

Offering of foreign non-UCITS funds in Italy: the case of a French FCPE

Introduction

For the first time, the Bank of Italy has expressed a position in relation to the offering in Italy of a peculiar foreign non-UCITS fund (i.e. a fund not set up according to Directive 85/611/EEC, as amended), endorsing Clifford Chance's view in this regard. This was achieved in the context of an authorisation procedure for the offering in Italy of a French investment vehicle denominated *fonds commun de placement d'entreprise* ("**FCPE**"), incorporated according to section L. 214-40 of the French *Code monétaire et financier* (the "**FMF Code**"), for the purposes of implementing an "employee group savings plan" ("**PEG**").

In this client briefing we outline the main issues discussed with the Bank of Italy in order to achieve such great result. In addition, we provide you with some guidelines on how the new regulatory environment should impact the applicable tax regime.

Offering of foreign non-UCITS funds in Italy

In order to be authorised for distribution in Italy, foreign non-UCITS funds - such as the FCPE - must meet certain cumbersome requirements, pursuant to Section 42, Paragraph 5 of the Italian Legislative Decree No. 58/1998 ("**TUF**"). One of these requirements is the conformity of the foreign non-UCITS fund structure to comparable Italian fund structures. Experience has proved that the authorisation procedure is a very lengthy process.

Clifford Chance's approach to the offering of the FCPE in Italy was to demonstrate that the FCPE is not to be classified as a foreign collective investment scheme for the purposes of Section 42 of the TUF, and as such would not trigger the relevant authorisation requirements.

The case of a French FCPE

As to the structure, an FCPE takes the form of a French investment vehicle, governed by article L.214-40 of the FMF Code. However, it is a very peculiar type of investment vehicle, as it solely serves the purposes of a PEG. In broad terms, a PEG may be construed to invest (i) directly in the shares of a group company (by means of a share allocation plan); or (ii) indirectly, through a vehicle such as the FCPE. The FCPE takes the technical form of a particular type of collective investment scheme (*fonds commun de placement*) defined under French law as a co-ownership of financial instruments or deposits that allows a specific type of investors, employees of a company or of companies within the same group (within the meaning of the French Labour Code), to make an investment in the shares of such company or the group to which such company belongs (the "**Shares**"), by subscribing for units of the relevant FCPE (the "**Units**").

Key Issues

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The case of a French FCPE

Envisaged tax regime

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Although an FCPE may have certain features in common with outright collective investment schemes (e.g. an asset management company is appointed in connection with the FCPE), the principal characteristics of an FCPE (such as the FCPE we assisted) and its peculiar applicable legal regime sets it apart, in our view, from traditional collective investment schemes and are consistent with FCPEs' function purely as a mean to implement a PEG.

In the context of the authorisation procedure, Clifford Chance discussed with the Bank of Italy the FCPE's structure, identifying the features that might have suggested that the FCPE qualified as a transparent vehicle rather than as a collective investment scheme. This enabled the Bank of Italy, upon CONSOB's favourable resolution, to endorse our views and thus to resolve that the provisions of Section 42, Paragraph 5 of the TUF do not apply to the distribution of the Units in Italy. Based on such resolution, the FCPE's application for authorisation was subsequently withdrawn.

Envisaged tax regime

Even if the new regulatory view expressed by the Bank of Italy does not directly affect the tax analysis, it may be argued, in absence of relevant law provisions and of public and generally applicable ministerial clarifications on the matter, that the FCPE should be treated as a transparent vehicle also from a tax perspective. Under such view it follows that, subject to certain conditions, the taxable income deriving from the investment in the Units should be subject to the same tax regime applicable to the direct investment in Shares in the context of a PEG. This could also have an impact on the applicable social security regime.

In any case, considering that the content of the resolution of the Bank of Italy in the context of the FCPE's authorization procedure cannot be directly extended to a tax perspective and given the uncertainty of any specific case, it will be necessary to formally consult the Italian tax authorities on the tax ramifications deriving from the investment in the FCPE through the application of the ruling procedure set forth by article 11, of Law No. 212/2000.

Consider that the aforementioned ruling procedure is commonly used in case of PEGs and that we are able to support you in preparing and filing the procedure.

This Client briefing does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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