

Implementation of the AIFMD in Italy – First Ground-Breaking Steps

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The Alternative Investment Funds Managers Directive (the “**AIFMD**”) and the level 2 delegated Regulation No. 231/2013/EU entered into force on 22 July 2013¹, but the legal framework for the full transposition of the AIFMD in Italy is not yet in place. However, on 26 July 2013 the Italian securities regulator (CONSOB) and the Bank of Italy, consistent with the action taken at the time of the entry into force of the UCITS IV Directive in summer 2011,² issued a resolution (the “**Joint Resolution**”), allowing for an initial and partial implementation of the AIFMD, particularly as regards marketing in Italy of European alternative investment funds (“**EU AIFs**”).

Background

The marketing in Italy of foreign non-UCITS funds has historically been severely constrained due to the absence of a private placement regime (so that any form of offer or marketing, regardless of the number or nature of the investors, had to be authorised) and the complexity, length and thoroughness of the authorisation procedure provided under the Bank of Italy’s Regulation on Collective Investment Undertakings (the “**Bank of Italy Regulation**”).³ The first ever authorisation under the Bank of Italy Regulation was granted only in August 2007 and since then only a handful of non-UCITS funds have been authorised to market in Italy.

The obstacles to the direct marketing of non-UCITS funds have also hindered the marketing of other products (such as structured products and insurance policies) having as underlying foreign non-UCITS funds, due to:

- (a) the view held by the Bank of Italy (and enforced until December 2006 under the powers then granted to it by Article 129 of the Italian Banking Act⁴) that the marketing of structured products linked to foreign non-UCITS funds would imply the marketing in Italy of the underlying funds and therefore would only be permissible if the underlying funds were themselves authorised; and
- (b) the more recent provisions contained in the regulations applicable to Italian insurance companies, which have allowed the investment of the insurance companies’ technical provisions in foreign non-UCITS funds, provided that such funds meet the requirements for authorisation to marketing set forth in the Bank of Italy Regulation.⁵

The Joint Resolution

While the national statutory measures for the detailed transposition of the AIFMD in Italy have been published only in draft form (the “**Draft Transposition Measures**”),⁶ in the Joint Resolution CONSOB and the Bank of Italy have affirmed the self-executing nature of certain parts of the AIFMD (“particularly those regarding the transitional provisions and the cross-border activity of EU AIFMs”⁷) and consequently resolved that, with effect from 22 July 2013:

- (c) with regard to EU AIFs managed by an EU AIFM, whose marketing in Italy has been authorised before 22 July 2013:
 - i. the EU AIFs may continue to be marketed in Italy to professional investors⁸ until 22 July 2014; and
 - ii. no later than 22 July 2014, the EU AIFM should put in place all the measures required to ensure compliance with the national provisions for the transposition of the AIFMD and, once it has been authorised in its home Member State⁹, should effect the notification required under article 32 of the AIFMD (the “**Article 32 Notification**”) for each EU AIF it markets in Italy, or otherwise the marketing of the EU AIFs should terminate;
- (d) with regard to EU AIFs managed by an EU AIFM, whose home Member State *has implemented* the AIFMD:
 - i. the EU AIFs may be marketed to professional investors in Italy under the AIFMD passporting regime, with CONSOB being the competent authority to receive the Article 32 Notification;
 - ii. the EU AIFs may be marketed to retail investors in Italy only under the existing authorisation procedure governed by the Bank of Italy Regulation, and the relevant authorisation may only be granted by the Bank of Italy if the Article 32 Notification has also been effected;
- (e) marketing in Italy (to both retail and professional investors) of EU AIFs managed by an EU AIFM whose home Member State *has not yet implemented* the AIFMD, should still be authorised under the existing authorisation procedure governed by the Bank of Italy Regulation; the relevant EU AIFM should also comply with point (a) (ii) above;
- (f) until the full transposition of the AIFMD in Italy,¹⁰ the existing authorisation procedure governed by the Bank of Italy Regulation will continue to apply to marketing in Italy (both to retail and professional investors) of:
 - i. AIFs managed by a non-EU AIFM; and
 - ii. non-EU AIFs managed by an EU AIFM;
- (g) EU AIFMs whose Home Member State *has implemented* the AIFMD may manage an Italian AIF (both on a cross-border basis or through a branch) subject to the notification procedure provided under article 33 of the AIFMD,¹¹ with the Bank of Italy being the competent authority to receive such notification. The relevant EU AIFMs will be enrolled in a new special section of the register of asset managers kept by the Bank of Italy pursuant to article 35 of the Italian Financial Act and will be subject, to the extent applicable, to the same provisions currently governing the activity in Italy of foreign management companies under the UCITS IV Directive; and
- (h) until the full transposition of the AIFMD in Italy, the authorisation of Italian AIFMs and the establishment and marketing of Italian AIFs will continue to be governed by the current pre-AIFMD provisions and Italian management companies may not avail themselves of the passporting/notification procedures provided under articles 32 and 33 of the AIFMD.¹²

With the Joint Resolution, marketing in Italy to professional investors of EU non-UCITS funds (and arguably of other products linked to such funds) becomes a significantly more easily achievable task, provided that the AIFM's Home Member State has already implemented the AIFMD and that the requirements set out therein are complied with.¹³ In this respect, it should be noted that, while this is not specifically mentioned in the Joint Resolution, the marketing in Italy of EU AIFs by EU AIFMs remains subject, *inter alia*, to compliance in Italy with: (i) the disclosure to investors rules set out in article 23 of the AIFMD; and (ii) the national provisions regarding the "arrangements made for the marketing of the AIFs and, where relevant, the arrangements established to prevent units or shares of the AIF from being marketed to retail investors, including in the case where the AIFM relies on activities of independent entities to provide investment services in respect of the AIF" (item (h) of Annex IV of the AIFMD).¹⁴ Item (ii) is not addressed in the Joint Resolution and it remains to be seen whether the relevant arrangements should be identified on the basis of the pre-AIFMD provisions (i.e. the Bank of Italy Resolution), which requires the appointment of a paying agent and of an entity in charge of investor relations in Italy (but at the same time provides for a possible derogation from these requirements where marketing is restricted to professional investors), or of the Draft Transposition Measures, which are, however, rather vague on this point and only list as an example the inclusion of appropriate selling restrictions in the fund rules or constitutional documents.¹⁵

Further Developments

Private placement. Neither the Joint Resolution nor the Draft Transposition Measures purport to change the current system, whereby no private placement exemption applies to the marketing of foreign funds in Italy. Reverse solicitations (provided they are genuine) will continue to be allowed.

EU passport for non-EU AIFMs. Under the Draft Transposition Measures, starting from the date on which the European passport for non-EU AIFMs comes into force pursuant to article 67(6) of the AIFMD (currently expected to fall in 2015):

- (a) non-EU AIFMs should be authorised in Italy by the Bank of Italy, if Italy is the "EU Member State of reference" pursuant to the AIFMD. A regulation to be issued by the Bank of Italy will set forth the conditions and procedure for such authorisation and the conditions under which the non-EU AIFMs authorised in Italy should comply with in order to operate in other EU Member States;
- (b) non-EU AIFMs authorised in another EU Member State pursuant to the AIFMD may market EU AIFs and non-EU AIFs in Italy to professional investors pursuant to a notification made to CONSOB by the Home Member State regulator in the same way as for the Article 32 Notification.

In light of these draft provisions, some tentative conclusions can be drawn:

(i) once the European passport for non-EU AIFMs comes into force, it would be the sole avenue for non-EU AIFMs to access the Italian market (i.e. there would be no dual marketing system after 2015);

(ii) until the entry into force of the European passport for non-EU AIFMs, the current authorisation procedure provided for by the Bank of Italy Regulation would continue to apply to non-EU AIFMs, although we note that adjustments to such procedure may be needed in order to ensure compliance with the requirements of article 42 of the AIFMD (*Conditions for the marketing in Member States without a passport of AIFs managed by a non-EU AIFM*).

Marketing to retail investors. The Draft Transposition Measures envisage a separate authorization procedure for the marketing of Italian, EU and non-EU AIFs to Italian retail investors and put CONSOB

in charge of it. It is also envisaged that marketing of AIFs to retail investors should be subject to stricter measures than marketing to professional investors, so as to ensure a higher level of investor protection.



If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings London lawyers:

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- ¹ For an overview of the AIFMD and of its impact on Non-EU Investment Managers, as well as its transposition in the UK, please refer to our previous [November 2010](#), [April 2013](#) and [June 2013](#) client alerts. Unless otherwise specified, capitalised terms used in this alert shall have the same meaning ascribed to them in our previous alerts.
- ² The national measures for the implementation of the UCITS IV Directive in Italy were finally published at the end of April 2012; however, CONSOB, in agreement with the Bank of Italy, acted on 5 July 2011 (with the deadline for the transposition of UCITS IV expiring on 30 June 2011) to ensure that the key parts of the UCITS IV regime (such as the new notification procedure for marketing of foreign UCITS, the replacement of the simplified prospectuses with the key investor information documents and the easement of the translation requirements), be given immediate implementation in Italy.
- ³ *Regolamento sulla Gestione Collettiva del Risparmio*, originally issued on 14 April 2005 and recast on 8 May 2012.
- ⁴ Under the former text of article 129 of the Italian Banking Act, the offer in Italy of a wide range of foreign debt securities had to be authorised in advance by the Bank of Italy. This vetting power was eventually removed by Legislative Decree 29 December 2006, No. 303.
- ⁵ See IVASS Regulation No. 36 of 31 January 2011.
- ⁶ See the consultation document published by the Italian Ministry of Finance available at: http://www.dt.tesoro.it/it/regolamentazione_settore_finanziario/consultazioni_pubbliche_online_corrente/consultazione_investimenti_alternativi.html. The implementation of the AIFMD in Italy will be effected through three types of measures: (i) a law passed by the Italian Parliament setting the general principles for the transposition (which was passed on 6 August 2013 and will enter into force on 4 September 2013); (ii) a legislative decree issued by the Italian Government setting the detailed provisions for the transposition (and whose contents are outlined in the Draft Transposition Measures); and (iii) implementing regulations to be issued by CONSOB and by the Bank of Italy once the measures under (i) and (ii) have entered into force.
- ⁷ I.e. articles 61 and 32-33 of the AIFMD, respectively.
- ⁸ The Draft Transposition Measures (see footnote 6 above) provide for the insertion in the Italian Financial Act of a definition of “professional investors”, which will be made to coincide with the MIFID definition of “professional clients”.
- ⁹ Reference here is to the definition of “home Member State of the AIFM”, pursuant to article 4(1)(q) of the AIFMD.

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- ¹⁰ Estimated to be completed by the end of 2013.
- ¹¹ Article 33 of the AIFMD governs the so-called “management passport”, which allows EU AIFMs to manage EU AIFs in any host Member State.
- ¹² Section 2 of the Joint Resolution further contains provisions for the implementation of Regulation (EU) No. 345/2013 of the European Parliament and of the Council on European venture capital funds (EUVECA) and of Regulation (EU) No. 346/2013 of the European Parliament and of the Council on European social entrepreneurship funds (EUSEF). Further detail on these provisions is beyond the scope of this client alert.
- ¹³ The Joint Resolution seems consistent with the *Opinion on Practical Arrangements for the late transposition of the AIFMD*, issued by ESMA on 1 August 2013 (ESMA/2013/1072).
- ¹⁴ According to article 32(5) of the AIFMD, these arrangements should be subject to Italian law and to the supervision of Italian regulators.
- ¹⁵ Further, like in the current regime, the marketing in Italy of EU AIFs under the Article 32 Notification should be subject to an annual supervisory fee payable to CONSOB. The 2013 supervisory fee is set at Euro 3,800 ca. for each AIF authorized to market in Italy and for each manager/management company authorised to manage funds established in Italy (in each case subject to increase in case the relevant funds/sub-funds are subject of an offer to the public). The new fee regime, updated in light of the transposition of the AIFMD, should be set by CONSOB in December 2013.