

ClientAlert

Milan Office

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New Italian finance law to facilitate company financings

On August 20, 2014, the *Decreto Competitività* (as converted into Law with amendments, the "**Decree**")¹, was published in the Italian Official Gazette (*Gazzetta Ufficiale della Repubblica Italiana*). The Decree is part of a broader reform package aimed at supporting the competitiveness of Italian entities. White & Case was part of the working group providing advice on the Decree.

The following is a summary of the key changes introduced by the Decree.

Italian companies may now borrow from non-bank entities, and tax advantages apply to Qualifying Financings².

- Italian insurance and securitization companies may now lend directly to Italian entities;
- Withholding tax exemption extended to Qualifying Financings granted to entities by banks, unleveraged UCITS³ and insurance companies located in European white list jurisdictions; and
- "Substitute tax"⁴ regime extended to transfers of receivables or contracts and related security interests in the secondary market.

Changes in the tax regime applicable to the issuance of bonds which are privately placed and not listed

- Withholding tax exemption extended to interest and other payments on unlisted bonds held exclusively by Qualified Investors⁵; and
- Withholding tax exemption extended to interest and other payments on bonds effected in favour of securitization companies and European collective investment undertakings.

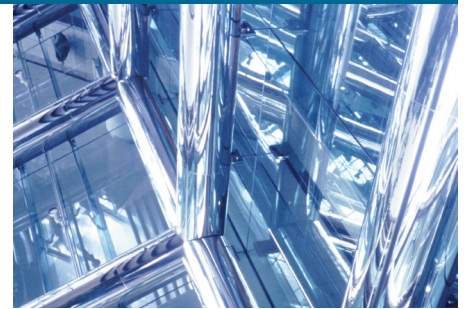
¹ Law Decree No. 91 of June 24, 2014, was enacted on June 25, 2014. The conversion law was published on the Italian Official Gazette (*Gazzetta Ufficiale della Repubblica Italiana*) on August 20, 2014 and became Law No. 116 of August 11, 2014 effective as of August 21, 2014.

² Financings with a term of more than 18 months.

³ Undertakings for Collective Investment in Transferable Securities (OICR – *Organismi di investimento collettivo del risparmio*), whether in the form of investment funds or companies (SICAV and SICAF).

⁴ A 0.25% tax substituting any other applicable taxes (e.g., mortgage tax).

⁵ "Qualified Investors" would include, *inter alia*, (a) persons authorized and regulated to operate in the financial markets, both Italian and foreign (e.g. banks, investment firms, other authorized and regulated financial institutions, insurance companies and pension funds); (b) large companies (e.g. companies satisfying at least two of the following requirements: total assets of at least Euro 20,000,000, net revenues of at least Euro 40,000,000 and capital resources of at least Euro 2,000,000); (c) institutional investors whose principal activity is investment in financial instruments, including companies dedicated to the securitization of assets; (d) other institutional investors who expressly request to be treated as qualified investors; and (e) national and regional public entities.



Paul Alexander
Partner, Milan
+ 39 02 00688 334
paul.alexander@whitecase.com

Iacopo Canino
Partner, Milan
+ 39 02 0068 8340
iacopo.canino@whitecase.com

Ferigo Foscari
Partner, Milan
+ 39 02 0068 8320
ferigo.foscari@whitecase.com

Michael S. Immordino
Partner, London and Milan
+ 44 20 7532 1399 (London)
+ 39 02 0068 8310 (Milan)
michael.immordino@whitecase.com

Nicholas Lasagna
Partner, Milan
+ 39 02 0068 8330
nicholas.lasagna@whitecase.com

Paola Leocani
Partner, Milan
+ 39 02 0068 8350
paola.leocani@whitecase.com

Should you be interested in sharing any comments or views regarding the above, please contact us at Alert.Milan@whitecase.com

White & Case LLP
Piazza Diaz 1
20123 Milan
Italy
T: + 39 02 00688 300
F: + 39 02 00688 301

Multiple voting rights shares

- Introduction of multiple voting right shares

The new provisions partially amend previous reforms contained in the *Decreto Sviluppo*⁶ and the *Decreto Destinazione Italia*⁷. See our prior Client Alerts published in December 2012, June 2012, December 2013 and January 2014.

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Detailed Discussion of Decree

Access to non-bank direct lending and tax advantages for Qualifying Financings

Italian insurance and securitization companies may now lend directly to Italian entities

The Decree allows Italian insurance and securitization companies to lend money (in any form such as loans, bonds or other credit facilities but excluding through the issuance of guarantees) to enterprises (other than micro enterprises⁸) subject to certain conditions⁹.

These provisions allow entities other than banks and financial intermediaries to extend financings directly through primary market transactions (*i.e.* by means of directly originating loans rather than purchasing bank loans and bonds on the secondary market).

We expect this change will allow Italian companies to take advantage of new funding opportunities arising from direct access to the greater liquidity of insurance companies and the greater flexibility of securitization structures; however the Decree still limits the applicability of this new regulatory regime to specified Italian entities and does not expressly include credit funds¹⁰.

⁶ Law Decree No. 83 of June 22, 2012 as converted into Law No. 134 of August 7, 2012 and amended by Law Decree No. 179 of December 17, 2012.

⁷ Law Decree No. 145 of December 23, 2013 as converted into Law No. 9 of February 21, 2014

⁸ As defined in Article 2(1) of the annex to EU Commission Recommendation No. 2003/361/EC.

⁹ Conditions include the following (i) the borrower must be identified by a bank or financial intermediary, (ii) the bank or financial intermediary must retain until maturity an interest of at least 5% (in the case of UCITS) or a significant interest (in the case of securitization vehicles) in the financing, (iii) in the case of UCITS, they must maintain adequate internal control and management risk systems (in order to fully understand the risks relating to the assets in which they are investing) and an adequate level of capitalization, (iv) in the case of securitization vehicles, notes issued by them must be subscribed and held until maturity by Qualified Investors only, and (v) the lender will be subject to periodic reporting duties *vis-à-vis* the Bank of Italy, that will be set out, together with other provisions aimed at guaranteeing compliance by lenders with transparency rules and fairness principles, in separate implementing provisions to be issued by the Bank of Italy.

Furthermore, regulations by IVASS (the Italian insurance regulator) and the Bank of Italy are to be adopted in order to establish conditions and limits for lending by insurance companies.

¹⁰ Although the definition of collective investment schemes has been amended to permit them to invest, *inter alia*, in receivables arising from loans extended out of their assets, the Decree expressly bans such entities from directly granting financings in the primary market, and the government has announced that a draft ministerial decree addressing this issue is about to be published for public consultation.

¹¹ The repeal of interest withholding tax on interest paid under financings granted by entities other than banks and the extension of the substitute tax to loans issued by European insurance companies and European unleveraged UCITS.

¹² EEA State allowing an adequate exchange of information

¹³ The "substitute tax" would also replace the financial transaction tax otherwise applicable to convertible bonds.

¹⁴ See however also some constraints relating to the applicable regulatory regime discussed herein which seems to limit primary market lending.

In addition, the Decree does not expressly allow non-Italian insurance companies and credit funds to extend financings in the primary market, which was expected in light of the new tax measures discussed below¹¹.

Withholding tax exemption extended to Qualifying Financings granted to entities by banks, unleveraged UCITS and insurance companies located in European white listed jurisdictions

The Decree extends the withholding tax exemption regime on interest (currently reserved exclusively to Italian resident lenders) paid to EU credit institutions, EU insurance companies, and unleveraged UCITS established within the EU or in an EEA white list jurisdiction¹².

This change should favor lending to Italian enterprises, allowing them to have access to a greater number of financing sources. However, we expect that the new measures will not achieve its goal unless non-Italian insurance companies and credit funds are granted the right to finance Italian borrowers.

"Substitute tax" (*Imposta Sostitutiva*) regime extended to transfers of receivables or contracts and related security interests

The Decree extends the availability of the "substitute tax" (*Imposta Sostitutiva*) regime (currently applicable only to an initial transfer of receivables) to any secondary transfer of receivables or contracts in connection with Qualifying Financings and to transfers of related security interests¹³.

It also extends the "substitute tax" (*Imposta Sostitutiva*) regime to insurance companies, EU or EEA UCITS and securitization companies authorized to carry out lending activities.

These new provisions extend the favorable tax regime to a variety of security interests and financing sources, providing greater flexibility in structuring secured transactions and thereby expanding the funding base for Italian borrowers¹⁴.

Changes in the tax regime applicable to the issuance of bonds distributed in the context of unlisted private placements

Withholding tax exemption extended to interest and other payments on unlisted bonds held exclusively by Qualified Investors

The Decree extends the withholding tax exemption regime under Decree 239¹⁵ to interest and other payments on bonds issued by unlisted entities¹⁶ that are not traded on regulated markets or multilateral trading facilities (“**MTF**”), provided that the bonds in question are held exclusively by Qualified Investors. This requirement applies not only to the distribution of bonds on the primary market but also to transfers on the secondary market. In order to benefit from the above exemption, evidence that the bonds are being held by a Qualified Investor would have to be available, in the absence of which the issuer and investor would lose the benefit of the favorable fiscal regime.

Accordingly, under the new tax regime, the issuer would benefit from the deductibility of interest and expenses¹⁷ and the investor would benefit from the withholding tax exemption if the bonds are either (i) listed at their issue date on a regulated market or MTF or (ii) held until maturity, in both the primary and secondary markets, by Qualified Investors¹⁸.

Although the new provisions would in theory allow Italian companies to enter into unlisted private placement transactions, we currently expect that the provision requiring the bonds to be held exclusively by Qualified Investors until maturity will lead companies to list the bonds since a company cannot police the transfers of bonds on the secondary market.

Withholding tax exemption extended to interest and other payments on bonds effected in favor of securitization companies and European collective investment undertakings

The Decree extends the withholding tax exemption regime to securities issued in the context of securitization transactions to the extent that (i) such securities are held by Qualified Investors and (ii) at least 50% of the securitization companies' assets are invested in bonds.

The purpose of this provision is to apply the same tax regime to securities issued in the context of securitization transactions which applies to the assets of such companies when those assets consist of bonds.

The Decree also clarifies that the withholding tax exemption for payments made to UCITS invested in by Qualified Investors only applies if at least 50% of the UCITS' assets are invested in bonds.

Introduction of multiple voting rights shares

The Decree also allows companies' by-laws to provide for the issuance of shares with multiple voting rights.

Private companies are allowed to issue multiple voting rights shares with up to three votes per share (*voto plurimo*), while listed companies are allowed to issue shares with up to two votes per share (*voto maggiorato*). In both cases, in order to benefit from such rights shares will have to be held for a minimum period of 24 months by the same holder.

With respect to listed companies, except for limited circumstances (such as estate succession and mergers of shareholders) the multiple voting right is not transferred together with the relevant shares. The resolution resolving upon the introduction of the *voto maggiorato* in the by-laws of listed companies will not allow dissenting shareholders to withdraw from the company. If a private company has shares with *voto plurimo*, such company may continue to maintain such shares upon listing. Please note that Consob is required to adopt implementing rules by December 31, 2014.

We expect that in certain limited situations the Decree will encourage private companies, companies that intend to go public or listed companies which are already public to issue equity with multiple voting rights, in the knowledge that they can reduce their economic rights below 50% while still maintaining voting control.

¹⁵ Legislative Decree no. 239 of April 1, 1996, which reduces withholding taxes to zero to the extent certain requirements are met, including that the holder of the bond is in a “white-listed” country.

¹⁶ Entities whose shares are not listed on regulated markets.

¹⁷ Deduction of interest and expenses by the issuer is allowed if bonds are listed on a regulated market or MTF since their issue date; or held by Italian or qualified investors established in a white listed jurisdiction and holding an interest in the issuer's share capital not greater than 2%.

¹⁸ The favourable fiscal regime, on the contrary, always applies if the bonds are listed from the issue date, as clarified by Circular No. 4/E of 6 March 2013 of the Italian Revenue Agency (*Agenzia delle Entrate*).