



Financial Regulatory News – Italy

Spotlight on the Markets (March/April 2023)

In this issue

The second issue of our newsletter focuses on some recent developments that have affected different areas of the EU and Italian regulatory framework over the last few months.

In particular, we have analysed the main amendments to the ELTIF regulation (applicable to newly established ELTIFs from January 2024) which have been enacted in order to make ELTIFs more accessible and popular among retail investors, with the goal of facilitating the raising and channelling of capital towards long-term investments in the real economy.

Other sections of the newsletter provide an overview of the revised EBA guidelines on deposit guarantee schemes, the Italian implementation of the MiFID II Quick Fix Directive and the ESMA Revised Guidelines on MiFID II product governance requirements.

Keep reading to catch up on the hot topic news!

Italian Regulatory Team

Please be aware that this newsletter is not and is not intended to be a comprehensive and exhaustive overview of all the legislative and regulatory enactments, changes and developments for the reference period.

Please be advised that this newsletter is not and is not intended to be an exhaustive and definitive review of the laws and regulations analysed therein but only analyses certain requirements and provisions that we at our own discretion consider relevant for the clients we assist.

This document is for general information purposes only and is not intended to provide legal or other professional advice. Legal advice shall always be sought on a case-by-case basis. Should you require legal assistance on any of the matters mentioned by this newsletter, please contact us and we shall be happy to assist on a case-by-case basis.

What's shaping the regulatory world today?

Highlight	Summary
1 The revised Guidelines on Deposit Guarantee Schemes Contributions	<p>The Directive on Deposit Guarantee Scheme mandates the EBA to develop Guidelines on methodologies for calculating the contributions to the deposit guarantee schemes (DGSs) and to review them at least every 5 years.</p> <p>Read more →</p>
2 The unilateral amendments to banking contract – the Bank of Italy Communication on unilateral amendments justified by trends in interest rate and inflation rate	<p>On 15 February 2023, the Bank of Italy published a communication whereby the Italian regulator urged banks and financial intermediaries to carefully assess any unilateral amendments to banking contracts where pertaining to the increase in the interest rates and/or charges imposed on clients.</p> <p>Read more →</p>
3 Amendments to the European Long-Term Investment Funds Regulation	<p>On 20 March 2023, Regulation (EU) 2023/606 amending Regulation (EU) 2015/760 was published in the Official Journal of the European Union.</p> <p>Read more →</p>
4 Adoption of the Legislative Decree further implementing the KID regime in Italy	<p>On 23 March 2023, Legislative Decree No. 29 of 10 March 2023, implementing Directive (EU) 2021/2261 and amending accordingly the Italian Financial Act, was published in the Italian Official Gazette (Decree 29)</p> <p>Read more →</p>
5 The Italian implementation of the Amending Directive	<p>On 24 March 2023, Legislative Decree no. 31 of 10 March 2023, implementing into Italy the European Directive no. 2021/338/EU and amending accordingly the Italian Financial Act, was published in the Italian Official Gazette.</p> <p>Read more →</p>
6 The ESMA Revised Guidelines on MiFID II product governance requirements	<p>On 27 March 2023, ESMA has published its Final Report on Guidelines on MiFID II product governance requirements.</p> <p>Read more →</p>

Watch out

List of the statements/speeches and/or press releases published by the main EU regulators/legislators/committees

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What's next

Upcoming changes in the legislative framework and consultations ending in the coming month

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Underlined contains a link to additional content

The revised Guidelines on Deposit Guarantee Schemes Contributions

On 23 February 2023, the EBA published its final revised Guidelines on Deposit Guarantee Schemes (DGS) Contributions

The Directive on Deposit Guarantee Schemes (hereinafter, the DGSD) mandates the EBA to develop Guidelines on methodologies for calculating the contributions to DGSs and to review them at least every 5 years.

The most substantial changes the revised Guidelines will introduce relate *inter alia* to:

- (i) setting minimum thresholds for the majority of the core risk indicators. In the EBA's view, this will avoid situations in which a credit institution does not meet the prudential requirements linked to a core indicator but is nevertheless not classified as "high-risk";
- (ii) adjusting the minimum weights of the core risk indicators based on empirical evidence, to better reflect the indicator's performance in measuring the risk to the DGSs;
- (iii) replacing the formula for determining the risk adjustment factor for each member institution to remedy an issue in the Guidelines where – in relative terms – the DGS contribution of a credit institution decreases despite increasing its riskiness. In particular, the new exponential formula is designed to ensure a constant relationship between the riskiness of institutions and their DGS contributions;
- (iv) specifying how to account for deposits where the DGS cover is subject to uncertainty, including in relation to a client's funds. This change aims to ensure closer alignment between the amount of covered deposits and the contributions of the credit institution;
- (v) requiring DGSs to regularly review the calibration of the calculation method against the prudential benchmarks, ensuring the method remains adequate and up-to-date;
- (vi) clarifying the addressees of the Guidelines and their respective roles;
- (vii) providing guidance as to how to apply a stock-based contribution method in addition to the flow-based contribution method; and
- (viii) clarifying how to raise contributions following the use of the DGS funds.

The Revised Guidelines will enter into force on 3 July 2024. This notwithstanding, in the context of the Revised Guidelines, EBA has also emphasised that the Revised Guidelines will also remain relevant after such date (i.e. the deadline by which the DGS should meet the target level for the first time), because: (a) the target level will grow after 3 July 2024 with an increase in aggregated covered deposits; and (b) following a DGS intervention, the target level will need to be reached again. In both cases, DGSs will continue to raise risk-based contributions

Your actions

Intermediaries are required to review their risk management practices and arrangements against the criteria and guidelines set forth in the EBA Guidelines.



Unilateral amendments to banking contracts

The Bank of Italy communication on unilateral amendments justified by trends in interest rates and inflation

On 15 February 2023, the Bank of Italy published a communication in which the Italian regulator urged banks and financial intermediaries to carefully assess any unilateral amendments to banking contracts where they pertain to an increase in the interest rates and/or commissions (including in the form of negative interests on deposits) imposed on clients.

In particular, the Bank of Italy has warned the addressed entities to reconsider any unfavourable clauses included in banking contracts, mainly banking accounts agreements, in light of the recent steady increases in interest rates applied by the ECB as from July 2022 and the positive impact such monetary policy decisions may have on the profitability of the commercial relationship with clients.

Although intermediaries are generally free to reasonably set the economic conditions applied to the performance of their services and activities, the Bank of Italy reminded the supervised entities to act in line with the general principles of fairness and good faith and to exercise the power to unilaterally amend a contract in compliance with the requirements identified by the regulator over the years.

Your actions

Intermediaries are invited to consider the Bank of Italy's indications, as set forth in their communication of 15 February 2023.

Please do not hesitate to contact us should you need assistance and advice in navigating the above guidelines provided for by the Bank of Italy or interpret them in the general context of the Bank of Italy's transparency and disclosure requirements.



Amendments to the European Long-Term Investment Funds (ELTIF) Regulation

On 20 March 2023, Regulation (EU) 2023/606 amending Regulation (EU) 2015/760 was published in the Official Journal of the European Union

The new Regulation (EU) 2023/606 (hereinafter, the **Regulation**), adopted by the European Parliament and the Council on 15 March 2023, is specifically aimed at amending Regulation 2015/760 (the **ELTIF Regulation**) as regards “the requirements pertaining to the investment policies and operating conditions of European long-term investment funds and the scope of eligible investment assets, the portfolio composition and diversification requirements and the borrowing of cash and other fund rules”.

The most relevant amendments to the ELTIF Regulation relate, *inter alia*, to:

- (i) the definition of “real assets” in which ELTIFs can invest, which has been broadened to include any real assets that have value due to their nature or substance; such real assets will therefore include, *inter alia*, immovable property (such as communication, environment, energy or transport infrastructure), social infrastructure and infrastructure for education, health and welfare support or industrial facilities;
- (ii) the inclusion within the list of eligible investment assets of (a) “green bonds” (issued pursuant to a Regulation of the European Parliament and of the Council on European bonds) that comply with the eligibility requirements set out by the ELTIF Regulation; and (b) undertakings for collective investments in transferable securities (**UCITS**) and EU alternative investment funds (**AIFs**) managed by EU AIFs managers, provided that such collective undertakings also invest in eligible investments and have not themselves invested more than 10% of their capital in any other collective investment undertaking;
- (iii) a decrease from 70% to 55% of the ELTIF’s capital that should be invested in eligible investment assets, mainly for the purpose of enabling managers of ELTIFs to better manage their liquidity;
- (iv) an additional flexibility in the portfolio composition of ELTIFs and a reduction of diversification requirements, achieved, *inter alia*, by increasing the diversification requirement for investment in each underlying asset (including loans) or portfolio undertaking from 10% to 20%;
- (v) the increase of the limit to the borrowing of cash from 30% of the value of the ELTIF capital to 50% of the ELTIF net asset value (for ELTIFs which are also marketed to retail investors) or 100% of the ELTIF net asset value (for ELTIFs marketed exclusively to professional investors); and
- (vi) generally speaking, the introduction of different rules applicable exclusively to professional investors (and not to retail investors). More specifically, some of the requirements in relation to the diversification and composition of the portfolio, the concentration limits and the borrowing of cash shall no longer apply (or apply differently) to ELTIFs that are marketed exclusively to professional investors.

The Regulation will enter into force 20 days following its publication in the Official Journal of the European Union and will be applicable from 10 January 2024. ELTIFs authorised before that date that are still raising capital shall be deemed to comply with the Regulation until 11 January 2029; moreover, pre-existing ELTIFs may already opt to be subject to the Regulation before that date by communicating their decision to the ELTIF competent authority.

Your actions

Now is a good time to start in-depth analyzing and assessing the main changes introduced by the Regulation to the ELTIF Regulation in order to be ready to set up compliant ELTIFs when such amendments will become applicable.



Adoption of the Legislative Decree further implementing the KID regime in Italy

On 23 March 2023, Legislative Decree No. 29 of 10 March 2023, implementing Directive (EU) 2021/2261 and amending accordingly the Italian Financial Act, was published in the Italian Official Gazette (**Decree 29**)

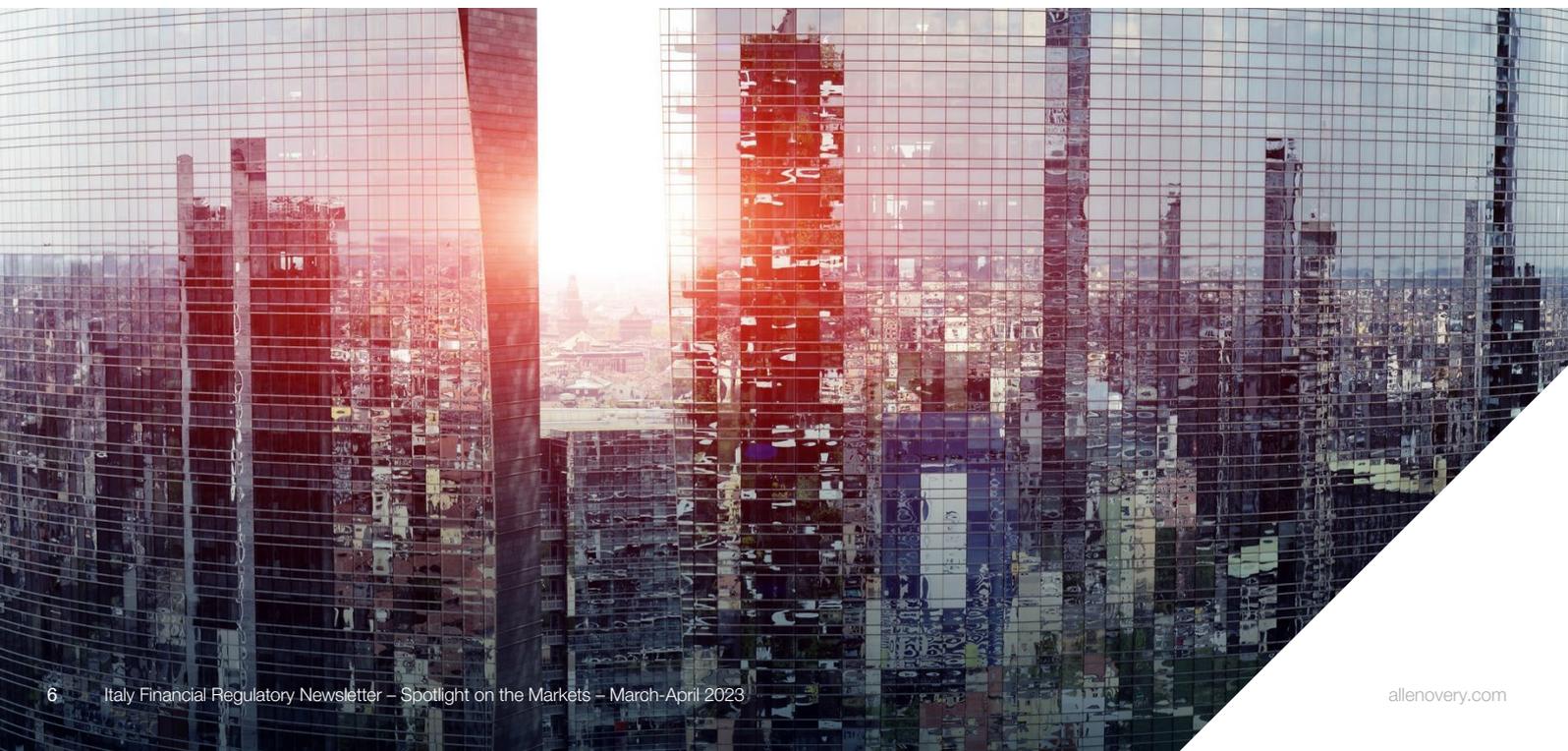
The amendments introduced to the Italian Financial Act by Decree 29 are necessary to ensure the correct and complete implementation of Directive (EU) 2021/2261, which amends Directive 2009/65/EC as regards the use of key information documents by management companies of undertakings for collective investment in transferable securities (**UCITS**).

In particular, such amendments are in line with those already introduced by CONSOB to the Issuer Regulation in December 2022 and provide, *inter alia*, that:

- (i) intermediaries shall prepare a KID in relation to the UCITS offered to retail investors and shall provide the KID to CONSOB (together with the prospectus) before offering the UCITS to investors;
- (ii) intermediaries offering units of UCITS to Italian professional investors may decide whether to provide investors with a KIID or a KID; and
- (iii) failures to comply with the obligations to provide a KID or a KIID to investors are subject to administrative sanctions.

Your actions

For a more comprehensive overview of the amendments introduced by CONSOB to the KID regime in Italy in December 2022, please refer to the first issue of our Newsletter – link available in the cover email under Our Team – Archive Section.



The Italian implementation of the Amending Directive

Legislative Decree no. 31/2023: the European Directive no. 2021/338/EU fully implemented at a primary level

On 24 March 2023, Legislative Decree no. 31 of 10 March 2023, implementing in Italy European Directive no. 2021/338/EU (i.e. the MiFID II Quick Fix Directive) and amending accordingly the Italian Financial Act, was published in the Italian Official Gazette (**Decree 31**). Decree 31 will enter into force on 8 April 2023 but intermediaries may phase in the implementation of some newly introduced provisions.

The main amendments introduced by Decree 31 relate to:

- (a) **Ancillary Activity Exemption** – Relevant entities would no longer be required to notify their intention to benefit from the exemption at stake to CONSOB on an annual basis. Such periodic prior notification requirement has been replaced by a one-off disclosure to the Italian regulator, upon CONSOB's request, of the reasons why the notifying entities consider their activities as falling within the Ancillary Activity Exemption.
- (b) **The communication channel** – Intermediaries shall send communications pertaining to, inter alia, the provision of investment services to their clients in an electronic format. Retail clients may at any time request to be provided with the above communications in a paper format free of charge.

Intermediaries shall notify their retail clients that any communications relating to their contractual relationship, which were previously handled in a paper format, going forward will be sent in an electronic format unless the retail clients exercise the option to continue to receive the above communication via courier.

- (c) **The make-whole clause** – The newly introduced Article 1, par. 1-bis.1, of the Italian Financial Act defines the make-whole clause as the contractual clause designed to protect investors envisaging that, upon the occurrence of an early repayment of a bond, the issuer shall pay out to the bondholders a value corresponding to the sum of the actual value of the coupons remaining up to the bond's maturity date, and the nominal value of the bond to be repaid in advance. Investment services rendered in connection with bonds having a make-whole clause may benefit from a light-touch regime as to product governance requirements, provided that certain requirements are met and where such services are performed towards eligible counterparties only.
- (d) **Investment research rendered by third-party intermediaries** – Article 21 of the Italian Financial Act, as revised by Decree 31, envisages further requirements which apply to third-parties providers rendering their investment research services to intermediaries authorised to provide the service of asset management or other investment services or ancillary investment services. Among such requirements, Decree 31 provides, inter alia, the conclusion of an agreement identifying, from among the joint commissions and fees connected to the execution of orders or investment research, the quotas attributable to the investment research only.
- (e) **Position limits on commodity derivatives** – Decree 31 has introduced amendments to several provisions laid down by the Italian Financial Act and relating to position limits on commodity derivatives.

Your actions

Intermediaries are required to comply with the requirements introduced by Decree 31 and in particular to disclose promptly to their clients the changes to the electronic format to notify any communications pertaining to the provision of investment services and activities. The make-whole clause should be duly taken into account when drafting the documentation pertaining to bond issuance and offering.



The ESMA Revised Guidelines on MiFID II product governance requirements

On 27 March 2023, ESMA has published its Final Report on Guidelines on MiFID II product governance requirements

The product governance requirements, introduced by MiFID II, have proven to be one of the key elements to ensure an adequate level of protection to investors throughout the Union. Whilst the guidelines provided by ESMA in 2017 remain valid, recent (and material), legislative developments have prompted a full revision of the previous guidelines in order to align its principle with:

- (i) the **Commission's Capital Markets Recovery Package** and subsequent **MiFID II Amending Directive**;
- (ii) the sustainability-related amendments to the **MiFID II Delegated Directive**;
- (iii) the recommendations on the product governance by ESMA's Advisory Committee on Proportionality; and
- (iv) the findings of ESMA's 2021 **Common Supervisory Action on product governance**.

The revised Guidelines were published on 27 March 2023 and will enter into force two months following the date of publication. The main amendments introduced by the 2023 revision to the Guidelines on MiFID II product governance requirements (Guidelines) relate to:

- (a) **Sustainability-related requirements** – The Guidelines request intermediaries to take into account any sustainability-related objectives of the product when identifying the target market for a specific product. When identifying the sustainability-related objectives, firms may specify *inter alia* the following aspects:
 - (i) the minimum proportion of the product that is invested in environmentally sustainable investments;
 - (ii) the minimum proportion of the product that is invested in sustainable investment; and
 - (iii) which principal adverse impacts on sustainability factors are considered by the product, including quantitative and qualitative criteria demonstrating that consideration.

The Guidelines clarify that, for products that consider sustainability factors, firms are not required to also identify a negative target market with respect to their sustainability-related objectives i.e. only a “positive” target market should be identified.

- (b) **The clustering approach** – The legal concept of a “clustering approach” is defined by the Guidelines as the practice manufacturers may decide to follow to identify their target market by adopting a common approach for some products if they have sufficiently comparable product features.

In applying the clustering approach, manufacturers are urged to use an adequate level of granularity to ensure that only products with sufficiently comparable characteristics and risks features are grouped together and carefully pay attention to the level of complexity of the products, meaning that the more complex the underlying products of a cluster become, the more granular the cluster should be.

Additional and specific reporting requirements to clients would apply in relation to products belonging to clusters.

- (c) **The criteria to determine the distribution strategy** – The Guidelines set out the additional requirements that distributors should apply when manufacturers consider that the features of a given product are compatible with a distribution strategy through non-advised services. Notwithstanding this, distributors are nonetheless required to assess the features of that given product against the characteristics of their existing or prospective clients, independently from any prior assessment undertaken by the manufacturers. Depending on the outcome of such evaluation, the distributors may decide that providing an investment advice would be the most appropriate choice to ensure their clients' best interests.

Your actions

Intermediaries are required to review – as soon as practicable – the product governance requirements they apply in order to ensure consistency with the criteria and guidelines identified by ESMA. In particular, attention should be paid to assessing the sustainability-related objectives, where needed, and in considering whether or not to follow the clustering approach.



Watch out – Press and News

Statement/speeches and/or press releases published by the main EU regulators/legislators/committees

1 **The Bank of Italy** confirms the countercyclical capital buffer at 0% for the second quarter of 2023.
The regulator's statement available [here](#)

2 The **EBA** has published the revised list of the validation rules for its reporting standards (ITS; RTS and Guidelines).
Link to the regulator's statement available [here](#)

3 **EBA** has published the annual assessment on banks' internal approach for the calculation of capital requirements.
Link to the regulator communication available [here](#)

4 **EBA** has publishes a no action letter on the boundary between the banking book and the trading book provisions.
Link to the regulator's letter available [here](#)

5 The **ESAs** and the **ECB** have published a joint statement on climate-related disclosure for structured finance products.
Link to the authorities joint statement available [here](#)

6 **ESMA** has published the result of the annual transparency calculations for equity and equity-like instruments.
Link to the regulator's press release available [here](#)

7 **ESMA** has found that MCM had no measurable impact on the financial market under current market conditions.
Link to the regulator's press release available [here](#)

8 **ESMA** has issued a public statement addressing investor protection concerns raised by derivatives on fractioned shares.
Link to the regulator's statement available [here](#)

9 **EBA** has published for the first time a new set of indicators to identify potential causes of consumer harm.
Link to the regulator's report available [here](#)

What's next – May

Consultations

- 1 CONSOB – Consultation paper on the secondary level legislation implementing the European Regulation on European crowdfunding service providers for business.
Link to the consultation available [here](#)
- 2 ESMA – Consultation paper on the review of the methodology included in the Guidelines on stress test scenarios under the MMF Regulation.
Link to the consultation available [here](#)
- 3 ESAs – Consultation paper on Draft Joint Guidelines on the system established by the European Supervisory Authorities for the exchange of information relevant to the assessment of the fitness and propriety of holders of qualifying holdings, directors and key function holders of financial institutions and financial market participants by competent authorities.
Link available [here](#)
- 4 EBA – Consultation on draft Implementing Technical Standards (ITS) on supervisory reporting with respect to IRRBB.
Link available [here](#)
- 5 EBA – Consultation on draft Implementing Technical Standard amending the ITS on specific reporting requirements on market risks (FRTB reporting).
Link available [here](#)
- 6 EBA – Consultation on draft Regulatory Technical Standards on the assessment methodology under which competent authorities verify institutions' compliance with the requirements applicable to their internal models under the Fundamental Review of the Trading Book (FRTB) rules.
Link available [here](#)
- 7 ESMA – Consultation paper on the Amendments to the Guidelines on position calculation under EMIR.
Link to the public statement available [here](#)



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