



Implementation of the AIFMD in Italy – Closer to the Finishing Line

BY [UGO M. GIORDANO](#) & [SOFIA DE CRISTOFARO](#)

In advance of 22 July 2014, the end of the transitional period for the entry into force of the Alternative Investment Funds Managers Directive (the “AIFMD”),¹ the legal framework for the full transposition of the Directive in Italy is finally taking shape. Italian Legislative Decree No. 44 of 4 March 2014 (“Decree 44”), which entered into force on 9 April 2014, has overhauled the provisions on collective investment undertakings contained in the Italian Financial Act² in order to bring them in line with the AIFMD. At the end of May 2014 the Italian Treasury started a public consultation on the draft of the new ministerial regulation on the structure and types of Italian investment funds. Finally, on 26 June 2014 the Bank of Italy and the Italian securities regulator (CONSOB) published a consultation package on all the remaining implementation measures at regulatory level, which include changes to CONSOB’s Issuers Regulation (in relation to the offer to the public of Italian and foreign AIFs), to CONSOB’s Intermediaries Regulation (in relation to the rules of conduct for investment managers), and, most significantly, an overhaul of the Bank of Italy’s Regulation on Collective Investment Undertakings (the “Bank of Italy Regulation”).³

This Client Alert provides a brief update to our previous [September 2013 Client Alert](#) on the implementation of the AIFMD in Italy and focuses on the regulatory framework applicable to the marketing of foreign investment funds into Italy.⁴ In summary:

- (i) it will be possible for EU AIFMs to market EU AIFs in Italy to professional investors and certain other categories of investors, on the basis of the AIFMD passport under Article 32 of the AIFMD;
- (ii) it will be possible for EU AIFMs to market EU AIFs in Italy to retail investors, subject to the AIFMD passport under Article 32 of the AIFMD and *ad hoc* authorization by CONSOB; and
- (iii) until the full implementation of the AIFMD provisions on Non-EU AIFs managed by EU AIFMs and on (EU and Non-EU) AIFs managed by Non-EU AIFMs, no alternative process appears available to enable the marketing of these funds into Italy.

Marketing of EU AIFs by EU AIFMs to Professional Investors and Other Categories of Investors

In July 2013 CONSOB and the Bank of Italy issued a resolution to achieve an initial and partial implementation of the AIFMD (the “Joint Resolution”). In particular, the Joint Resolution allowed for the full implementation of the AIFMD passport regime for EU AIFs managed by EU AIFMs, whose Member State had already fully implemented the AIFMD, while in all other cases the existing Bank of Italy authorization procedure for the marketing of foreign non-UCITS funds⁵ had to be used.

This transitional regime has now ended and the marketing in Italy of EU AIFs⁶ managed by EU AIFMs may occur only in accordance with Article 32 of the AIFMD. In this respect, it should be noted that the draft CONSOB regulation: (a) confirms that EU AIFMs will be entitled to commence marketing in Italy when they receive from their Home Regulator confirmation that the notification package and the AIFMD certificate have been submitted to CONSOB; (b) in determining the contents of the notification package, goes beyond the reach of the AIFMD by requiring the provision of information also on any arrangement for the discharge of liability entered with the depositary.⁷

1. Concept of Marketing

The concept of marketing of foreign AIFs in Italy can be derived from the new definition of “marketing of AIFs” which has been introduced in the Italian Financial Act (being “the direct or indirect offering, at the initiative or on behalf of the AIFM, of units or shares of an AIF managed by it, addressed to investors domiciled or having their registered office in the European Union”). This definition substantially reflects the definition of “marketing” contained in the AIFMD (Article 4 (1)(x)), although it does not include the reference to “placement” activity. It also appears broadly in line with the concept of “marketing of foreign funds” as developed in the Italian regulatory practice over the last two decades. It should be noted that the specific reference to the legality of reverse enquiry contained in recital (70) of the AIFMD has not been reflected in the new Italian provisions. However “reverse enquiry” has long been accepted by Italian scholars and regulators as exempted from public offer rules, and therefore responding to a truly unsolicited enquiry by an Italian investor should not be deemed to amount to “marketing”.

2. Potential Investors

In order to define the potential investors pool which EU AIFMs may target in Italy one should look at the new provisions governing Italian AIFs. According to the Italian Financial Act, Italian AIFs can be marketed to “professional investors” (*i.e.* entities which under MIFID qualify as (a) deemed public or private professional clients, as well as (b) professional clients upon request) and to other categories of (non-professional) investors, in the latter case without having to go through the *ad hoc* procedure for retail marketing summarized below.

The draft Italian Treasury Regulation on Italian investment funds has identified the conditions upon which an Italian AIF can be marketed to Italian non-professional investors, as follows:

- 1) the minimum subscription amount should be equal to or higher than Euro 500,000;
- 2) the non-professional investor should issue a separate written statement representing that he is aware of the risks relating to the proposed investment, with specific mention of the items which must be included in the fund rules (as listed below); and
- 3) the investment should be suspended for 7 days from the date of signing, during which the investor is entitled to withdraw from the contract and to be returned the investment amount without penalties.

The fund rules of Italian AIFs must set out in particular:

- a) that the fund rules are not subject to approval by the Bank of Italy;
- b) that the AIF may derogate from the investment restrictions and diversification rules which apply to collective investment undertakings generally;
- c) the investment objective, risk profile, management style and investment techniques used by the AIF;

- d) the maximum leverage of the AIF; and
- e) the diversification rules which apply to the AIF.

Finally, in no circumstance may the units/shares of Italian AIFs which are subscribed for by non-professional investors be fractioned.

Pursuant to Article 43(8) of the Italian Financial Act, EU AIFMs will be granted the same flexibility allowed for Italian AIFs and will therefore be able to market their EU AIFs to non-professional investors in Italy in the circumstances set out above, simply based on the AIFMD Article 32 passport. However, the conditions set out in 1) to 3) above will apply and, arguably, also the requirements in terms of fund rules listed in points (a) to (e) above, so EU AIFMs should take this into account when setting up an EU AIF which is intended to be marketed in Italy.

3. Marketing Arrangements

Although this is a matter which, according to Article 32(5) of the AIFMD, should be subject to the Host Member State laws and supervision, the Italian AIFMD implementation provisions do not include any specific requirements on the “arrangements made for the marketing of AIFs and [...] arrangements established to prevent units or shares of the AIF from being marketed to retail investors” (Annex IV, item (h) of the AIFMD), for the cases where EU AIFs are offered in Italy to professional investors or other investors as described in sub-section (ii) above. However, a useful clue for the preparation of the notification package for EU AIFs could be derived from the provisions applicable to the marketing in Italy or in the EU of Italian AIFs and (prospectively) to the marketing in Italy of non-EU AIFs for which Italy will be the Member State of reference. For these funds, Article 43(3)(g) of the Italian Financial Act specifically provides that, in order to achieve the aim of preventing marketing to Italian retail investors, the fund rules and all the documentation made available to investors in Italy should provide that the units or shares of the relevant AIF can be marketed only to professional investors, arguably implying that the inclusion of appropriate wording in the fund’s offering and marketing documents is an arrangement which Italian provisions deem satisfactory “to prevent units or shares of the AIF from being marketed to retail investors”.

4. Tax Treatment

Decree 44 has extended to EU AIFs managed by EU AIFMs (other than real estate funds) and marketed in Italy in accordance with the AIFMD the same Italian tax treatment applicable to UCITS funds. In essence this provides that: (i) income received by investors who have invested through an Italian paying agent is subject to a 26% withholding tax, which is levied when the income is received (*i.e.* upon distribution of dividends or redemption of the shares/units of the fund) and is applied as an interim charge for investors acting in the exercise of a business activity and as a final charge for all other investors; and (ii) income received by corporate investors who have invested in the fund directly is not taxed at source and will be included in the taxable income of the relevant investor.

Marketing of EU AIFs by EU AIFMs to Retail Investors

EU AIFMs can market EU AIFs to retail investors in Italy, provided that:

- a) such EU AIFs are already marketed to retail investors in the Home Member State;
- b) the AIFMD passport procedure under Article 32 has been completed; and
- c) a further authorization is given by CONSOB, in consultation with the Bank of Italy.

Under the draft CONSOB regulation, the authorization procedure will last 20 days for closed-ended AIFs and 60 days for open-ended AIFs. Regarding the offering documents, closed-ended AIFs will be able to rely on the prospectus prepared in accordance with the Prospectus Directive and duly notified to CONSOB, whilst open-ended AIFs will be required to prepare a prospectus (substantially in the form required for Italian UCITS funds) and a KIID (substantially in the form required under the UCITS IV Directive).

The requirements which AIFs must meet in order to be authorized are very similar to those which currently apply within the Bank of Italy authorization procedure for the marketing of foreign non-UCITS funds. They include, *inter alia*: (i) consistency of the operational model and risk management and diversification measures of the AIF, as well as of the provisions governing the depositary, with those applicable to Italian AIFs; (ii) evidence of prior marketing to retail investors in the Home Member State; (iii) appointment of a paying agent and investors relations agent in Italy; and (iv) delivery of a summary of the marketing strategy which the AIF intends to follow in Italy. With a provision which will hopefully be changed upon issue of the final regulations, a translation in Italian is required for all documents in foreign language (including English) submitted to CONSOB within the authorization procedure.

EU AIFs (both open-ended and closed-ended) should use an Italian subscription form (having the contents detailed in CONSOB regulation) and will need prior authorization from CONSOB (to be granted within 60 days from request) before implementing any change to the fund's operational model, to the arrangements for the offering in Italy or to the documentation submitted during the original authorization procedure.

Open-ended EU AIFs which have been authorized to market to retail investors in Italy will be subject to very similar disclosure obligations to those applicable to UCITS funds.

UCITS Funds

The implementation of the AIFMD has had very limited impact on the provisions applicable to the marketing in Italy of foreign UCITS funds. However, the new notion of "marketing" of funds in Italy, though formally referred only to AIFs, should arguably be applicable also to the marketing of UCITS funds and provide a clearer scope to this (previously wholly undefined) concept. Furthermore, the provision according to which mentioning in the offering documents and in the marketing documentation that a certain product is reserved to professional investors is a satisfactory arrangement to prevent marketing to retail investors, could arguably prove useful also in the UCITS environment, where some uncertainty remains as to how information on share classes or funds reserved to professional investors can be made available (for example on websites).⁸

Non-EU AIFs Managed by EU AIFMs and AIFs Managed by Non-EU AIFMs

The new provisions of the Italian Financial Act provide that the passport under Article 35 of the AIFMD (for non-EU AIFs managed by EU AIFMs) and the authorization and passport regime under Articles 37 to 41 of the AIFMD (for AIFs managed by non-EU AIFMs) will be the only ways of entry of these funds into Italy. This would mean that:

- (i) in the future, after the entry into force of the delegated act of the Commission referred to in Article 67 (6) of the AIFMD, there will be no parallel private placement regime in Italy within the meaning of Articles 36 and 42 of the AIFMD; and
- (ii) in the short term, as the old Bank of Italy authorization procedure for foreign non-UCITS funds appears to have been wholly abrogated and the relevant new provisions of

the Italian Financial Act are not yet in force,⁹ there can be no marketing in Italy of non-EU AIFs managed by EU AIFMs and of AIFs managed by non-EU AIFMs.¹⁰

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

Ugo M. Giordano
44.020.3023.5160

ugogiordano@paulhastings.com

Jonathan Shenkman
44.020.3023.5131

jonathanshenkman@paulhastings.com

Sofia De Cristofaro
44.020.3023.5181

sofiadecristofaro@paulhastings.com

¹ For an overview of the AIFMD and of its impact on Non-EU Investment Managers, as well as its transposition in the UK, please refer to our previous November 2010, April 2013 and June 2013 client alerts. Unless otherwise specified, capitalised terms used in this alert shall have the same meaning ascribed to them in our previous alerts.

² Italian Legislative Decree No. 58 of 24 February 1998.

³ *Regolamento sulla Gestione Collettiva del Risparmio*, originally issued on 14 April 2005 and recast on 8 May 2012.

⁴ This is only one of the areas where the implementation of the AIFMD has innovated the Italian asset management provisions; significant changes and reforms have been introduced also in the rules governing domestic collective investment undertakings.

⁵ As set out in Title VI, Chapter V of the Bank of Italy Regulation of 2012.

⁶ At first glance, the definition of EU AIFs included in the Italian Financial Act ("the collective investment undertakings falling within the scope of application of Directive 2011/61/EU, established in a EU Member State other than Italy") seems to cover only limb (i) of the definition of "EU AIF" set out in article 4(k) of the AIFMD ("an AIF which is authorized or registered in a Member State"). However, in light of the general principle that Italian domestic law should be interpreted in a way which ensures consistency with EU law, AIFs falling within limb (ii) of the AIFMD definition ("an AIF which is not authorized or registered in a Member State, but has its registered office and/or head office in a Member State") should be considered "EU AIFs" also for the purposes of the Italian Financial Act and benefit from all the relevant provisions (including passporting).

⁷ This information is referred to in Article 23(2) of the AIFMD, whilst according to Annex IV, item (h) of the AIFMD only the information referred to in Article 23(1) should be included in the notification package.

⁸ Arguably, the debate about whether it is necessary to use a password-restricted website for the products reserved to professional investors should be outdated, provided the appropriate disclaimers are in place.

⁹ In this respect the consultation package issued by the Bank of Italy and CONSOB on 26 June 2014 clarifies that the regulations implementing the new provisions of the Italian Financial Act on Non-EU AIFs managed by EU AIFMs and AIFs managed by Non-EU AIFMs will be issued at a later stage, when such provisions enter into force.

¹⁰ This conclusion goes beyond the position set out in the Joint Regulation, which had indicated that the old Bank of Italy authorization procedure would continue to apply until the full implementation of Articles 35 and 37-41 of the AIFMD. However this appears to be the line which the Italian regulators are inclined to follow based on the wording of Article 15(13) of Decree 44.

Paul Hastings LLP

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