



Implementation of EU Directive on Alternative Investment Fund Managers into Italy Has Begun

Implementation and Scope of the Directive

On June 8, 2011, the European Parliament and the European Council issued Directive 2011/61/EU on alternative investment fund managers (the “AIFM Directive”). The AIFM Directive applies to alternative investment fund managers that manage and/or market alternative investment funds (“AIFs”)—investment funds other than UCITS funds—in the EU and lays down a set of harmonized rules regarding authorization, operation, and transparency. The managers of real estate funds, private equity funds, venture capital funds, infrastructure funds, and hedge funds fall within the subjects to whom the provisions of the AIFM Directive apply.

The AIFM Directive governs alternative investment fund managers (“the AIFMs”) only and maintains the power to regulate the structure of AIFs and the supervision of AIFMs at the level of each EU Member State.

On December 19, 2012, the European Commission issued the Commission-delegated Regulation (EU) No. 231/2013 (the “AIFM Regulation”), which implements certain provisions of the AIFM Directive.¹

The deadline for the implementation of the AIFM Directive by each EU Member State was July 22, 2013, but Italy was not able to implement the AIFM Directive within that time frame. Regardless, the Bank of Italy and the CONSOB stated that certain provisions of the AIFM Directive² were directly enforceable into Italy—starting from July 22, 2013—via a joint notice issued on July 26, 2013.

On July 22, 2013, the AIFM Regulation became effective in each EU Member State, since the AIFM Regulation did not require any formal implementation act. On March 4, 2014, Legislative Decree No. 44, implementing the AIFM Directive into Italy (the “Legislative Decree”), was issued.³ The Legislative Decree came into force on April 9, 2014.

Changes to the Unified Financial Act

The Legislative Decree introduces material changes to the provisions of the Legislative Decree No. 58 of February 24, 1998 (the “Unified Financial Act”) on collective portfolio management. However, the Legislative Decree incorporates the general terms of the AIFM Directive only and refers the relevant technical aspects to a set of level 2 and 3 regulatory

measures to be issued by the Bank of Italy, the CONSOB, and the Ministry of Economy and Finance, each within its relevant powers (the “New Regulations”).⁴

The establishment, management and marketing of Italian AIFs will continue to be ruled by the current set of Italian level 2 and 3 regulations (the “Current Regulations”), as described below in greater details, until the New Regulations will be issued and come into force.

Key News

SICAFs. The Legislative Decree has introduced the SICAF,⁵ a new type of closed-ended undertaking for collective investment incorporated as a company with fixed capital.

The EU Passport. Through the EU passport, an AIFM licensed in its home Member State, pursuant to the implementing regulations of the AIFM Directive of its home Member State, may manage and/or market AIFs in Member States other than its home Member State via a passporting of its AIFM Directive’s license. Any marketing activity carried out taking advantage of the EU passport may be addressed only to professional investors.

The Registration Procedure. AIFMs managing one or more AIFs for a total value not exceeding certain thresholds fixed in advance may benefit from a smooth registration procedure pursuant to the AIFM Directive rather than applying for an AIFM Directive license.⁶ The AIFM Directive granted each EU Member State with the power to issue stricter provisions in relation to such AIFMs. It appears that Italy has exercised its power to provide stricter provisions by introducing: (i) the authorization procedure for all the Italian AIFMs as a general rule, regardless of the total value of the portfolios of the AIFs managed by the AIFMs; and (ii) the registration process, as an exception to the general authorization procedure, only for Italian AIFMs incorporated as special joint stock companies (“*Società di gestione del risparmio*” or “SGR”) and currently managing AIFs that meet the requirements to qualify as “European funds for venture capital” and “European social Entrepreneurship funds” under, respectively, the EU Regulation No. 345/2013 and the EU Regulation No. 346/2013.

Operation of EU AIFMs within the EU

Existing Italian AIFMs: SGRs. SGRs managing Italian AIFs⁷ are deemed as already licensed to manage such funds in accordance with the Current Regulations and can therefore continue to carry out their management activity. By July 22, 2014, SGRs shall implement the necessary measures to comply with the provisions implementing the AIFM Directive and file a notice with the Bank of Italy.

In their capacity as licensed AIFMs, Italian SGRs may: (i) establish, manage, and market Italian AIFs in Italy; (ii) establish and manage Italian AIFs in Italy and market such funds in Italy and/or in other Member States taking advantage of the EU passport; and (iii) establish and manage AIFs in a Member State other than Italy and market such funds in Italy and/or in other Member States taking advantage of the EU passport.

Other Existing Italian AIFMs. Italian entities other than SGRs carrying out collective management of alternative investment funds services upon the date on which the Legislative Decree entered into force (e.g., investment companies) may continue to provide such services, provided that, by July 22, 2014, they implement all the necessary measures to comply with the provisions implementing the AIFM Directive and file an application request for the AIFM Directive’s license with the Bank of Italy.

New Italian AIFMs. Licensing procedures of new SGRs will continue to be ruled by the Current Regulations until the New Regulations are issued and enter into force.

EU AIFMs. EU AIFMs licensed in their home EU Member State pursuant to the relevant provisions implementing the AIFM Directive may: (i) establish and manage AIFs in their home Member State and market such funds in their home EU Member State and/or in other host EU Member States taking advantage of the EU passport, including Italy; and (ii) establish, manage, and market Italian AIFs and market them into Italy and/or into other Member States taking advantage of the EU passport.

Marketing of EU AIFs

Existing Italian AIFs. Italian undertakings for collective investment reserved to qualified investors and Italian speculative undertakings for collective investment⁹ are to be considered as Italian reserved AIFs pursuant to the provisions of the Unified Financial Act as amended by the Legislative Decree.

SGRs may continue marketing the Italian AIFs for which the fundraising period is still running on the basis of the existing legal framework until the New Regulations come into force. Starting from the entry into force of the New Regulations, Italian AIFs may be marketed only to professional investors and the categories of nonprofessional investors pointed out under the New Regulations.

SGRs managing Italian AIFs for which the fundraising period is still running are to be deemed as licensed to carry out marketing activities in Italy pursuant to the provisions of the Unified Financial Act, as amended by the Legislative Decree, and must implement by July 22, 2014 the necessary measures to comply with the provisions implementing the AIFM Directive.

New Italian AIFs. The marketing of new Italian AIFs to Italian investors continues to be ruled by the Current Regulations. Italian undertakings for collective investment reserved to qualified investors and Italian speculative undertakings for collective investments may be marketed only to professional investors and to the categories of nonprofessional investors pointed out by the New Regulations, as of the New Regulations' effective date.

SGRs marketing new AIFs must implement the necessary measures to comply with the provisions implementing the AIFM Directive by July 22, 2014.

EU AIFs. The marketing of Non-Italian EU AIFs in Italy authorized before July 22, 2013 may continue to be targeted to professional investors and investors that may subscribe the units of reserved funds and speculative funds pursuant to the Current Regulations. As of the effective date of the New Regulations, the same requirements described in "New Italian AIFs" (paragraphs 2 and 3 above) will apply.

With regard to non-Italian EU AIFs for which a marketing authorization procedure in Italy is currently pending pursuant to the former provisions of the Unified Financial Act, the simplified notification procedure set forth under Article 32 of the AIFM Directive for the marketing of EU AIFs into a host EU Member State will apply. Any marketing authorization filed pursuant to the former provisions of the Unified Financial Act will be deemed as expired.

* * * * *

This *Commentary* provides just a preliminary analysis of some limited aspects relating to the implementation of the AIFM Directive into Italy. Once the New Regulations have been implemented, it will be possible to provide a more comprehensive analysis.

Lawyer Contacts

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

Alessandro E. Corno

Milan
+39.02.7645.4001
acorno@jonesday.com

Eriprando Guerritore

Milan
+39.02.7645.4001
eguerritore@jonesday.com

Giovanni Meschia

Milan
+39.02.7645.4001
gmeschia@jonesday.com

Endnotes

- 1 In particular, we refer to the provisions on exemptions, general operating conditions, custodians, leverage, transparency, and surveillance.
- 2 In particular, we make reference to the provisions on the EU passport concerning the marketing of EU AIFs into Italy and the establishment of Italian AIFs by EU AIFMs authorized in their home Member State pursuant to the AIFM Directive. For additional information on the EU passport regime, please refer to “Key News,” below.
- 3 The Legislative Decree was published into the Italian Official Gazette (*Gazzetta Ufficiale*) on March 25, 2014.
- 4 The definitions contained under the Unified Financial Act have been amended and a new Title III on collective portfolio management, which replaced the previous Title III, has been added by way of the Legislative Decree.
- 5 Pursuant to the Unified Financial Act, as amended by the Legislative Decree, SICAF means: “the closed-ended undertaking for collective investment incorporated as a joint stock company (*Società per azioni*) with fixed corporate capital, having its registered office and its headquarter in Italy, and whose sole object is the collective investment of funds collected through the offering of its own shares and other equity instruments.”
- 6 Article 3 of the AIFM Directive points out that the provisions on registration apply to AIFMs managing: (i) portfolios of AIFs whose managed assets, including any assets acquired through the recourse to leverage, do not exceed the overall threshold of EUR 100,000; and (ii) portfolios of AIFs whose managed assets do not exceed the overall threshold of EUR 500,000, if the portfolio of AIFs consists of AIFs that do not recur to leverage and do not provide reimbursements rights to their investors for a period equal to five years from the date of the initial investment in each AIF.
- 7 For example, real estate funds and private equity funds.
- 8 For example, real estate funds and private equity funds.