;
- banks must set up specific and appropriate control procedures to monitor the risk assets concerned.
Finally, the resolution is without prejudice to the application of the general limits to large exposures.

The Bank of Italy has not issued the provisions implementing the Credit Committee resolution referred to above yet. All that is available is a consultation document (dated August 2007) that preceded the adoption of the resolution.

**Article 58 (Assignment of legal relationships)**

1. The Bank of Italy shall issue instructions for the assignment to banks of businesses, parts of businesses, goods and legal relationships identifiable en bloc. The instructions may provide for transactions of major importance to be subject to authorization by the Bank of Italy.

2. The assignee bank shall give notice of the effected assignment by way of entry in the Company Register and publication in the *Gazzetta Ufficiale della Repubblica italiana*. The Bank of Italy may establish additional forms of publication.

3. Charges and guarantees of whatever kind, by whomsoever granted or however existing in favour of the assignor, and transcriptions in public registers of purchases of assets involved in financial leasing included in the assignment shall maintain their validity and their priority in favour of the assignee without the need for any formality or recording. Special rules established for assigned claims, including those regarding legal proceedings, shall also remain applicable.

4. For assigned debtors, publication pursuant to paragraph 2 shall have the effects referred to in Article 1264 of the Civil Code.

5. Within three months of publication pursuant to paragraph 2, assigned creditors may demand performance by the assignor or the assignee of the assigned obligations. Once the three months have expired the assignee shall be solely responsible.

6. Parties to assigned contracts may withdraw from the contract within three months of publication pursuant to paragraph 2, for good cause; in such cases the responsibility of the assignor shall be unaffected.

7. The provisions of this Article shall also apply to assignments in favour of persons, other than banks, included within the scope of consolidated supervision pursuant to Article 65 and in favour of financial intermediaries entered in the special register provided for in Article 107.

**Related implementing provisions**

The Supervisory Instructions for Banks issued by the Bank of Italy (see circular letter No. 229 of 21 April 1999 as amended) state that transactions under Article 58 of the Banking law whose value exceed 10% of the regulatory capital of the assignee are subject to the preliminary approval by the Bank of Italy. The subsequent communication of the Bank of Italy dated December 2000 clarified that also transactions whose value exceeds 5% of the regulatory capital of the assignor must be approved by the supervisor.
In December 2007, the Bank simplified the implemented provisions referred to above as follows:

- the assignee must seek for Bank of Italy’s prior approval if the transaction involves banks not belonging to the same group and its value exceeds 10% of the supervisory capital of the assignee;

- any transaction under Article 58 of the Banking Law exceeding 5% of the regulatory capital of the assignee must be communicated to the Bank of Italy after their execution.

**Group reorganization**

Intercompany transfers of assets not falling under the application of Article 58 of the Banking Law, but within the definition of “group reorganization”, must be communicated to the Bank of Italy both before the transfer and after it (see Supervisory Instructions for Banks, Title I, Chapter 2, Section V, and the subsequent communication of the Bank of Italy dated December 2007 referred to above). For this purpose, “group reorganization” means any merger, acquisition, contribution or transfer of shares, incorporation of sub-holdings, and amendment to the bylaws of the companies belonging to the group fostered by the mother company and being part of a unitary plan.

**ANNEX B Examples of transfer of assets agreements**

**Deed of transfer of the whole business of a leasing company to another financial institution belonging to the same group**

Between:

- "[●]", with registered office address [●], hereby represented by [●] in his capacity as [●], granted with the necessary powers, also pursuant to art. 1395 of the Italian civil code, according to the resolution of the Board of Directors dated [●] and the resolution of the shareholders’ meeting of [●], a certified excerpt of which is hereby attached as Annex "A" (hereinafter "Seller");
and

- "[ ● ]", with registered office address [ ● ], hereby represented by [ ● ] in his capacity as [ ● ], granted with the necessary powers, also pursuant to art. 1395 of the Italian civil code, according to the resolution of the Board of Directors dated [ ● ] hereto attached as Annex "B" (hereinafter "Purchaser", and together with the Seller the "Parties").

Whereas

a) the Seller is the owner of a business which carries out finance lease activity and the granting of loans in any form whatsoever ("Business");

b) the Seller is willing to sell to the Buyer and the Buyer is willing to acquire, at the terms and conditions referred to in the present agreement, the Business (hereinafter the "Agreement"):

***

Now, therefore, the Parties, as above represented,

agree as follows:

1.) (Recitals and annexes) – The recitals hereof and annexes hereto are integral and substantial part hereof.

2.) (Subject-matter) – Pursuant hereto and at the close of business of [ ● ] (hereinafter referred to as "Effective Date") the Seller shall transfer and sell to the Purchaser, who purchases it, the Business, consisting in the organized complex of assets (tangible and intangible) and other assets, contracts and relevant rights and obligations, payables and
other liabilities being functional for the performance of the activity of granting loans – also to the public at large – in any form and, in particular, of the asset leasing activity, in any possible application. All as listed hereinafter and described more in details in the estimate report regarding the aforesaid Business based on the balance sheet as at [●], drafted by the expert appointed for this purpose by the Seller and true copy of which is attached hereto under letter "C".

On the basis of the balance sheet as reported in the aforesaid Estimate Report, the Business includes the following:

**assets:**

- leased assets: euro [●];

- assets to be leased: euro [●];

- receivables from financing entities at sight: euro [●];
- receivables from credit institutes at sight: euro [●];
- trade receivables: euro [●];
- other receivables: euro [●];
- accrued income: euro [●];

**liabilities:**

- payables to financing entities at sight: euro [●];
- payables towards suppliers: euro [●];
- severance payment: euro [●];
- debts towards employees: euro [●]
- debts towards social security institutions: euro [●];
- accrued liabilities: euro [●];

- adjustment accounts: euro [●];

- depreciation reserve: euro [●];

All – as already mentioned – as better described in details in the Estimate Report attached hereto under letter "C", and subject to a more accurate identification of the assets and liabilities of the transferred business complex.

3.) (Consideration) – The transfer shall take place for the total price of euro [●], to be deemed as base price and subject to any adjustments within and not later than [●], in relation to the results following the update of the Estimate Report as at [●] (True-up / true-down) in accordance with what is specified hereinafter.

Moreover, the price was determined based on the appraisal made by an independent expert according to the Italian accounting principles (attached hereto under annex "C").

The consideration, equal to euro [●], shall be fully paid with value date and available within and not later than [●], by bank transfer to the current account that will be indicated by the Seller.

4.) (Price Adjustment and Balance) – In order to determine the final transfer price within and not later than [●], the Seller and the Purchaser shall jointly prepare and draft – by applying the same criteria and principles used to quantify the transfer price as described hereinabove – the final financial statement of the Business at the Effective Date, which once it has been agreed between the Parties shall be deemed final and binding for the purposes of the calculation of the final price.
The Parties shall undertake as from now to identify the terms for the payment of any balance by the latest date of [●], unless otherwise agreed upon by the Parties.

5.) **(Employees).** It is hereby agreed that, as of the Effective Date, the employees working for the Business relating to the transfer hereof shall continue their employment with the Purchaser, by maintaining their seniority rights and the current treatment levels and salaries. The relevant severance pay shall be part of the transferred Business.

Any action provided for by the law as regards the relations with the Unions have been duly performed.

6.) **(General provision and rights to subsequent supplements and item identifications).** The lists contained herein, in the annexes hereof and in the aforementioned Estimate Report have just a mere indicative value, being understood that, as a result of the transfer, the Purchaser shall take over from the Seller by full right and in the broadest and general way all the assets of the Business relating to the transfer hereof, and shall replace the Seller in any and every concession, agreement, authorization, license, permit, relation (even with the public authorities) in existence or under development, or in any case relating and inherent to the title ownership of the activity of the transferred Business and its assets, so that the Purchaser may continue to exercise the transferred Business without solution of continuity.

If needed, the Parties shall agree to make, on the simple request of even only one of them, any act of acknowledgement of assets and liabilities included in the transferred business organization and not expressly or completely described herein, even by the Seller only, with any consequent balance.

7.) **(Seller’s representations and warranties).** The Seller hereby represents and warrants that it has full and free ownership and title to the assets of the transferred Business and that on the items and assets of the Business there are no past pledges or other liens, charges, even tax charges (of course, subject to every debt, as reported in the financial statement of reference, duly updated as per point 4.) above) or encumbrances of any kind whatsoever or third parties’ rights.

8.) **(Registration changes).** The Purchaser shall be authorized as from now to accomplish any act and fulfill any obligation stemming from the transfer hereof and to procure to make, once the transfer is effective, the registration change of all assets and rights transferred, as well as to make all relevant applications and acts in order to obtain, if this shall not take place by law, the transfer to its own name of the agreements, concessions, authorizations, licenses, permits, all contracts relating to the transferred Business, the Seller being bound to accomplish all necessary formalities without bearing the costs and charges therefor.

9.) **(Registration tax)** – Pursuant to article 2, third paragraph, letter b), of the Presidential Decree n. 633 dated 26 October 1972, this transfer shall be VAT exempt and pursuant to articles 51 and 23, paragraph four, of Presidential Decree n. 131 dated 26 April 1986, shall be subject to the registration tax.
For the reasons mentioned under point 3.) hereunder, it is hereby specified that the value of the transferred Business, calculated on the basis of the Italian accounting principles, for the purposes of the application of the registration tax, amounts to euro [●].

It is also specified that the Business does not include any real estate assets.

10.) (Competition Clause) – Expressly notwithstanding the provisions of article 2557, first paragraph, of the Italian Civil Code, after the Effective Date hereof, the Seller shall not be bound to fulfill any non competition obligation under this clause vis-à-vis the Purchaser.

11.) (Costs and Taxes) – The costs and taxes relating hereto shall be borne by the Purchaser.

12.) (Applicable Law) – This agreement shall be governed by the Italian Law.

13.) (Competent Court) – For any dispute arising in relation to the interpretation, validity, effectiveness and performance or breach hereof, the competent Court will be the Court of [●].