



Italian regulatory provisions applicable to financial intermediaries

HIGHLIGHTS OF THE MINISTRY OF FINANCE'S DECREE NO. 29/2009

The Italian Ministry of Economy and Finance has issued a new decree on financial intermediaries that brings together the content of previous decrees on the same matter but also introduces some changes to the existing legal framework. Besides a partial reform of the registration criteria applicable to financial intermediaries (including securitisation vehicles), the decree mainly affects certain specific financial activities, such as the purchase of receivables, the release of guarantees and the acquisition of holdings. The Bank of Italy is requested to issue implementing guidelines. This briefing summarises the decree's effects.

Introduction

By means of Decree No. 29, dated 17 February 2009, on financial intermediaries (Decree 29), the Italian Ministry of Economy and Finance (MEF) has consolidated in a single piece of legislation the content of several decrees, which have been repealed. In addition to minor rewordings, the MEF has also introduced some new rules affecting both the requirements applicable to the authorised financial intermediaries in Italy and the scope of certain regulated financial activities.

New general rules applicable to financial intermediaries registered with the general register

Under article 106 of the Italian Banking Act, the Bank of Italy (formerly the *Ufficio Italiano Cambi*) is entitled to require all financial intermediaries registered with the general register under article 106 (the '106 register') of the Italian Banking Act ('106 intermediaries') to provide certain information and documents. If necessary, the Bank of Italy may also carry out on-the-spot checks on 106 intermediaries to verify compliance with the requirements for entry in the 106 register.

The Bank of Italy's supervision over 106 intermediaries has now been tightened under Decree 29 to the extent that the above powers can be exercised by the Bank of Italy more generally 'for the purpose of carrying out the controls falling within its area of competence'. Moreover, Decree 29 also provides that the Bank of Italy can carry out

'inspections' (*ispezioni*, as opposed to lighter on-the-spot checks – *verifiche*) and it may request that records and information be submitted to it 'on a periodical basis'.

Furthermore, with a view to ensuring that only effectively operating intermediaries remain registered with the 106 register, Decree 29 provides that the MEF may, under a proposal from the Bank of Italy, decide the cancellation from the 106 register of those 106 intermediaries that have stayed (or, after their registration, failed to start) their activity for a period of at least 24 months. The same rule applies to financial intermediaries registered with the special register (107 register) referred to under article 107 of the Italian Banking Act (107 intermediaries) but the relevant period is halved.

New criteria for registration with the special register under article 107 of the Italian Banking Act

One of the main changes introduced by Decree 29 is that financial intermediaries are no longer obliged to register with the 107 register as a result of their net assets value (*mezzi patrimoniali*) exceeding a certain threshold. Apparently, the suppression of the net assets value criterion arises from the experience that there is often little correlation between holding considerable assets and the financial intermediaries' actual volume of financing activities (*volume di attività finanziaria*, which thus remains the only relevant economic criterion for the purposes of registration with the 107 register).

Those 107 intermediaries that are registered with the 107 register for the sole reason that they exceeded the aforementioned threshold will remain registered for 12 months after the entry into force of Decree 29 (18 April 2009) and will be cancelled thereafter unless they meet one of the other registration requirements.

Additional relevant changes to the registration criteria affect the securitisation vehicles created under article 3 of Law No. 130/1999 (the Italian Securitisation Law), which are no longer required to be registered with the 107 register. Provided that such vehicles were already subject to a specific and separate supervision from the one applicable to other 107 intermediaries, the Bank of Italy shall issue new guidelines to ensure that securitisation vehicles created in accordance with the Italian Securitisation Law will continue to provide it with the necessary information on the securitised assets.

On the other hand, special-purpose companies that acquire assets from banks in the context of covered bonds transactions carried out in accordance with the Italian Securitisation Law are now required to register with the 107 register.

Foreign financial intermediaries

Some further requirements have been introduced for registration with the 106 register of EC financial intermediaries (ie financial intermediaries having their registered office in an EU member state and not subject to the mutual recognition regime, which carry out in their home country 'towards third parties as opposed to members of the same group' (*nei confronti del pubblico*; hereafter 'towards the public') at least one of the activities referred to in article 106 of the Italian Banking Act) and non-EC financial intermediaries (ie financial intermediaries having their registered office in a non-EU member state, which carry out in their home country towards the public at least one of the activities referred to in article 106 of the Italian Banking Act).

Such further requirements include actual performance of financial activity in the home country and, limited to EC financial intermediaries, the need for the shareholders of such financial intermediaries to comply with certain integrity requirements. Moreover, EC financial intermediaries carrying out the reserved financial activity of 'release of guarantees' must comply with the same

(new) asset and capitalisation requirements applicable to analogous Italian financial intermediaries (see 'Release of guarantees' below).

Purchase of receivables

The general principle applicable under both the previous and the new regime is that intra-group activities are not considered to be performed towards the public. Decree 29 now provides that the purchase of receivables owed by companies of the same group towards third party creditors does not qualify as activity towards the public.

Therefore, financial intermediaries currently performing 'group factoring' activities will 'migrate' to the section of the general register referred to under article 113 of the Italian Banking Act (113 register), provided of course that all other relevant conditions for registration with the 113 register are met (ie performance on an exclusive or prevailing basis of one of the activities referred to in article 106, paragraph 1 of the Italian Banking Act).

It should also be noted that, under the previous regime, intra-group purchases of receivables were considered performed towards the public if the subject matter of the sale was receivables owed by non-group members towards a member of the group. Decree 29 now provides that any purchase of receivables *from financial intermediaries belonging to the same group* qualifies as activity performed towards the public. As a result of this new provision, it appears that the purchase of receivables owed by non-group members no longer qualifies as activity reserved to 106 intermediaries and/or 107 intermediaries to the extent that the receivables are acquired from group companies other than a financial intermediary (although, subject to the relevant conditions being met, it remains necessary for the purchaser to be registered with the 113 register).

Release of guarantees

Decree 29 has also introduced some relevant changes in respect of the registration requirements applicable to financial intermediaries performing the activities of granting guarantees (guarantors).

In the first instance, it is now clarified that for this activity to be considered performed towards the public it is sufficient that either the beneficiary or the guaranteed

entity is not party to the same group as the guarantor (unless the guaranteed entity is part of the guarantor's group and the beneficiary is, in turn, a 107 intermediary).

As to the requirements applicable to guarantors, Decree 29 confirms that these must be registered with the 106 register (106 guarantors) if the activity is performed towards the public but it now specifies that guarantors must be registered with the 107 register (and are therefore subject to the relevant supervisory regime) if the activity is either performed on an 'exclusive', 'prevailing' (which is defined substantially in the same manner as before) or 'material' basis (ie average value of the guarantees higher than €25m per semester) (107 guarantors). Under the previous regime, guarantors were required to be registered with the 107 register only if the respective net assets value or financial volume met the applicable thresholds.

New and more restrictive requirements are provided for 106 guarantors, including in terms of corporate form (ie *società per azioni*) and minimum corporate capital, which has been increased from €1m to €1.5m. The requirement (applicable to both the 106 guarantors and the 107 guarantors) to have the corporate capital invested either in liquid assets or nearly liquid securities is now further detailed, it being provided that such securities must be traded on Italian regulated markets or foreign regulated markets recognised by the Italian market regulator CONSOB and must be valued at their market price or, for IAS/IFRS-compliant intermediaries, their fair value.

Finally, 106 guarantors are required to send to the Bank of Italy their annual and semi-annual financial statements including detailed information on the guarantees provided by them (eg total value of the guarantees, connected revenues etc).

Acquisition of holdings

The mere acquisition of holdings that is not performed towards the public (ie as a service rendered to third parties on a professional basis and with a view to a subsequent dismissal of the holdings as provided in Decree 29), even if made on an exclusive or prevailing basis, no longer requires registration with the 113 register unless it is accompanied by the provision of other financial activities to the entity whose shares or stocks have been acquired.

This rule is relevant for the so-called *holding statiche* whose activity is exclusively limited to the holding of equity participations and that were nonetheless previously subject to registration with the 113 register.

It should be noted that deregistration is not automatic because, under Decree 29, the Bank of Italy shall determine the relevant modalities.

Other simplifications

Decree 29 has also lightened the regulatory framework applicable to certain activities and/or entities (in addition to those already considered in the above paragraphs). This includes the exclusion of the distribution of credit cards and debit cards from the definition of payment services.

The same exclusion applies in respect of the transfer of funds where the transfer is ancillary to a main activity (provided that the relevant entity is not entitled to dispose of such funds on its own account). The rather wide and vague wording of this carve-out, which seems potentially to cover a grey area in the field of payment services, is likely to give rise to issues over its precise scope of application.

For further information please contact	Emiliano Conio T +39 02 625 30425 E emiliano.conio@freshfields.com
	Giuliano Marzi T +39 02 625 30436 E giuliano.marzi@freshfields.com

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