



Gatti Pavesi Bianchi

COVID-19 Update

Alternative Investment Management and Financial
Institutions

PRELIMINARY REMARKS

The World Health Organization qualified COVID-19 as a pandemic event. Italy has been materially hit by COVID-19 and the Italian Government - together with EU and national banking and finance regulators - issued a number of extraordinary measures to fight the COVID-19 emergency. The main goal of the Government measures is to secure Italian health since health is a fundamental constitutional right¹. However, in order to achieve their scope they jeopardize other fundamental constitutional rights². Further, byway of these measures additional financial resources have been granted for the benefit of, *inter alia*, enterprises and employees.

The aim of this paper is to summarize the main impacts of COVID-19 on the operations of banking and financial institutions as well as on the alternative investment management sector based on the Government's and competent regulators new extraordinary measures and on the general rules of conducts applying to regulated entities running a business into Italy.

This paper is updated as of 21 April 2020.

COVID-19 ITALIAN MAIN EXTRAORDINARY MEASURES ON BANKING AND FINANCIAL SERVICES

COVID-19 main Italian measures have been issued by the Government and by competent regulators as well. We will summarize the Government's measures first and then move to the competent regulators ones. As a general rule, the Government's measures should remain into force until 3 May 2020 without any prejudice to the Government's power to extend their terms and/or issue any new measures.

The extraordinary decree³ issued by the Italian Government provides for a general ban on:

- x) The carrying out of any non-essential activities⁴ without prejudice to the right to continue carrying out any essential activities as well as any activities related to essential ones;
- y) Physical meetings jeopardizing therefore peoples' right to freely move in the country which are forced to stay at their home.

By derogation to the general ban: x) Essential activities as well as any activities related to essential ones may continue to be carried out; y) People may leave their home as long as they are able to provide evidence that they must move in light of any un-deferrable working, health or other extraordinary grounds.

¹ As instance, Article 32 of the Italian Constitution is related to any rights relating to health.

² As instance, reference is made to Article 16 of the Italian Constitution on the right to move on a free basis into Italy without any limitations save as for a number of limited carve-outs.

³ Reference is made to Italian Prime Minister Decree 10 April 2020 repealing, *inter alia*, the following law measures: Italian Prime Minister Decree 11 March 2020; and Italian Prime Minister Decree 22 March 2020.

⁴ As instance, reference is made to retail activities such as shopping malls (save as for food sale), restaurants, bars, pubs.

Any banking, financial and insurance activities - including alternative investment management and investment services ones - qualify as essential activities and therefore any regulated entity may continue to run these activities into Italy. This derogation considers the importance to ensure the business continuity of regulated players operating in the banking, financial and insurance sector.

However, such services shall be carried out in compliance with the health and hygiene requirements and by favouring the recourse to “smart working” scenarios⁵.

Furthermore, European and domestic competent authorities have adopted a number of guidelines and measures aimed at mitigating COVID-19 impact on regulated entities (see below)⁶.

TEMPORARY MEASURES RELATING TO THE OPERATIONS OF REGULATED ENTITIES

Emergency and contingency plans review as a consequence of COVID-19

The European Directive on Markets in Financial Instruments⁷ and the Capital Requirements Directive⁸ require European investment firms and banks to take reasonable steps to ensure continuity and regularity in the performance of their services and activities, by using appropriate and proportionate systems, resources and procedures.

Bank of Italy highlighted the importance to include in regulated entities’ emergency plans the risk of a pandemic outbreak and to provide for a preventive program and a documented strategy aimed at ensuring the continuance of critical operations. The regulated entities’ competent body (e.g. the board of directors) shall oversee the development, approval, review and ongoing update of the pandemic response plan.

Significant banks

The European Central Bank enacted a number of measures in support of the economy providing material temporary capital and operational relief to banks⁹. By way of the relief certain liquidity amounts have been unlocked and may be employed to cover any losses

⁵ As instance, reference is made to the 14 March 2020 protocol executed among the Italian Government and the main Italian unions in relation to “any measures aimed at avoiding the spread of COVID-19 among working places”.

⁶ As instance, reference is made to the ESMA – Securities and Markets Stakeholder Group own initiative report on measures relating to the COVID-19 crisis dated 20 March 2020 and the European Central Bank press release dated 18 March 2020 by way of which the new “Pandemic Emergency Purchase Programme (PEPP)” has been launched with the aim of managing the growing risks arising from the COVID-19 outbreak on the financial securities’ sector. The PEPP provides for additional purchases of public and private securities for a total of 750 billion until the end of 2020.

⁷ Reference is made to Directive 2014/65/EU and the Italian implementation of such measures.

⁸ Reference is made to Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms as well as the Italian implementation of such measures (as amended from time to time).

⁹ As instance, reference is made to the European Central Bank press release dated 12 March 2020 (<https://www.bankingsupervision.europa.eu/press/pr/date/2020/html/ssm.pr200312~43351ac3ac.en.html>).

arising from COVID-19 as well as to finance enterprises facing a liquidity shortfall as a consequence of COVID-19.

Also banks may enjoy a much wider flexibility in structuring any actions to recover their NPLs exposures by temporarily departing from applicable measures¹⁰.

Further, the term within which banks' stress tests and audits relating to internal based models had to be carried out has been delayed for a 6 months' period.

Less significant banks

Certain prudential floor threshold requirements applying to less significant banks and non-banking intermediaries have been released and therefore such banks and intermediaries may temporarily run their business below these floors¹¹.

Suspension of fees due to certain regulators as well as of the terms applying to regulated entities licensing and qualified holding proceedings

The duty of players supervised by CONSOB to pay supervisory fees to CONSOB has been frozen based on CONSOB's resolution¹².

In line with the Government measures, Bank of Italy has provided for the suspension of terms relating to administrative proceedings (pending or started on or after 23 February 2020) conducted by the regulator itself, such as licensing and qualified holding ones.

Delay of certain reporting duties

A number of reporting obligations' deadlines involving regulated entities supervised by the Bank of Italy have been delayed¹³. In particular, the initial delivery date of the following reports has been extended by the Bank of Italy by:

- (a) 150 days for the first report on operational risks and safety for the banks;
- (b) 60 days for the (i) compliance with internal capital adequacy assessment process (ICAAP) and/or internal liquidity adequacy assessment process (ILAAP) if and to the extent applicable for banks, 106 financial institutions¹⁴ and investment firms; (ii) recovery plans, reports on outsourced functions for banks and financial institutions;

¹⁰ In greater detail, the European Central Bank has introduced supervisory flexibility regarding the treatment of NPLs, in particular to allow banks to fully benefit from guarantees and moratoriums put in place by regulators to tackle the current distress. Lastly, supervisors will take into account the extraordinary nature of current market conditions when discussing the implementation of NPL reduction strategies.

¹¹ Such players are allowed to operate temporarily below the level of the Pillar 2 Guidance (P2G), the capital conservation buffer (CCB) and the liquidity coverage ratio (LCR).

¹² Reference is made to CONSOB resolution dated 20 December 2019 n. 21211 and 18 March 2020 n. 21305.

¹³ As instance, reference is made to the Bank of Italy press release dated 20 March 2020 (https://www.bancaditalia.it/media/comunicati/documenti/2020-01/Deadlines-extension-COVID-19.pdf?language_id=1). Please note that these rules apply also to significant banks to the extent they are subject to Bank of Italy's supervision.

¹⁴ As instance, reference is made to financial institutions (so called "near bank institutions") licensed pursuant to article 106 of the Italian legislative decree 1 September 1993 no. 385 (the Italian unified banking act).

(iii) reports on the organizational structure for investment firms and investment managers (such as SGRs, SICAF, SICAV), payment institutions and electronic money institutions (i.e. IP and IMEL); (iv) self-assessment of the existence of the depositary's eligibility requirements; (v) anti-money laundering annual report (including 2019 risk self-assessment); and (vi) adequate verification of clients (in particular, recovery of clients' data already acquired for anti-money laundering purposes).

Furthermore, the term for the filing of the updated non-performing loan reduction plan by less significant banks has been postponed to 30 June 2020.

KEY LEGAL PRINCIPLES AND RULES OF CONDUCTS ON ALTERNATIVE INVESTMENT MANAGEMENT

As described above investment management, banking and financial services qualify as essential services. Therefore, pending COVID-19,

- (a) investment managers shall still:
 - Guarantee the daily calculation of the net asset value of any undertakings for collective investments (UCIs) they manage¹⁵;
 - Ensure daily monitoring operations on portfolio investments;
 - Keep managing any UCIs pursuant to applicable rules of conduct.
- (b) UCI's custodian banks and auditors shall continue providing their services.

Investment managers owe fiduciary duties towards their investors and must manage any UCI, *inter alia*, on a safe and prudent basis, independently and in a transparent manner. Investment managers enjoy broad managerial powers which are limited, *inter alia*, by the rules of conducts on investment management and the fiduciary duties they owe towards UCI's investors.

Based on the above:

- (a) Investment managers must consider whether in light of COVID-19 they are still able to continue managing any UCI in the best interest of the investors and on a transparent basis. In case they believe their management is being carried out on a non-transparent basis and/or departing from the investors' best interest they might think of enacting a number of actions, such as liaising on a transparent basis with UCI's investors pointing out how they are monitoring portfolio investments in light of COVID-19, their revised strategies as a consequence of COVID-19 (if any) and their views on the financial market's trend;
- (b) UCI's investors might consider a number of actions in relation to their funds' projects such as requests for additional information, exercising of additional monitoring rights *etc.* They should comply with their obligations as investors into an UCI (e.g. funding obligations) save as for any derogations to this duty based on applicable laws and regulations.

¹⁵ UCIs can be either: (a) Externally managed according to an investment management agreement by a selected investment manager appointed by the UCI itself; or (b) where the legal form of the UCI permits an internal management and where the UCI's management body chooses not to appoint an external investment manager, the UCI itself.

However, notwithstanding the above an assessment on a case by case basis must be carried out in relation to any fund project so as to identify any managers' and investors' rights and duties based on each projects constitutional and offering documents.

TEAM



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The practice focuses on fund formation, investment management and financial institutions.

We specialize on alternative investment funds projects counseling fund initiators, investors in fund projects (such as FoFs, insurance companies, pension schemes and high net worth individuals), placement agents, investment managers and investment advisers. We assist clients in all aspects of structuring and documenting new alternative investment funds' projects. Our expertise covers a wide variety of asset classes and investment strategies including private debt, private equity, real estate, venture capital and other alternative investment strategies.

The team handles, also, a wide range of sophisticated legal, banking and regulatory aspects with a particular (but not exclusive) emphasis on the alternative investment management sector covering, *inter alia*: new businesses and product launches, licensing of banks, financial institutions and alternative investment fund managers, passporting of EU banks, alternative investment fund managers and financial institutions licenses into Italy for the provision of banking services, investment management activities and investment services, prudential requirements, compliance with the rule books issued by the competent Italian regulators, including a reference to anti-money laundering duties, banking, placement and investment services agreements and related issues (including outsourcing and separate accounts agreements), marketing and offering of financial products into Italy and related safe harbor exemptions, clearing duties, securities.

Further, we regularly assist investors to carry out their investments into regulated entities, such as banks, financial institutions and alternative investment fund managers as well as to comply with applicable investment advanced filing duties and post-closing duties.

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