

# Italy introduces an innovative regime for the issue and transfer of DLT securities

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## Authors

### Angelo Messore

Partner



### Francesco Dagnino

Partner



### Federico Bonardi

Associate



[lexia.it](https://www.lexia.it)



*The Decree approved by the Italian Government introduces the possibility to issue digital financial instruments through DLT.*

The Italian government approved a decree introducing the possibility to issue digital financial instruments through distributed ledger technology (DLT).

The decree was approved in view of the entry into force of the European Regulation on the DLT Pilot Regime and provides for a detailed and innovative legal framework allowing the issue and transfer of digital financial instruments through DLT as an alternative to paper-based and book-entry securities.

Under the Decree it will be possible also in Italy to issue and offer shares, bonds, or other financial instruments in digital form through Security Token Offerings (STO) even for securities that are not listed on trading venues, as well as to set up trading platforms for digital securities.



## Introduction

On 17 March 2023 the Italian Government approved the Decree No. 25/2023, setting forth the rules on the issue and transfer of digital financial instruments (the “**Decree**”).

The Decree introduces a wide-ranging regime allowing the issue of financial instruments in digital form through ledgers based on distributed ledger technology (“**DLT**”).

The approval of the Decree was necessary in view of the application, starting from 23 March 2023, of the Regulation (EU) 858/2022 (the “**DLT Pilot Regime**”), which regulates the setting-up of trading platforms for DLT financial instruments in the European Union – see our focus available at [this link](#).



While the DLT Pilot Regime applies only to financial instruments listed on DLT MTF, the Decree recognizes the possibility to use the DLT also for the issue of financial instruments that are not traded on trading venues, such as for instance shares of private joint stock companies.

The following paragraphs provide a general overview of the contents of the Decree outlining the key aspects of the new regime. We will provide separate guidance on selected aspects of the Decree.



*The new rules apply only to digital financial instruments included in the list set forth in the Decree – for instance, shares and bonds of joint stock companies, notes of limited liability companies and shares or units of Italian AIFs or UCITS.*

### **Scope of the new rules**

The Decree specified that the notion of “financial instruments” set forth in the Legislative Decree No. 58 of 24 February 1998 (the “**Italian Financial Act**”) includes also financial instruments issued through DLT.

The regime introduced under the Decree applies only to the following categories of financial instruments:

- ▶ shares and bonds of joint stock companies;
- ▶ notes issued by limited liability companies;
- ▶ other debt securities that can be issued in accordance with Italian law;
- ▶ deposit receipts relating to bonds and other debt securities of foreign issuers that are issued by Italian issuers;
- ▶ money market instruments governed by Italian law;
- ▶ shares or units of Italian alternative investment funds (“**AIFs**”) or UCITS.

The Italian Financial Market Authority (“**Consob**”) can extend the scope of the financial instruments subject to the Decree through its second-level regulations.

The Decree does not apply to shares of limited liability companies or other assets that do not fall within the scope of the notion of financial instruments (such, for instance, utility tokens or payment tokens).

The overarching principle of the Decree is that the financial instruments mentioned above can be issued and transferred through entries in a DLT ledger that is kept by a registrar. The Decree introduces a digital system for the issue and transfer of financial instruments that is not subject to the ordinary rules on book-entry securities that are set forth in the Italian Financial Act.



## The DLT ledgers

In line with the definition of distributed ledger used in the DLT Pilot Regime, the Decree specifies that the ledger of digital financial instruments is an information repository that keeps records of transactions and that is shared across, and synchronised between, a set of DLT network nodes using a consensus mechanism.

In order to ensure that the entries in the ledger are made in a secure and reliable way, the ledger must:



*The DLT ledgers must have certain features ensuring that they are correctly kept by the related registrars.*

- ▶ ensure the integrity, authenticity, non-repudiation, non-duplicability and validity of the entries made to attest the ownership and transfer of digital financial instruments and the security interests and other encumbrances created on them;
- ▶ enable, directly or indirectly, to identify at any time the persons in whose favour the entries are made, the category and number of digital financial instruments held by them, allowing also their transfer;
- ▶ allow the person in whose favour the entries are made to access at any time the entries in the ledger relating to its digital financial instruments and extract a copy in electronic format for all purposes required by law;
- ▶ enable the creation of any type of security interests or encumbrances on digital financial instruments;
- ▶ enable Consob and the Bank of Italy to have access to the ledger for the exercise of their respective powers;
- ▶ enable the identification of the details concerning the security interests and other encumbrances created on the digital financial instruments, as per the provisions set forth in the Decree.



*The Decree identifies the information that must be linked to each type of financial instrument issued through DLT.*

## Issue of digital financial instruments

Different rules apply under the Decree to the issue of digital financial instruments depending on the nature of the security to be issued.

In case of issue of digital shares, bonds, notes, units or shares of AIFs or UCITS funds, certain information – specifically linked to each security and indicated in the Decree – must be made available in electronic form and must be made accessible and searchable at all times, including, as the case may be, through the DLT ledger.



Any amendment to the terms and conditions of the bonds or the notes must be made available promptly with the same modalities.

### **Transition strategy**

For each issue of digital financial instruments made through DLT it is necessary to define a transition strategy to transfer the entries from a DLT ledger to another ledger, or to change the regime applying to the issue and transfer of the digital financial instruments.

The issuer may at any time change this regime, or issue securities that were previously issued in “traditional” forms on DLT in accordance with the provisions set forth in the Decree.

### **Exercise of the rights attached to the digital financial instruments**

The entries in the DLT ledger entitle the person holding ownership or other rights on the relevant securities (i.e. the person indicated as such in the entries made in the register) to exercise these rights according to the rules applicable to each instrument and the provisions set forth in the Decree. The holder of these rights may dispose of them in accordance with the applicable law.

The entitlement to the exercise of the rights attached to the digital financial instruments is verified by the issuer on the basis of the entries made in the ledger.

Any person that is indicated as the owner of the instrument in the ledger on the basis of a valid legal title and a *bona fide* transaction is not subject to claims or other actions made by the previous owners of the instrument.

### **Corporate law implications of the ledger**

The entries in the register are used also to identify the person that is entitled to take part to shareholders’ meetings and exercise the voting rights, as well as to receive dividends and other distributions in relation to the digital financial instruments, in accordance with the criteria set forth in the Decree.

The issuer of digital financial instruments may keep its corporate books in accordance with the Italian civil code on the basis of the entries made in the register.



*The ownership or other rights on the digital financial instruments are transferred through entries made in the DLT ledgers. Similarly, the persons entitled to exercise the rights attached to the digital financial instruments are identified on the basis of the information available in the DLT ledgers.*



The shareholders' ledger and the bondholders' ledger can be kept also through DLT ledgers.



*Under the Decree it will be possible to create security interests on digital financial instruments also by way of a floating charge.*

### **Security interests and other encumbrances**

The Decree provides that security interests and other encumbrances on the digital financial instruments can be created only through the entries made in the DLT ledger, by indicating the information detailed in the Decree.

The Decree also regulates the creation of floating charges on digital financial instruments, by providing, among others, that in case the collateral is replaced by, or supplemented with, other financial instruments, the date when the security interest is created remains the date when the interest was created on the original collateral.

Simultaneously with the creation of the floating charge the registrar – or the DLT SS or DLT TSS (as defined below) – must receive written instructions that must be consistent with the agreement entered into with the creditor with respect to the integrity of the value of the collateral and the exercise of the rights on the digital financial instruments posted as collateral.



*A DLT ledger of financial instruments that are not registered with a DLT SS or DLT TSS operating in accordance with the DLT Pilot Regime can only be kept by registrars enrolled in the register kept by Consob.*

### **Financial instruments that are not subject to the DLT Pilot Regime**

Under the DLT Pilot Regime the DLT ledgers can only be kept by entities authorized to operate a DLT settlement system (“**DLT SS**”) or a DLT trading and settlement system (“**DLT TSS**”).

While the requirements to be authorized as DLT SS or DLT TSS are already detailed at EU level under the DLT Pilot Regime, the Decree specifies the requirements applicable to registrars of digital financial instruments that are not subject to the DLT Pilot Regime.

According to the Decree, a DLT ledger for financial instruments that are not kept by a DLT SS or DLT TSS can only be operated by a registrar enrolled in the register kept by Consob. The Decree also specifies that there can be one ledger only for each issue of digital financial instruments, and that this ledger can be kept by one registrar only.

At the time of each issue of financial instruments, the issuer must:

- ▶ notify Consob of the features of such issue and the related registrar, by transmitting any further information as may be identified by Consob in its second-level regulations; and



- ▶ make available to the holders of the instruments the information relating to the way in which the ledger is kept and the security measures adopted to safeguard its operations, including the transition strategy.



*The registrars can be banks, investment firms, market operators established in Italy, as well as issuers (including both financial institutions and other companies) and other non-regulated entities established in Italy.*

### **The registrars**

With respect to the financial instruments that are not subject to the DLT Pilot Regime, the DLT ledgers can be kept only by:

- ▶ banks, investment firms and market operators established in Italy;
- ▶ other financial institutions established in Italy, with exclusive regard to instruments issued by them or other group companies (financial intermediaries registered in accordance with Article 106 of the Italian Banking Act, payment institutions, e-money institutions, AIFMs or UCITS funds managers, insurance or reinsurance undertakings);
- ▶ issuers that are not financial institutions and are established in Italy, but only with respect to digital securities issued by them;
- ▶ companies established in Italy other than those listed above; and
- ▶ other entities that can be identified by Consob in its second-level regulations.

Italian central security depositaries that want to provide these services on an ancillary basis – subject to the required authorizations – are automatically enrolled in the Consob register.

Banks and investment firms established in Italy and the related group companies cannot deal on own account or provide placement services on a firm commitment basis with respect to digital financial instruments registered in their DLT ledgers.

### **Enrolment in the Consob register**

In order to be enrolled in the register Consob verifies – with respect to all possible applicants – that:

- ▶ the ledger ensures the compliance with the requirements set forth in the Decree;
- ▶ the applicant adopted adequate mechanisms and measures in order to: (i) prevent the use of digital financial instruments by persons other than those that are entitled to use them, (ii) ensure business continuity and disaster recovery, including by avoiding



*The enrolment in the Consob register requires the submission of an application and the compliance with the requirements set forth in the Decree. The statutory term of the registration procedure is of 90 days from the date when a complete application is submitted.*

that the information can be access by third parties; (iii) prevent any loss or non-authorized change to the data and the entries related to the digital financial instruments for the entire term of the issue and ensure that the overall number of the digital financial instruments constituting a single issue cannot be modified;

- ▶ the transition strategy published is adequate;
- ▶ the applicant complies with the additional requirements (if any) that will be identified by Consob in its second-level regulations;
- ▶ the applicant transmits a technical report illustrating the initiative, including the elements identified in the Decree.

The statutory term for the registration process with Consob is of 90 days from the date when a complete application is submitted to Consob. Consob must verify whether the application is complete within 20 business days of the date when the submission is made.

### **Additional requirements for non-financial issuers and companies that indent to operate as registrars**

Additional requirements apply under the Decree to issuers that are not financial institutions as well as to other companies established in Italy that intend to operate as registrars. The satisfaction of these requirements is assessed by Consob in the context of the registration procedure described above.

In particular, these companies must be established as joint stock companies and have a minimum capital of at least Euro 150,000. Their financial statements must be audited by an external auditor, and they must take out an insurance policy covering the risks of liability for the damages that may result from their business as registrar. They must also adopt adequate policies to identify, prevent, manage and disclose potential conflicts of interest.

Companies that are not financial institutions and intend to offer DLT ledger services to third parties must also:

- ▶ have a corporate purpose expressly indicating the possibility to carry on this business;
- ▶ appoint persons complying with certain integrity requirements as directors, statutory auditors or general manager(s) (in case of significant registrars, they must also comply with the applicable professional experience, independent, knowledge, correctness and time commitment requirements);



*Issuers and companies that are not regulated financial institutions must comply with more stringent requirements to be enrolled in the Consob register.*



- ▶ have a clear organizational structure with well-defined, transparent and consistent reporting lines, effective internal control and ICT systems, effective outsourcing policies, as well as adequate administrative and accounting procedures to ensure the compliance with the Decree also by the company's personnel.

Consob may introduce additional requirements in its second-level regulations. The Consob regulations will also have to define the criteria to identify registrars that are considered as “significant”.

### **Obligations of the registrars**

The Decree spells out a list of obligations that apply to the registrars.

Any registrar (as well as any DLT SS or DLT TSS) must ensure that the ledger that they keep complies with the requirements specified in the Decree and the related implementing regulations. The registrars as well as the DLT SSs and DLT TSSs must also ensure that the entries in the DLT ledger are always correct, complete and up-to-date.

The registrars must make available to the public – in a form which must be accessible and can be read at any time – a document containing the information related to the operational modalities used to manage the ledger and the security measures adopted in this connection, including also the transition strategy.

### **Liability of the registrars**

A registrar can be held liable for any losses deriving from the keeping of the ledger towards the issuer (if the issuer is not the registrar) as well as the persons in whose favour the entries in the ledger have been made. In order to be released from this liability, the registrar must provide evidence that it adopted all measures aimed at avoiding the occurrence of the loss.

The registrar is also responsible for the damages caused to the person in whose favour the entries in the ledger have been made or the investors (if different). The liability applies in case of false information or information that may induce a third party in error, as well as in case of any omission of an information that was due to be included. The registrar must provide evidence that it applied the level of diligence necessary to ensure the correctness and completeness of the information concerning the operational modalities of the DLT ledgers and the security measures related to them, including the transition strategy, in order not to be held liable for the loss.



*The registrars must abide by the obligations set forth in the Decree, e.g. by ensuring that the entries in the ledger are always correct, complete and up-to-date.*



*Registrars may be held liable for losses incurred by third parties and can be subject to sanctions in case of breach of the obligations set forth in the Decree.*





## Sanctions

In case of breach of the main obligations set forth in the Decree the registrar can be subject to pecuniary sanctions ranging from Euro 5,000 to Euro 5 million. Regulated financial institutions can also be subject to the sanctions contemplated under the Italian Financial Act.

## Additional aspects

The Decree introduces certain rules aimed at identifying the regulatory responsibilities of Consob and the Bank of Italy for the purpose of the DLT Pilot Regime.

It also introduces additional flexibility in order to have access to the Italian Regulatory Sandbox for the provision of investment services without being subject to the related authorization requirements.

## Conversion of the Decree and approval of the Consob regulations

The Decree will have to be converted into law by the Italian Parliament by mid-May. Within the same term Consob should issue the second-level regulations that will supplement the provisions set forth in the Decree.

Pending the approval of these second-level regulations, Consob will keep a temporary register of the entities authorised to operate as registrars.



*The Decree introduces a pioneering regime which will allow Italian issuers to collect funds through STOs. It will create a market for the provision of registrar services and will permit the completion of innovative M&A, capital markets, banking and securitization transactions through DLT.*

## A pioneering regime for the issue of DLT securities

As a result of the entry into force of the Decree, Italy becomes one of the countries at the forefront of the regulatory innovation in terms of DLT securities.

The Decree will facilitate several initiatives in this field and represents a major step towards the simplification of the process for the issue, transfer and settlement of transactions related to financial instruments.

The new rules will allow Italian companies to collect funds through security token offerings (STOs) and have access to trading venues dedicated to this type of financial instruments.

Italian companies can also use the DLT to comply with their corporate obligations, for instance in relation to the keeping of the corporate books and the issue of financial instruments without using paper-based or book-entry securities.

The choice made by the Italian Government to enable companies that are not financial institutions to operate as registrars is particularly



notable, as it will create a market for the provision of this type of services by tech companies specialised in DLT.

Finally, the Decree creates several opportunities for banks, investment firms, and central security depositaries that want to exploit the DLT in order to offer services to Italian companies or structure innovative M&A, capital markets, banking or securitisation transactions.

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## Our Financial Services, Fintech & Blockchain Team



**Angelo Messore**

Partner



**Francesco Dagnino**

Partner



**Andrea Maroni**

Counsel



**Corrado Ghielmi**

Senior Associate



**Giulietta Minucci**

Senior Associate



**Federico Bonardi**

Associate



**Carlo Giuliano**

Associate



**Filippo Belfatto**

Associate



**Tommaso Fossati**

Associate



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