Italian debt securities: the market opens up

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As part of a series of reforms aimed at encouraging economic growth, the Italian government has enacted new legislation that significantly relaxes legal and tax restrictions on the issuance of debt securities by Italian unlisted companies. This process began with the enactment of Law Decree No. 83 of 22 June 2012 ("**Decree No. 83**") and was completed with the coming into force of Law No. 134 of 7 August 2012, which amended Decree No. 83 and removed some of its more controversial aspects.

1. Disapplication of statutory limits on bond issuance

Article 2412 of the Italian Civil Code imposes limits on the issuance of bonds by companies limited by shares (*società per azioni* or *S.p.A*'s) but, under Decree No. 83, these no longer apply to bonds which:

- are intended to be listed on an EEA regulated market or multilateral trading facility (or MTF); or
- give the right to acquire or subscribe for shares.

In contrast to the previous rules, this new exemption applies regardless of whether the issuer is a listed or an unlisted company, *i.e.* regardless of whether its shares are listed.

2. More favourable withholding tax regime

Under Decree No. 83, instead of withholding tax, a substitute tax regime now applies on interest and similar income on the bonds and, although the rate is 20%, many investors are normally entitled to receive those payments without any deduction of substitute tax, including institutional investors in Italy and investors from "white-list" countries (*i.e.* states and territories considered to offer an adequate exchange of information with the Italian tax authorities). The substitute tax regime applies provided that

- the securities are traded on an EEA regulated market or MTF; and
- that EEA member State is a white list country.

3. Deductibility of interest and expenses

The payment of interest on bonds by Italian unlisted companies is no longer subject to the severe limitations on deductibility for corporation tax purposes that previously applied. This is as long as the issuer is not a micro enterprise and the bonds are subscribed for by qualified investors who are not shareholders of the issuer. This tax benefit applies regardless of whether the bonds are admitted to trading on a regulated market or a multilateral trading facility.

Fees and other expenses related to the issue of bonds are now deductible when incurred regardless of their accounting treatment, provided that the bonds are traded on an EEA regulated market or MTF.

4. Issue of commercial paper

Decree No. 83 also allows limited companies, co-operatives and mutual insurance companies (other than banks and micro enterprises) to issue commercial paper (*cambiali finanziarie*) with a maturity of not less than one month and not more than three years. For unlisted companies, the issue of commercial paper is subject to the following requirements:

- the most recent financial statements of the issuer must be audited by independent auditors;
- the commercial paper must be issued and subsequently transferred solely to "professional investors" who must not be shareholders of the issuer; and

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- if the issuer is an SME, it must be assisted by a sponsor, whose role includes the following:
  - to assist the issuer in the issue and placement of the commercial paper;
  - to hold a proportion of the commercial paper to maturity; and
  - to classify the issuer according to its creditworthiness and to publish the classification.

The tax regime for commercial paper has been aligned to that applicable to bonds.

5. Subordination and profit participation clauses

Decree No. 83 also allows for the issuance of bonds containing profit participation and subordination provisions.

6. Overview

There remain a number of areas of uncertainty concerning the legislation, of which the main ones may be briefly summarised as follows:

- some lingering doubts over the scope of the relaxation of tax restrictions;
- for limited liability companies (*società a responsabilità limitata* or *S.r.l*'s), transfer restrictions on the issue of debt securities under Article 2483 of the Italian Civil Code have not been amended by Decree No. 83, which is disappointing as the vast majority of SME's in Italy are S.r.l's; and
- for SME's wishing to issue commercial paper, it is still not known whether institutions eligible to act as sponsor would be willing to take on all of the responsibilities envisaged under that role.

Notwithstanding these points, it is fair to say that the new legislation has successfully removed many of the legal and tax obstacles to the issue of debt securities by unlisted Italian companies and can only be welcomed.