



ICLG

The International Comparative Legal Guide to:

Alternative Investment Funds 2017

5th Edition

A practical cross-border insight into Alternative Investment Funds work



Italy

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1 Regulatory Framework

1.1 What legislation governs the establishment and operation of Alternative Investment Funds?

Italian Alternative Investment Funds (“AIFs”) are regulated mainly by:

- Legislative Decree of 24 February 1998, No. 58 on the Consolidated Law on Finance (*Testo Unico della Finanza*, “TUF”).
- The Bank of Italy Regulation of 19 January 2015, on collective portfolio management (*Regolamento sulla Gestione Collettiva del Risparmio*).
- Ministerial Decree of 5 March 2015, n. 30, implementing art. 39 TUF.
- The Bank of Italy, CONSOB and ESMA communications, orientations and guidelines.
- The Italian Securities and Exchange Commission (*Commissione Nazionale per la Società e la Borsa* (“CONSOB”)) Regulation no. 11971 of 14 May 1999, containing the Regulation on issuers (CONSOB Regulation).
- The Bank of Italy and CONSOB Act of 29 October 2007, concerning the Regulation on the organisation and intermediary procedures providing investment services or collective investment management services (“Joint Regulation”).
- Delegated Regulation (EU) no. 231/2013, with regard to exemptions, general operating conditions, depositaries, leverage, transparency and supervision.

Of course, all Italian AIFs are impacted operationally by Directive 2011/61/EU on Alternative Investment Fund Managers (the “AIFM Directive”).

1.2 Are managers or advisers to Alternative Investment Funds required to be licensed, authorised or regulated by a regulatory body?

All Italian AIF managers must be authorised by the Bank of Italy after consultation with CONSOB (the Italian Financial Services Authority). The authorisation shall be granted by the Bank of Italy within 90 calendar days beginning from the day of filing the application. The Bank of Italy can suspend the term one or more times if it requires additional documents and/or information. Generally, the authorisation procedure should not exceed 120 days.

1.3 Are Alternative Investment Funds themselves required to be licensed, authorised or regulated by a regulatory body?

AIFs themselves need not to be authorised, but their regulations must be approved by the Bank of Italy.

1.4 Does the regulatory regime distinguish between open-ended and closed-ended Alternative Investment Funds (or otherwise differentiate between different types of funds) and if so how?

Ministerial Decree 5 March 2015, no. 30 distinguishes between four types of Italian AIFs:

- the Italian Open-Ended AIF;
- the Italian Closed-Ended AIF;
- the Italian Real Estate AIF; and
- the Italian Reserved AIF (please note that reserved funds can be open-ended and/or closed-ended).

Italian Open-Ended AIFs

The capital of an Italian Open-Ended AIF can be invested in:

1. financial instruments traded on a regulated market; and/or
2. bank deposits.

It can also invest in financial instruments not traded on a regulated market if the amount of the investment does not exceed 20% of the capital.

The investors have the right to request a redemption of the units/shares of the capital of an Open-Ended AIF at least once a year. Furthermore, the AIF must calculate the value of the units/shares every year, or any time new units/shares are issued. The investors have the right to receive a redemption within 15 days from the request.

Italian Closed-Ended AIFs

The capital of an Italian Closed-Ended AIF can be invested in:

1. immovable assets, immovable property rights (including rights resulting from property leasing contracts with translational nature and concessionary relationships) and holdings in real estate companies, and units in other Real Estate AIFs;
2. credits and debt securities, including receivables associated to the undertaking for collective investments (“UCI”) capital (in other words, such closed-ended AIFs can be invested in credits and debt securities and, at the same time, they can provide financing to any third parties); and/or

- other assets for which there is a market and which have a value determinable with certainty at least every six months.

The redemption of the units/shares of the capital of a Closed-Ended AIF takes place upon maturity of the fund. In this respect, please note that the regulation of the AIF may allow the anticipated redemption of the unit/shares in the following cases: (i) at the initiative of the AIF's manager, to all the participants, proportionally to the shares owned by each participant; (ii) at the request of a single participant, for an amount: (iiia) not higher than the sums acquired through new subscription; or (iiib) not higher than the value of the loans received by the AIF, even though they do not exceed 10% of the AIF's value.

The law does not establish a minimum or maximum duration period for a Closed-Ended AIF, although these types of AIFs usually mature after 5–10 years.

Italian Real Estate AIFs

Italian Real Estate AIFs are Closed-Ended AIFs that can invest in immovable assets, immovable property rights (including rights resulting from property leasing contracts with translational nature and concessionary relationships) and holdings in real estate companies, and units in other Real Estate AIFs.

The value of this type of real estate investment cannot be lower than $\frac{2}{3}$ of the gross value of all the investments made by the AIF, reduced to 51% if at least 20% of the capital of the AIF is invested in securitisation transactions involving immovable assets, immovable property rights, or credits secured by mortgage.

Italian Reserved AIFs

Italian Reserved AIFs are Alternative Investment Funds reserved exclusively:

- to professional investors; and/or
- to non-professional investors who subscribe to an AIF's shares/units for an amount of at least €500,000; this threshold does not apply to the shares/units subscribed by the directors and/or employees of the AIFM.

An Italian Reserved AIF can be Open-Ended or Closed-Ended.

1.5 What does the authorisation process involve?

The Bank of Italy (after consulting CONSOB) will authorise an AIFM when the following conditions, *inter alia*, are met:

- the company has adopted the form of a private limited liability company by shares (*società per azioni* or "S.p.A.");
- the company has its registered office and head office in Italy;
- the minimum share capital, as required by the Bank of Italy, has been fully paid up;
- all persons performing administrative, management and supervisory functions satisfy certain integrity, experience, professionalism, fairness and independence requirements;
- all shareholders holding at least 10% of the voting rights of the company satisfy certain integrity, fairness and financial soundness requirements (for a detailed description, please see section 4 below);
- ensure a sound and prudent management of the company, considering, among others, the quality of the shareholders, the financial soundness of the same shareholders, the capacity of the company to comply with the provisions governing its activities, the suitability of the structure of the group to allow effective supervision and the absence of reasonable suspicion that the shareholders are related to money laundering or terrorist financing;
- the structure of the group of which the company is part is not prejudicial to the effective supervision of the company; and

- filing, together with the memorandum and articles of association, a Program of Initial Operations ("PAI") and a Report on the Organisational Structure ("RSO").

Authorisation will be denied if, upon verification of the above conditions, the Bank of Italy deems that the sound and prudent management of the company is not ensured.

The application to obtain approval of an AIF regulation from the Bank of Italy must include:

- the fund's regulation;
- an affidavit from the depositary bank in which the bank states that it is authorised by the Bank of Italy to provide depositary services; and
- an affidavit from the AIFM showing that it assessed that the depositary bank fulfils the autonomy requirements.

The regulation is deemed to be approved 60 days after the date of receipt of the application by the Bank of Italy, complete with all necessary documentation.

1.6 Are there local residence or other local qualification requirements?

The AIFM must have its registered office and head office in Italy.

1.7 What service providers are required?

The AIFM must enter into an agreement with a depositary bank for the safekeeping of the assets of the fund.

The statutory audit must be devolved to an independent audit firm (*revisore legale dei conti*) enrolled in the relevant public register.

1.8 What co-operation or information sharing agreements have been entered into with other governments or regulators?

The list of agreements and cooperation actions is available on the website of the Ministry of Economy and Finance (<http://www.finanze.gov.it/opencms/it/fiscalita-comunitaria-e-internazionale/convenzioni-e-accordi/>).

2 Fund Structures

2.1 What are the principal legal structures used for Alternative Investment Funds?

Under Italian law, the setting-up of alternative investments funds is reserved to companies authorised by the Bank of Italy (having consulted CONSOB) to operate either as:

- AIF's asset management company ("SGR"); or as
- AIF's fixed share capital investment company ("SICAF").

The main difference between the two schemes is the contractual relationship between the company and its investors. Particularly, a SICAF is a closed-ended UCI incorporated as a private limited liability company by shares (*società per azioni*), whose share capital is fixed, having as its exclusive corporate purpose the collective investment of the assets raised by offering its shares and other hybrid financial instruments to the public; the sub-funds are established by the SICAF and the investors become shareholders of the SICAF itself. As a consequence, investors will have governance rights on the SICAF and may have a voice on the investment strategies of the funds, by exercising their voting right within the SICAF.

Instead, under a SGR scheme, the funds are set up by the SGR and the investors will only purchase units of the funds without becoming shareholders of the SGR. Consequently, the investors do not have any voting rights whatsoever in relation to the management of the funds; the investors, by subscribing the funds' units, will establish a contractual relationship only with the SGR.

2.2 Please describe the limited liability of investors.

Investors will not be liable beyond the amount of their contributions.

2.3 What are the principal legal structures used for managers and advisers of Alternative Investment Funds?

Please refer to the answer to question 2.1.

2.4 Are there any limits on the manager's ability to restrict redemptions in open-ended funds or transfers in open-ended or closed-ended funds?

In Open-Ended AIFs, the investors have the right to request a redemption of the units/shares of the capital of an Open-Ended AIF at least once a year. Furthermore, the AIF must calculate the value of the units/shares every year, or any time new units/shares are issued. The investors have the right to receive the redemption within 15 days from their request.

In exceptional cases specifically indicated in the AIF regulation or in the AIFM by-laws, the right to receive a redemption can be suspended for not more than one month. The suspension must be immediately communicated to the Bank of Italy and CONSOB.

In Closed-Ended AIFs, the investors have the right to request a redemption of the units/shares of the capital upon maturity of the fund. The maturity can be postponed, for no more than three years, if provided for in the AIF regulation or in the AIFM by-laws. The postponement must be immediately communicated to the Bank of Italy and CONSOB.

The AIF regulation or the AIFM by-laws can also establish the cases in which the right to request a redemption can be anticipated.

2.5 Are there any legislative restrictions on transfers of investors' interests in Alternative Investment Funds?

There are no restrictions apart from those provided for by the fund's management rules, if any.

3 Marketing

3.1 What legislation governs the production and offering of marketing materials?

See question 1.1 above.

3.2 What are the key content requirements for marketing materials, whether due to legal requirements or customary practice?

Marketing materials must be accurate, clear and not misleading.

3.3 Do the marketing or legal documents need to be registered with or approved by the local regulator?

No, marketing or legal documents do not need to be registered.

3.4 What restrictions are there on marketing Alternative Investment Funds?

- **Marketing in Italy of Italian Closed-Ended retail AIFs conducted by an Italian AIFM.** The Italian AIFM must notify CONSOB of its intention to market the Italian Closed-Ended retail AIFs. The Italian AIFM can begin the marketing after receiving the notification from CONSOB.
- **Marketing in Italy of EU Closed-Ended retail AIFs conducted by an Italian AIFM.** The Italian AIFM must transmit a marketing request to CONSOB, which must authorise the request within 20 days, if the conditions are met.
- **Marketing in Italy of EU Closed-Ended retail AIFs conducted by an EU AIFM.** The authorisation procedure described above for EU Closed-Ended retail AIFs conducted by Italian AIFMs applies. In addition, the passport procedure (that is, the competent authority of the home member state of the AIFM must notify CONSOB of the AIFM's intention to market the AIF in Italy) applies too.

3.5 Can Alternative Investment Funds be marketed to retail investors?

Open-Ended and Closed-Ended AIFs can be marketed to retail investors as long as they are not Reserved AIFs.

3.6 What qualification requirements must be carried out in relation to prospective investors?

CONSOB Regulation No. 16190 of 29 October 2007 ("*Regolamento Intermediari*") defines a "client" as the individual or company to whom the intermediary provides investment services. It identifies three categories of clients: (i) retail clients; (ii) professional clients; and (iii) qualified counterparties.

Retail clients are all "customers who do not qualify as professional customers or qualified counterparties". Professional clients are (i) those specifically identified as such by CONSOB (so-called "Professional Clients by Law"), and (ii) those who request the fund manager that they be qualified as professional clients.

The fund manager is required to assess the client's characteristics and its ability to be classified as a professional client.

3.7 Are there additional restrictions on marketing to public bodies such as government pension funds?

Generally speaking, public bodies are classified as retail investors.

However, Italian law also defines professional public clients. The Government and the Bank of Italy are professional public clients by law. Professional public clients on request are Regions, the Autonomous Provinces of Trento and Bolzano, the subjects referred to in art. 2 of Legislative Decree no. 267/2000, as well as national and regional public entities, provided that they meet the following requirements:

- a final revenue ascertained in the last approved management accounts of more than €40 million;

- they have carried out transactions in the financial market of a nominal or notional value greater than €100 million in the three years prior to the conclusion of the contract; and
- presence in the staff of financial management personnel who have acquired adequate skills, knowledge and experience in investment services, including collective management and financial instruments.

3.8 Are there any restrictions on the use of intermediaries to assist in the fundraising process?

The intermediary must be authorised to provide investment services in relation to the marketing of AIFs. The use of intermediaries so licensed is not restricted.

3.9 Are there any restrictions on the participation in Alternative Investments Funds by particular types of investors, such as financial institutions (whether as sponsors or investors)?

There are no specific restrictions on participation by financial institutions besides the measures designed to contain systemic risk.

4 Investments

4.1 Are there any restrictions on the types of activities that can be performed by Alternative Investment Funds?

Please refer to question 1.4.

4.2 Are there any limitations on the types of investments that can be included in an Alternative Investment Fund's portfolio whether for diversification reasons or otherwise?

Under Italian law, specifically Ministerial Decree 5 March 2015, no. 30, the capital of an AIF can be invested in one or more of the following categories:

- financial instruments traded on a regulated market;
- financial instruments not traded on a regulated market;
- bank deposits;
- immovable assets, immovable property rights (including rights resulting from property leasing contracts with translational nature and concessionary relationships) and holdings in real estate companies, and units in other Real Estate AIFs;
- credits and debt securities, including receivables associated with the UCI capital; and
- other assets for which there is a market and which have a value determinable with certainty at least every six months.

5 Disclosure of Information

5.1 What public disclosure must the Alternative Investment Fund make?

See the answer to question 3.2.

5.2 What are the reporting requirements in relation to Alternative Investment Funds?

AIFMs must communicate to the Bank of Italy:

- information related to relevant operations that are to be carried out;
- administrative documents (e.g. minutes of the shareholders' meeting that resolves an amendment of the articles of association);
- information related to modifications to the corporate governance system;
- accounting documents;
- every year, a description of the corporate group;
- every year, information related to the shareholders;
- every year, the financial statements; and
- reports of the supervisory body.

Furthermore, the Bank of Italy and CONSOB, to the extent of their duties, may require the communication of data and information and transmission of documents and records in the manner and within the time limits they establish.

The independent statutory auditors shall notify the Bank of Italy and CONSOB without delay of the acts or facts that may (i) constitute a serious violation of the provisions governing the activity of the AIFM, (ii) jeopardise the continued existence of the AIFM, or (iii) result in an adverse opinion or a qualified opinion on the annual accounts or interim statements of AIFMs.

The board of statutory auditors shall inform the Bank of Italy and CONSOB without delay of any act or fact it comes to know of in the performance of its duties that may constitute a management irregularity or a violation of the provisions governing the activity of an AIFM.

5.3 Is the use of side letters restricted?

The use of side letters is not restricted as long as their existence is disclosed to the other investors.

6 Taxation

6.1 What is the tax treatment of the principal forms of Alternative Investment Funds?

The tax treatment of the main forms of AIF is as follows:

- they are not subject to income tax; and
- they are subject to the Italian regional tax on productive activity ("IRAP") only in the limits of the difference between active commissions and passive commissions.

Withholding taxation is limited to certain capital gains.

6.2 What is the tax treatment of the principal forms of investment manager / adviser?

For FIA managers/consultants, the Italian legislator has not provided any *ad hoc* rules.

Therefore, the Consolidated Text of the Laws on Income Tax ("TIUR") applies.

6.3 Are there any establishment or transfer taxes levied in connection with an investor's participation in an Alternative Investment Fund or the transfer of the investor's interest?

No, there are no such taxes.

6.4 What is the tax treatment of (a) resident, (b) non-resident, and (c) pension fund investors in Alternative Investment Funds?

The tax treatment of investors is differentiated, depending on:

- whether the investment relates to securities or real estate; and
- the residence of the investor.

Therefore:

- A. Resident investors participating in a non-Real Estate AIF: withholding tax on periodic income of 26%.
- B. Resident investors participating in a Real Estate AIF:
 1. Institutional Participants/Non-Institutional Participants with Unqualified Investments: withholding tax on periodic income of 26%.
 2. Non-Institutional Participants with qualifying holdings: perceived incomes contribute to the formation of the participant's income.
- C. Non-resident investor participating in a non-Real Estate AIF:
 1. Non-taxable regime for non-resident individuals as defined in art. 6 of Legislative Decree no. 239/1996 (persons residing in *white list* jurisdictions, international bodies or entities established under international agreements enforced in Italy; foreign institutional investors, even though not subject to taxation, set up in *white list* jurisdictions; central banks or bodies that also manage a foreign State's official reserves).
 2. Withholding tax on periodic income of 26% for other non-resident individuals.
- D. Non-resident investors participating in a Real Estate AIF:
 1. Resident investors participating in a Real Estate AIF for Pension Funds or UCITS of *white list* jurisdictions; international bodies or entities established under international agreements enforced in Italy; central banks or bodies that also manage a foreign State's official reserves.
 2. Withholding tax on periodic income of 26% for other non-resident individuals.

6.5 Is it necessary or advisable to obtain a tax ruling from the tax or regulatory authorities prior to establishing an Alternative Investment Fund?

It is not necessary, but it is highly advisable.

6.6 What steps have been or are being taken to implement the US Foreign Account and Tax Compliance Act 2010 (FATCA) and other similar information reporting regimes such as the Common Reporting Standard?

The Italian Tax Authority must annually exchange information automatically with the other tax authorities of other countries in accordance with the Common Reporting Standard, based on common rules concerning the automatic exchange of information on financial accounts, including AIFs.

6.7 Are there any other material tax issues?

No, there are no other material tax issues.

6.8 What steps are being taken to implement the OECD's Action Plan on Base Erosion and Profit-Shifting (BEPS), in particular Actions 6 and 7, insofar as they affect Alternative Investment Funds' operations?

Most of the BEPS recommendations have already been implemented or will be in the near future.

7 Reforms

7.1 What reforms (if any) are proposed?

A CONSOB/Bank of Italy joint consultation is currently under way with regard to the collective portfolio management regulation.



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A founding partner of LEXIA Avvocati, Francesco Dagnino specialises in corporate law, corporate governance (with a focus on corporate governance of listed companies), securities regulation, investment services, asset management and regulation of financial institutions. Francesco has extensive expertise on mergers & acquisitions, private equity, real estate and venture capital transactions. He also serves as a vice-chairman of the Italian Shareholders' Rights Association (*Associazione Italiana per l'Esercizio dei Diritti degli Azionisti* – "AIEDA").

Francesco Dagnino was admitted to the Italian Bar in 2006. He obtained a PhD in Corporate and Financial Markets Law from the University of Bologna, and an LL.M. in Corporate Law from the New York University School of Law as a Fulbright Scholar and an Arthur T. Vanderbilt Scholar. He was a visiting Scholar at Columbia University in New York. He is the author of many academic publications in the field of corporate law, regulation of financial institutions and private international company law and he is a regular speaker at conferences.



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