

New Italian rules to permit direct lending by alternative investment funds to Italian companies

February 2016

On February 14, 2016, the Italian Government approved Law Decree No. 18/2016 (the “Decree”) which sets out, *inter alia*, the direct lending regime by EU alternative investment funds (“AIFs”) to Italian borrowers. The long-awaited Decree entered into force on February 16, 2016 and must be converted into law by the Italian Parliament within 60 days.

Executive Summary

- Prior to the Decree, only Italian AIFs were expressly permitted to lend directly to Italian borrowers while it was unclear whether:
 - The same rules applied to EU AIFs;
 - AIFs could lend to consumers; and
 - Lending by AIFs was subject to the same transparency requirements applying to banks and financial intermediaries.
- The Decree establishes that:
 - EU AIFs may, subject to certain conditions, lend directly to Italian borrowers;
 - Italian and EU AIFs are not permitted to lend to consumers; and
 - Italian and EU AIFs are subject to the same transparency obligations applicable to banks and financial intermediaries.

Background

- Over the past few years, Italian companies have benefited from several legislative measures which have facilitated access to liquidity, including:
- Facilitating the issuance of bonds by unlisted companies;

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- Permitting Italian insurance and securitization companies and AIFs to lend directly to Italian borrowers; and
 - Extending the withholding tax exemption regime on interest to bond and bank financings provided by debt providers located in European white-listed jurisdictions.

The Decree now permits Italian borrowers to access non-bank direct lending by AIFs and broadly aligns the lending regime with the existing tax regime for withholding tax exemption on interest.

This Decree is expected to result in the following changes that will further liberalize access to capital:

- favor lending to Italian companies, by broadening their access to financing sources by allowing access to non-bank financings by all EU AIFs;
- facilitate the financing process for Italian companies by allowing for access to loan financing as compared to by issuing bonds which are relatively more complicated and expensive to issue than loans;
- permit EU AIFs to lend directly to Italian borrowers, subject to certain conditions.

Direct lending by EU AIFs

Under the Decree EU AIFs may lend to Italian borrowers (other than to Italian consumers) if the following conditions are met:

- (i) The EU AIF must be authorized to lend by the competent authority in its home Member State;
- (ii) The EU AIF must be a closed-end fund and its operating rules (including those relating to its investors) must be similar to those applicable to Italian AIFs¹; and
- (iii) The rules on risk diversification and limitation (including limitations on leverage) applicable to the EU AIF under the regulations of its home Member State must be equivalent to those applicable to Italian AIFs².

EU AIFs which intend to commence lending activities in Italy must file a notice with the Bank of Italy and may commence their activities (unless the Bank of Italy expressly prohibits them from doing so) 60 days after filing such notice.

The Bank of Italy must enact regulations to implement the regime introduced under the Decree³.

Direct lending by Italian AIFs

Although Italian AIFs were already permitted to lend to Italian borrowers, the Decree clarifies that Italian AIFs cannot lend to consumers and their lending activities must be conducted in compliance with the provisions of the Financial Code and its implementing regulations⁴.

¹ Although no guidance has been provided so far by the Bank of Italy on the interpretation of this requirement, based on similar provisions included in Legislative Decree No. 58 of February 24, 1998 (the “**Financial Code**”) it may be expected that the assessment related to the similarity between the operating rules of the EU AIF and those of Italian AIFs will have to be conducted taking into account, *inter alia*, the investment policy of the EU AIF, the categories of investors that are allowed to subscribe or purchase its shares or units, the rules governing subscriptions and redemptions, the relationship between the EU AIF and its depositary, etc.

² Such equivalence may also be verified on the basis of the provisions included in the EU AIF’s rules or articles of association (as opposed to the regulations applying in its home Member State), provided that the competent authority of its home Member State ensures compliance with such rules or articles of association. As to the requirements applying to Italian AIFs that should be considered for the purpose of this equivalence assessment, see also the considerations set out under footnote no. 4 below.

³ These regulations will likely specify, *inter alia*, the type of documents to be submitted to the Bank of Italy for the purpose of filings by EU AIFs as well as the scope of the Bank of Italy’s assessment of such filings.

⁴ See, in particular, the provisions included in (i) the Decree of the Ministry of Economy and Finance No. 30 of March 5, 2015 and (ii) the Bank of Italy Regulation of January 19, 2015 on collective investment management activities (the “**BoI Regulation**”). In particular, the BoI Regulation specifies the diversification requirements and leverage limits

The Financial Code does not prescribe specific procedures to be carried out by alternative investment fund managers (including, in particular, Italian asset management companies (“*Società di Gestione del Risparmio*” or “**SGR**”)) which intend to establish Italian direct lending AIFs⁵.

Transparency and reporting requirements

The Decree also clarifies that lending by Italian and EU AIFs is subject to the transparency requirements set out under Title VI, Chapter I and III of the Banking Code⁶.

In addition, the Bank of Italy may require EU AIFs to join the Italian Central Credit Register (“*Centrale dei Rischi*”), which they may do so directly or through third party banks or financial intermediaries.

Next steps

The Decree entered into force on February 16, 2016 and must be converted into law by the Italian Parliament within 60 days of such date. Following conversion of the Decree – and assuming no significant amendments are made – the Bank of Italy must enact regulations to implement the regime for EU AIFs introduced under the Decree in order for the Decree (as may be amended upon conversion) to be fully effective.

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applying to closed-ended Italian AIFs investing in loans. These requirements and limits are stricter in the case of closed-ended Italian AIFs which are not reserved to professional investors (FIA chiusi non riservati), while Italian AIFs which are reserved to professional investors (FIA riservati) are subject to a higher leverage limit. Finally, as a general rule for both categories of AIFs the residual maturity of the loans may not be longer than the term of the AIF.

⁵ Nonetheless, before setting up a credit AIF (or amend the rules of existing AIFs so as to include direct lending in their investment policy) SGRs may be required to transmit to the Bank of Italy a communication on business changes (“*modifiche dell’operatività*”) in accordance with Title II, Chapter I, Section VIII of the BoI Regulation.

⁶ Accordingly, Italian and EU AIFs will have to comply with the same pre-contractual, contractual and organizational requirements that normally apply to banks and financial intermediaries when performing lending activities in Italy.