ITALY

Investment rules of the world

DLA PIPER

About

At DLA Piper, we have one of the largest finance and projects teams in the world with more than 600 dedicated lawyers and an established local law firm network. We share knowledge and skills in debt instruments, debt securities, funds, derivatives and portfolios, as well as energy, infrastructure and other projects, across Europe, the Middle East, Africa, Asia Pacific and the Americas.

When and wherever we work for you on finance and investment deals and projects, you can rely on our international platform; we are backed by the network and resources of one the largest and most-connected business law firms in the world.

We enjoy being part of your team, bringing experience across sectors, borders and financial products, supporting you on first-of-a-kind deals, in new markets and to grow.

With global perspective, we can help you to realize your financial strategy in whichever markets you do business.

Investment Rules of the World

With input from across our global network, this guide covers key legal topics for different financial activities and projects and gives you an overview of the points you may consider when initially looking at financing or investing in particular jurisdictions. Please contact us if you would like to discuss any legal issues or solutions for your business. We also welcome your feedback about this guide via investmentrules@dlapiper.com.

Italy

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Capital markets and structured investments

Issuing and investing in debt securities

Are there any restrictions on issuing debt securities?

Pursuant to the Italian Civil Code, a company may issue debt securities for an amount not exceeding twice its share capital, the legal reserve and the available reserves of that company, as set out under its last approved balance sheet.
These constraints do not apply in the following cases:

- debt securities issued in excess of the limit set out above which are underwritten by institutional investors subject to prudential supervision;
- debt securities secured by a first-ranking mortgage;
- debt securities to be listed on a regulated market or negotiated on a multilateral trading facility (As a general remark, it is not possible to state a precise timeframe for listing which will be valid for all the issuers. Timeframes for the admission to trading may vary depending on the market (ie whether Borsa Italiana or EuroTLX), the type of issuer and/or the type of security. As a rule of thumb, the admission procedure can take from one week to a couple of months (or even longer if the relevant market requires more information from the issuer));
- convertible bonds which grant the right to purchase or underwrite shares;
- special authorization given by governmental authorities on national economic interest grounds; and
- application of special laws relating to particular categories of companies (eg in relation to banks by virtue of the provisions set out under the Consolidated Banking Act).

Furthermore, pursuant to the Prospectus Regulation, and relevant implementing measures in Italy, an issuer shall draft and file with CONSOB a prospectus in order to offer the debt securities to the public and/or list such debt securities on a regulated market. Such provision is valid and effective to the extent that an exemption does not apply.

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What are common issuing methods and types of debt securities?

Debt securities are most commonly issued by means of either a standalone prospectus or a base prospectus.

Several different types of debt securities are offered and/or listed in Italy. Among the others, some common forms include:

- plain vanilla notes (including, *inter alia*, fixed-rate notes, floating-rate notes, zero-coupon notes fixed to floating rate notes, step-up notes, step-down notes);

- structured notes (linked to one or more underlying assets, including, *inter alia*, shares, interest rates, currencies, commodities, indexes, funds, as set out under the Rules of the Markets organized and managed by Borsa Italiana S.p.A.);
- convertible bonds (notes that may be converted either in the shares of the issuer or in the shares of another company, depending on its structure);
- subordinated notes;
- covered bonds; and
- 'minibonds' (issued by unlisted companies of small or medium size (excluding micro-corporations)).

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What are the differences between offering debt securities to institutional / professional or other investors?

A different disclosure regime exists in the case of offers addressed to retail investors or institutional/professional investors (named 'qualified investors'). In the latter case, the Prospectus regulation clarifies that a prospectus is not necessary (unless the securities are subsequently traded on a regulated market).

The disclosure regime also depends on the denomination of the debt securities offered. To this extent, debt securities having a denomination amount that is lower than €100,000 are usually directed to retail investors and offered for subscription by means of a prospectus approved by CONSOB, whereby debt securities having a denomination that is equal to or higher than €100,000 shall be considered as a wholesale issue and a less rigid disclosure regime is applicable.

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When is it necessary to prepare a prospectus?

Under the Prospectus Regulation, unless an exemption applies, it is necessary to publish a prospectus where there is an offer of securities to the public or an application for the securities to be admitted to trading on a regulated market.

An offer would not be deemed to have been made to the public if it is made solely to qualified investors, addressed to fewer than 150 persons (other than qualified investors) per European Economic Area state or where the minimum denomination per unit is at least €100,000.

If the offer is deemed not to be made to the public, a Prospectus Directive compliant prospectus may still be required if an application is made for the securities to be admitted to trading on a regulated market. An exemption from both the offer to the public and the admission to trading on a regulated market is needed to avoid publishing a prospectus.

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What are the main exchanges available?

Borsa Italiana S.p.A. provides different markets where debt securities may be traded. In this respect, the primary market in Italy is the MOT (*Mercato Telematico delle obbligazioni e dei titoli di Stato*). Pursuant to the Rules of the Markets organized and managed by Borsa Italiana S.p.A., the financial instruments that may be traded on the MOT are bonds (excluding convertible bonds), sovereign debt, Eurobonds, asset-backed securities, structured bonds, covered bonds and other debt securities and instruments tradable in the monetary market.

The MOT consists of two segments:

- DomesticMOT, for debt securities that are settled through Monte Titoli S.p.A., according to the Instructions accompanying the Rules of the Markets organized and managed by Borsa Italiana S.p.A.; and
- EuroMOT, for debt securities that are settled through Euroclear/Clearstream, according to the Instructions accompanying the Rules of the Markets organized and managed by Borsa Italiana S.p.A..

Furthermore, there are other trading venues – in particular Multilateral Trading Facilities – where debt securities may be traded:

ExtraMOT

The ExtraMOT is a multilateral trading facility, regulated by Borsa Italiana S.p.A., for trading corporate bonds issued by Italian and foreign companies which are already listed on other regulated EU markets, as well as non-listed bonds and debt instruments issued by Italian small and medium-sized enterprises (SMEs).

ExtraMOT Pro

The ExtraMOT Pro is the professional segment of the ExtraMOT dedicated to trading, *inter alia*, bonds (including convertible bonds), commercial papers and project bonds, generally issued by Italian SMEs. Trading is only open to professional investors on the ExtraMOT Pro.

EuroTLX

EuroTLX is the multilateral trading facility organized and managed by Borsa Italiana S.p.A., targeted to non-professional and professional investors trading in retail size and mainly focused on fixed income securities.

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Is there a private placement market?

The private placement market in Italy is underdeveloped compared to, for instance, the UK or the US. According to a paper published by the Bank of Italy, there were 235 issuances of debt securities in the period 2012–2014.

Having said that, the private placement market in Italy is growing due to the introduction of so-called minibonds, ie debt securities issued by Italian non-listed companies (generally small and medium-sized enterprises (SMEs)) and usually negotiated on the ExtraMOT Pro.

Efforts have been made by the Loan Market Association and International Capital Markets Association to standardize private placement documentation.

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Are there any other notable risks or issues around issuing or investing in debt securities?

Issuing debt securities

Under Italian law, the issuer, offeror, guarantor, or the persons responsible for the information contained in the prospectus, shall be liable, each in relation to the extent of their own duties, for damages caused to the investor placing reasonable faith in the truth and accuracy of information contained in the prospectus, unless it is proved that all due diligence was adopted for the purpose of guaranteeing that the information in question complied with the facts and that no information was omitted that could have altered the sense thereof. Investors suffering loss are entitled to bring a civil action for negligent misstatement or misrepresentation, and also criminal law sanctions may be imposed in such cases.

Investing in debt securities

Under Italian law, a noteholders' meeting may amend the terms and conditions of the debt securities provided that certain conditions regarding the constitutive/deliberative *quorum* are fulfilled. To this extent, an extraordinary resolution passed by a qualified majority of noteholders binds all the noteholders.

In addition, in the case that the issuer is an institution falling within the scope of the BRRD the potential investor should be aware that such institution may be subject, upon certain conditions, to resolution measures. In particular, the relevant resolution authority could apply certain resolution tools including, among others, the bail-in tool. Consequently, the potential investor may be subject to the risk that the resolution authority will exercise the write-down or conversion power in respect of the relevant institution's liabilities (including the securities purchased by the investor).

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Establishing and investing in debt / hedge funds

Are there any restrictions on establishing a fund?

Generally

In general terms, the establishment, marketing and management of Italian investment funds (having either contractual or corporate form) are regulated activities, exclusively reserved to duly licensed entities, subject to authorization requirements and ongoing supervision and to be performed in compliance with the relevant rules and regulations.

Collective Investment Schemes

Under the Italian regulatory framework, the overall operation and activities of Collective Investment Schemes shall comply with a set of rules and provisions, involving, *inter alia*:

- disclosure and authorization procedures *vis-à-vis* the competent supervisory authorities in relation to:
    - the funds, especially when qualifying as retail funds (in this context the applicable provisions set forth different requirements regarding, *inter alia*, minimum content of the fund documents, disclosure obligations of such fund documents *vis-à-vis* the supervisory authorities, investment limits, risks fractioning and diversification requirements etc); and
    - the management companies (in this context, the applicable provisions require, *inter alia*, the obtainment of an authorization to perform collective asset management activities, the compliance with sound and prudent management safeguards, as well as with minimum capital requirements and ongoing prudential thresholds, transparency provisions towards the investors and rules of conduct); and
- procedures to be followed for the promotion, offer and marketing of the funds, differently modulated based on the cross-border operation, if any, the target investors (retail or professional), the type of vehicles etc.

Generally, the rules set forth for retail funds are more stringent than those relating to reserved funds exclusively for professional investors. Fewer and less stringent investment limits, for example, are imposed on reserved funds, as well as less onerous disclosure and reporting requirements.

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What are common fund structures?

Different categories of funds may be identified, based, *inter alia*, on the:

- subscription and redemption modalities adopted (open-ended or closed-ended funds);
- types of subscribers addressed (retail or reserved);
- risk level involved (recourse to leverage on a substantial basis or not); and
- relevant investments to be made (real estate funds, private equity funds, master-feeder structures, fund of funds etc).

In this context, the most common investment structures, as anticipated, can be divided between:

- investment vehicles having a contractual form (ie investment funds, either qualifying as Undertakings for Collective Investment in Transferable Securities (UCITS) or alternative investment funds (AIFs)), established and managed by a manager as a segregated pool of assets divided into units and collected, through one or more issues of units, among a plurality of investors, managed as a whole in the interest of (and independently from) the unit holders; and

- corporate vehicles (ie *Società di Investimento a Capitale Variabile* (SICAV) and *Società di Investimento a Capitale Fisso* (SICAF), depending on the open-ended or closed-ended nature, either qualifying as UCITS or AIFs) which may be both self-managed or externally managed by an asset management company.

Please note that some common characteristics may be identified, such as the basic presence of a plurality of investors, the establishment of a predetermined investment policy to be followed, certain management independence and autonomy principles and the general pooling of investors contributions, profits and incomes.

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What are the differences between offering fund securities to professional / institutional or other investors?

Retail funds

Italian retail funds are subject to stringent regulatory requirements, comprising, *inter alia*, minimum contents of the fund rules, authorization procedure *vis-à-vis* the Bank of Italy, approval of the management rules and of its subsequent amendments, investments' limits and risk mitigation, fractioning and diversification criteria.

Institutional/professional funds

Italian reserved funds, as expected, are subject to fewer and less stringent investment limits, as well as less disclosure and reporting requirements towards the relevant supervisory authorities. No authorization is required for the establishment of reserved funds and generally the fund rules are not subject to approval by the Bank of Italy.

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Are there any other notable risks or issues around establishing and investing in funds?

Establishing funds

As anticipated, the establishment, marketing and management of Italian investment funds (having either contractual or corporate form) represent activities exclusively reserved to duly licensed entities and subject to authorization requirements and ongoing supervision. Such activities, as a consequence, are to be performed in compliance with all the relevant applicable rules and regulations. Every potential breach or evasion (eg 'ghost companies') of the aforesaid rules and regulations may trigger the application of administrative and criminal sanctions associated to an unlawful exercise of financial activity or to the violations of the applicable regulatory provisions.

Investing in funds

No specific issue arises. Any specific risk and the overall risk profile connected with any investment in a fund is mandatorily disclosed in the fund's offering and subscription documentation.

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Managing and marketing debt / hedge funds

Are there any restrictions on marketing a fund?

Italy selling restrictions

The offer of securities in Italy is covered under the CONSOB financial promotion regime provisions, respectively implementing Undertakings for Collective Investment in Transferable Securities Directive regime and Alternative Investment Fund Managers Directive regime.

Undertakings for Collective Investments in Transferable Securities (UCITS)

UCITS, including those established in Italy, have an EU passport which enables fund promoters to create a single product for marketing in all EU member states and, on the completion of the appropriate notification procedure, a UCITS established in one member state can be sold in any other.

A UCITS intending to market in another member state must complete and submit to its home regulator a notification including certain specified information, including copies of key investor documents. The home regulator then completes a notification file which is sent in a regulator-to-regulator transmission, following which the UCITS can be sold in the other member state.

Alternative Investment Funds (AIFs)

Under the Alternative Investment Fund Managers Directive, marketing is defined as: a direct or indirect offering or placement at the initiative of the Alternative Investment Fund Manager (AIFM) or on behalf of the AIFM of units or shares in an AIF it manages to or with investors domiciled or with a registered office in the EU.

An AIFM may only market an AIF to EU investors if it is authorized by a relevant EU regulator – registration with one EU regulator opens access, subject to certain further limited conditions, to marketing to professional investors across the EU under a EU passport or if it complies with national private placement regimes (please note that NPPR has not been yet implemented in Italy).

Reverse solicitation and the definition of 'marketing'

In general terms, reverse enquiry mechanisms refer to situations in which clients contact managers, on their own initiative, in order to subscribe for units or shares of a fund, and no placement or marketing activity are performed by the managers towards such clients.

Italian law and regulation does not contain specific provisions on the reverse solicitation scheme. The qualification of the operation as a 'genuine' reverse solicitation, in this sense, will derive from an assessment, made by the competent Italian supervisory authorities, of the procedural and documentary evidences underlying the transaction. More precisely, the Italian supervisory authorities, in order to prove the legal construction of the reverse inquiry, adopt a stringent 'substance over form' approach.

In relation to the definition of 'marketing', the Consolidated Financial Act defines this as 'the offer, also indirect, on the initiative or on behalf of the manager, of the AIF units and shares managed, addressed to resident investors or those with a registered head office in the EU'.

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Are there any restrictions on managing a fund?

Fund management in Italy is regulated under the Consolidated Financial Act, various statutory instruments and the supervisory authorities' rules and regulations. The Bank of Italy is mainly responsible for regulating funds and fund managers, as well as the criteria for the obtainment of the relevant authorizations.

The various restrictions imposed by the aforesaid provisions (including, *inter alia*, structuring, management autonomy and independence, conflict of interest and remuneration issues) shall be proportionate to the managers' size, internal organization, scope and complexity of activities.

Alternative Investment Fund Managers (AIFMs) are also subject to regulation under the Alternative Investment Fund Managers Directive (as implemented in Italy) and managers of Undertakings for Collective Investments in Transferable Securities (UCITS) are subject to certain requirements under the Undertakings for Collective Investment in Transferable Securities Directive.

More precisely, the authorization procedure with the Bank of Italy to perform collective asset management activities, is granted upon positive evaluation of, *inter alia*, the business plan, activities plan and organizational structure of the manager, integrity, professionalism and independence of its directors and controllers' integrity, and professional competence of its shareholders and their representatives.

The entity willing to exercise the collective portfolio management activity must submit to Bank of Italy certain documentation confirming the above prerequisites, and the Bank of Italy will have 90 days from the filing to grant or deny authorization (this term may be suspended in case the Bank of Italy requires clarifications or additional information).

In terms of incorporation costs, the Bank of Italy usually requires the *Società di Gestione del Risparmio* (SGR) to be provided with excess cash in order to cover incorporation costs without reducing the minimum corporate capital.

Special provisions are set forth for SGR managing assets below predefined thresholds (so called SGR *sotto soglia*), which are subject, *inter alia*, to simplified capital and authorization requirements, assets evaluation criteria, control functions, outsourcing, conflict of interest and portfolio and management regimes, as well as to simplified guidelines on remuneration.

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Entering into derivatives contracts

Are there any restrictions on entering into derivatives contracts?

An Italian client entering into derivative contracts in Italy might be a private or corporate client or a public client (such as central and local authorities).

Italian private and corporate clients

There are no restrictions on private or corporate clients entering into derivatives contracts.

Nevertheless, when entering into a derivative contract with a corporate client it is advisable to check whether the relevant constituting documents and by-laws of such client:

- Encompass any provision evidencing the authority of the party entering into this type of agreement and the performance of its obligations under such agreement; or
- Encompass any limit in relation to entering into derivatives contracts (in particular, it may be possible that only derivatives contracts with hedging – and not speculative – purposes may be permitted).

Italian public clients

As of June 2008, all Italian public authorities (including local entities, regions, metropolitan cities etc) are prohibited from entering into any type of new derivative contract.

Banks authorized in Italy and/or authorized to carry out in Italy financial services on a cross-border basis

Entering into derivative contracts entail the provision of financial services. Therefore, in order to provide such service, banks and/or financial intermediaries selling a derivative product must be duly authorized to carry out this service (on its own account) in Italy, whether on a cross-border basis or by establishing a branch.

In the event that the bank/financial intermediary is at the same time advisor and counterparty to the client of the derivative contract, Italian law provides a wide range of further information to be disclosed to the client (in order to comply with both appropriateness and suitability rules in favour of the client).

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What are common types of derivatives?

In Italy, derivative contracts are entered into for the following purposes:

- hedging; and
- trading (including trading for speculation purposes).

Derivatives may be traded over-the-counter (OTC) or on an organized exchange (ETD, Exchange Traded Derivatives).

The most common types of derivative contract in Italy entered into for hedging purposes are:

- swaps (in particular interest rate swap or currency swap), as OTC derivative; and
- forwards (to hedge foreign exchange rate risk).

The underlying asset is often constituted by a loan (denominated in euro), linked to the fluctuation of Euribor (or other similar reference rates).

The most common types of derivative contract in Italy entered into for trading purposes are:

- futures;
- swaps; and
- options (call options and put options).

The value of the derivative contract is based on the value of the underlying assets and on other market factors. The most common underlying assets considered in the Italian market are:

- equity;
- fixed income instruments;
- commodities;
- foreign currency; and
- credit events.

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Are there any other notable risks or issues around entering into derivatives contracts?

Derivative contracts (in particular OTC derivative contracts) are also regulated by the European Market Infrastructure Regulation (EMIR) and the implementing regulation of Regulatory Technical Standards (RTS) which attempts to ensure the same degree of protection to clients within all EU countries by providing comprehensive information and transparency on over-the-counter derivative position, and reduce counterparty risk by increasing the use of central counterparty clearing.

It is worth noting that the derivatives market hassignificantly changed in light of the implementation of the MiFID II starting from January 2018, as summarised above.

Due to a recent increase in disputes over OTC derivatives in Italy, a specific focus is attributed to the following items:

- complete disclosure of all costs related to the initial mark-to-market of the OTC derivative contract (distinguishing each line item such as hedging cost and bank remuneration); and
- comprehensive information to be provided to the client before the entering into the derivative contract with particular reference to the appropriateness and suitability of the derivative.

The level of information required by law depends on the MiFID II classification of the client (retail or professional).

The risk related to the non-disclosure of the above information to the client is that the derivative contract might be declared null and void by an Italian court. Pursuant to current case law in Italy a client (professional or retail) shall explicitly receive detailed information and give its consent on the value of the hedging costs and any further charge applied to the derivative transaction to be concluded by it.

According to the provisions of EMIR the counterparties to derivatives transactions must verify the need to enter into specific arrangements for risk reducing. More particularly, for those transactions entered into between clients classified as FC (Financial Counterparties) or as NFC+ (Non-Financial Counterparties above a certain threshold) it will be necessary to establish security arrangements for the calculation and exchange, on a daily basis, of the “variation margin” to be exchanged between the parties to cover the relevant exposure under the master agreement governing the entire set of derivatives transactions.

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Debt finance

Lending and borrowing

Are there any restrictions on lending and borrowing?

Lending

In general terms, under Article 106 of the Consolidated Banking Act the granting of loans in any form is reserved to duly authorized financial intermediaries enrolled with a Register kept by the Bank of Italy.

Specific exclusions are set forth in Ministerial Decree No. 53 of 2015, as well as cases in which the granting of loans is not considered as performed *vis-à-vis* the public.

In addition, loans can be granted also by Italian special purpose vehicles incorporated pursuant to the Italian Securitization Law. Such SPVs can carry out lending activity in the context of securitisation transactions, both in performing and non-performing scenario, in accordance with the specific requirements and limits set out under the Italian Securitization Law.

Borrowing

While borrowers are generally not regulated, it is advisable for borrowers to consider whether the consumer-lending regime applies to their activities, in which case they will benefit from some additional protections and benefits (such as, for example, in terms of limitations to unilateral amendments by the finance party and transparency rules).

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What are common lending structures?

Lending in Italy can be structured in a number of different ways to include a variety of features depending on the commercial needs of the parties.

A loan can either be provided on a bilateral basis (a single lender providing the entire facility) or syndicated basis (multiple lenders each providing parts of the overall facility).

Syndicated facilities by their nature involve more parties (such as the agent which fulfils certain roles for the finance parties), are more highly structured and involve more complex documentation. Larger financings will typically be done on a syndicated basis with one of the syndicate taking the lead in coordinating and arranging the financing.

Loans will be structured to achieve specific purposes, eg mortgage loans (including credito fondiario in relation to the financing of real estate assets), working capital loans, equity bridge facilities, bridge to cash facilities, project facilitiesand, letter of credit facilities and export facilities.

Finally, loans can be 'in cash' (finanziamenti per cassa), when the lender makes available to the borrower cash, or through the issue of documental guarantees in favour of third parties in the interest of the borrower (finanziamenti per firma).

Loan durations

The duration of a loan can vary between:

- a term loan, provided for an agreed period of time but with a short availability period;
- a revolving loan, provided for an agreed period of time with an availability period that extends nearer to maturity of the loan and which may be redrawn on a roll over basis;
- an overdraft, provided on a short-term basis to support short-term cash flow issues; or

- a standby or a bridging loan, intended to be used in exceptional circumstances when other forms of finance are unavailable and often attracting a higher margin.

Loan security

A loan can either be secured, unsecured or guaranteed. For more information, see Giving and taking guarantees and security.

Loan commitment

A loan can also be:

- committed, meaning that the lender is obliged to provide the loan if certain contractual conditions are fulfilled; or
- uncommitted, meaning that the lender has discretion whether or not to provide the loan.

Loan repayment

A loan can be repayable on demand, on an amortizing basis (in instalments over the life of the loan) or bullet (usually meaning the loan is repayable in full at maturity).

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What are the differences between lending to institutional / professional or other borrowers?

Lending to institutional/professional borrowers entails a reduced set of protections and limitations in favour of the borrower.

Lending activities towards retail clients and consumers in particular are subject to stricter provisions and limitations.

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Do the laws recognize the principles of agency and trusts?

In theory both principles are recognized as a matter of Italian law, although the trust concept is not yet commonplace in the Italian market and is seldom present in common lending structures.

From a practical perspective, in finance transactions with more than one finance party an agent is always appointed to act on behalf of the finance parties. It is extremely rare to have trustees appointed in connection with secured assets as generally trustees may encounter legitimacy issues in enforcing security interests. Parallel debt structure is not recognized/applicable in Italy.

Moreover, the agent usually is granted with reduced representation powers when such powers are granted by hedging banks which, for example, often have more flexibility in the management of the security interests assisting their claims (although subject to the restrictions of any intercreditor agreement).

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Are there any other notable risks or issues around lending?

Generally

Loan agreements and other finance documents are subject to general contractual principles.

However, certain principles of law cannot be contractually derogated and any contrary provisions contained in the finance documents would be null and void. As an example, finance documents may not provide for the exclusion of liability in case of gross negligence (*colpa grave*) or willful misconduct (*dolo*), and there are limitations to accrual and liquidation of interest (the Italian Usury Legislation applies in this case) and compound interest.

Furthermore, the enforcement of obligations of a party or the binding effect of such obligations may be limited by laws regarding bankruptcy, receivership, insolvency, liquidation, reorganization and any laws generally affecting the rights of creditors. In particular any payment made in advance in respect of its due date as originally agreed between the parties, including as a consequence of the acceleration of such payment obligation or as a result of the operation of any mandatory prepayment provision contained in the finance documents, may, at certain conditions, be deemed ineffective *vis-à-vis* the bankruptcy administration of the payer, pursuant to Article 65 of the Bankruptcy Law, and accordingly the bankruptcy administration of such payer may request the restitution of such payment.

In addition, it is worth noting that:

- In banking transactions, a loan facility (from an accounting perspective) constitutes an asset of the lending bank rather than a liability but Directive 2014/59/EU (Bank Recovery and Resolution Directive or BRRD) and the relevant powers of the competent resolution authority may still be relevant eg in relation to a bank's potential liabilities to other syndicate members in a loan or an inter-creditor arrangement.
- If a financial institution happens to be a borrower, then its liabilities to repay debt may be subject to bail-in.

Specific types of lending

Specific to the area of mortgage lending is the issue of whether a lender falls within the recently formed Italian mortgage regime. The Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property, implemented in Italy through the Consolidated Banking Act and the Transparency Provisions, aims to prevent the irresponsible lending and borrowing practices that were exposed during the global financial crisis. The implementing regulations impose a number of requirements on lenders including the need to:

- conduct affordability tests before lending;
- provide standard information about the mortgage to enable borrowers to compare products; and
- ensure that staff are suitably trained.

Standard form documentation

It is quite common to see Italian law syndicated finance transactions governed by documentation based on forms published by the Loan Market Association (LMA), duly amended and integrated to be compatible with Italian law and Italian market standards. It is, however, also very common to see syndicated and bilateral finance transactions documented on bank standard form documentation prepared in-house or other simplified standard forms prepared by external legal advisors but diverging from the LMA.

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Are there any other notable risks or issues around borrowing?

Borrowers should be aware of the potential implications of the BRRD, which outlines certain measures for dealing with failing financial institutions.

The BRRD applies to financial institutions incorporated in the European Economic Area (EEA), but does not apply to EEA branches of non-EEA incorporated entities.

Article 55 of the BRRD gives authorities the power to 'bail in' obligations of failed EEA financial institutions and also postpones the enforcement of early termination rights against the affected institution. 'Bail in' describes a variety of write down and conversion powers, such as the power to convert certain liabilities into shares or cancel debt instruments. In the case of EEA law contracts, such powers override what the contracts says. In the case of non-EEA law contracts, there are requirements to incorporate such provisions into the contract.

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Giving and taking guarantees and security

Are there any restrictions on giving and taking guarantees and security?

Some of the key areas affecting the granting of guarantees and security are as follows.

Capacity/Corporate Benefit

It is important to check the constitutional documents of a company granting a guarantee or security to ensure it has an express or ancillary power to do so and there are no restrictions on the directors' powers that would be preventative. Under Italian law, directors have a general duty to promote the success of the company for the benefit of its members as whole; as such, they will need to be able to show that adequate corporate benefit is derived from the company giving the guarantee or security. This is often more difficult in the case of upstream or cross-stream guarantees or security provided by a subsidiary to its parent or sister company.

Provided that the assessment of a corporate benefit is a matter of fact depending on a number of commercial and financial factors to be evaluated by the management body of the grantor of the guarantee and/or security, the market approach is often to have the members of the company approving the granting of the guarantee or security by written resolution and, if possible, to limit the guaranteed/secured amount to the direct monetary benefit arising to the issuer/grantor of the upstream or cross-stream guarantees or security (for example, the maximum guaranteed/secured amount would not exceed the amount of the intra-group/shareholders' loans made available to the issuer/grantor by the entity in the interest of which the upstream or cross-stream guarantees or security is issued/granted).

Insolvency

Guarantees and security may be at risk of being set aside under Italian insolvency laws if the guarantee or security was granted by a company within a certain period of time prior to the declaration of bankruptcy (*dichiarazione di fallimento*). For such a transaction to be set aside, certain statutory criteria would have to be met, including that the guarantee or security was given within six months (or one year in the event that the underlying guaranteed obligation was not undertaken prior to (and not at the same time as) the issue/granting of the guarantee/security) of the declaration of bankruptcy (*dichiarazione di fallimento*) of the affected party.

In case of mortgage lending transactions governed by Section 38 of the Consolidated Banking Act (the so called '*Credito Fondiario*' providing for certain requirements and limitations for the lenders in the selection of the remedies against the borrower in case of default), the period within which the mortgage assisting the financing may be set aside is reduced to 10 days.

Financial assistance

Financial assistance is subject to stringent regulation and limitations and it is therefore quite rare in the market to encounter a company providing financial assistance for the purchase of its own shares as a complex "whitewash" procedure is required in order to legally carry out such a transaction. Financial assistance in this context would include giving a guarantee or security in connection with the share purchase.

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What are common types of guarantees and security?

Common forms of guarantees

Guarantees can take a number of forms.

A particular distinction worth remembering is between a personal guarantee (*fideiussione*) and an autonomous first demand guarantee.

- A personal guarantee (*fideiussione*) is a strictly regulated form of guarantee. Some of its main features are that:
  - it remains valid only if the underlying guaranteed obligation is valid;
  - the guarantor is entitled to object to a payment request by invoking the exceptions and objections which pertain to the debtor in the interest of which the guarantee was issued (the relevant debtor);
  - the guarantor may, before paying and under certain conditions, act against the relevant debtor to be released from the guarantee or to obtain due counter guarantees or counter security for the satisfaction of its claims after the payment; and
  - the guarantor is released if the guaranteed creditor has further financed the relevant debtor although it was aware of its difficult financial conditions.

- An autonomous first demand guarantee is intended as an instrument ensuring payment to the relevant creditor irrespective of the circumstances affecting the relevant debtor or the underlying guaranteed obligation if the contractual conditions/steps and procedures provided by the relevant agreement are met.

Both of the above described guarantees shall expressly provide for the maximum guaranteed amount should the guaranteed obligation be a future/conditional obligation.

Common forms of security

There are four basic types of security interest that can be created under Italian law:

- a mortgage;
- a pledge;
- an assignment by way of security; and
- a *privilegio* (general or special lien).

Different types of security are suitable for securing different types of assets.
Under Italian law it is not possible for a single security to cover all of the assets of an Italian company, but only individual assets or classes of assets. Granting security over all of a company's assets will tend to be achieved through the granting of the following multiple security interests:

- a pledge over movable assets (including shares/quotas of a company) or receivables;
- a mortgage over real estate assets or vehicles or ships;
- a *privilegio* (general or special lien) over movable assets different from vehicles and ships; and
- an assignment by way of security of receivables.

With respect to financial transactions it is customary to establish securities in the form of "financial collateral guarantees" according to Legislative Decree 170/2004 implementing in Italy Directive EC 2002/47. Financial collateral guarantees relating to financial transactions are documented as transfer-title pledge over assets granted by a transferor in favour of a transferee covering the exposure of one party to another under the relevant financial transactions.

In addition to the above, the following securities have been recently introduced in Italy:

- Security transfer of immovable asset; and
- Non-possessory pledge (not implemented).

SECURITY TRANSFER OF IMMOVABLE ASSET

A loan granted to an entrepreneur by a bank or another financial entity authorized to grant loans to the public in Italy can be secured by transferring to the creditor (or to a company in the creditor's group authorized to purchase, hold, manage and transfer rights in rem in immovable properties) the ownership of an immovable asset of the entrepreneur or of a third party. Such transfer is subject to the condition precedent of the debtor defaulting. In such a case, the creditor is entitled to notify the pledgor its intention to enforce such security pointing out the amount of its credit; following such notification an independent valuer is appointed by the relevant Court in order to determine the value of the relevant immovable asset and consequently the sale process is carried out. The creditor shall pay to the pledgor the difference (if any) between the transfer price and the amount of its credit towards the pledgor.

NON-POSSESSORY PLEDGE

A non-possessory pledge allows the pledgor (who shall be engaged in entrepreneurial activities) to continue to use, transfer or otherwise dispose of the pledged assets for business purposes, provided that in such a case, the pledge would extend to any asset resulting therefrom. A non-possessory pledge agreement requires a written form and shall indicate a maximum secured amount. However, the pledge is enforceable vis-à-vis third parties only upon registration on an electronic register of non-possessory pledges to be set up. In this respect, since such electronic register has not been implemented, such security is not currently effective.

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Are there any other notable risks or issues around giving and taking guarantees and security?

Giving or taking guarantees

To be valid, a guarantee needs to be in writing and signed by the guarantor. It can be provided also in case the Relevant Debtor is unaware of its issue.

The issue of a guarantee by a company does have some limitations regarding, *inter alia* the:

- preservation of the assets of the guarantor and the preservation of the rights of the creditors and stakeholders;
- misuse of corporate assets;
- exclusion of liability in case of gross negligence (*colpa grave*) or willful misconduct (*dolo*); and
- accrual and liquidation of compound interest.

Giving or taking security

A security document may need to be executed through notarial deed should it:

- contain a mortgage;
- contain a pledge over quotas over a limited liability company;
- contain a *privilegio speciale* (special lien); or
- contain an assignment of receivables *vis-à-vis* public entities.

In all other cases, it may be entered into either in notarial form or via exchange of commercial letters. In particular, this latter form is mainly utilized when the registration of the relevant instrument is not required by law.

Once granted, security needs to be properly perfected before it is valid against third parties. Perfection formalities can range from having the secured asset delivered to the security holder or a custodian, registration of the security in a company's books (as per the pledge of a company's shares) public registries and/or notice being given to (or, alternatively, acceptance being obtained from) third parties. Mortgages must be registered at the Land Registry, the pledges over a company's quotas must be registered in the Companies Registry, while the *privilegio speciale* (special lien) must be registered in the relevant book held at the competent courts. Failure to register means that the charge will be ineffective (*non opponibile*) against the liquidator, administrator or any creditor of the company and the money secured by the charge becomes immediately payable.

As for guarantees, for a period after a new security interest has been granted (known as the hardening period), there is a risk that such security is set aside in certain circumstances under insolvency laws.

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Financial regulation

Law and regulation

What are the main laws and regulations that apply to entities that are involved in finance and investments generally?

Generally

Italian Civil Code
Legislative Decree No. 385 dated 1 September 1993 (Consolidated Banking Act)
Legislative Decree No. 58 dated 24 February 1998 (Consolidated Financial Act)
CONSOB Regulation No. 20307 dated 15 february 2018 (Intermediaries Regulation)
CONSOB Regulation No. 11971 dated 14 May 1999 (Issuers Regulation)
Ministerial Decree No. 53 dated 2 April 2015
Presidential Decree No. 600/1973
Legislative Decree No. 239 dated 1 April 1996
Presidential Decree No. 601/1973

Consumer credit

Legislative Decree No. 206 dated 6 September 2005 (Consumer Code)
Bank of Italy Regulation of 29 July 2009, as subsequently amended, containing the transparency provisions for banking and financial transaction and services and for correctness of the relationship between the intermediaries and their clients (Transparency Provisions)

Mortgages

Legislative Decree No. 385 dated 1 September 1993 (Consolidated Banking Act)

Corporations

Italian Civil Code

Funds and platforms

Alternative Investment Fund Managers Directive (2011/61/EU)
Undertakings for Collective Investment in Transferable Securities Directive (2009/65/EC), as amended by Directive 2014/91/EU
Bank of Italy Regulation on collective asset management services dated 19 January 2015 (Bank of Italy Regulation)
Ministerial Decree No. 30 dated 5 March 2015 (Ministerial Decree)
European Long Term Investment Funds Regulation (Regulation (EU) 760/2015)

Other key market legislation

Bank Recovery and Resolution Directive (2014/59/EU) as amended from time to time (recovery and resolution)
Capital Requirements Regulation (Regulation (EU) 575/2013) as amended by Regulation EU 876/2019 (capital requirements)
European Market Infrastructure Regulation (Regulation (EU) 648/2012) (derivatives)
Market Abuse Regulation (Regulation (EU) 596/2014) (market abuse)
PRIIPs Regulation (Regulation (EU) 1286/2014) (packaged retail and insurance-based investment products)
Regulation on the prospectus to be published when securities are offered to the public or admitted to trading (Regulation (EU) 1129 /2017) and repealing Directive 2003/71/EC and relevant delegated regulations 2019/979/EU and 2019/980/EU
Benchmark Regulation (Regulation (EU) 1011/2016) (indices used as benchmarks in financial instruments or financial contracts)
Capital Requirements Directive (2013/36/EU) (CRD IV)
STS Regulation (Regulation (EU) 2017/2402) (laying down a general framework for securitisation and creating a specific framework for simple, transparent and standarised securitisation)
Markets in Financial Instruments Directive (2014/65/EU) (MiFID II) (financial instrumets)
Payment Service Directive (2015/2366/EU) (PSD2)
E-Money Directive (2009/110/EC), as subsequently amended and supplemented (EMD)
Directive for the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (2015/849/EU), as amended by Directive 2018/843/EU (Fifth AML Directive) (money laundering)
Legislative Decree No. 231 of 21 November 2007 (AML Decree)
Law No. 108 dated 7 March 1996 as amended and implemented from time to time (Italian Usury Legislation)
Royal Decree Law No. 267 of 16 March 1942 as amended and implemented from time to time (Bankruptcy Law)
Law No. 130 of 30 April 1999 (Italian Securitization Law)
Legislative Decree No. 170 of 21 May 2004, implementing in Italy the Directive 2002/47/EC on financial collateral guarantees
Legislative Decree No. 11, 27 January 2010, as amended from time to time (PS Decree) (payment services)

Legislative Decree No. 45, 16 April 2012 implementing Directive 2009/110/EC (e-money)
CONSOB Regulation 18592 of 26 June 2013, as subsequently amended and supplemented (Crowdfunding Regulation)

Securities listed on Borsa Italiana (Italian regulated market)

Rules of the Markets organized and managed by Borsa Italiana S.p.A.
Instructions accompanying the Rules of the Markets organized and managed by Borsa Italiana S.p.A.

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Regulatory authorization

Who are the regulators?

The Bank of Italy is the central bank of Italy and is entrusted with the supervision of banks and financial intermediaries, which are the entities entitled to carry out banking and financial activities *vis-à-vis* the public. In particular, the Bank of Italy pursues the objective of ensuring the stability and the efficiency of the banking and financial system and compliance with Italian rules and regulations. To this end, the Bank of Italy issues secondary legislation and monitors the activities carried out by banking and financial institutions, also in relation to the payments system and the overall regulatory supervision.

The Bank of Italy has also powers of inspection and sanctioning powers *vis-à-vis* the banks and the financial intermediaries.

In addition to the above, Italian banks qualifying as significant institutions are also directly subject to the prudential supervision of the European Central Bank (ECB), which is also entrusted with both hard and soft regulatory powers, in accordance with the overall European framework.

The *Commissione Nazionale per le Società e la Borsa* (CONSOB) is the Italian government authority responsible for regulating the Italian securities market. More precisely, CONSOB is entrusted with supervision on transparency and correctness of regulated entities, including banks and financial intermediaries providing investment services and other financial activities. This authority also regulates, *inter alia*, the solicitation of investment (ie public offers) and the marketing of financial instruments, including units of collective investment funds. For the purposes of its supervisory competence, CONSOB also has powers of inspection and sanctioning powers *vis-à-vis* the banks and the financial intermediaries.

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What are the authorization requirements and process?

The authorization requirements and processes applicable in Italy depend on the type of intermediary which is involved (i.e. mainly a bank, an institution, an asset management company or a financial intermediary).

Generally speaking, in order to be entitled to perform banking or financial activities in Italy, each type of intermediary shall submit to the Bank of Italy a set of documents describing, *inter alia*, the activity to be performed and confirming compliance with each of the requisite legal requirements in order to perform such activities. The main documents to be prepared are an organizational structure report aimed at describing the internal organization and main procedures that the applicant is setting up in view of the authorization, and a business plan. The applicant institution shall also be able to demonstrate the possession of the relevant minimum own capital requirements, which differ depending on the type of intermediary.

The application includes, *inter alia*, documents confirming compliance with certain integrity, professionalism and independency requirements by the stakeholders and their senior management.

In this context, the supervisory authorities shall assess within a certain timeframe whether the applicant meets the required conditions. This term may be suspended if the authority requires clarifications. With respect to some significant banks the authorisation is formally granted by the ECB on the basis of the assessment made by the Bank of Italy.

At the end of the authorization processes, if successful, the banks/financial intermediaries/other supervised companies or institutions are enrolled in the relevant sections of the Bank of Italy Registers.

In relation to the fees associated with the incorporation and authorization of banks and financial intermediaries, there are no fees for the enrolment on any register of the Bank of Italy, however, certain fees are requested by CONSOB (by way of supervisory contribution).

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What are the main ongoing compliance requirements?

Certain conditions, requirements and thresholds (eg financial resources, compliance measures and adequate internal organization, policies and procedures, integrity, professionalism and independency requirements of the senior management) must be met in order to preserve the authorized status of the bank or financial intermediary. Failure to comply with such requirements can result in sanctions for intermediaries or banks and/or regulated entities, and in the revocation of the authorization granted.

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What are the penalties for failure to be authorized?

The provision of banking and/or financial activities in Italy *vis-à-vis* the public, without being authorized, triggers criminal sanctions (in the form of a financial penalty and/or imprisonment).

In addition (based on a number of Italian court judgements) loans granted by an entity which is not duly authorized will be null and void.

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Regulated activities

What finance and investment activities require authorization?

Generally

In general terms, the performance in Italy of one or more of the following financial activities requires an authorization:

- savings collection;
- payment and e-money services;
- the provision of investment services;
- granting financing in any form *vis-à-vis* the public (ie to third parties on a professional basis) (this activity includes the granting of loans, including the issue of guarantees replacing the credit and guarantee commitments, financial leasing, the purchase of receivables for valuable consideration, consumer credit, mortgage credit, loans backed by pledges, the issue of guarantees, the opening of a documentary credit facility, the acceptance, endorsement or commitment to grant a facility, as well as any other form of issuing guarantees and credit commitments); and
- collective asset management activities.

Consumer credit

The Consolidated Banking Act defines a consumer credit agreement as a contract by which the lender grants or undertakes to grant credit to a consumer in the form of a deferred payment, loan or other similar financing, also in relation to real estate consumer credit. In this context, pursuant to the Consolidated Banking Act, 'consumer' shall mean a natural person acting for purposes unrelated to a business or professional activity (if any) carried out by the same. Such definition includes all financings granted by professionals (banks or authorized intermediaries) *vis-à-vis* consumers. Specific transparency and disclosure obligations *vis-à-vis* consumers are provided for by the Consolidated Banking Act and by the Transparency Provisions. The Transparency Provisions have been amended in order to, *inter alia*, introduce product oversight and governance requirements for retail banking products, including consumer credit. As a consequence credit institutions shall now make sure to design and bring to the market products with features, charges and risks, that are appropriate for the interests, objectives and characteristics of a pre identified target clientele (so called “target market”). The Consolidated Banking Act also lists a set of exclusions, in relation to which the consumer credit regime shall not apply.

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Are there any possible exemptions?

In relation to the possible authorization exemptions, in general terms, the above-mentioned activities do not trigger authorization requirements and can be freely exercisable if they are not performed *vis-à-vis* the public.

For instance, activities carried out exclusively *vis-à-vis* the group to which the intermediary belongs, upon certain conditions, do not fall within the scope of activity requiring authorization.

Moreover, activities carried out on an occasional basis, without any stable organization and continuity, do not fall within the definition of activities performed on a 'professional basis' and, therefore, are not required to be authorized.

However, according to Italian case law, the granting of one loan can fall within the scope of authorized activity if the lender has a framework in place which presumes the potential continuation of the relevant activity.

Without prejudice to the above, certain specific exemptions are provided for with regard to consumer credit activities.

Also in relation to other type of intermediaries, upon certain conditions, some regulatory exemptions could be invoked, provided that such exemptions widely reflect those already provided at the European level.

As regards the provision of payment services, it has to be considered that, after the implementation of Directive 2015/2366/EU (PSD2), operators willing to invoke the so called “limited network exemption” or the so called “electronic communication exclusion” shall submit a notification to the Bank of Italy – should some volumes and thresholds be exceeded – are enrolled in a separate section of the register as “exempted entities” and are subject to an annual assessment.

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Do any exchange controls or other restrictions on payments apply?

In Italy there are no exchange controls. Italian residents may hold, within and outside Italy, foreign currency and foreign securities of any kind and non-residents may export cash and/or securities, in both foreign currency and euro and are entitled to invest in Italian securities provided that when the total amount of the value to be transferred is more than €10,000, reporting and record-keeping requirements are complied with. Entering or leaving the EU with €10,000 or more in cash must also be declared to customs.

Certain additional procedural requirements are also imposed for tax reasons.

In Italy, payments in cash, or made with bank or postal deposit savings passbooks, or by way of debt securities in bearer form both in euro or in a foreign currency must not exceed €2,000. Starting from 1 January 2022 such limit will be reduced to €1.000.

The limit fixed for money transfers as well as bank or postal check books without the identification of the beneficiary is €1,000.

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What are the rules around financial promotions?

The rules around financial promotion differ depending on the object of the promotional/offering activity.

As regards the promotion of banking activities/financial services and products in places other than the registered office or the branches of the bank (ie 'door-to-door offer'), banks may make use of their employees and financial salesmen (*agenti*), other banks and investment firms and the relevant salesmen, insurance companies and the relevant agents, and financial intermediaries. Certain particular transparency requirements apply in case of door-to-door promotion and placement of banking services/financial activities and products.

Certain other specific transparency rules apply to promotion of banking activities/financial services and products by means of distance marketing techniques.

The relevant rules – both relating to door-to-door promotion of banking activities/financial services and products and to promotion of banking activities/financial services and products by means of distance marketing techniques – are provided for by the Consolidated Banking Act, the Consolidated Financial Act and the relevant implementing provisions.

With reference to promotion/offer of financial instruments/investment services, for 'door-to-door offers' – meaning the promotion and the placement with the public of financial instruments and/or investment services and activities in a place other than the registered office of the issuer, the offeror, the seller of the services or the provider, as the case may be, the person in charge of carrying out the promotion and the placement of such financial instrument(s) or service(s) will be subject to specific rules. The intermediaries may also make use of financial salesmen (*consulente finaziario abilitato all'offerta fuori sede*), ie individuals who, acting as tied agents under the MiFID II, carry out the door-to-door sales of financial instruments/investment services. Financial salesmen must be registered in a specific register kept in accordance with Italian financial law.

Intermediaries, including banks, may engage in door-to-door selling of their own investment services and activities. Where such selling involves services and activities provided by other intermediaries, the offering intermediary must be authorized to perform the services of:

- subscription and/or placement with firm commitment underwriting or standby commitments to issuers; or
- placement without firm or standby commitment to issuers.

In case of door-to-door offers of financial instruments or investment services, any recipient of such instrument or service will have a right of withdrawal within a specific term.

For door-to-door selling of their own investment services and activities by means of distance marketing techniques, the use of financial salesmen is not required. Moreover, the right of withdrawal will be governed by the general provisions set forth by the applicable rules and regulations, as applicable (Consumers' Code etc).

The above-mentioned requirements relating to door-to-door offer of financial instruments/investment services and the door-to-door offer of financial instruments/investment services by means of distance marketing techniques do not apply in the case that the offering activity is carried out *vis-à-vis* professional customers nor in case the offering consists only of own financial instruments and is targeted to executives, employees and other affiliates of the relevant issuer.

In addition, certain specific rules will apply to 'public offering of securities'.

'Public offering of securities' means every communication to persons in any form and by any means, presenting sufficient information on the terms of the offer and the securities to be offered, so as to enable an investor to decide to purchase or subscribe for those securities. This definition also applies to the placing of securities through financial intermediaries.

The legislation provides for specific requirements applicable to 'public offerings of securities'; in particular, any public offering is subject to the publication of a prospectus by the person making the offer, such publication being subject, in turn, to the prior authorization of CONSOB (which, inter alia, is the authority in charge of the supervision of public offerings of securities in Italy). The prospectus shall be drafted in compliance with the provision of the Prospectus Regulation and of its relevant implementing provisions.

Certain exceptions to the obligations relating to 'public offering of securities' are provided for by the law.

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Entity establishment

What types of legal entity are generally used to undertake financial or investment activity?

Generally

In general terms, the performance of banking/financial activities in Italy is mainly reserved to duly licensed entities, subject both to initial authorization requirements and to ongoing controls and supervision. In this context, some of the authorization procedures set forth

under the Italian regulatory framework expressly require certain types of legal entities or corporate forms, modulated on the basis of the activities to be performed and on the related legal and regulatory safeguards to be adopted (eg with reference to sound and prudent management requirements, the relevant capital requirements and liability issues).

The most common type of legal entities involved are limited companies, especially companies limited by shares (*società per azioni*) or limited liability companies (*società a responsabilità limitata*), which are generally characterized by separate legal personality and limited liability of the members.

Please note that, in any case, special organizational and governance rules are usually imposed on supervised intermediaries, regardless of the specific legal regime commonly applicable to the adopted corporation. Particular provisions are also set forth in relation to qualifying holdings which:

- an intermediary is entitled to acquire in other entities; and
- other entities are entitled to acquire in an intermediary.

Notwithstanding the above, upon certain conditions, intermediaries' shares can be offered to the public or admitted to trading on a regulated market.

Funds

Italian investment funds can be established by contract or as a corporate entity.

In the case of a fund established by contract, a management company is needed and such entity, usually a *Società di Gestione del Risparmio* (SGR), shall be a company limited by shares. In the case of corporate funds (*Società di Investimento a Capitale Variabile* (SICAV) or *Società di Investimento a Capitale Fisso* (SICAF), based on the open-ended or closed-ended nature of the fund), the vehicle could be both self-managed or externally managed by a management company, qualifying as a company limited by shares.

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Is it possible to conduct lending or investment business through a branch or establishment?

Yes.

A company can conduct lending business in Italy through an establishment (also known as a 'branch').

Companies having an Italian establishment need to follow a notification procedure before starting their operations in Italy.

As regards funds, following the Undertakings for Collective Investment in Transferable Securities (UCITS) directives and Alternative Investment Fund Managers (AIFM) directive implementation, EU asset management companies can carry out their activity in Italy on the basis of 'passports'. In particular, the EU asset management companies can set up and manage Italian alternative investment funds both under an establishment regime and under freedom to provide service regime and can offer in Italy their funds on a cross-border basis.

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FinTech

FinTech products and uses

What are the most common technology products and FinTech applications used or being developed in the finance and investment marketplace?

Peer-to-peer funding platforms and marketplace lending

There is no strict definition for marketplace lending given the wide variety of entrants and financing techniques involved, provided that CONSOB has recently conducted a set of studies on the matter, trying to outline a more precise framework for this phenomenon. The principal characteristics of new marketplace lenders, however, would include:

- operating from or through a non-bank lending platform established as a specialist corporate or special purpose vehicle (SPV) based structure;
- applying technology to leverage and optimize the lending platform and user experience; and
- connecting borrowers and lenders through the platform rather than applying funding arising from a wider deposit-based relationship.

HOW ARE MARKETPLACE LENDING PLATFORMS FUNDING THEMSELVES?

Marketplace lending includes peer-to-peer (P2P)-type structures often operated through an electronic platform provider as well as crowdfunding and also direct to retail financing mechanisms.

ISSUES FOR STARTUP MARKETPLACE LENDERS

Italian marketplace lending is at an early stage of development but the number of participants and transactions is increasing at a rapid rate. Issues for such lenders may relate to funding structures and the regulatory aspects of marketplace lending. For more information, see FinTech products and uses – particular rules.

Blockchain, smart contracts and cryptocurrencies

WHAT IS BLOCKCHAIN?

Blockchain provides a new approach to holding and authenticating data. It is a database operating through distributed ledger technology in which data is recorded on computers, by way of a P2P mechanism, based on pre-agreed consensus algorithms in the applicable participating network. It is a form of database where data is stored in the chain in either fixed structures called 'blocks' or algorithm functions called 'hashes'.

Each block includes unique features such as its unique block reference number, the time the block was created and a link back to the previous block. Each block is reviewed by a number of nodes and the block is only added to the database if the node reaches consensus that the block only contains valid transactions. Content includes digital assets and instructions which reflect the transactions and parties to those transactions. The ability to track previous blocks in the chain makes it possible to identify transactions back to the first ever transaction completed, enabling parties to verify and establish the authenticity of the assets in the latest block. This makes blockchain exceptionally accurate and secure.

Specialist users on the system apply advanced computing software to identify time stamped blocks, verify the accuracy of the blocks using sophisticated algorithms and add the verified blocks to the chain. As the number of participants increases, the replication of the data over a wider base makes it harder for any person to alter the data in the chain. Any attempted addition or modification to the information on a block needs to be approved by all users in the network and verification of any block can only happen through a 'proof of work' process. This process requires vast amounts of computing power, making it practically impossible to insert fake transactions into a block.

As a result, the data is identified and authenticated in near real-time, providing a permanent and incorruptible database sufficiently robust to operate as a store of value (eg in the case of cryptocurrencies such as bitcoin) or providing an indisputable record, for example, relating to securities transfer.

Blockchain is a decentralized system, created and maintained by users of the network rather than being dependent on any central or third party intermediary. It may be public and open ('permissionless' or 'unpermissioned') or structured within a private group ('permissioned').

Permissionless blockchains include bitcoin and ethereum, in which anyone can set up a node that once authorized, can validate, observe and submit transactions. The identities of the participants are not known (other than the unique and random identities known as an 'address'). Permissioned ledgers restrict participation in the network and only the specific participants are given access and are known within the network. The network is private, and only organizations that have been authorized can participate and view transactions.

WHAT ARE SMART CONTRACTS AND DECENTRALIZED AUTONOMOUS ORGANIZATIONS (DAOS)?

Developments in blockchain are also providing an ability to transfer and rely on instructions verified within the electronic system in the form of so called 'smart contracts'. These contracts have been converted into code and are then executed and enforced by the blockchain network on the occurrence of an event. This reduces the need for intermediaries to collect, store and act on communicated information.

Smart contracts are essentially pre-written computer codes which are stored and replicated on distributed ledger platforms such as blockchain. Execution takes place over the network, eliminating the need for intermediary parties to confirm the transaction, leading to self-executing contractual provisions. These contracts can be as simple as moving a balance from one account to another or advanced, more-complex interactions with the outside world using so called 'Oracles'. With Oracles, the contract code consults with a service outside of the blockchain network to make a decision. This may entail receiving a confirmation that an event has occurred, such as payment, which automatically executes a further step in the contract, such as the transfer of an asset, which might be in digital form or by delivering instructions to a person or warehouse to release the asset for delivery.

Recent regulatory changes introduced the possibility for the execution of smart contracts to have the same evidentiary value of written contracts under specific conditions and technical standards that needs still to be approved. Once approved, such a change might represent a significant improvement since smart contracts might be more easily used in the financial services sector.

DAOs are essentially online, digital entities that operate through the implementation of pre-coded rules. These entities often need minimal to zero input into their operation and they are used to execute smart contracts, recording activity on the blockchain. DAOs can be particularly challenging to regulate depending on their software engine, the nature of transactions they are completing or other unique features. Questions of ownership and responsibility for resulting acts of DAOs can also be brought to question if any technical issues arise with their operation.

WHAT IS A CRYPTOCURRENCY?

The European Central Bank definition of a cryptocurrency is that it is a digital representation of value that is neither issued by a central bank or public authority nor necessarily attached to a fiat currency, but is issued by natural or legal persons as a means of exchange and can be transferred, shared or traded economically. The oldest and best-known cryptocurrency is bitcoin (itself based on the bitcoin platform) although many other cryptocurrencies now exist. For example, the most widely-known alternatives to bitcoin include ether, based on the ethereum platform and litecoin (these cryptocurrencies are now actively traded with a large developing infrastructure for holding, pricing and exchanging currency).

Furthermore, because of these different features, it is not only the Italian banks and financial institutions that are interested in this new technology, but also the insurance, digital payments, Industry 4.0, the Internet of Things (IoT), health, retail and public sectors.

As a general remark, it is not quite clear which Italian regulatory reference framework can be (and is) used for managing impacts connected to the crypto-currencies sector; moreover, important proposals for action, such as the adoption of decrees implementing EU provisions, are on the table of the Italian Parliament and are expected to be adopted and implemented in the next future.

Having this said, at the current state of affairs, a first step towards the regulation of the aforesaid sector has been made with reference to the anti-money laundering regulations. With the implementation of the Fourth and Fifth AML Directive providers engaged in exchange services between virtual currencies and fiat currencies and custodian wallet providers have been expressly included within the scope of the obliged entities subject to the requirements and obligations of the AML and CTF regulations.

Initial coin offerings and token-based products

WHAT IS AN INITIAL COIN OFFERING (ICO)?

ICOs are a form of digital currency or token using blockchain technology. The expression 'Initial Coin Offering' was initially used in the relevant market with reference to the issue of crypto-currencies (e.g., Bitcoin, Ethereum); as of today, such expression is used to identify any offering of tokens which do not necessarily represent a crypto-currency but, however, embed various rights and can be purchased against payment either in fiat currency or crypto-currency. ICOs come in a wide variety of forms and may be used for a wide range of purposes. Some forms of ICOs may be directed at customers or suppliers as a form of loyalty program or a form of access or purchasing power (preferential or otherwise) in respect of assets of the issuer's business. Other forms may be more focused on raising initial funding. In general terms, most ICOs are issued for an activity/project. Tokens may be issued by companies, natural persons or networks of product developers. The company's business activity is often merely in the phase of being planned (more or less organised start-ups), and the production of goods/services is scheduled to start after the end of funding.

It is essential to examine the legal and regulatory basis for any ICO, as an unauthorized offering of securities is illegal and may result in criminal sanctions in a number of jurisdictions. Legal analysis of the underlying token will determine if it should be treated as a specified investment or form of regulated security or is more appropriately a form of asset that is not itself subject to the regulatory regime.

ICOs are substantially similar to an Initial Public Offering as long as both the offerings aim at raising capital from the public made up of a potentially undetermined number of investors, involving a set of activities aimed at promoting/advertising the offering itself. Compared to conventional offerings of financial instruments, ICOs are characterised by the following elements:

- use of blockchain technology, which allows to disintermediate the typical capital markets infrastructure (e.g., custodian banks, underwriters, secondary markets);
- the means of payment used for the transaction settlement, as payments for purchasing tokens are made in crypto-currencies (e.g., Ethereum, Bitcoin) instead of fiat currency;
- they are advertised and promoted via the World Wide Web, which allows promotion and funding at a cross-border level, with no territorial constraints either for the issuer or the promoter;
- the publication of a so-called 'white paper' in place of a prospectus, describing the main characteristics of the investment scheme and the object of the offering.

Due to their characteristics, some types of token may qualify as financial instruments or, as financial products (investment tokens or security-like tokens). Other tokens present a variable mix of characteristics and are therefore called 'hybrid tokens'; these are the most difficult to discuss and qualify in the light of the current regulatory framework. In particular, this last set of tokens may have a remarkable financial content, in addition to being placed to retail investors via public offerings.

Typical attributes provided by tokens will include:

- access to the assets or features of a particular project;
- the ability to earn rewards for various forms of participation on the platform; and
- prospective return on the investment.

Key aspects to consider will include the:

- availability and limitations on the total amount of the tokens;
- decision-making process in relation to the rules or ability to change the rules of the scheme;
- nature of the project to which the tokens relate;
- technical milestones applicable to the project;
- basis and security of underlying technology;
- amount of coin or token that is reserved or available to the issuer and its sponsors and the basis of existing rights;
- quality and experience of management; and
- compliance with law and all regulatory requirements.

Artificial intelligence and robo advisory systems

The system known as 'robo advisors', or automated financial advice tools, are software tools driven by artificial intelligence (AI) that provide a variety of investment advice services from portfolio selection to personal finance planning. In general, robo advisors or automated financial advice (and optimization) tools are digital/mobile asset management and financial advice platforms, which process data around specified parameters for a variety of financial assets and activities and/or (personal) finances.

Although generally of application in the asset management sector, AI and automated advice tools also impact in the banking and private wealth advisor sectors; the implications include decreased human involvement, although recent trends have included a growth in popularity of hybrid structures which combine AI and human inputs.

In terms of different market sectors, AI brings significant value to financial operations, where both the risk mitigation as well as customer service could be supported. Italian AI is a rapidly growing sector. With reference to the Italian market, it is estimated that in 2019 the assets managed by 'robo advisors' exceeded $400 million (with an average assets approximately equal to $12,000 per client), while the average growth rate forecast between the 2019 and 2023 stands at a total of around 51%.

Data analysis and cloud computing

WHAT IS CLOUD COMPUTING?

Cloud computing is a method for delivering scalable and flexible information technology (IT) services in which users can retrieve resources from the internet/intranet through private or public web-based tools and applications, rather than hosting software locally within their own organization. Within the broad 'cloud' concept three main service models can be identified:

- Software as a service (SaaS) involves providing access to and use of, an end user software application, such as e-mail or a word processor, through a pay-as-you-go or on-demand model.
- Platform as a service (PaaS) involves providing access to and use of tools for the development and deployment of custom applications, for example, certain mobile applications.
- Infrastructure as a service (IaaS) involves providing access to and use of computing resources including servers, networking, storage, and data center space on a pay-per-use basis.

Depending on the degree of privacy of the resources and service delivery mechanisms, businesses can employ cloud computing in different ways. Some users maintain all apps and data on the cloud, while others use a hybrid model, keeping certain apps and data on private servers and others on the cloud.

WHAT ARE THE ADVANTAGES OF CLOUD COMPUTING FOR FINTECH FIRMS?

The rise of cloud-based solutions offers FinTech companies a number of potential benefits allowing them to speed-up business processes while reducing costs. As an example, cloud computing could:

- assist in automating audit and verification processes thereby allowing FinTech engineers to work on product enhancement;
- allow maintenance of performance levels even during peak hours or end of month queues, by giving access to high-performance servers and data storage;
- help make the production cycle continuous by providing access to data 24/7, thereby reducing time-to-market of a product/solution; and
- help create an enhanced setup for disaster recovery.

In exploring the potential benefits of cloud computing, attention should be paid to ensure full compliance of each solution with the applicable law, even at local level.

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Are there any restrictions, specific laws, regulations or procedures that apply to FinTech products?

General financial regulatory regime

In relation to the performance of banking, financial or payment services, the main Italian supervisory authorities are:

- the Bank of Italy, which is the central bank of Italy and is entrusted with the overall regulatory supervision of banks and other financial intermediaries, including payment services providers and e-money issuers; and
- the CONSOB, which is the Italian government authority responsible for regulating the Italian securities market as well as the provision and marketing of investment services.

CONSOB is entrusted with supervision on transparency and correctness of regulated entities, including banks and financial intermediaries providing investment services and monitoring compliance with the rules of conduct generally imposed on such intermediaries.

Additional authorities also operate, in relation to specific sectors (eg insurance) or in connection with specific issues (eg competition and data protection).

GENERAL

The provision of banking, financial and payment services in Italy is reserved to authorized intermediaries. A person must not carry on a regulated activity in Italy unless authorized or exempt.

Consequently, where FinTech products and applications involve financial activities falling within the scope of the required regulatory authorizations, the firms providing such products and applications, if not otherwise exempt, must be authorized/passported, as the case may be.

Following a public debate involving market operators and based on a document for discussion CONSOB recently published a report on the initial offers and exchanges of crypto-activities. Pending the establishment of a shared European regulatory framework on crypto-assets and, in particular, on their possible qualification as securities, CONSOB's intention was to start a debate at national level on initial coin offerings (ICOs) and crypto-assets exchanges, in connection with the recent spread of ICOs and therefore, of crypto-assets invested in by Italian investors.

Electronic payments platforms and regulation of peer-to-peer lenders

ELECTRONIC MONEY (E-MONEY)

Reference shall be made to the provisions of the e-money directive No. 2009/110/EC (EMD) and to its national implementing measures, which include the Consolidated Banking Act and Legislative Decree No. 45, 16 April 2012, containing the EMD's implementing decree, both as amended from time to time. Moreover, for a complete understanding of the applicable legal and regulatory framework, also the rules regulating the provision of payment services shall be considered, as well as the Bank of Italy secondary level provisions.

E-money is defined as the electronically (including magnetically) stored monetary value, represented by a claim on the issuer, which is issued on receipt of funds for the purpose of making payment transactions. E-money must be accepted by a person other than the e-money issuer and include pre-paid cards and electronic pre-paid accounts for use online.

All providers performing payment services or e-money related activities must be authorized by, or passported with, the Bank of Italy, although, based on the specific functioning mechanism, the management of electronic payment platforms could qualify as a reserved activity, subject to regulations governing payment service providers and e-money issuers, or fall within one of the possible exemptions (eg if the firm qualifies as a mere technical service provider supporting the provision of the relevant services without any involvement in their offering or performance).

PEER-TO-PEER LENDING

Peer-to-peer lending activities (also 'social lending' or 'lending based crowdfunding') are defined, under the Italian regulatory framework, as 'the mechanism through which a plurality of borrowers could demand to a plurality of potential lenders, by means of online platforms, refundable funds for personal use or to fund a project'.

Based on the similarity of such activities with those relating to the public savings collection and considering that the latter, in accordance with the Consolidated Banking Act, are exclusively reserved to duly authorized credit institutions, since November 2016, the Bank of Italy has regulated social lending by a regulation governing the performance of collection activities carried out by subjects other than banks. The relevant provisions mainly clarify the conditions to be complied with in order to avoid a qualification of social lending services as reserved savings collection activities.

Bank of Italy's regulation refers both to the managers of social lending platforms and to the subjects who collect or lend funds through such platforms and is generally aimed at preventing non-banking entities from raising significant amounts of funds *vis-à-vis* an indefinite number of borrowers. In this sense, managers and collectors are, in any case, precluded from collecting demand deposits and from carrying out other forms of collection whatsoever involving the issuance or management of payment instruments having generalized usability. No limits are imposed on banks in carrying out social lending activities through online portals.

The Bank of Italy does not have investigation or sanctioning powers on non-banks entities providing collection activities. Any infringement of the aforesaid provisions is governed by criminal law.

A special regime for the collection of risk capital via online portals (equity crowdfunding) is regulated by the Italian securities law (in particular by the Crowdfunding Regulation (as amended by CONSOB resolution No. 21110 dated 10 October 2019), adopted by CONSOB pursuant to articles 50- quinquies and 100- ter of the Consolidated Financial Act). In equity crowdfunding, the securities respectively sold are issued by Italian innovative startups and small-to-medium-size companies or by certain undertakings for collective investments investing in those kind of companies. The managers of such portals shall comply with a set of requirements, and in order to be entitled to operate are then enrolled in a specific register kept by CONSOB.

Following recent amendments to the Consolidated Financial Act and the Crowdfunding Regulation, the Italian regulation also introduced the possibility, within certain limits, for the aforesaid entities to collect of bonds and other debt financial instruments through such online portals (debt crowdfunding).

The other possible forms of crowdfunding are not formally regulated and may be included – depending on the specific features and structures adopted – in other forms of financial activity, such as those relating to the granting of loans (whose performance is reserved to duly authorized financial intermediaries).

Regulation of payment services

Reference shall be made to the provisions of the PSD)2 and to its national implementing measures, which include the Consolidated Banking Act, and Legislative Decree No. 11, 27 January 2010, containing the PSD2's implementing decree (PS Decree), both as amended from time to time, as well as Bank of Italy secondary level provisions.

All providers performing payments services related activities shall be authorized by (or passported with) by the Bank of Italy.

In providing and marketing their services, payment services providers must also comply with the transparency and disclosure requirements set forth in the Transparency Provisions.

Application of data protection and consumer laws

The Italian Data Protection Code (Legislative Decree No. 193/2003) applies to the processing of personal data, including data held abroad, if the processing is performed by:

- an Italian or European Union company with a branch/stable organization in Italy;
- an entity established in the territory of a country outside the European Union, where said entity makes use in connection with the processing of equipment, whether electronic or otherwise, situated in the Italian territory, unless such equipment is used only for purposes of transit through the territory of the European Union; and
- a non-European Union controller processing data through a branch/stable organization in Italy.

Data processing under the Italian legislation may imply certain notification and compliance obligations and can give rise to privacy issues such as:

- whether the data is used appropriately;
- whether the collection of data is carried out in an appropriate manner;
- whether the data is disclosed only where disclosure is appropriate;
- whether the data is stored and transmitted safely;
- how long the data will be retained for;
- the circumstances under which the data subject can access and correct the data; and
- whether the data subject is sufficiently and appropriately informed about these matters.

The European General Data Protection Regulation (GDPR) will officially replace some of the provisions of the Italian Data Protection Code from 25 May 2018, but its principles are already being enacted in the Measures issued by the Italian Data Protection Authority. The GDPR is more prescriptive and restrictive and includes mandatory notifications where a breach occurs and provide for severe monetary sanctions in case of breach.

The Italian Consumer Code (Legislative Decree No. 206/2005) applies to any service offered to natural persons acting for purposes outside their trade, craft, business or profession. It includes rules relating to matters such as unfair commercial practices and unfair terms. In order to ensure compliance with the Italian Consumer Code, Fintech companies may consider the implementation of solutions aimed at monitoring and analyzing customer services, mitigating fraud and abuse, and implementing fair lending systems.

Money laundering regulations

The Italian rules governing the prevention of the use of the financial system for money laundering (AML) and/or terrorist financing (CTF) purposes are mainly contained in Legislative Decrees No. 231 of 21 November 2007 (AML Decree), and No. 109 of 22 June 2007, which implement the Fourth AML Directive) and Fifth AML Directives. Additional secondary level provisions which complete the new regulatory framework introduced by the Fourth and Fifth AML Directives have been issued by the Bank of Italy.

In general terms, the Central Information Unit (Unità di Informazione Finanziaria), established within the Bank of Italy, is empowered with supervision and monitoring powers on AML and CTF issues. The overall prevention system:

- is based on the collaboration and coordination between each of the operators and the administrative and investigation authorities;
- is regulated according to the risks involved; and
- requires the operators to comply with a series informative and record-keeping obligations.

FinTech services and activities, where relevant in light of the above, are subject to AML and CTF provisions, especially when involving activities considered as high money-laundering risks. Furthermore, with the implementation of the Fourth and Fifth AML Directives, the Italian legislator has expressly included "crypto currency operators" and "custodian wallet providers" within the category of the "other non-financial operators" subject to the provisions of the AML Decree. Crypto currency operators are defined as "any natural or legal person which provides third parties, in a professional capacity, with services that are functional to the use, the exchange, the custody and storage of virtual currencies and their conversion from, or into, currency of legal tender", or in digital representations of value, including those convertible in other virtual currencies as well as issuing, offering, transfer and clearing any other service instrumental to the acquisition, negotiation or intermediation in the exchange of the virtual currencies". Custodian wallet providers are, in turn, defined as "any natural person or entity that provides services to safeguard private cryptographic keys on behalf of its customers, to hold, store and transfer virtual currencies".

It should be noted that, according to the aforesaid AML regulations, crypto-currencies operators and custodian wallet providers are, as of today, subject to the AML obligations to the extent that their operations include the performance of the activity of cryptographic storage or of conversion of virtual currencies from, or into, currency of legal tender.

In addition to the above, FinTech providers qualifying as banking or financial institutions or payment services providers shall also comply with the customer due diligence and on organisational requirements set forth in the secondary level regulations of the Bank of Italy.

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What type of funding arrangements and incentives are available to FinTech businesses?

Early stage

SEED INVESTMENT

Initial investment in FinTech businesses may be provided by family and friends of the founders and other high-net-worth individuals (often known as business angels) in return for an equity stake. Such seed investment is often used to fund the establishment and early growth of the business before larger investment is available. The investing individuals may also provide know-how and expertise to assist in the company's development.

CROWDFUNDING

The crowdfunding sector is well established, and may be appropriate for a FinTech business in the early stages. It involves members of the public investing in a business by pooling their resources through an intermediary platform.

Below are the most common models of crowdfunding:

- Equity crowdfunding involves company shares being given in exchange for investment in the business.
- Reward-based crowdfunding provides investors with a tangible benefit, such as early access to a platform or application that the business is developing.
- Donation crowdfunding involves NGO and non-profit associations in relation to the funding of humanitarian projects and nonprofit projects.
- Hybrid crowdfunding is a combination of the above.

Crowdfunding offers a large number of private investors an opportunity to make small-scale investments in early-stage businesses to which they may otherwise not have had access.

ACCELERATORS

There are a growing number of incubators or accelerators in the Italian market which offer support, facilities and funding for startups, often in return for an equity stake, such as iSTARTER.

Venture capital and debt

Venture capital funding is a type of equity investment usually targeted at early stage FinTech companies with an established business and some trading history. Venture capital provides a viable alternative to traditional lending given that the business is unlikely to have the tangible asset base or long track record needed to attract traditional debt funding from financial institutions. Research suggest that there are more than 15 asset managers active in venture capital in Italy with more than 60 funds under management.

Warehouse and platform funding

Warehouse financing and platform financing may be suitable for FinTech companies depending on the type of business and assets.

Senior bank debt and capital markets funding

SENIOR BANK DEBT

Once a FinTech company is established and has a track record, bank debt becomes a more viable source of funding, either on a secured or unsecured basis depending on the creditworthiness and asset base of the business. In contrast to capital markets funding which is often covenant-lite, bank funding will generally involve the imposition of financial covenants and controls that will apply over the life of the facility. Bank finance may be particularly important for working capital, overdraft, accounts management and general liquidity purposes.

CAPITAL MARKETS FUNDING

In Italy both debt and equity capital markets are accessible to FinTech businesses (usually of a certain size).

Raising finance by way of an Initial Public Offering (IPO) is a possible funding arrangement for FinTech companies that have grown to a certain size. An IPO is the initial sale of company shares on a public exchange, such as the Milan Stock Exchange. The Milan Stock Exchange's Alternative Investment Market (AIM) in particular caters for small, growth-orientated companies.

Issuance of bonds is an alternative funding structure for FinTech businesses.

CONVERTIBLE BONDS/LOAN NOTES

Convertible bonds or loan notes may also represent a funding tool for FinTech businesses, being essentially a hybrid between debt and equity. Convertible instruments begin as a bond accruing interest and are convertible into shares in the issuing company at prescribed prices in certain circumstances.

SECURITISATION TRANSACTIONS

An additional funding tool for the FinTech companies may be the realization of a securitisation transaction. In particular, it is possible to securitize the loans granted by FinTech platforms and have access to the funds of the investors on the debt capital markets.

Incentives and reliefs

INNOVATIVE STARTUPS

Italian tax law establishes a set of tax incentives to Italian companies qualifying as so-called 'innovative' startups. The favourable regime is available to Italian and European Union/European Employment Strategy companies having a branch in Italy, provided they meet a set of requirements. Among others these are as follows:

- The company's core business should consist of the development, production and commercialization of innovative goods or services of high technological value.
- The company should have been set up for no longer than 60 months.
- The company's turnover should not exceed €5 million.
- The company shall not distribute profits.

Companies and individuals investing directly or indirectly in qualified innovative startups may benefit from significant tax reliefs up to 30% of the invested amount, subject to a minimum holding period of three years.

ALLOWANCE FOR CORPORATE EQUITY

Italian companies and Italian permanent establishments (PEs) of foreign enterprises may benefit from Italian notional interest deduction (NID) (so-called Allowance for Corporate Equity or ACE). The ACE benefit entails a notional deduction from the corporate income taxable base corresponding to the net increase in the 'new equity' injected in the entity after 2010, multiplied by a rate annually determined (1.3% for financial year 2019 and thereafter as set by the Budget Law for 2020). The qualifying equity increases may include equity contributions, retained earnings (with the exception of profits allocated to a non-disposable reserve) and the waiver of shareholder credit.

RESEARCH, DEVELOPMENT AND INNOVATION TAX CREDIT ("RDI")

From financial year 2020 , Italian companies and Italian PEs of non-resident companies carrying out qualifying RDI activities (i.e. R&D expenses and technological innovation costs, together RDI) can benefit from a tax credit computed as a percentage of each specific RDI expenditures (e.g. 12% of the costs falling in the base of R&D computation, net of external contributions, up to the amount of Euro 3 Mio per 12 months; 6% of the costs qualified as technological innovation expenses, net of external contributions, up to Euro 1.5 per 12 months; 10% of the costs qualified as technological innovation expenses for new products/processes, net of external contributions, up to Euro 1.5 per 12 months; 6% of the design costs, net of external contributions, up to Euro 1.5 per 12 months). The tax credit can be used to offset other taxes due, in three equal instalments. Other fulfilments (e.g. formal communication to the Ministry of Economic Development) are mandatory required before the tax credit is used.

PATENT BOX

The patent box regime is a tax bonus introduced in order to improve the development of intellectual property, granting tax benefits to resident and non-resident taxpayers carrying out R&D activities, consisting of partial tax deduction (50%) from corporate income tax for income arising from direct use or licensing of qualified intangible assets (not including commercial trademarks).

WITHHOLDING TAX EXEMPTION ON INTEREST PAYMENTS

Italian tax law provides for an exemption from withholding tax on interest payments on medium-long term loans granted to Italian-resident borrowers by European Union foreign institutional investors (eg banks, insurance companies) and certain approved institutional investors. In order to benefit from the exemption, foreign lenders should comply with Italian law on the exercise of lending activity (to the extent that they operate *vis-à-vis* the public). The withholding tax exemption would apply to the extent the borrower performs business activities, expressly including holding companies.

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Portfolio sales

Loan transfers and portfolio sales

What are common ways of buying and selling loans?

A loan can be sold on an individual basis or packaged up with other loans and sold as a portfolio.

The most common ways of selling loans are:

- **Assignment of contract** – An assignment of contract is a full legal transfer of the party's contractual rights and obligations. It is a tripartite arrangement between the existing parties and the transferee and results the transferee becomes party to the loan agreement, with the transferee assuming all the rights and obligations arising under the agreement and the transferee and the transferor being released from its obligations.
- **Assignment of receivables** – An assignment is a transfer of rights only, not obligations. Subject to any contractual restrictions, assignment can be done without the consent of the debtor but notice to the debtor is generally required in order to make such transfer opposable to vis-à-vis the relevant debtor. The assignment will result in the assignee becoming the legal owner of the receivables and being entitled to receive the relevant payments.

In the case of transfer of contracts/receivables as a pool and provided that the transferee/assignee meets certain requirements, the assignment may be made under Article 58 of the Consolidated Banking Act, so that the notice of the assignment can be performed with a publication on the Official Gazette and in the competent register of the companies registry.

Depending on the specific needs of the transaction and taking into account the requirements of the relevant investors, the receivables can be assigned to a securitization vehicle in accordance with the Italian Securitization Law, so that the purchase price of the receivables is paid by the securitization vehicle which is funded through the issuance of asset-backed securities notes. The assignment of the receivables to the securitization vehicle is made as a true sale.

Loan transfers (including in bonis or non-performing loans) are commonly documented as a bespoke sale and purchase agreement. The form and content of the transfer documentation will depend on the nature of the loan assets being sold.

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What are the main considerations when transferring a loan and related security?

There are a number of issues to consider before transferring a loan or portfolio of loans. These issues are often covered as part of a due diligence exercised. Some of the key considerations include:

- **authorization requirements** – lending activity (including the purchase of receivables) is a reserved activity and the transferee /assignee must be duly authorized (in case the investor is not authorized to carry out such activities in Italy, a securitization structure can be used); in relation to the assignment/sub-participation schemes, it is noteworthy to highlight the strict approach very recently locally adopted by the Italian Supreme Cassation Court (criminal law division); in the context of a proceeding against a foreign bank accused of providing lending activity in Italy without authorization, the Court has in fact identified a set of symptomatic elements based on which it could be concluded that a fictitious structure has been put in place with the exclusive aim of concealing the lending activity carried out by a non-authorized entity. These symptomatic elements include, inter alia: (i) allocation of the default risk also on the unauthorized entity and not only on the authorized entity; (ii) independent credit risk assessment formulated by the foreign non-authorized entity; (iii) awareness of/disclosure to the borrower of the agreements concluded between the authorized and the unauthorized entities; (iv) possibility, for the foreign non-authorized entity, to interfere in the implementation of the relationship with the borrower; (v) greater commitment of the foreign unauthorized entity in terms of exposure with the borrower;
- **tax aspects** – the tax implication of the assignment/transfer must be evaluated on a case by case basis;
- **confidentiality** – whether the seller of the loan is allowed to disclose information relating to the loan to a potential purchaser;
- **data protection** – whether there is any personal data or other restricted information in the loan that should not be disclosed to a potential purchaser;

- **lender eligibility** – whether there are any restrictions around the type of entity to which the loan can be transferred;
- **undrawn commitments** – whether there are any continuing obligations for further funding or other material obligations on the part of the lender that may fall on the transferee or reduce claims made by the transferee;
- **transfer mechanics** – whether there are any steps that need to be taken to transfer the loan in accordance with its terms;
- **consent and notification** – whether a transfer requires the consent or notification of any other parties (as indicated above, notice of the assignment (or, in the event of an assignment as a pool and provided that Article 58 of the Consolidated Banking Act applies, publication on the *Official Gazette* and in the competent register of the companies house) is generally required); and
- **acknowledgment of security** – an acknowledgment of the security is generally needed (depending on the kind of security, notarization and registration of the acknowledgement deed(s) may be needed).

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Projects

Financing / investing in energy / infrastructure

To what extent are energy and infrastructure assets publicly or privately owned?

Generally

ENERGY

The energy sector has a fundamental role to play in the growth of Italy's economy, both as a facilitating factor (providing a competitive supply environment whilst limiting environmental impact) and also as a growth factor itself. This is why the government has drawn up a National Energy Strategy that sets out clearly the main goals to be pursued in the coming years whilst remaining aware that we are acting in a free market context and with driving forces that cannot be controlled centrally. Sustainable growth, the main priority for both the government and the country, can be achieved only if the competitiveness of the Italian economy improves substantially, not least within the energy sector and the national electricity market. To achieve this goal, it will be essential to act on all structural factors which may enhance Italy's competitive position internationally.

INFRASTRUCTURE

The infrastructure sector in Italy is expected to have an increasingly important role in the national economy in the following years due to the effort of the Italian government to promote economic growth and modernization of the country through infrastructural investments, both public and private. In general, infrastructure is publicly owned, apart from some minor projects (touristic marinas, stadiums, management of airports, management of ports etc). Most infrastructures are now developed under public-private partnership (PPP) schemes financed through project financing investments (metro, motorways, hospitals, light rail, public offices etc).

Energy

The ownership of energy and infrastructure assets in Italy can be private or public. From the grid perspective, the National Electric Transmission Grid (RTN), with over 72,000 km of HV lines, is publicly owned but its management has been assigned to a specific private operator (TERNA). From the 'operator's' point of view, the generation, distribution and supply services has been privatized by the Bersani Decree in 1999 – which has liberalized the energy market by the creation of free competition. The distribution of energy is granted under a concession regime to certain operators while the supply activity of energy is freely carried out by other companies in a competitive regime. All the activities are carried out under the vigilance of the energy authorities. The main public bodies having responsibility for the regulation of the energy sector in Italy are the GSE (*Gestore Servizi Energetici*) and ARERA (*Autorità di Regolazione per Reti e Ambiente).*

Transport infrastructure

HEAVY RAIL

The rail market in Italy is dominated by the national railway company Gruppo Ferrovie dello Stato Italiane, a publicly owned company which includes the national network owner RFI Rete Ferroviaria Italiana. With regard to high speed trains, a new operator, Nuovo Trasporto Viaggiatori S.p.A., has entered the market offering high speed train transportation. There are no signs of the market opening up to more competitors on high speed transportation.

LIGHT RAIL, PUBLIC BUSES

Light rail assets (such as trams and associated track) are generally owned by local public sector promoting bodies. As for metro lines, two important projects (Milan Line M 4 and Milan Line M5) have been developed under a PPP scheme. Similarly to light rail, certain regional authorities have tendered concession agreements for the renewal, maintenance and operation of public buses for regional public transportation.

ROADS, BRIDGES AND TUNNELS

A government entity (*ANAS*) operates, maintains and improves the motorways and major state roads in Italy. ANAS is regulated by the Ministry of Infrastructures and Transport and receives funding from the government for investment in the strategic road network (including additional road capacity). Local roads in Italy are the responsibility of local authorities. The public sector may outsource the construction, operation and maintenance (sometimes on a project financed basis) of such assets to the private sector. In certain cases, the private sector is awarded the design, build, financing, operation and maintenance of motorway sections (in particular the BreBeMi motorway where traffic risk is mainly with the private sector).

AVIATION

Aviation in Italy is (for the most part) privatized. In relation to airport infrastructure, there are a number of ownership structures in the Italian market, including private ownership, local government ownership and various forms of public-private ownership. All models are heavily regulated by government and ENAC, the Italian Civil Aviation Authority.

PORTS

The Italian ports sector comprises a variety of company and municipal ports, all operating on commercial principles, independently of government and largely without public subsidy. The private sector operates the vast majority of the Italian major ports.

Other infrastructure

SOCIAL INFRASTRUCTURE (SCHOOLS, HOSPITALS, NURSING HOMES ETC)

Typically, these are owned by the public sector. Social infrastructure assets in Italy have often been directly financed by the government, save for hospitals and nursing homes where in the recent years the PPP model has been at the base of the most successful projects in the sector or where (especially for nursing homes) investment funds are investing using private capital.

Education

The ownership of a school's infrastructure depends upon the categorization of the school itself. For example, in the case of a local authority maintained school, the school and playing fields will be owned by the local authority, whereas an academy school (which receives funding directly from the government) may lease land from a local authority. In the case of private schools, these are owned and financed by private institutions although it is not uncommon that such private schools receive at least some funding from the government.

Hospitals and nursing homes

Ownership of hospitals and nursing homes in Italy is often vested in various public sector bodies managed and financed at regional level and operating within the National Health Service. There are also several private structures which can also provide health services under specific arrangements with the National Health Service. In recent years, most of the new hospitals especially in the northern regions have been developed under PPP schemes and investment funds are investing in public and private healthcare facilities. It is important to point out that the construction of health and social care facilities and the carrying out of the relevant activities are heavily regulated both at national and regional level.

DEFENSE

Typically, defense assets are owned by the public sector.

WASTE

Waste management in Italy is managed at a municipal level in accordance with national legislation, and differs widely from area to area. Companies in the waste management sector provide services on a continuing basis, with prices set through service contracts. By law such prices are required to cover the full cost of operations and investments, based on the principle of full cost recovery. To date, most players in the waste management sector are public-private partnerships or private companies.

WATER

Water and wastewater (sewage) services in Italy are delivered by public sector companies (water companies) which use the relevant public infrastructure assets. In certain cases, such companies are grouped together to form an ATO (Optimized Territorial Area) so as to manage the relevant services in a more efficient manner by way of outsourcing to private companies.

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Are there special rules for investing in energy and infrastructure?

Energy

There are no particular limitations to the investment by foreign entities in Italian energy assets. However, the supply, generation, transmission and distribution of energy are heavily regulated sectors. Permitting, concessions and subsidies regimes evolve quickly and any investors will need to have a good understanding of both the current framework and the potential directions in which the legal framework and the market may move.

It is also to be considered whether the acquisition of any interests in the energy sector would cause any issues with any concessions, licenses, permits or agreements with public authorities.

Infrastructure

There are no particular limitations to the investments by European entities in Italian infrastructure assets. Potential investors coming from outside the EU may face more difficulties and barriers to entry due to less harmonized legislative systems.

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What is the applicable procurement process?

Energy

The procurement process for the achievement of the energy efficiency targets requires, as a prerequisite, collaboration and coordinated action between the State and local governments. This has resulted distribution of the 2020 targets on renewable energy and energy efficiency (known as 'Burden Sharing') which assigns to the State and each local government a corresponding objective in terms of sharing energy consumption through renewable sources. Each region can, based on the characteristics of its territory and the general nature of its consumption, operate at the most appropriate levels of renewable energy consumption. Potential savings are very broad but will require the careful action of local government, for example in the fields of local transport and mobility, public lighting, buildings and district heating. The role of regional and local authorities is also crucial for the effective simplification and harmonization of the authorization procedures.

Infrastructure

In general, the Code of Public Contracts provides for different public procurement procedures (eg the open procedure, the restricted procedure, the negotiated procedure and the competitive dialogue).

It must be highlighted that the open procedure consists in the following steps:

- publication of a call for tender;
- submission of offers by the bidders;
- evaluation of the offers by the Awarding Entity;
- awarding of the tender; and
- submission of the contract.

Each individual step is structured as follows.

PUBLICATION OF THE CALL FOR TENDER

The publication of the call for tender aims to select the subjects who meet the necessary requirements in order to enter into the agreement with the awarding entity.

THE SUBMISSION OF THE OFFERS

Pursuant to the Code of Public Contracts, in order to take part to the public tender procedure, the bidder has to meet the requirements stated by the call for bids.

If the bidder does not meet these requirements, it will be excluded from the tender.

As a general rule, two requirements must be met:

- **The general requirements** – These requirements are aimed at assuring that the administration will enter into the agreement with a trustworthy and reliable subject. Such requirements are defined by Article 80 of the Code of Public Contracts, which provides a list of mandatory requirements to be met by all entities taking part in a public procedure. In particular, Article 80 provides, *inter alia*, that the awarding entity cannot award the procedure to companies that have incurred breaches concerning tax payment obligations. This violation represents a cause of exclusion from the tender when the breach is considered serious (ie if it exceeds an amount of €10,000). Moreover, there is also the requirement that the bidder and the subcontractor should not have committed any serious professional crime.
- **The special requirements** – Such requirements relate to the experience and technical and financial capability of the bidders. Such requirements are provided by the awarding entity in the tender documentation, on the basis of the value and the nature of works, services or supplies which are subject to tender.

Moreover, in order to take part in the procedure, the bidder shall submit an offer including all the required documents by the deadline indicated in the call for tender. In order to fulfil the above-mentioned requirements, the bidder must declare, through a self-declaration (the so called DGUE), that the business operator and its management meet all the general requirements. Any sub-contractor will also have to declare through the DGUE. If the business operator or its subcontractor do not fulfil the above-mentioned requirements they will be excluded from the tender.

In case of false self-declaration, penal and civil consequences shall be applied (eg exclusion from the tender; enforcement of the bid bond; warning to the Anticorruption Authority (ANAC); prosecution for the offence of false declaration of a public deed). If the ANAC believes that such declarations have been given fraudulently or with sufficiently serious negligence (considering the facts of the false declaration or false documentation), it may exclude the bidder from public tenders for a maximum of two years.

EVALUATION OF THE OFFERS BY THE AWARDING ENTITY

After the expiry of the deadline for the submission of the offers, the awarding entity shall proceed with the examination and evaluation of the offers received. This activity is carried out in several private sessions and it depends on the awarding criteria.

The awarding entity will be required to independently make such verifications, in relation to the accessible data, through the consultation of several databases. However, they may ask bidders to provide appropriate evidence or to carry out verifications on a sample basis.

The awarding entity may also require, *inter alia*, the criminal records and a court certificate concerning pending trials (a *Certificato del Casellario giudiziale* and *Certificato dei carichi pendenti*) and a tax certificate released by the '*Agenzia delle Entrate*'.

The awarding entity will also consult the Digital Registry held by the ANAC. This will reveal if the bidder has been excluded from public tenders (within the previous two years, starting from the registration of the fact in the Registry) as a result of false declarations, as mentioned above.

AWARDING OF THE TENDER AND SUBMISSION OF THE CONTRACT

If the evaluation of the requirements has a positive outcome, the awarding entity will enter into the agreement with the awardee and ask for the issuance of the performance bond.

Please note that any bidder must satisfy each general and special requirement for the entire duration of the tender procedure. Please also consider that the awarding entity should periodically verify the fulfilment of each requirement and if during the execution of the contract any such requirement is not fulfilled, the awarding entity is entitled to terminate the contract.

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What are the most common forms of funding / investing in energy and infrastructure?

Funding

The Italian energy industrial sector has been financed by various structures. Renewable energy sources have been historically financed through project financing and cash-flow based leasing agreements based on business plans reflecting the long-term life span of public subsidies. However, in the recent years the public subsidies for new energy plants have been reduced or, in certain cases, have not been renewed; the result is that the market, at least for the more technologically advanced sources such as photovoltaic, is now shifting to subsidy-free investments supported by long-term private power purchase agreements.

More recently, securitization has been used (including through synthetic transactions) to consolidate large debt portfolios both in the renewable energy sector (eg portfolios deriving from project financing transactions) and in the energy efficiency sector, where operator-owned portfolios of credit receivables and energy efficiency certificates are payable over the lifespan of the underlying agreements.

Bonds and minibonds are also commonly used in the sector.

A current market trend is the offer of mezzanine financing by financial entities or funds eager for high interest rate of return, particularly in the renewable energy sector. An operator may in fact demand mezzanine financing to release equity trapped in generation assets with stable returns and long maturity.

Also, the Italian infrastructure sector has been funded through project financing. In certain cases, traditional project financing has been subject to refinancing which has also contemplated a portion of bond financing.

Investing

The most commonly used forms of investments in the energy sector are funds and commercial companies (limited liability companies per shares, SPA, or simplified limited liability companies, SRL). There are significant differences between asset deals and share deals in terms of liabilities transferring to the purchaser, required consents by the authorities to the change of owner of the plant or the energy infrastructure and tax treatment of the transaction. Where possible, share deals are preferred in the energy generation sector, due to various legal and tax considerations.

In the infrastructure sector, investors mainly use special purpose vehicles in the form of commercial companies (either SPAs or SRLs) created specifically for the purposes of appropriate project management.

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Restructuring

Enforcement and sanctions

When can there be regulatory investigations?

To safeguard the integrity of the financial system and to combat illegal practices, both the Bank of Italy and the CONSOB carry out specific controls, aimed at preventing unauthorized activities, as well as any activity involving mis-selling, money-laundering, usury, market abuse.

The investigations are carried out through the evaluation of documents and on-site inspections at intermediaries' premises aimed at checking the quality and accuracy of the data submitted and at gaining a better understanding of their organization and operations.

Moreover, regulators may require the drafting or transmission of documents, records and any other useful information.

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What regulatory penalties may apply?

In the event that management irregularities and regulatory violations are discovered in the course of off-site reviews and on-site inspections, sanction procedures may be initiated against the intermediary and/or the directors which could result in the imposition of administrative penalties.

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What criminal penalties may apply?

Following the inspections carried out, in the event of breaches of the regulatory provisions, the regulators may impose criminal penalties such as fines and/or imprisonment.

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Tax

Tax issues

Are stamp, registration, transfer or other similar taxes applicable?

Are there stamp, registration, transfer or other similar taxes payable on the advance, transfer or assignment of a loan?

Registration taxes may apply on a lump-sum basis of €200 both on the grant of a loan and on the transfer of receivables for the purpose of financing. Additional stamp duties may apply both to the documentation of the loan and on the assignment.

Are there stamp, registration, transfer or other similar taxes payable on the taking, transfer or assignment of a mortgage, debenture or other security?

Registration taxes are also applicable to the grant of security, depending upon the nature of such security. In principle (eg for a mortgage or pledge), registration taxes apply as follows:

- €200, if the security is securing the Italian company's own obligations; or
- 0.5% of the secured amount, if the security is securing third party obligations; and
- nominal stamp duty (usually at the rate of €16 per page).

In the case of mortgages over real estate, mortgage tax is payable at 2% of the secured amount (0.5% of cancellation) unless the mortgage has been released to cover a receivable covered by the Substitutive Tax (in which case, it is exempt from any indirect tax, see below).

In the case of securities securing a loan (or a financing structure set up via the issuing of a bond, according to the law), provided that:

- the loan has an initial contractual duration of at least 18 months and one day;
- the loan is advanced by an EU-incorporated bank or an Italian branch of an EU incorporated bank; and
- the facility agreement is executed in Italy.

The payment of registration taxes, mortgages and cadastral taxes, stamp duties, governmental duties and all the other taxes and duties (other than income tax and withholding taxes) on related documents, including (and in particular) all documents relating to a security package, can be substituted (at the option of the bank) by an alternative tax (ie the *imposta sostitutiva*, or the Substitute Tax). The Substitute Tax is an umbrella tax applicable (currently) at a rate of 0.25% on the principal amount of the loan (the amount of the Substitute Tax is typically retained by the bank from the relevant drawn amount).

Are there stamp, registration, transfer or other similar taxes payable on the issue, transfer or assignment of a debt security (eg a bond)?

The assignment of a debt would be subject to the following registration taxes:

- €200, if the assignment is securing the Italian company's own obligations; or
- 0.5% of the secured amount, if the assignment is securing third party obligations; and
- nominal stamp duty (usually at the rate of €16 per page).

As said, please lease note that the Substitute Tax may also apply to guarantees related to the issuing of bonds.

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Do tax authorities take priority on enforcement?

On the enforcement of security, do tax authorities take priority over secured lenders or secured debt security holders (eg secured bond holders)?

Yes, the Italian state usually has a special privilege on any debt associated with indirect tax.

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Is withholding tax on interest payments applicable?

Is there withholding tax on interest payments under a loan?

Interest paid by an Italian resident borrower to an Italian resident lender (including an Italian permanent establishment of a non-resident entity) is not subject to withholding tax. In the case of lenders not resident in Italy, interest payments are subject to a final withholding tax.

If so:
What is the rate of withholding?

Domestic withholding tax on interest payments is applicable at 26%.

What are the key exemptions?

Exemptions from withholding tax apply in the case of medium- and long-term loans when the interest is paid to:

- a bank or a financial institution authorized or licensed to carry out banking activities within the territory of Italy, and resident in Italy for tax purposes (and not acting through a permanent establishment located outside of Italy);
- a credit institution which is resident or established in an EU member state, and not acting through a permanent establishment located outside of the EU;

- an insurance company incorporated in and authorized under the laws of an EU member state; and
- an institutional investor not resident in Italy, but resident or established in a state or territory allowing for an adequate exchange of information, provided that it is subject to supervision in the respective jurisdiction of establishment.

An exemption from withholding tax may be applicable under the EU Interest and Royalties Directive as implemented in Italy.

An exemption may also be applicable under the double tax treaties entered into by Italy. However, double tax treaties signed between Italy and other EU countries usually only reduce the amount of withholding tax applicable to a 10% rate.

Some exemptions may also apply to interest on loans granted or guaranteed by public entities.

Would the same analysis apply to interest payments under a debt security (eg a bond)?

Yes.

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Are foreign lenders and debt security holders subject to tax on interest payments?

Will the lender be taxed on interest payments under a loan in the jurisdiction of the borrower (other than by way of the application of withholding taxes (if any)), assuming the lender is not otherwise resident in that jurisdiction for tax purposes (eg by virtue of incorporation, residence or local branch)?

No.

Would the same analysis apply to interest payments under a debt security (eg a bond)?

In general terms interest on bonds paid to foreign qualified investors is exempt from withholding tax and the securities to the bond may benefit, upon specific option, to the Substitutive Tax regime.

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