

Direct Lending in Italy by EU AIFs in the light of the Bank of Italy and CONSOB Joint Regulation on Collective Asset Management (as amended pursuant to the Bank of Italy Resolution of 23 December 2016)

Introduction

The Bank of Italy Resolution of 23 December 2016 (the “**Resolution**”), amending the Bank of Italy and CONSOB Joint Regulation of 19 January 2015 on investment services and collective asset management (the “**Regulation**”), was published in the Italian Official Gazette of 4 January 2017. The Resolution entered into force on 5 January 2017.

The new provisions included in the Resolution are intended to, *inter alia*, implement Article 46-*ter*¹ of the Legislative Decree No. 58 of 24 February 1998 (the “**Italian Financial Act**”), which lays down the general conditions under which collective investment undertakings to which Directive 2011/61/EU applies, incorporated in a EU country other than Italy (the “**EU Alternative Investment Funds**” or “**EU AIFs**”) may engage in credit investments in Italy.

1. Credit investments in Italy by EU AIFs

This memo is intended to provide a preliminary outline of the requirements for the exercise of credit investments in Italy by EU AIFs.

It is worth noting that for regulatory purposes, under Italian law, the purchase of receivables (save for certain express exceptions) is considered a credit investment activity², which – when carried out on a professional basis and to the public – would amount to lending business and therefore would be subject to regulatory requirements. The new provisions included in the Resolution are therefore relevant also for the EU AIF which intend to purchase performing or non performing receivables (e.g. bank debt or trade receivables) and, for various reasons, do not consider efficient or convenient the setting up of a securitization structure.

2. Conditions for EU AIFs to credit investments in Italy

¹ Pursuant to Article 46-*ter* of the Italian Financial Act “[1] *EU AIFs may exercise credit investments activity, by using its own assets, to entities other than consumers, in Italy subject to the following conditions: a) the EU AIF is authorised by the home member state competent authority to credit investment, including credit granted by its own assets, in its home member state ; b) the EU AIF is a close ended fund and the relevant operating model, in particular the modalities regime applicable to participate in the fund, is equivalent to the one of an Italian alternative investment fund exercising credit investments activity; c) the legal provisions of the EU AIF home member state regarding risk mitigation and risk fractioning, including financial leverage limitations, are equivalent to the provisions applicable to Italian alternative investment funds exercising credit investments activity. Equivalence with respect to Italian provisions can be tested also with reference only to the fund regulations of the EU AIFs, provided that the competent authority of the EU AIF member state ensures their compliance. [2] The asset management companies of EU AIFs which intend to exercise credit investments by using its own assets in Italy inform the Bank of Italy of such intention. The EU AIF may not commence its activity before the expiry of a sixty days term from such notice, within which time Bank of Italy may forbid the exercise of the credit investment activity by using its own assets in Italy. [3] Art. 8, paragraph 1 applies to the managers. The Bank of Italy may provide for the participation of the EU AIFs mentioned at paragraph 1 to the “Centrale dei rischi”, and may also provide that such participation occurs by means of banks and intermediaries listed in the register kept pursuant to article 106 of Italian Legislative Decree no. 385 of 1 September 1993. [4] Italian provisions applicable to EU AIFs remain effective for the sale of shares and quotas and every other area not expressly regulated by this article. [5] Bank of Italy set forth the implementing provisions of the present article.”*

² Reference is made to Article 2 of the Italian Ministerial Decree No. 53 of 2 April 2015.

Pursuant to the Resolution, EU AIFs are expressly entitled to carry out credit investments in Italy *vis-à-vis* any entities other than consumers, subject to the following conditions³:

- (i) the EU AIF must be authorised to credit investments, by using the fund's own resources, in its home Member State by the competent authority of the relevant home country;
- (ii) the EU AIF is a close ended fund and the relevant operating model, in particular the regime applicable to participations in the fund, is equivalent to the one of an Italian collective investment undertakings to which Directive 2011/61/EU applies (the "**Italian Alternative Investment Funds**" or "**Italian AIFs**") carrying out the same activity;
- (iii) the legal provisions of the EU AIF home Member State regarding risk mitigation and risk fractioning, including those relating to financial leverage limitations, are equivalent to the provisions applicable to the Italian AIFs exercising the same activity. Such requirements can be tested also with reference to the fund regulations of the EU AIFs, provided that the competent authority of the EU AIF home Member State ensures their compliance.

3. Authorisation procedure for EU AIFs for the purposes of credit investments in Italy

According to the Resolution, the asset management company of an EU AIF (the "**Manager**") which intends to carry out credit investments in Italy must submit to the Bank of Italy a prior notice (the "**Notice**") with respect to each relevant EU AIF, which will contain the following information:

- denomination, registered office and head office of the Manager;
- denomination of the EU AIF or the relevant compartment which it is meant to operate in Italy;
- complete and detailed personal information and capacity of the signatory of the Notice; and
- list of the documents provided with the Notice (as specified below).

The Notice must be transmitted to the Bank of Italy at least sixty (60) days prior to the commencement of credit investments activity in Italy. Upon receipt of the Notice, the Bank of Italy will check the completeness of the documentation and will be entitled to require supplemental documents. Once verified the completeness of the documentation received (including any supplemental documents required), Bank of Italy shall serve to the Manager a notice to acknowledge receipt of the documentations (the "**Receipt Notice**").

Within sixty (60) days from the Receipt Notice, the Bank of Italy may decide to prevent the EU AIF from credit investment in Italy should the conditions under paragraph 2 above not being met. Upon expiry of the above sixty (60) days term without any prohibition notice having been served by the Bank of Italy, the EU AIF may commence its activity in Italy.

The relevant documents which shall be attached to the Notice are the following:

1. certification from the competent EU home Member State authority of the Manager that the latter is authorized to manage the EU AIF to which the Notice refers, or, alternatively, a copy of the authorization granted to the Manager, together with the certification from its legal representative of the enrollment of the Manager in the applicable regulatory register of the managers;

³ Please, note that the relevant conditions set forth under paragraph 2.1 of the Chapter V of the Regulation substantially repeat the requirements provided for under Article 46-ter, paragraph 1, of the Italian Financial Act.



2. certification from the competent EU home Member State authority of the Manager or, alternatively, a legal opinion, concerning the EU AIF's capacity to invest in credit;
3. copy of the regulations (or by-laws) of the EU AIF, copy of the Manager's by-laws or any other equivalent document, whose validity must duly certified by the competent authority of the EU home Member State of the EU AIF and the Manager. Alternatively, such certification by the competent authority can be replaced by a written declaration from the legal representative of the EU AIF and the Manager certifying the validity of such documents;
4. a written declaration from the legal representative of the Manager indicating the relevant law provisions of the EU AIF home Member State which are supposed to be equivalent to the Italian provisions (copy of such provisions must be enclosed), together with a legal opinion addressing such equivalence;
5. as an alternative to what indicated under point 4 above, a written declaration from the competent EU AIF home Member State authority confirming the relevant commitment of such authority to supervise the compliance by the Manager with the relevant provisions regarding risk mitigation and risk fractioning, including provisions relating to financial leverage limitations;
6. copy of the latest annual report and the subsequent semiannual report of the EU AIF, if published;
7. an explanatory memorandum concerning the EU AIF operation, including in particular the regime applicable to subscription and redemption of the participation unit, the EU AIF's investment policy (the memorandum should expressly clarify whether the Manager has entered into or has intention to enter into any side letters with the investors).

The above documents shall be provided in Italian or English language. In case such documents are drafted in a language other than Italian and English, a translation in Italian or English will be required, together with the a written declaration from the legal representative of the Manager certifying the consistency of the translated documents with the relevant original version.

Even if the wording of the Resolution is unclear it would appear that, should an EU AIF be already exercising credit investments in Italy for a specific EU AIF's compartment, the Manager shall not be required to submit the information relating to itself already provided to the Bank of Italy for the commencement of the activity in Italy of another compartment of the same EU AIF.

4. Further Information duties for EU AIFs

The Manager shall (i) send EU AIF's statement of account to the Bank of Italy within 10 days from the relevant approval, and (ii) promptly communicate to the Bank of Italy any changes to the information provided according to paragraph 3 above. In case of change of any of such information, the Bank of Italy shall serve to the EU AIF a notice confirming the receipt of the required information and indications. Within thirty (30) days from this last notice the Bank of Italy may start a procedure in order to evaluate whether the EU AIF can still carry out credit investment in Italy which procedure is due to be completed in sixty (60) days.

