

DIGITAL SECURITIES NOW A REALITY IN ITALY

On 16 March 2023, the Italian government passed the DLT Decree (Decree-Law no. 25/2023) – a long-awaited new law setting out the framework for the issuance of securities in digital form by means of distributed ledger technology (DLT).

With the DLT Decree, Italy closes the gap with other EU jurisdictions where similar laws have been passed in recent years: as openly stated in the recitals, a key purpose of the DLT Decree is to ensure that Italian market participants do not find themselves at a competitive disadvantage relative to participants in other EU Member States.

The DLT Decree was enacted in the form of a decree-law issued by the government and will need to be converted into ordinary law by the parliament within 60 days of its publication in the official gazette.

KEY CONTENTS

Digital form / distributed ledger:

The DLT Decree introduces a new form of security, referred to as 'digital form'. Until now, Italian securities could be issued either in dematerialised form, or as paper-based bearer or registered securities. Following the enactment of the DLT Decree, it is now possible to issue securities in digital form, meaning securities that exist solely in the form of data entered and stored in a distributed ledger. A very broad range of securities can be issued in digital form, including shares, bonds, fund units and other securities.

To be eligible to host securities in digital form, a distributed ledger must meet certain requirements, as set out in the DLT Decree, such as: 1. ensuring the integrity, authenticity and validity of the data stored in the ledger; 2. allowing the identification of the securities issued in the ledger, and their holders; 3. allowing holders to access the ledger and obtain an excerpt of the ledger showing their positions; 4. permitting the registration of in-rem rights created over the securities issued in the ledger; 5. ensuring that the regulators are granted access to the ledger.

Key points

- Italy's new DLT Decree finally makes it possible to issue digital securities in Italy.
- Securities eligible for issuance in digital form include shares, bonds, fund units and other securities.
- Digital securities will be hosted on a distributed ledger; the person in whose name a given security is entered in the ledger will be deemed to be holder of that security; in-rem rights over digital securities will also be created and evidenced solely by way of entries in the ledger.
- The ledger will be kept either by a DLT SS or DLT TSS authorised under the Pilot Regime, or by a 'person responsible for the ledger', i.e., a ledger operator accepting responsibility for the proper functioning of the ledger.
- The DLT Decree is already in effect (even pending conversion into ordinary law, and publication of certain second-level measures); issuers and service providers can rely on it to explore the opportunities offered by DLT instruments and infrastructures.

Transfer regime:

The DLT Decree sets out the legal regime governing the transferability of digital securities, and the creation of in-rem rights over them. With this, the Italian legislator has clarified the legal effects of entries made in the ledger – which is crucial for ensuring the viability of a digital issuance.

Pursuant to the DLT Decree, the person in whose name a given security is entered in the ledger is deemed the holder of that security (if it has acquired it in good faith) and is exclusively entitled to exercise all the rights attaching to that security.

Moreover, the DLT Decree makes provision for the creation of in-rem rights over digital securities by way of appropriate entries in the ledger.

Ledger operator / authorisation process:

Under the DLT Decree, the distributed ledger must be kept either by a DLT settlement system (DLT SS) or DLT trading and settlement system (DLT TSS) authorised under the EU Pilot Regime (Regulation (EU) 2022/858), or by a 'person responsible for the ledger', *i.e.* a ledger operator who is enrolled in a local register maintained by CONSOB (the Italian securities regulator), and who takes responsibility for the correct functioning of the ledger vis à vis the issuer and the holders. Ledger operators must adopt adequate measures to prevent the use of digital securities by persons other than the holders, ensure business continuity, and prevent the loss or unauthorised manipulation of data entered in the ledger.

The enrolment in the register of ledger operators is subject to prior authorisation by CONSOB, and is open to banks, investment firms and other financial intermediaries, as well as any other unregulated entities – although the latter will have to meet certain additional requirements in order to obtain the authorisation.

In terms of process, upon receiving an application for registration CONSOB will assess whether the application is complete within 20 days of receipt. Following such assessment, CONSOB will enrol the applicant in the register of ledger operators within 90 days if the applicable requirements are met.

INITIAL CONSIDERATIONS

The publication of the DLT Decree represents a key milestone in the development of the digital capital markets in Italy. Until now, many grey areas existed around whether it was actually possible to issue digital securities in Italy, and how to do so. This discouraged market participants from exploring digital alternatives to traditional capital markets.

In this regard, the DLT Decree is potentially a game-changer, as it provides much needed certainty regarding the possibility to issue DLT instruments under Italian law, as well as – crucially – the possibility to transfer such instruments by way of entries in a DLT ledger.

In terms of design, the architecture laid down by the DLT Decree shows some similarities with solutions adopted in other EU jurisdictions, in that it contemplates the role of the ledger operator, who accepts responsibility for the proper functioning of the distributed ledger. This may lead to a ledger that is ultimately placed under the control of a single identified person, as opposed to operating in true decentralised fashion. This is, however, an almost inevitable compromise that must be tolerated, realistically, for DLT market infrastructures to obtain regulatory blessing in the real world (as also evidenced by the policy choices made at EU level in the Pilot Regime).

One aspect that stands out in the DLT Decree is that it expressly references the Pilot Regime, permitting the creation of digital securities to be hosted on DLT

platforms established under the Pilot Regime, with legal certainty as to compatibility of those platforms with local law requirements. An upside of the DLT Decree being passed after the enactment of the Pilot Regime (and just days before the latter is scheduled to enter into force) is that it can promote the cohesion and integration between the local framework and the broader EU DLT ecosystem – an advantage that corresponding laws in other jurisdictions who pioneered legislation in this space did not enjoy.

Specifically, the DLT Decree permits the issuance of digital securities on a ledger kept either by a ledger operator authorised under the DLT Decree, or by the operator of a DLT SS or DLT TSS authorised under the Pilot Regime; however, the DLT Decree does not go as far as to suggest that any distributed ledger underpinning a DLT SS or DLT TSS is, by definition, an eligible ledger for the creation of an Italian digital security. It follows, therefore, that any such ledger would still need to meet all the requirements set out in the DLT Regime.

Additionally, we note that article 18 of the DLT Decree provides, generally, that the issuance of digital securities can only be effected on a ledger kept by a ledger operator authorised under the DLT Decree. This seems to negate the possibility for operators of DLT SS or DLT TSS to do the same, with no need for local authorisation; that said, the fact that this article is located in the section of the DLT Decree dedicated solely to instruments "not entered in a DLT SS or DLT TSS" suggests that when, instead, a digital security is entered in a DLT SS or DLT TSS, the relevant operator does not need to be separately authorised under the DLT Decree.

NEXT STEPS AND OPPORTUNITIES

The DLT Decree, being a decree-law, will need to be converted into ordinary law by the Italian parliament within 60 days of its publication. This notwithstanding, the DLT Decree is already in effect, even pending such conversion. Moreover, Consob has been tasked with issuing certain second-level implementing measures, governing selected aspects of digital issuances, e.g. the establishment of the register of ledger operators. That said, article 32 of the DLT Decree clarifies that, until such time as these measures are enacted, Consob will enrol ledger operators in a temporary register.

All of this suggests that the regime laid down by the DLT Decree is already available to issuers and operators wishing to explore the possibilities offered by digital instruments and infrastructures, with no need to wait for further legislative steps before going live.

The DLT Decree opens up an array of opportunities for both issuers and service providers seeking to reap the benefits of digital capital markets solutions, including a significant reduction in transactional and operational costs, increased automation of otherwise lengthy processes (removing manual intervention), and achieving real-time settlement. The DLT Decree is quite broad in terms of instruments that are eligible for issuance in digital form (encompassing shares, bonds, fund units and other securities); this makes the new regime potentially suitable for many different types of issuers, and the providers that service them.

Especially noteworthy is, finally, the express link between the DLT Decree and the Pilot Regime: this will make it possible to launch DLT-enabled initiatives at EU level under the Pilot Regime and have Italian law governed securities issued, settled, and possibly traded through them, with a high degree of legal certainty. Securities issued under the DLT Decree may thus be especially suitable for being held through DLT SS or DLT TSS established under the Pilot Regime.

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