

Newsalert

Patrimonio Rilancio: participation in share capital increases by Italian corporates

1. Introduction

On 20 November 2020 the draft Italian decree (the "**Draft Decree**") of the Italian Ministry of Economy and Finance ("**Ministry of Finance**") setting out the regulations for the operation of a new Italian Patrimonio Rilancio went to Parliamentary committee stage and the Parliamentary Committees gave their opinion on December¹).

The aid scheme outlined in the Draft Decree provides for certain recapitalisation and financial support measures to be implemented via committed resources to be administered by the segregated fund called "Patrimonio Rilancio" (the "**Patrimonio Rilancio**") to be established by *Cassa Depositi e Prestiti S.p.A.* (an Italian majority-State-owned company) ("**CDP**") pursuant to the provisions of Law Decree No. 34 of 19 May 2020 (the so-called "**Decreto Rilancio**", converted into Law No. 77 of 17 July 2020). The intention is that the Patrimonio Rilancio will invest on the basis of the criteria set out in the Draft Decree.

Further instructions on the operation of Patrimonio Rilancio will be contained in the regulation which will be adopted by the board of directors of CDP, subject to approval by the Ministry of Finance (the "**Regulation**").

Under the Draft Decree, the Patrimonio Rilancio can invest in one of two ways:

- (i) under the EU's *Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak* (the "**Temporary Framework**"), as to which see Section 2 below; or

¹ The opinion released on 22 and 28 December 2020 respectively by the Parliamentary Committees of the Chamber of Deputies and of the Senate are available here (in Italian only):

<https://www.camera.it/leg18/824?tipo=A&anno=2020&mese=12&giorno=22&view=&commissione=0610#data.20201222.com0610.allegati.all00010>

http://www.senato.it/japp/bgt/showdoc/frame.jsp?tipodoc=SommComm&leg=18&id=1187646&part=doc_dc

- (ii) on market conditions ("**Market Regime**"), as to which see Section 3 below.

2. Temporary Framework – Participation in capital increases

Among other available instruments, the Patrimonio Rilancio may subscribe for capital increases of Italian corporates upon request of the issuer ("**Capital Increases**") under the Temporary Framework.

2.1 Eligibility requirements

In addition to the general eligibility criteria applicable to the company under the Decreto Rilancio, as further supplemented and specified by Article 3 of the Draft DM, in order to be eligible for the capital increases measures under the *Temporary Framework* regime, the following further requirements must be met:

- (i) without the intervention of the Patrimonio Rilancio, the issuer would have serious financial difficulties in continuing to operate as a going concern;
- (ii) without the intervention of the Patrimonio Rilancio, there would be social difficulties and material job losses, the exit from the market of an innovative or systemically important enterprise, or a risk of disruption of a significant service;
- (iii) the company is not able to obtain funding in the market on affordable terms and the additional liquidity support measures in Italy to deal with the consequences of the pandemic are insufficient to ensure its viability;
- (iv) the company was not an “undertaking in difficulty” as at 31 December 2019 (within the meaning of Regulation (EU) 651/2014); and
- (v) the company is not State-owned, as defined in Article 2, paragraph 1, letter n), of Legislative Decree No. 175 of 19 August 2016, with the exception of companies in which the State’s ownership stake is less than 10% of the share capital and with the exception of listed companies;

The issuer must self-certify compliance with the eligibility criteria.

2.2 The maximum amount of the Capital Increases

The amount of the Capital Increase shall not be less than EUR 100 million per intervention.

In addition, in order to comply with the requirements of the Temporary Framework, the aid granted by Patrimonio Rilancio through the subscription of Capital Increases:

- (i) may not cause the debt to equity ratio of the company as at 31 December 2019 to be exceeded;
- (ii) with respect to listed companies, may not involve the issuance of new shares in excess of 20% of the company's listed shares over a period of 12 months preceding the date of issuance of the new shares to the Patrimonio Rilancio;
- (iii) with respect to unlisted companies, may not involve the issuance of new shares in excess of 20% of the outstanding shares of the company as at the date of the intervention of the Patrimonio Rilancio, which may be increased by a further 4.99% when a simultaneous co-investment of an equal amount is made by third party investors.

2.3 Commitments and conditions of beneficiary companies

In order to prevent distortions of competition, the companies benefiting from Capital Increases will have to undertake certain commitments and comply with certain conditions, including:

- (i) not to advertise the granting of the measure for commercial benefit;
- (ii) not to acquire holdings of more than 10% in competing companies;
- (iii) not to make any non-compulsory dividend payments or shares repurchase other than in favour of the Patrimonio Rilancio;
- (iv) not to increase the fixed portion of directors' and executives' remuneration compared to 2019, and not to pay bonuses or other variable (or similar) components of remuneration,
- (v) to keep separate books of accounts to mitigate the risk of receiving multiple subsidies for undertakings in difficulty on 31 December 2019;
- (vi) not to relocate its know-how and production activities and not to transfer its registered office outside of Italy;
- (vii) to comply with the use of proceeds plan submitted to the Patrimonio Rilancio accompanying the company's request and periodically report on the use of the proceeds received from the Patrimonio Rilancio.

The commitments set out in (ii) and (iv) above shall apply until 75% of the funds advanced by the Patrimonio Rilancio has been repaid.

In addition, under certain conditions ⁽²⁾, some of the above-mentioned commitments will not apply, in whole or in part, or will apply for a more limited time horizon (typically 3 years after the intervention).

2.4 The main economic conditions of the Capital Increases

The Draft Decree sets out, in detail, the economic conditions to be applied to the Capital Increases.

A brief description is given below.

1. The subscription price for the Capital Increases will be determined as follows:
 - (i) for listed companies, on the basis of the lower of the weighted average of the official listing prices in the 15 days preceding the date of the issuer's request, in the 15 days preceding the announcement to the market of the issuer's request, if earlier, and in the six months preceding the announcement to the market of the issuer's request; and
 - (ii) for unlisted companies, on the basis of the market value of the company, as resulting from a valuation made by an independent expert appointed by the issuer based on a vendor due diligence;

⁽²⁾ Generally speaking: State participation in the share capital of the company concerned and significant private participation in the funding (in principle corresponding to at least 30 % of the relevant amount). These exceptions are generally reserved for interventions involving listed companies.

2. provisions that will progressively increase the return on investment of the Patrimonio Rilancio (up to a potential maximum of 20%) – a so-called ‘step-up’ – will be envisaged⁽³⁾;
3. the beneficiary company will always have the right to buy back the shares held by the Patrimonio Rilancio at a price that allows for a fair exit remuneration;
4. with reference to unlisted companies only, there will be additional exit mechanisms in favour of the Patrimonio Rilancio, including:
 - (i) a drag-along right vis-à-vis the reference shareholder in the event of transfer of control of the beneficiary company;
 - (ii) a put option vis-à-vis the reference shareholder of the beneficiary company, and
 - (iii) a right of withdrawal from the beneficiary company, in the event of unsuccessful exercise of the put option right.

3. Market Regime

3.1 Interventions under the “Market” regime

The Market Regime is divided into different forms of fundraising:

- (i) standard market transactions ("**Standard Market Regime**"),
- (ii) funding for strategic companies ("**Strategic Companies Regime**"), and
- (iii) restructuring transactions ("**Restructuring Transactions**").

3.2 Standard Market Regime

3.2.1 Fundraising instruments: Capital Increases

The Patrimonio Rilancio may provide funding under the Standard Market Regime by participating (inter alia) in Capital Increases.

The Standard Market Regime, however, will require a simultaneous co-investment by at least one private investor (also already a shareholder of the company) for not less than 30% of the aggregate amount of the fundraising applied for. These fundraisings must be on market terms according to the principle of the so-called *market economy operator* ('MEO') test such in order to mitigate the risk of the aid falling foul of the State aid regime under Article 107(1) TFEU.

3.2.2 Eligibility criteria

In addition to the general eligibility requirements provided for under the Patrimonio Rilancio, as further supplemented and specified by Article 3 of the Draft DM, in order to be eligible for the capital increases measures under the Standard Market Regime, the following further requirements must be met:

⁽³⁾ This mechanism will not, however, apply to funding for listed companies where there is (i) a State participation in the share capital of the company involved, and (ii) a significant private participation in the funding (in principle corresponding to at least 30 % of the relevant amount).

- (i) the company must submit two of the last three approved and audited annual accounts in profit, the last of which must be dated not more than 18 months before the date of the issuer's request;
- (ii) on the date of the company's request and on the issue date, the company must not be in a situation of difficulty within the meaning of Article 2(18) of Commission Regulation No. 651/2014 of 17 June 2014 ⁽⁴⁾;
- (iii) the company is not a company in which the State owns shares, as defined in Article 2, paragraph 1, letter n), of Legislative Decree No. 175 of 19 August 2016, with the exception of companies in which the State's ownership is less than 10% of the share capital and with the exception of listed companies; and
- (iv) on the date of the company's request and on the issue date, the company is not registered in the Bank of Italy's "Centrale Rischi" as "non-performing" and the ratio of "total cash overdrafts" to "total operating cash" shall not be higher than 20%.

The issuer must self-certify compliance with the eligibility criteria.

3.2.3 Maximum amount of Capital Increases

Firstly, the amount of the Capital Increases shall not be less than EUR 25 million per intervention.

In addition, Capital Increases under the Standard Market Regime will have to comply, in particular, with the following additional size constraints:

- (i) with respect to listed companies, the issuance may not result in the allocation to the Patrimonio Rilancio of a number of underlying shares exceeding the percentage of the voting capital entailing the obligation to launch a takeover bid on the company;
- (ii) with regard to non-listed companies, the issuance may not result in the allocation to the Patrimonio Rilancio of a number of shares that would confer legal control of the company.

3.2.4 Undertakings and conditions

The contracts relating to the funding through Capital Increases by the Patrimonio Rilancio under the Standard Market Regime may impose undertakings and conditions on the company, including:

- (i) limits and commitments relating to the distribution of dividends;
- (ii) an undertaking by the majority shareholders of the issuer not to engage in activities in competition with those carried out by the company;
- (iii) an undertaking not to relocate know-how and production activities abroad and not to transfer its registered office abroad;
- (iv) limits on the use of the proceeds deriving from the issue of the Bond;
limits on the remuneration of directors and senior managers.

3.2.5 Principal economic terms

Pursuant to the provisions of the Draft Decree, the subscription price for the Capital Increases will be determined:

⁴ This access requirement is met by satisfaction of objective and predetermined criteria.

- (i) for listed companies, on the basis of the lower of the weighted averages of the official listing prices in the 15 days preceding the date of the issuer's request, in the 15 days preceding the announcement to the market of the issuer's request, if earlier, in the 6 months preceding the announcement to the market of the issuer's request; and
- (ii) for unlisted companies, on the basis of the market value of the company, as resulting from an evaluation carried out by an independent expert appointed by the issuer based on a vendor due diligence.

3.3 Strategic Companies Regime

With regard to equity instruments, the Patrimonio Rilancio may invest under the Strategic Companies Regime as follows:

- (i) directly, through the purchase of shares in the primary and secondary markets, or
- (ii) indirectly, through the subscription of units of UCITS.

3.3.1 "Direct" funding

"Direct" funding is restricted to strategic companies (as defined in the Draft Decree) that meet the following requirements:

- (i) its shares are listed on the Italian stock exchange (managed by Borsa Italiana S.p.A.) and it has a market capitalization of more than EUR 250 million;
- (ii) a free float of more than 25%, and
- (iii) an average daily trading volume of the shares in the 6 months preceding the intervention greater than EUR 1 million.

3.3.2 "Indirect" funding

"Indirect" funding is restricted to strategic companies that meet the following requirements:

- (i) its shares are listed on regulated or multilateral stock markets;
- (ii) it has a market capitalization of less than EUR 250 million.

"Indirect" funding is carried out through the subscription of units of UCITS that invest mainly in Italian SMEs whose objectives and investment policy are consistent with the objectives of the Patrimonio Rilancio.

3.4 Restructuring Transactions

Finally, the Patrimonio Rilancio can provide funding in respect of Restructuring Transactions in favour of companies that, notwithstanding temporary economic or financial difficulties, have reasonable prospects of future profitability.

The Patrimonio Rilancio can invest in the Restructuring Transactions:

- (i) directly, principally by subscribing for Capital Increases simultaneously with one or more co-investors (on the same terms and conditions), which may include the existing shareholders of the company, who must fund an amount that is not lower in aggregate than the amount of the funding provided by the Patrimonio Rilancio;
- (ii) indirectly, by subscribing for units or shares of Italian alternative UCITS.

3.4.1 "Direct" funding

"Direct" funding by the Patrimonio Rilancio may not, however, be for less than EUR 250 million per capital injection.

When applying, the company must have to submit, among other things, a restructuring plan certified by an independent expert, showing the sustainability of the debt and a 'fair value' valuation of the company, determined in accordance with the criteria set out in the Draft Decree, which has a positive "pre-money" value before the new finance injected.

Finally, specific commitments and conditions may be attached to the company.

Companies in a reversible crisis situation which have applied for, or had access to, one of the procedures referred to in Article 182-bis of the Bankruptcy Law, or an arrangement with creditors, will also be eligible for assistance.

3.4.2 "Indirect" funding

"Indirect" funding may be provided by the Patrimonio Rilancio subject to the following conditions:

- the units or shares of the UCITS are subscribed on the same conditions as the Patrimonio Rilancio by one or more private co-investors, or one or more private co-investors must participate in the rescue by the Patrimonio Rilancio via the UCITS under the same conditions;
- the objectives and investment policy of the UCITS must be consistent with the purposes of Patrimonio Rilancio;
- the amount of the UCITS (being the greater of the amount of subscription commitments raised and the amount of assets as shown in the latest approved annual or semi-annual report) is at least EUR 100 million;
- each investment of the UCITS is no greater than 20% of the amount of the UCITS; and
- the amount of the units or shares of the UCITS subscribed by the Patrimonio Rilancio is at least EUR 30 million and not more than 49% of the amount of the UCITS.

For further information, please reach out to your usual contacts at Chiomenti.