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Financial Services Compliance in Italy

Legance Avvocati Associati

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Regulatory framework

Regulatory authorities

What national authorities regulate the provision of financial products and services?

The National Commission for Companies and the Stock Market (Consob) and the Bank of Italy are the national authorities that regulate the provision of financial services and products.

The duties and activities carried out by Consob and the Bank of Italy are aimed at:

- maintaining confidence in the financial system;
- investor protection;
- stability and good functioning of the financial system;
- competitiveness of the financial system; and
- compliance with financial regulatory provisions.

A memorandum of understanding has been entered into between Consob and the Bank of Italy to ensure full coordination of these authorities' supervisory activities and to regulate their tasks and duties as well as the exchange of information.

What activities does each national financial services authority regulate?

Consob is competent with respect to transparency and correctness in the conduct of business while the Bank of Italy is competent in relation to risk containment, financial stability and sound and prudent management of intermediaries.

The Bank of Italy regulates, inter alia, the obligations relating to the provision of investment services and activities and collective asset management with particular regard to:

- corporate governance and general organisational requirements;
- remuneration systems;

- business continuity;
- administrative and accounting organisation;
- business risk management;
- internal audit;
- liability of senior management; and
- outsourcing of essential or important operating functions or services or activities.

What products does each national financial services authority regulate?

Legislative Decree No. 58/1998 (Consolidated Finance Act) includes within the definition of financial products any ‘financial instruments and any other form of investment of a financial nature’ (with the exclusion of bank or postal deposits without the issue of financial instruments).

According to Annex I, section C), of the Consolidated Finance Act, ‘financial instruments’ are:

- transferable securities (eg, shares and bonds);
- money-market instruments;
- units of collective investment undertakings;
- options, futures, swaps, forward rate agreements and any other derivative contracts relating to securities, currencies, interest rates or yields, emission allowances or other derivatives instruments, financial indices or financial measures that may be settled physically or in cash;
- options, futures, swaps, forwards and any other derivative contracts relating to commodities that must be settled in cash or may be settled in cash at the option of one of the parties other than by reason of default or other termination event;
- options, futures, swaps, and any other derivative contract relating to commodities that can be physically settled provided that they are traded on a regulated market, a multilateral trading facility (MTF), or an organised trading facility (OTF), except for wholesale energy products traded on an OTF that must be physically settled;
- options, futures, swaps, forwards and any other derivative contracts relating to commodities, that can be physically settled not otherwise mentioned in the point above and not being for commercial purposes that have the characteristics of other derivative financial instruments;
- derivative instruments for the transfer of credit risk;
- financial contracts for differences;
- options, futures, swaps, forward rate agreements and any other derivative contracts relating to climatic variables, freight rates or inflation rates or other official economic statistics that must be settled in cash or may be settled in cash at the option of one of the parties other than by reason of default or other termination event, as well as any other derivative contracts relating to assets, rights, obligations, indices and measures that have

the characteristics of other derivative financial instruments, having regard to whether, inter alia, they are traded on a regulated market, OTF, or an MTF; and

- emission allowances consisting of any units recognised for compliance with the requirements of Directive 2003/87/EC (Emissions Trading Scheme).

‘Any other form of investment of a financial nature’ basically refers to any investment proposals entailing a capital investment, a financial return expectation and a risk assumption.

Authorisation regime

What is the registration or authorisation regime applicable to financial services firms and authorised individuals associated with those firms? When is registration or authorisation necessary, and how is it effected?

The provision of investment services and activities on a professional basis to the public is reserved to Italian investment firms (*società di intermediazione mobiliare*), EU investment firms, Italian banks, EU banks, and non-EU companies whose activity corresponds to the one of EU investment firms or EU banks performing investment services or activities. Certain investment services can also be provided by Italian asset management companies (*società di gestione del risparmio*), EU asset management companies provided they are authorised in the home country, and financial intermediaries enrolled in a register held by the Bank of Italy pursuant to article 106 of Legislative Decree No. 385/1993 (Consolidated Banking Act).

Authorisation regime

Consob is competent to authorise - following consultation with the Bank of Italy and provided that certain conditions are met - the performance of investment services and activities by Italian investment firms.

The Bank of Italy is competent to authorise - following consultation with Consob and provided that certain conditions are met - the performance of investment services and activities by Italian banks, Italian asset management companies, Italian branches of non-EU banks, and financial intermediaries enrolled in the above-mentioned register under article 106 of the Consolidated Banking Act.

EU investment firms and EU banks

EU investment firms and EU banks wishing to provide investment services and activities in Italy can establish a branch or avail themselves of the freedom to provide services.

As to EU investment firms wishing to establish a branch in Italy a prior communication must be sent to Consob by the home country authority. The branch can start its activities once it has received a communication from Consob or, if it receives no response from Consob, two months after the communication by the home country authority. A simple communication by the home country authority to Consob is due in the case of freedom to provide services.

Similar rules apply in relation to EU asset management companies.

With respect to EU banks, the procedures set forth in the provisions of the Single Supervisory Mechanism apply in relation to the establishment of a branch in Italy. With particular regard to banks of EU countries not taking part in the Single Supervisory Mechanism, the establishment

of a branch requires a prior communication to the Bank of Italy by the home country authority (the branch can start its activities two months after the communication to the Bank of Italy). A communication by the home country authority to the Bank of Italy is due in the case of freedom to provide services.

Non-EU companies (other than banks) and non-EU banks

The establishment of a branch in Italy - to be authorised by Consob after consultation with the Bank of Italy in the case of non-EU companies and by the Bank of Italy after consultation with Consob in the case of non-EU banks - is required to provide investment services to and carry out investment activities for retail and professional clients on request. With regard to professional clients and eligible counterparties, non-EU companies can act in accordance with the freedom to provide services only if the conditions under EU Regulation No. 600/2014 are met.

Financial advisers offering services off-site

For the off-site offer of financial instruments and investment services, intermediaries must appoint qualified financial advisers.

The activity of financial advisers is carried out in the interest of only one intermediary. To be enrolled in the relevant register, financial advisers need to satisfy requirements set forth by Consob (eg, possession of integrity and professional requirements).

Legislation

What statute or other legal basis is the source of each regulatory authority's jurisdiction?

Supervisory powers of the competent authorities are based on a legal framework of primary and secondary law sources.

Primary sources are the Consolidated Banking Act and the Consolidated Finance Act. The former regulates banking and financial activities carried out by banks and other financial intermediaries; the latter regulates investment firms, investment services and activities and markets of financial instruments.

Secondary sources include different kinds of regulations produced by the Inter-ministerial committee on credit and savings (CICR), the Ministry of Economy and Finance (MEF), and the Bank of Italy and Consob. At least four types of secondary legislation can be promulgated:

- general measures;
- CICR resolutions;
- MEF regulations; and
- Bank of Italy and Consob regulations (among the latter it is worth mentioning Consob regulations concerning intermediaries, markets, and issuers, respectively).

The regulations issued by the Bank of Italy and Consob and those issued by MEF have the same hierarchy within the Italian legal framework.

In relation to certain matters, MEF and the supervisory authorities have a shared competence. In such cases, the Bank of Italy and Consob are required to regulate the relevant matters in compliance with MEF regulations to avoid any interpretative issues and produce a coherent financial regulation.

What principal laws and financial service authority rules apply to the activities of financial services firms and their associated persons?

See question 5. With respect to financial regulation, reference is to be made to the Consolidated Finance Act and its implementing regulations issued by Consob.

Scope of regulation

What are the main areas of regulation for each type of regulated financial services provider and product?

See questions 2 and 4.

Additional requirements

What additional requirements apply to financial services firms and authorised persons, such as those imposed by self-regulatory bodies, designated professional bodies or other financial services organisations?

Within the Italian legal framework, self-regulatory bodies may not impose specific requirements on supervised entities, irrespective of whether the entities are members of the body. However, self-regulatory bodies issue guidelines or recommendations that are usually taken into consideration by all market participants.

With regard to the offering of off-site financial services, the Consolidated Finance Act provides for the establishment of a self-regulatory body (OCF), which is competent for the management of the register on which financial advisers are enrolled; for the supervision of correctness of financial advisers' activities; and for the exercise of powers of sanction, suspension and disbarment. OCF activities are carried out in accordance with the new Consob Regulation No. 20307/2018 on intermediaries.

Enforcement

Investigatory powers

What powers do national financial services authorities have to examine and investigate compliance? What enforcement powers do they have for compliance breaches? How is compliance examined and enforced in practice?

Both the Consolidated Finance Act and the Consolidated Banking Act grant Consob and the Bank of Italy, within their respective competences, strong powers to inspect and require information from supervised entities.

In particular, the supervisory authorities can request information or documentation from supervised entities as well as from their personnel and outsourcers (also to be provided on a periodical basis) and carry out on-site verifications and inspections.

In addition, Consob and the Bank of Italy can exercise certain intervention powers over

supervised entities such as:

- convening directors, auditors and personnel;
- ordering the convening of the corporate bodies of the supervised entities determining their agenda;
- directly convening the corporate bodies of the supervised entities where the competent bodies do not comply with the authorities' order (see point above).

The supervisory authorities may also remove one or more members of the corporate bodies of the supervised entities where their permanence is prejudicial to the sound and prudent management of the relevant entity or detrimental to transparency and correctness in its conduct of business.

To ensure stability, the Bank of Italy, upon consultation with Consob, may adopt restrictive measures regarding one or more supervised entities (eg, limit the services and activities they provide also on a territorial basis, prohibit the distribution of profits, set limits on the total amount of the variable part of remuneration).

Disciplinary powers

What are the powers of national financial services authorities to discipline or punish infractions? Which other bodies are responsible for criminal enforcement relating to compliance violations?

Infractions are provided for by the Consolidated Finance Act and the Consolidated Banking Act (depending on the matter involved). Both Consob and the Bank of Italy, within their respective competences, may impose administrative sanctions (mainly pecuniary administrative sanctions) on supervised entities and relevant individuals (often as a result of a verification or inspection carried out in the performance of supervision powers). Specific regulations discipline the supervisory authorities' sanction proceedings (and relevant phases and timeline). In any case, the sanction proceedings need to allow all interested parties to intervene and to have access to the investigation file. It is possible to bring opposition against a sanction issued by the supervisory authorities before the competent court of appeal.

Tribunals

What tribunals adjudicate criminal and civil financial services infractions?

Competence in relation to financial services criminal and civil infractions is reserved to ordinary criminal and civil courts. See also question 33 of Getting the Deal Through - Securities Litigation (<https://gettingthedealthrough.com/area/73/securities-litigation/>) with regard to cases where retail clients can resort to arbitration through the Banking and Financial Arbitrator or the Financial Disputes Arbitrator.

Penalties

What are typical sanctions imposed against firms and individuals for violations? Are settlements common?

The Consolidated Finance Act provides for different sanctions of criminal and administrative nature against supervised entities and relevant individuals.

Among the criminal sanctions provided by the Consolidated Finance Act, it is worth mentioning those relating to unauthorised performance of investment services and activities, collective asset management or off-site offer of financial products or investment services or activities (punished with imprisonment and a fine).

As to administrative sanctions, they mainly relate to non-fulfilment by supervised entities and relevant individuals of duties under the primary and secondary sources of law (the latter basically consisting in Consob regulations concerning intermediaries, markets and issuers).

Both criminal and administrative sanctions are provided for obstruction or non-cooperation with respect to the supervision activities of Consob and the Bank of Italy.

Compliance programmes

Programme requirements

What requirements exist concerning the nature and content of compliance and supervisory programmes for each type of regulated entity?

In Italy there are no specific compliance programmes issued by the competent supervisory authorities.

Gatekeepers

How important are gatekeepers in the regulatory structure?

Specific pieces of regulation issued by the supervisory authorities govern the internal organisation of supervised entities and the need to establish internal control functions (compliance, risk management and internal audit functions) and a board of statutory auditors.

Supervised entities must adopt and continuously maintain an internal control function to prevent breaches of law and regulation. To ensure correctness and independence of internal control functions, compliance staff must be provided with the necessary powers and resources. The persons in charge of the different internal control functions periodically report to the corporate bodies. The internal control functions need to be separate one from the other. In addition, persons who are part of internal control functions cannot participate in the performance of the services they are required to control.

Furthermore, the board of statutory auditors is in charge of supervising all the activities carried out by the relevant entity and reports to the competent authority any infringement of the applicable provisions of law and regulation.

Directors' duties and liability

What are the duties of directors, and what standard of care applies to the boards of directors of financial services firms?

Directors of financial services firms must act in the sole interest of the company. According to the applicable regulations, they need to fulfil specific integrity, professionalism and independence requirements as well as satisfying certain competence and correctness criteria and dedicate sufficient time to the performance of their office.

The board of directors sets out the aims, targets and strategies of the company, by approving its internal organisation and continually evaluating corporate procedures and policies, and the internal bodies' functioning.

Those duties are part of the 'duty of correct administration', according to which directors are responsible for the efficient management of the company, taking into account the various economic and market developments, and responsible for the correct and efficient performance of the activities set out in the corporate object. Correct administration involves the application of a certain standard of diligence, which varies depending on the nature of the role (eg, the standard expected of executive directors and non-executive directors is different) and by the experience, skills, cultural background and education of the individual director. In this respect, any directors shall act with a proportionate level of information and awareness, so that his or her decisions are informed and thought through.

When are directors typically held individually accountable for the activities of financial services firms?

The sanction regime provided for under the Consolidated Finance Act was amended as a consequence of the implementation of Directive 36/2013/EU (CRD IV).

The implementation of CRD IV determined a significant change with respect to the previous regime. Indeed, with the previous regime administrative sanctions were almost exclusively imposed on individuals holding offices within supervised entities and the latter were just jointly liable to pay the sanctions, if any, and then exercise a right of recourse against the relevant individuals.

According to the current regime, legal entities are directly liable. Only in some cases and provided that certain conditions are met (among others, in case the relevant director's behaviour directly contributed to the breach of regulatory provisions) the Consolidated Finance Act provides for direct liability (or shared liability with the relevant intermediary) of natural persons.

Private rights of action

Do private rights of action apply to violations of national financial services authority rules and regulations?

Private subjects (eg, banks and intermediaries' clients, associations) may report to Consob and the Bank of Italy - within their respective competences - any supposed breaches of national financial services authority rules.

The reports represent a very important information source for the supervisory authorities that may decide, for example, to request information, or start on-site investigations relating to a supervised entity and its conduct.

Standard of care for customers

What is the standard of care that applies to each type of financial services firm and authorised person when dealing with retail customers?

The standard of care required in the provision of investment services and activities to retail clients is higher compared with that in relation to professional clients or eligible counterparties. The applicable rules of conduct vary based on the investors involved.

Retail clients have little knowledge and experience in the financial services sector and investments and thus deserve the maximum level of protection.

Professional clients (eg, banks, investment firms) and professional clients on request (those not falling within the definition of professional client, but requiring to be treated as a professional client provided that they meet certain criteria) have a certain level of experience, knowledge and competence regarding investments allowing correct evaluation of risks.

Eligible counterparties are, among other things, entities that operate on a professional basis in the financial market. The classification of a client as an eligible counterparty only refers to determined investment services (ie, execution of orders on behalf of clients, dealing on own account, reception and transmission of orders).

In general terms, all conduct rules apply to dealing with retail clients (eg, duty to provide clients with a complete set of information regarding, inter alia, the intermediary and its services, the financial instruments, costs) while certain conduct rules do not apply (or partly apply) to dealing with professional clients. As to eligible counter-parties, almost all the conduct rules do not apply (with the exception of the rules regarding conflicts of interest). However, Directive 2014/65/EU (MiFID II) - whose implementation in Italy is being completed - provides for the extension to dealing with eligible counterparties of the application of certain conduct rules and reporting requirements.

Does the standard of care differ based on the sophistication of the customer or counterparty?

See question 18. If a client is classified by the relevant intermediary as a retail client, all conduct rules apply notwithstanding the client's level of sophistication.

Rule making

How are rules that affect the financial services industry adopted? Is there a consultation process?

Both with regard to primary (in particular to the Consolidated Finance Act and the Consolidated Banking Act) and secondary law sources, before any relevant amendment (eg, amendments to the Consolidated Finance Act deriving from the implementation of MiFID II) MEF usually starts a public consultation.

As to secondary legislation, Consob and the Bank of Italy are specifically required to start a public consultation for the issue or the amendment of their regulations.

Cross-border issues

Cross-border regulation

How do national financial services authorities approach cross-border issues?

See question 4.

International standards

What role does international standard-setting play in the rules and standards implemented in your jurisdiction?

Italian law and regulations relating to the financial services sector and the banking sector mostly derive from the transposition in Italy of EU rules and, in certain cases, also from implementation of international standards, such as those issued by the Bank for International Settlements (Basel Committee) or International Organization of Securities Commissions.

Update and trends

Recent developments

Are there any other current developments or emerging trends that should be noted?

In the course of 2018 the Italian regulatory framework has been extensively reformed in connection with the implementation in Italy of MiFID II and MiFIR provisions. Among others, on 15 February 2018 a new regulation on intermediaries reflecting MiFID II provisions has been adopted by Consob following a consultation process.

In the coming months, a new regulation is expected to be adopted by the Bank of Italy with a view to completing implementation of MiFID II and MiFIR provisions regarding, inter alia, the organisational duties and remuneration system of regulated intermediaries (the consultation process was concluded on 23 October 2018 but the final version of the regulation has not yet been enacted).

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