



## Direct Lending by EU AIFs: Bank of Italy's implementing regulations

5 January 2017

On 23 December 2016, the Bank of Italy ("**Bol**") issued the regulation implementing the legislative provisions enabling direct lending by EU AIFs in Italy, introduced by the Law Decree no. 18 of 14 February 2016 (the "**Decree**"). Furthermore, on 30 December 2016, the Bol issued a document summarising the outcome of the consultation process carried out before the adoption of the implementing provisions (the "**Consultation Comments**") which tend to clarify the position of the regulator with respect to certain open issues considered at the time of the promulgation the Decree (see our previous [alert](#)).

The implementing provisions are included in the Bank of Italy's Act of 23 December 2016 which entered into force today (one day after the publication in the [Official Gazette](#) of the Republic of Italy, see page 52) and amends the Bank of Italy's Regulation on collective asset management of 19 January 2015 ("*Regolamento sulla gestione collettiva del risparmio*") (the "**Bol's Regulation**").

In particular, the Bol's Regulation now sets out (i) the application process (in terms of contents and timing) to be followed by an AIFM in order to obtain the "passport" to perform lending activities<sup>(1)</sup> in Italy and (ii) certain ongoing reporting requirements to the Bol.

The Bol evaluates the application filed by the AIFM in order to assess the satisfaction of the conditions provided by the Decree, as implemented by the Bol's Regulation<sup>(2)</sup>.

### Contents of the application

The AIFM shall file with the Bol a prior notice including details on the AIFM and the EU AIF as well as the following documentation:

- a. Statement of the home Member State authority of the AIFM attesting that the AIFM is authorised in the home Member State and can manage the relevant EU AIF<sup>(3)</sup>;
- b. Statement of the competent authority or, alternatively, a legal opinion, concerning the possibility of the EU AIF to originate loans;
- c. Copy of the management rules or by-laws of the EU AIF as well as the by-laws of the AIFM (or equivalent documents), together with a statement attesting the actual validity of such documents released by the home Member State authority of the AIF and of the AIFM<sup>(4)</sup>;
- d. Declaration signed by the legal representative of the AIFM pointing out the rules [on

risk mitigation and diversification, including those concerning limits on leverage] of the AIF's home Member State considered equivalent to the provisions applicable to Italian AIFs<sup>(5)</sup> as well as a legal opinion concerning such equivalence<sup>(6)</sup>;

**alternatively**, statement of the home Member State authority ensuring that it supervises the compliance of the AIFM with the [equivalent] risk mitigation and diversification rules, including those concerning limits on leverage, provided by the management rules or by-laws of the EU AIF;

- e. Last annual report and half-year report, if available;
- f. Note explaining the operational scheme of the EU AIF, with particular reference to the rules concerning the subscription and redemption of units/shares<sup>(7)</sup> as well as to the object and investment policy. Furthermore, the note shall indicate whether the AIFM signed or intend to sign side letters with investors of the EU AIF and, in this case, it discloses their content<sup>(8)</sup>.

## Timing

The application process provides for a "silent-consent" mechanism. Specifically, the Bol will firstly verify the completeness of the filed documentation: in case of positive outcome it communicates it to the applicant (the "**Notice of Completeness**")<sup>(9)</sup>. Starting from the day on which the Bol notifies the applicant with the Notice of Completeness, the Bol has 60 days to eventually notify its refusal to grant the "passport" to the applicant. If no such refusal is notified, after the sixty-day period expires, the EU AIF may commence its lending activity.

## Ongoing reporting to the Bol

Any subsequent change to the information provided at the time of the application process shall be promptly communicated to the Bol (which may eventually start a proceeding aimed at revoking the "passport" in case the conditions provided by the Decree are no longer fulfilled).

Furthermore, the AIFM shall send to the Bol the financial reports of the EU AIF within 10 days from the approval.

Finally, while the Bol's Regulation is silent on the point, it is very likely that the Bol will require access to the Italian Central Credit Register ("*Centrale dei Rischi*") also to EU AIFs<sup>(10)</sup>.

If you are interested in obtaining more information or discussing any of the above, please contact [Andrea Arosio](#), [Dario Longo](#), [Luca Dal Cerro](#), [Davide Mencacci](#), [Francesco Faldi](#), [Emanuele Umberto Aurilia](#), [Riccardo Petrelli](#) or your usual contact at Linklaters.

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(1)With respect to the performance of the lending activity, in the Consultation Comments, the Bol:

(i) implicitly clarified that EU AIFs which have obtained the "passport" to lend directly (i.e., to originate loans or to purchase commitment to lend) are also authorised to purchase loans disbursed to Italian borrowers (excluding consumers) on the secondary market; while

(ii) explicitly clarified that lending activities can be performed only by the regulated EU AIF: i.e., lending through non-fund SPVs wholly owned by the "passported" EU AIF would not be allowed.

(2)Please see our previous [alert](#). In a nutshell, pursuant to the Decree, EU AIFs are authorised to lend directly to Italian borrowers (excluding consumers) subject to the following conditions:

a) the EU AIF is authorised by its home Member State to lend directly in its home jurisdiction;

b) the EU AIF is set up as a closed-end AIF and its operational scheme, with particular reference to the rules of participation in the AIF, is equivalent to the operational scheme of Italian credit funds; and

c) the risk mitigation and diversification rules, including those concerning limits on leverage, applicable in the EU AIF's home Member State are equivalent to the provisions applicable to Italian AIFs. Equivalence can be assessed through the constitutional documents of the AIFs (i.e., its management rules or by-laws), provided that the home Member State authority ensures compliance by EU AIFs with their constitutional documents.

(3) Alternatively, the applicant may file a copy of the authorisation granted to the AIFM together with a statement signed by the legal representative on the actual enrolment in the relevant register of the AIFM.

(4) Alternatively to the statement of the competent authority, the applicant may file a statement signed by the legal representative of the EU AIF and of the AIFM.

(5) Copy of these rules shall be attached to the application file.

(6) In the Consultation Comments, the Bol clarifies that this requirement is satisfied only where there is full "equivalence": i.e., the prudential limits applicable to EU AIFs shall be equal or eventually more stringent to those provided for Italian AIFs. Where these limits are not provided by the home member state legislation, it is sufficient that the same are set out in the management rules or by-laws of the EU AIF (provided that the home authority supervises the compliance of these rules by the AIFM).

(7) In the Consultation Comments, the Bol clarifies that, pursuant to the Decree, the EU AIF shall be set up as a closed-end AIF: in this respect, an open-end fund would not satisfy the relevant condition even if its constitutional documents provide for stringent redemption mechanisms.

(8) In the Consultation Comments, the Bol clarifies that the disclosure obligation concerns exclusively the possibility to early reimburse the units and/or any preferential treatment in favour of certain investors (with indication of the triggering conditions).

(9) Otherwise, the Bol will request to the applicant to integrate the application with the missing piece of information/documentation.

(10) We note that the Bol has this power pursuant to the Decree and already expressed its intention to extend access to the EU AIFs in the context of the consultation process on the amendments to the Bol's Regulation.