

COMING SOON: Article 129 Of The Italian Banking Act: New Post Issue Reporting Obligations In Italy. Are you ready?

Article 129 of Italian Legislative Decree No. 385 of 1 September 1993 (as amended, the "**Italian Banking Act**"), further to a major reform back in 2006¹ (which abolished any power of prior supervision from the Bank of Italy on issues and/or offers in Italy of debt securities), provides that the Bank of Italy is empowered to require (i) any Italian entity which issues debt securities (as identified below) or, (as the case may be) (ii) any non-Italian entity which offers debt securities in Italy – to notify or provide to the Bank of Italy certain post-trade reports, data and information concerning such debt securities (the "**Reporting Obligations**").

Article 129 of the Italian Banking Act also provides that the aforementioned Reporting Obligations should be carried out in compliance with the relevant implementing regulations to be issued by the Bank of Italy (the "**Implementing Regulations**").

On 14 October 2013, the Bank of Italy started a public hearing (the "**Public Hearing**") among market participants aimed at assessing the most efficient method to give effect to new Implementing Regulations which would replace the existing ones² (contained in Chapter I, Title IX of Circular no. 229 issued by the Bank of Italy on 21 April 1999 ("**Circular No. 229**").

Further to the above, on 25 August 2015 the Bank of Italy issued a first resolution (the "**First Resolution**") which finally replaced the regime under Circular No. 229.

¹ Cfr. Article 1, paragraph 7 of Italian Legislative Decree No. 303 of 29 December 2006.

² These were suspended by the Bank of Italy on 17 August 2011 as they were no longer deemed to be adequate and efficient for the purposes of Article 129 of the Italian Banking Act.

Subsequently, the First Resolution has been amended (in part only) and restated by way of a second resolution issued by the Bank of Italy on 10 August 2016 (the "**Second Resolution**" and together with the First Resolution, the "**Resolutions**").

Pursuant to the Resolutions, the new Reporting Obligations will enter into force on 1 October 2016 or, as the case may be (see below), 1 January 2017.

The below note is aimed at summarising the main contents of the Resolutions as well as the scope, contents and timing of the several Reporting Obligations.

1. Reporting Obligations: Scope and Exemptions

(a) Scope

The Resolutions provide that (subject to certain exceptions)³, from 1 October 2016, any: (i) issue by an Italian entity of any financial instruments/debt securities other than the Exempted Securities (as defined below) ("**Article 129 Relevant Securities**"), or (ii) offer in Italy of Article 129 Relevant Securities issued by a non-Italian entity, must comply with the Reporting Obligations.

(b) Exemptions

The Resolutions provide that from 1 October 2016, the Reporting Obligations do not apply to the issuance and/or offering (as the case may be) of the following financial instruments/debt securities (the "**Exempted Securities**"):

- company shares or stocks and other similar securities referred to in Article 1, paragraph 1-bis, letter a), of Italian Legislative Decree No. 58 of 24 February 1998 (as amended, the "**Italian Financial Act**")⁴;
- debt securities issued, or guaranteed by EU Member States and other similar securities referred to in Article 100, paragraph 1, letters d) and e), of the Italian Financial Act⁵;

- non-structured financial instruments having an original maturity equal to, or less than 12 months;
- financial instruments issued under a "reverse enquiry arrangement"⁶;
- STEP securities;
- deposit certificates (*certificati di deposito*)⁷;
- financial instruments resulting from the stripping of debt securities;
- financial instruments that (i) cannot be traded on capital markets because - either in full or in part - they are not transferable, or (ii) are offered, assigned or to be assigned to directors (or former directors) or to employees (or former employees) by the issuer or by the parent company, a subsidiary, an affiliate or a company subject to joint control of the issuer;
- securities issued by non-EU Member States; and
- financial instruments that permit exclusively the purchase or sale of the assets listed under the previous numbers, for which settlement through physical delivery of the underlying asset is mandatory

³ Please note that - as further specified below - some provisions will only apply in certain circumstances only from 1 January 2017.

⁴ These are: (i) company shares and other shares equivalent to shares of companies, partnerships or other persons, and (ii) share depositary certificates.

⁵ These are: (i) financial instruments issued or guaranteed by the Italian government or an EU Member State or issued by international organisations of a public nature of which one or more EU Member State is part; (ii) financial instruments issued by the

European Central Bank or the national central banks of any EU Member States.

⁶ Defined in the Resolution as: "any issue of financial instruments carried out at the request of one or more initial purchasers, and in relation to which no subsequent transfer of the securities is allowed. The relevant terms and conditions must provide that the initial purchasers may transfer the financial instruments only to the issuer itself or to a pre-defined entity, which will keep the securities in its portfolio until their expiry or will proceed to have them cancelled";

⁷ As defined in Title V, Chapter 3, of Circular No. 229.

(for example stock options that require the physical delivery of the underlying shares).

2. Reporting Obligations: Notifying Entities, Contents and Timing of Notification

a) Notifying Entities

The Resolutions provide that the Reporting Obligations shall apply to the following entities.

From 1 October 2016:

- if the Article 129 Relevant Securities are issued by an Italian resident issuer, then the Reporting Obligations, shall be carried out by the same issuer (the "**Italian Issuer**");
- if the Article 129 Relevant Securities are issued by a non-Italian resident Issuer (the "**Non-Italian Issuer**"), then the Reporting Obligations shall be carried out by:
 - either by the Italian resident holding company (*soggetto vigilato capogruppo*) (the "**Italian Supervised Holding Company**")⁸, in cases where the Non-Italian Issuer is a member of the same group of the Italian Supervised Holding Company (the "**Italian Supervised Group**"), or
 - by the Non- Italian Issuer itself where the Article 129 Relevant Securities are placed/distributed in Italy on the basis of a private placement or direct listing and the Non- Italian Issuer does not belong to an Italian Supervised Group.

Further to the above, as provided under the Second Resolution, from 1 January 2017 only:

- if the Article 129 Relevant Securities are issued by a Non-Italian Issuer that does not belong to an Italian Supervised Group, then the Reporting Obligations shall be carried out:
 - where the Article 129 Relevant Securities are placed/distributed in Italy through a syndicate, by the relevant settlement manager (with respect to certain information that is available as at the issue date) and, by

⁸ i.e. those entities having their registered office in Italy, that are the holding company ("società capogruppo") of (i) a banking group ("gruppo bancario"), pursuant to Article 61 of the Italian Banking Act, or (ii) a financial group ("gruppo finanziario"), pursuant to Article 109 of the Italian Banking Act, or (iii) of a group of SIMs or of a group of asset management companies ("società di gestione"), pursuant to Article 11 of the Italian Financial Act.

each member of the syndicate (the "**Manager**"), on a several basis (with respect to certain information relating to the relevant amount that it has placed in Italy that shall be notified at a later stage only); or

- where the Article 129 Relevant Securities are placed/distributed in Italy through a so called "pot system", by the relevant lead manager (the "**Lead Manager**"); or
- by the offeror itself in the event of a public offer (without the involvement of any Manager) (the "**Offeror**" and, together with the Italian Issuer, the Non-Italian Issuer, the Italian Supervised Holding Company, the Manager and the Lead Manager, the "**Notifying Entities**" and each a "**Notifying Entity**").

(b) Content and Timing

Under the Resolutions, each Notifying Entity is only liable for the accuracy of the information provided by it (on its own account) and for compliance by it with the several submission deadlines⁹.

The specific data and information (as well as the relevant timing of notification) to be provided by a Notifying Entity vary on a case by case basis (and also on the basis of the nature of the specific Notifying Entity) and are specified in detail in Annex A of the Resolutions.

However, in general, the contents of the Reporting Obligations may be split between:

- so called "qualitative information" (*informazioni di carattere qualitativo*): this is information concerning mainly the details of the relevant Non Exempted Security and the relevant issuer (and any guarantor, if any); for example:

⁹ The Resolutions provide that the collection by the relevant Notifying Entity of the required information under the Reporting Obligations (as further detailed under Annex A of the Resolutions), shall be carried out in accordance with the same procedures that apply to the granting of the ISIN codes by the relevant National Numbering Agencies.

In particular, reports are collected through Internet, Bank of Italy's Infostat platform in accordance with the instructions provided on the Bank of Italy Internet website in the Statistics/ISIN Service and Securities Register section and ISIN (<http://www.bancaditalia.it/statistiche/servizi/isin-anagrafe-titoli/index.html>).

- i. main identification information relating to the issue ("*informazioni anagrafiche all'emissione*")¹⁰;
 - ii. other identification information relating to the issue ("*altre informazioni anagrafiche*")¹¹; and (where applicable only)
 - iii. informations concerning structured financial instruments¹².
- so called "quantitative information" (*informazioni di carattere quantitativo*): information relating to the same Article 129 Relevant Securities concerning mainly: number of certificates in circulation, trading price, placed or underwritten amount, total amount of early redemptions and coupons amount.
 - the so called "quantitative information" (*informazioni di carattere quantitativo*) needs to be filed with the Bank of Italy (as the case may be):
 - following any admission to trading or, should no listing occur, offer period that started in any quarter ending on, respectively, 31 December, 31 March, 30 June and 30 September of any year, within 20 January, 20 April, 20 July and 20 October of each following year; and/or
 - within the twentieth day¹⁴ after the end of the placement/distribution period in Italy; and/or
 - within the first day¹⁵ following the relevant issue/settlement date.

As far as the relevant timing of the Reporting Obligations is concerned, the Resolutions provide several deadlines depending mainly on the specific information to be provided as well as on the nature of the specific Notifying Entity.

In general:

- the so called "qualitative information" (*informazioni di carattere qualitativo*) needs to be filed with the Bank of Italy (as the case may be):
 - within the first working day following (i) the date of publication of a prospectus, or (ii) (in cases where a prospectus is not required) the settlement/issue date (the "**Deadline**"); or
 - within the twentieth day¹³ following the Deadline.

¹⁰ ISIN code; issuer code; issuer's parent company code; guarantor's code; guarantor's parent company code; economic activity sub-group; currency; type of financial instrument; regulated market of listing; multilateral trading facilities (mtf); selling restrictions; priority in repayment; issue or offer price; first entitlement date; settlement date; maturity date; coupon frequency; reimbursement price; issue rate; ISIN code for the reference parameter; indexing of principal and coupons; cap/floor clauses; early redemption option; derivative component (structured financial instruments).

¹¹ Expected duration; effective yield at the time of issue; guaranteed fixed rate component; floating rate component; issue's borrowing cost.

¹² Basic optionality; type of exercise on the derivative; leverage of the security.

¹³ The resolutions do not clarify whether this should be considered as working day as well or not

3. Applicable sanctions

Article 144 of the Italian Banking Act provides that any breach of the Implementing Regulations shall be sanctioned with an administrative fine issued by the Bank of Italy (from Euro 30,000 Euro up to 10% of the annual turnover of the relevant Notifying Entity in breach).

4. Conclusions

Although several market participants (including ICMA, ISDA and ASSOSIM) raised in the context of the Public Hearing a number of comments (and some doubts) with the Bank of Italy on several provisions contained in the draft Implementing Resolutions¹⁶, only some have been accepted in the final drafts of the Resolutions (in particular with regards to the extension of the reporting deadlines for "quantitative information" and the postponement of the entry into force of the Regulations for Managers, Lead Managers and/or Offerrers as Notifying Entities introduced by the Second Resolution). Accordingly, doubts still remain around the interpretation of certain provisions of the Resolutions and, therefore, pending any further clarifications by the Bank of Italy (and any actual market practice), any Notifying Entities will need to take due care when carrying out their Reporting Obligations in order to mitigate any risk of being sanctioned by the Bank of Italy.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Cfr

<https://www.bancaditalia.it/compiti/vigilanza/normativa/consultazioni/2013/art29-tub/Resoconto.pdf>.

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