

THE REAL ESTATE
LAW REVIEW

NINTH EDITION

Editor
John Nevin

THE LAWREVIEWS

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This article was first published in March 2020
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Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34-35 Farringdon Street, London, EC4A 4HL, UK
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Enquiries concerning editorial content should be directed
to the Publisher – tom.barnes@lbresearch.com

ISBN 978-1-83862-496-5

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ALLEN & OVERY SCS

AUMENTO LAW FIRM

BELLWETHER GREEN

BINDER GRÖSSWANG RECHTSANWÄLTE GMBH

BIRD & BIRD

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TSMP LAW CORPORATION
URÍA MENÉNDEZ
WALKERS

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PREFACE

The ninth edition of *The Real Estate Law Review* is testament to the book's success and the continued significance of real estate as a global asset class. A great deal has happened since the first edition appeared in 2012. *The Real Estate Law Review* has proved its worth by providing readers with an invaluable overview of how key markets across the globe operate and how they have evolved in the context of world events. It is no longer possible to look at domestic markets in isolation. Investors and their advisers need to understand real estate assets in the context of the global investment market, and *The Real Estate Law Review* seeks to help its readers to do just that.

This edition extends to 28 key jurisdictions around the world and I am very grateful to all the distinguished practitioners for their insightful contributions. Each chapter has been updated to highlight key developments and their effect on the relevant domestic market. Together, the chapters offer a helpful and accessible overview of the global real estate market. Overseas investors are key influencers in most markets, and it is vital that practitioners are able to advise on a particular deal in the light of an understanding of the client's own jurisdiction.

In the year that the UK was expected to leave the EU, Brexit and the associated economic and political fallout has continued to be the dominant issue for UK real estate markets. Although there has been a drop-off in investment volumes, continued interest from a wide range of investors from around the world underlines the need to see each issue in the context of world events. A growing cache of investment capital is likely to prompt a surge in investment activity once some degree of certainty is finally achieved. The UK, and London in particular, seem certain to remain attractive to overseas investors troubled by matters of greater significance than Brexit.

Once again, I wish to express my deep and sincere thanks to all my fellow contributors to this ninth edition of *The Real Estate Law Review*. I would also like to thank the members of the Law Review team for their sterling efforts in co-ordinating the contributions and compiling this edition.

John Nevin

Slaughter and May
London
February 2020

ITALY

*Umberto Borzi*¹

I INTRODUCTION TO THE LEGAL FRAMEWORK

Italian law does not provide a definition of ownership for real estate. However, under the Italian Civil Code, an owner of a thing has the right to fully and exclusively enjoy and dispose of the thing, within the limits and with observance of duties established by the legal system.

Ownership is a right in rem characterised as being (1) immediate – it does not need the cooperation of any third party to be enforced, (2) full – it grants general powers to enjoy and dispose and (3) exclusive – any third party must not interfere in the relationship between the owner and the thing. Nevertheless, ownership is not an unlimited right. Indeed, the owner must exercise its rights within the limits, and with the observance of duties, established by the legal system (e.g., not damaging other properties or people, avoiding emissions, etc.). Further, ownership may also be limited by pre-emption rights and other rights in rem such as: surface right, emphyteusis, housing right, easement rights, right of use, right of usufruct, mortgages and privileges.

Pre-emption rights, which may limit the right to dispose of real estate, can be divided in two categories: voluntary pre-emption rights or mandatory pre-emption rights. The main difference between these two categories is that usually a breach of a mandatory pre-emption right triggers the right of the jeopardised subject to enforce a compulsory purchase of the real estate. Italian law provides, inter alia, for the following types of mandatory pre-emption rights:

- a* public authorities have pre-emption rights over properties of historical or architectural interest;
- b* agricultural tenants or neighbouring farmers, meeting certain qualifications, have pre-emption rights over farming land; and
- c* non-residential tenants may, if certain conditions are met, have pre-emption rights over leased premises.

Real estate properties, and most rights in rem over such properties, are registered in a specific real estate registry and in the real estate tax registry (the cadastre).

The real estate registry does not provide any state guarantee of ownership over a property. However, it allows third parties to know the legal status of a property. In particular, by means of searches in such a registry, public notaries or surveyors may allow a potential investor to

¹ Umberto Borzi is a partner at Chiomenti.

know, with a high level of certainty: (1) the latest deed of transfer of the property; (2) the existence of mortgages, liens, easements, and other rights in rem encumbering the property; and (3) whether all transfers during the previous 20 years have been properly registered.

Registration of a deed of transfer of real estate with the real estate registry has only 'preference' and 'disclosure' effects (i.e., where there are multiple registrations the person who transcribed its title first is preferred to the others, and a transfer may be enforced against third parties). Therefore, absence of registration does not impair the validity of the transfer deed. However, certain regions in north-eastern Italy do provide for a particular registration regime that is necessary to give legal effect to a transfer.

On a different note, registration of ownership with the cadastre is required and it does not attest the title of ownership over real estate.

Transactions concerning real estate located in Italy are usually governed by Italian law.

Nevertheless, parties may agree to a different law governing the relationship between them and the overall transaction provided for in a deed of transfer of a real estate property, which must be notarised by a public notary, will still be governed by Italian law. In these cases, the deed of transfer is a sort of short form setting out only the provisions required for its validity.

II OVERVIEW OF REAL ESTATE ACTIVITY

From 2017 to date, the real estate market in Italy has experienced a volume growth of up to 40 per cent at the end of the third quarter compared to the same quarter 2018.² The luxury hotel field seems to be the most attractive one, especially in cities like Venice and Rome where there is a strong presence of tourists. The segments relating to offices remain vibrant in the Milan and Rome markets, and the logistic segment seems to be expanding in all the north of Italy. Also, the prices of houses are beginning to increase and, although with significant differences around the country, the market outlook is improving.

Forecasts for 2020 see for stable prices with a solid turnover. In addition, urban regeneration and new segments, as student housing, are expected to grow and to attract more investments.

Milan and Rome are once again the most dynamic cities, and the most liquid markets. In particular, the city of Milan is facing major regeneration projects and developments, also connected to the 2026 Winter Olympic Games, drawing the attention of the major real estate players around the world.

III FOREIGN INVESTMENT

Italian law does not contain specific restrictions on ownership, or on investment, in real estate, except for the 'reciprocity principle'.

According to a (seldom applied) provision of Italian law, non-Italian investors are allowed to invest in Italy only if their country of origin allows equivalent rights to Italian investors, or if their country of origin has an international treaty with Italy that permits such investments. While this rule is not relevant for European investors, in some residual cases involving non-EU investors, it is worth checking the application of this principle, and if

² Data prepared by CBRE and published on the on-line edition of *Il Sole 24ORE* on 7 October 2019.

necessary, setting up a specific investment structure, which is at any rate often widely used for efficiency purposes. In fact, most foreign investors use EU platforms or Italian vehicles, mainly real estate funds.

IV STRUCTURING THE INVESTMENT

i Type of investment

Investment in real estate under Italian law may occur either through an asset deal, where the investor acquires, directly or through vehicles, real estate or a share deal, where the investor, (directly or through vehicles), acquires an interest in a company or an investment fund that owns real estate.

Asset deals (that are not structured as an acquisition of a going concern), are usually simpler than share deals, as the purchaser acquires only the real estate property without liabilities or contracts, except for a lien over the property which may derive from certain liabilities over the property (e.g., certain tax liabilities), and for certain contracts that are transferred by operation of law together with the property (e.g., lease agreements, insurance agreements, agreements with janitors). Therefore, the relevant legal due diligence for the acquisition of an Italian property may be focused only on title to the real estate property and encumbrances on it, payment of certain indirect taxes related to the property, and compliance of the property with applicable laws and lease agreements.

Share deals, instead, entail that the investor acquires an interest in the entity that owns the real estate property. This investment structure usually requires a broader due diligence on the whole entity, including on its assets and liabilities.

With respect to acquisition formalities, asset deals are generally more complicated than share deals. Indeed, asset deals may trigger the application of mandatory or voluntary pre-emption rights, need to comply with certain formalities provided by law, (e.g., the transfer deed shall be notarised, and it must include certain mandatory provisions). They are also subject to a VAT and transfer taxes regime depending on the features of the real estate property being sold.

ii Investment vehicles

Investing in Italian real estate by means of Italian vehicles allows investors to benefit from the following: limitation of liability (except for cases in which the limitation of liability may be affected by how the vehicle is managed and operated); the easy set-up of 'no recourse' financing; sharing (indirect) of ownership in the real estate property (and relevant risks) among multiple investors (who may be granted with different rights and powers both in terms of distribution of dividends and of corporate powers); and the availability of a local asset manager responsible for the management of the investment and the implementation of the business plan.

In general terms, investment vehicles may be set up specifically for the acquisition of real estate property, or the investor may indirectly invest in real estate property by acquiring an interest in investment vehicles.

The investment vehicles that may be taken into consideration when planning an investment can be divided in to the following two main groups: non-regulated vehicles and regulated vehicles.

Non-regulated vehicles

The most common non-regulated investment vehicles are corporate vehicles: real estate joint stock companies or limited liability companies.

Non-regulated vehicles allow investors to directly manage their investment. This is because they may make, directly in the shareholders' meeting or through the board of directors, all the decisions concerning the management and operation of the vehicle.

Listed real estate joint stock companies may benefit from income tax exemption on profits deriving from lease activity, if certain requirements are met (that mostly concern shareholding and business activity).

Regulated vehicles

Regulated real estate investment vehicles can either be corporate vehicles as SICAFs (i.e., joint stock companies with fixed capital), or contractual vehicle mutual funds. Both of these vehicles qualify as alternative investment funds pursuant to the common EU legal framework based on the directive on alternative investment fund managers (AIFMD).

Compared with non-regulated vehicles, regulated vehicles may benefit from the application of a favourable tax regime and from management by a specialised asset manager. On the other hand, regulated vehicles:

- a* generate significant additional costs regarding management and compliance;
- b* are overseen by regulatory authorities; and
- c* have a limited scope (the investment policy and the activities that these vehicles can pursue are generally limited).

Therefore, regulated vehicles are generally only used for transactions above a certain size.

Regarding the managing powers of the investors with respect to regulated vehicles that are mainly set up to collect capital contributions by a variety of investors, Italian law provides for a general principle pursuant to which an investor in a regulated vehicle should be a 'passive' investor. Therefore, the management of the vehicle must be carried out independently by a regulated management company, while investors can be involved in certain main investment decisions. Such involvement is generally regulated under the fund rules or the by-laws of the vehicle (depending on the kind of vehicle), which provide for advisory committees or similar bodies that must give their opinion (binding or non-binding), on certain matters. Where a vehicle is set up in corporate form, the investor may benefit from certain prerogatives granted to the shareholders (e.g., approval of the balance sheet, amendments of the by-laws).

The set-up of funds reserved for professional investors is a very smooth process as it does not require any authorisation from regulators, on the contrary to the set-up of SICAFs, which is less immediate as they must be authorised by the regulators. The funds and the SICAFs are subject to the same regulatory framework, but SICAFs must also comply with ordinary corporate law provisions.

Italian regulated vehicles must be managed by an Italian asset management company. However, pursuant to the AIFMD management passport, Italian investment funds may also be set up and managed by asset management companies based in other EU countries.

SICAFs can be externally managed by an asset management company (such as a fund) but can also be internally managed. In this latter case, the SICAF generally has a governance structure that reflects the presence of 'business' shareholders (which participate, for management purposes, providing the SICAF with its management and organisational

structure and with the financial resources needed to carry out the business and meet the regulatory capital requirement) and ‘investor’ shareholders (who are granted the voice rights generally recognised to the investors of the funds).

V REAL ESTATE OWNERSHIP

i Planning

Under Italian law, any building activity (except for certain limited building activities of minor relevance) requires, depending on the type of building works:

- a* the issue of a building permit by the competent municipality;
- b* the filing, by the person interested in carrying out the works, with the competent municipality of a self-certificated declaration (SCIA); and
- c* the filing, by the person interested in carrying out the works, with the competent municipality, of a certified communication of commencing of the building works.

Any building activity carried out in breach of the applicable laws and regulations and not cured by the issue of building amnesties and payment of relevant fines, may be sanctioned with administrative fines and, in the case of major breaches, with criminal sanctions and orders for demolition of the works carried out.

With respect to planning restrictions, in the course of the due diligence over the real estate property, it is useful to review the town-planning certificate, which lists the town-planning regulations applicable to the area in which the property is located, and identifies the existence of certain burdens (e.g., landscape, monumental, architectural, use). In such respect, a zoning development plan and town-planning agreement (i.e., an agreement between the owners and the local authority) may provide for limitations to use or transfer of the land or the property.

ii Environment

Italian law contains the ‘polluter-pays’ principle. Nevertheless, as soon as an owner of land becomes aware that it is contaminated, the owner is required to report it to the competent authorities and implement the precautionary measures proscribed by applicable laws and regulations or ordered by the competent authorities.

Further, in relation to buildings, Italian law provides for a census of the buildings in which asbestos-containing materials are present. Italian laws and regulations set out obligations to manage or remove asbestos-containing materials within buildings, which also depend on the features and status of the material, or on the use of the building, or both.

iii Tax

The following indirect taxes will apply to the transfer of ownership of real estate located in Italy: value added tax (VAT); registration tax; mortgage tax; cadastral tax; and minor stamp duties.

The tax regime applicable to the transfer of the ownership of a real estate depends on the characteristics of the parties (seller and purchaser), and on the features of the property being transferred.

The disposal of real estate made by a person that is subject to Italian VAT, is subject to VAT. The VAT regime applies depending on whether the real estate property qualifies as

residential or non-residential (e.g., commercial), and on whether it has been built or the subject of certain renovation works in the five years prior to the sale and purchase agreement for the property.

On the other hand, the sale of real estate made by a person that is not subject to Italian VAT is outside the scope of the VAT regime.

iv Finance and security

Real estate financing granted in accordance with Italian law generally provides for the following security package:

- a* mortgage over the property – mortgage is an in rem security granting to its holder the right to start an expropriation procedure over the property and to be privileged (with respect to other creditors) in the distribution of the amount recovered from the sale of the property;
- b* assignment by way of security of the receivables arising from the deed of sale and from the other agreements concerning the sale and purchase of the property;
- c* assignment, by way of security, of the receivables arising from the lease agreements relating to the property and relevant guarantees;
- d* for works to be performed on the property, assignment by way of security of the receivables arising from the relevant contracts for the works;
- e* assignment by way of security of the receivables arising from an interest hedging agreement;
- f* assignment by way of security of the receivables arising from the insurance relating to the property (i.e., ‘loss payee clauses’);
- g* pledge over the bank accounts of the borrower; and
- h* depending on the structure of the investment, (i.e., a share or fund unit deal), pledge over the shares or the units of the borrower.

VI LEASES OF BUSINESS PREMISES

Italian tenancy law³ sets out a number of mandatory provisions to which lease agreements relating to premises having a commercial use must comply. Non-compliance can result in the lease being declared null and void. However, parties to a lease agreement may depart in favour of the tenant or landlord from these mandatory provisions (except the provision relating to the transfer of lease agreements if there is a sale of the leased premises) if all of the following requirements are met: (1) the yearly rent in the lease agreement exceeds €250,000; (2) the lease agreement was executed after 12 November 2014; and (3) the leased premises have not been classified as of historic heritage by an order of the relevant region or municipality.

i Term

Lease agreements must have a minimum duration of six years where they are for non-residential use (nine years for hotel use), and be automatically renewed for a further six-year (or nine-year) period.

At the first expiry of a lease, the landlord may terminate the lease agreement only under certain specific circumstances related to the landlord’s intentions (e.g., intention to

3 Italian Law 392 of 1978.

use the leased premises for the landlord's own residence or for its own activities; intention to demolish and rebuild the leased premises; or intention to refurbish the leased premises to comply with certain regulations). For subsequent lease expirations, no restrictions apply to the landlord's right to deny the renewal of the lease agreement.

ii Indexation

The parties to a lease agreement may include a rent indexation clause in the agreement for increases in the rent at a yearly rate not higher than 75 per cent of the inflation index for the families of workers published by the Italian national institute for statistics. The limitation can be derogated from for leases with a duration exceeding the minimum term provided for by law.

In accordance with Italian case law, the payment of an inflation adjustment for rent has to be requested by the landlord every year, including when the lease agreement provides for 'automatic' indexation. 'Automatic indexation' clauses are not effective.

iii Termination of the agreement

The tenant is entitled to terminate the lease agreement early at any time on serious grounds, and on six-months prior notice. The existence of 'serious grounds' must be evaluated on a case-by-case basis. No definition of 'serious grounds' is provided under Italian law, but, as a general principle, the Italian Supreme Court has established that serious grounds occur when all the following conditions are met in relation to the event in question:

- a* it is beyond the tenant's control, and is not a result of the tenant's actions, decisions or will (i.e., it cannot be attributed to subjective choices of the tenant);
- b* it occurred after execution of the lease agreement and was neither predictable nor foreseeable at the time of execution of the lease; or
- c* it would render it extremely burdensome for the tenant to perform the lease agreement.

The serious grounds clause has puzzled international investors for years. From 2014, this clause may be waived by the parties if the lease has the following features: (1) yearly rent exceeding €250,000; (2) date of execution of the lease agreement after 12 November 2014; and (3) leased premises having not been classified as of historic heritage by an order of the relevant region or municipality, giving more certainty to long-term investors.

iv Assignment and sublease

The tenant is entitled to assign the lease, or to sublease the leased premises, without the landlord's consent by serving a simple notice to the landlord, if the assignment or the sublease is made to the purchaser of the tenant's going concern. However, the landlord can object to the assignment or the sublease on the basis of 'serious grounds'.

v Pre-emption right and compensation for loss of goodwill

If the activities carried out by the tenant in the leased premises entail direct contact with the public of consumers, the tenant must be granted:

- a* a pre-emption right if there is a sale of the leased premises by the landlord to a third party. However, under Italian case law, the tenant will not be granted with the

pre-emption right if the sale can be qualified as a bulk sale, that is, *inter alia*, the sale is of the whole building where the leased premises are located, and the latter being only a limited portion of such building; and

- b* a right to ask for compensation for loss of goodwill if the lease is terminated by the landlord for any reason except for breach of contract by the tenant, bankruptcy or other administrative procedure under Italian bankruptcy law, or order of an authority. The amount of compensation due to the tenant is set down by law and is equal to 18 times the monthly rent (and 21 times in the case of hotel use). The amount is doubled if, within a year of termination of the lease agreement, the same commercial activities carried on by the tenant (or similar commercial activities) are undertaken within the leased premises.

vi Transfer of the lease agreement

Under the Italian Civil Code, if the owner of real estate has leased it (in whole or in part) to a tenant and the property (or the leased premises only) is subsequently transferred to a third party, this third party automatically becomes a party to the relevant lease agreement.

vii Registration of the lease agreement

Under Italian tax law, generally real estate lease agreements having a duration of 30 days or more must be registered with the Revenue Agency within 30 days of the execution of the agreement.

Lease agreements having a duration of more than nine years must also be registered with the real estate registries.

VII DEVELOPMENTS IN PRACTICE

i Investments made through SICAF vehicles

In recent years the Italian market has been experiencing growth in real estate that is externally managed by SICAFs on the initiative of large foreign investors acting as founding shareholders of the SICAF and having selected an Italian asset management company. In these cases, some foreign institutional investors may benefit from certain advantages that the SICAFs, unlike the funds set-up in contractual form, may provide in terms of compliance with their home country rules. Finally, the corporate form of the SICAFs can also provide the investor with some initiatives granted to the shareholders, such as the amendments to the by-laws, approval of the balance sheet and distributions.

ii Set-up of alternative investment fund managers

In recent years, the Italian market has experienced several projects aimed at the set-up of new real estate investment fund managers. In certain cases, these projects have been carried out upon the initiative of specialist real estate operators, such as independent real estate advisers or large groups active in the real estate field, which intend to complete and integrate their offer of services.

For instance, specialist real estate advisory boutiques availed themselves of the ‘below threshold management companies’ (which allows them to manage investment funds within certain AUM thresholds and, in turn, require limited capital and organisational requirements, compared to ordinary management companies), in order to expand their range of services

to their current clients and to seek new clients. On the other side, large real estate groups opted for the set-up of 'ordinary asset management companies', so as to carry out real estate investments through funds managed by them and collect equity from third parties.

iii Real estate securitisation

In 2019, Italy extended the securitisation schemes to real estate. In light of this new legal framework, special purpose vehicles (SPVs) meeting certain requirements can carry out securitisation of proceeds arising from real estate and related rights.

In particular, these SPVs will not need to be regulated and shall have a corporate purpose contemplating the acquisition, management and valorisation, in the exclusive interest of the same securitisation transaction, of real estate and registered movable asset. The management of the pool of assets in the interest of the noteholders shall be carried out by entities that shall not necessarily be regulated asset managers (pursuant to the AIFM Directive and its implementing provisions).

It is worth noting that real estate and related rights underlying the securitisation, owned by the SPV, constitute a segregated pool of assets that is separated from the other assets of the same SPV. Therefore, each pool of assets will have liability only vis-à-vis its own noteholders and its own creditors.

The real estate securitisation, therefore, constitutes a new scheme that allows the acquisition of real estate by SPVs financed through the issuance of notes. By this new tool, the noteholders will be entitled to receive the proceeds arising from the management, valorisation and disposal of the assets, benefiting from the segregation of liability, on one side, and of a lighter and less expensive management structure, on the other side.

iv Warranty and indemnity insurance

Warranty and indemnity (W&I) insurance in relation to real estate purchases is a relatively new tool, which is experiencing continuous growth in Italy.

The purpose of W&I insurance is to allow an efficient allocation of transactional risks, by involving an insurer who is in a better position to assume such risks, including owing to its access to statistical models. W&I policies usually cover the representations and warranties set out in the relevant sale and purchase agreement (with some exceptions), and can be either in favour of the purchaser (buy side) or in favour of the seller (sell side).

The main benefits of underwriting W&I insurance are:

- a* simplification of negotiations on the provisions concerning representations and warranties and relevant indemnification obligations;
- b* efficient risk allocation; and
- c* a clean exit from the transaction for the seller.

On the other hand, W&I insurance: (1) may present additional costs (as additional advisers and parties are involved); (2) can cause slowdowns in the process (unless very well planned by involving the insurer from the beginning); (3) may not cover all risks, if 'standard' policies are used (e.g., policies that exclude matters within the insured's knowledge, disclosed by the seller, or not adequately investigated during the due diligence process); and (4) are based on a seller providing representations and warranties. However, some sellers may not be willing to provide representations and warranties (e.g., where the seller is not aware of the condition of the real estate property or cannot assume obligations because of external constraints).

v Deposit of the price with the notary

Italy has recently experienced a growth in, and a multiple implementation of, the deposit of the purchase price (or portions of it) with a notary public. In this respect, in 2017 a tool was introduced aimed at protecting purchasers in the context of real estate transactions by giving them the right to deposit the relevant purchase price in a dedicated bank account held by the notary before whom the transfer deed is executed. Although this tool has not been frequently used, especially in large-sized transactions, the number of transactions providing (at different stages) the deposit of amounts in escrow with the notary has significantly increased. By way of example, this mechanism is used by real estate players (1) in transactions in which the purchaser shall pay certain amounts before acquiring the real estate, either as earnest money or down payment (in these cases, the deposit of the relevant amount with the notary public protects the purchaser from the risk of not being reimbursed if the transaction is not completed); and (2) to expedite closing activities, especially when the transaction involves lenders (which shall either be reimbursed or lend money), or when the bank account from which the payments are made is located in a country with a different time zone. In this respect, the purchaser may deposit the purchase price with the notary in advance, so to give comfort about its financial resources to the other parties involved in the closing activities or to facilitate the transfer of the same or both.

VIII OUTLOOK AND CONCLUSIONS

Forecasts for the real estate market for 2020 maintain an encouraging outlook. The implementation of targeted structural reforms (such as real estate securitisation) and incentives on development and redevelopment will play a decisive role in pushing the country's growth, with significant impact on real estate activity.

The overall outlook for the real estate market is positive: prices of real estate are expected to remain stable or increase, (also in the residential segment), and the turnover of the market is expected to maintain a positive growth rate. Among the main key drivers of growth, the following factors should be taken into account: development and requalification (i.e., the requalification of marshalling yards and industrial districts); development of new infrastructure (also taking into consideration the upcoming events, such as the Milan Cortina 2026 Winter Olympic Games); focus of investors on value-added opportunities; and diversification of real estate portfolios and 'alternative' asset classes: student residences, senior living facilities and smart living facilities.

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ISBN 978-1-83862-496-5