GLI GLOBAL LEGAL INSIGHTS

Banking Regulation

2024

11th Edition

Contributing Editors: **Peter Ch. Hsu & Daniel Flühmann**

glg Global Legal Group

CONTENTS

Italy

Emanuele Grippo & Federico Cappellini
Gianni & Origoni

Introduction

The macroeconomic situation resulting from the global and European financial crisis had resulted in significant legislative changes in the last 10 years, both at a European and Italian level, aimed at strengthening banks' internal control and risk management systems, as well as ensuring that they have adequate regulatory capital to face any situation of economic and financial stress.

In this regard, it is indeed interesting to mention how the banking system (both Italian and European) has been able to deal with highly stressful situations in recent years, related to the pandemic crisis linked to the spread of COVID-19 and the Ukrainian conflict, as well as, ultimately, the crisis of certain US regional banks and Credit Suisse. In contrast with the financial crisis in 2008, in which the banking system was severely tested, over the past few years, European banks have implemented, in accordance with recent regulatory developments, governance and capital adequacy arrangements capable of better absorbing shocks from financial and economic stress and thus reducing systemic risk.

In this sense, it has been pointed out that "*weaknesses in corporate governance have been one of the main causes of the banking crises in recent years*", and, with specific reference to the recent crisis that affected non-EU banks, "*[t]he contagion only marginally affected European banks, including Italian ones. The Union's banking legislation [...] extends prudential standards based on the Basel accords to smaller banks as well. combined with often more intrusive supervisory practices, this has helped on this occasion to mitigate risks and prevent a contagion*".[1]

Over the past few years, the Italian government has launched a number of initiatives aimed at addressing the needs of Italian banks, providing greater transparency and stability to the Italian banking system, and helping Italian banks increase their attractiveness to domestic and foreign capital.

Regulatory architecture: Overview of banking regulators and key regulations

Supervisory authorities

The Italian banking prudential supervision system is strongly influenced by the progressive consolidation of the Banking Union at European level.

The Banking Union

The degree of coordination and cooperation among EU Member States is increasingly focused on a new single system of harmonised prudential rules (the Single Rulebook) that, in most cases, have a direct effect in EU Member States.

The main institutions are the European System of Financial Supervision (ESFS), which consists of the European Systemic Risk Board (ESRB), responsible for macro-prudential supervision, and three European Supervisory Authorities (ESAs) in charge of coordinating micro-prudential supervision, namely the European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA), and the European Securities and Markets Authority (ESMA), their joint committee, and the Member States' competent supervisory authorities (in Italy, the Bank of Italy – BoI).

The Banking Union among euro area countries is based on three main pillars:

- the Single Supervisory Mechanism (SSM), which sets out the joint exercise, by the European Central Bank (ECB) and EU national supervisory authorities, of tasks and powers for banking supervision;
- the Single Resolution Mechanism (SRM), which establishes the framework for the crisis resolution of banks in the EU countries that adhere to the SSM. The resolution is to be managed, under harmonised rules, by the Single Resolution Committee or by national resolution authorities following joint instructions or guidelines established by the Committee and financed by a single fund, to which the banks themselves contribute; and
- the European deposit insurance scheme, which builds on the system of national deposit guarantee schemes (DGS) regulated by Directive 2014/49/EU, to provide a stronger and more uniform degree of insurance cover to banks in the euro area.

The BoI

The macro-prudential supervision of the Italian market is conducted by the BoI (in collaboration with the ECB and ESRB) in order to identify the risk factors and vulnerabilities of the financial system that could threaten its stability and to prevent or limit their effects on the real economy.

With the entry into force of the SSM, the ECB has taken on specific tasks relating to the prudential supervision of credit institutions, in cooperation with the national competent authorities of participating EU Member States.

On a practical level, the ECB focuses on significant banks and banking groups, identified in accordance with specific criteria, by regularly assessing their financial situation, verifying their compliance with prudential requirements, taking any supervisory measures necessary, and performing stress tests. All of these tasks are overseen by the Joint Supervisory Teams, comprising staff from the ECB and the BoI, which are the primary vehicle of cooperation and the first point of contact for intermediaries.

Less significant banks and banking groups are supervised directly by the BoI, which provides harmonised supervision guided by the general policies and instructions issued by the ECB.

The BoI maintains full and autonomous competence in the fields of:

- monitoring of investment companies (securities investment firms (SIMs) and groups of SIMs), asset management companies (SGRs, SICAVs and SICAFs), financial intermediaries, electronic money institutions (EMIs), and payment institutions;
- consumer protection, jointly with the National Antitrust Authority (AGCM): the BoI issues rules and regulations on marketing consumer credit products, while the AGCM ensures the market's fairness through transparency and disclosure duties;
- anti-money laundering (AML) and terrorism financing;
- payment services and markets in financial instruments;
- supervision of non-banking entities and Italian branches of non-EU banks, while EU banks are supervised by their respective home Member States' competent authorities

(except for a limited number of compulsory matters applicable to their Italian branches, such as internal controls, business continuity, registrations, outsourcing of cash management, offer of investment services, custodian banks, *etc*.); and

- transparency of contractual conditions: the BoI issues and periodically reviews a set of rules aimed at ensuring that clients can be provided with a high level of information about costs, fee structures, remedies and protection tools, together with a clear explanation of the applicable terms and conditions, distinguishing between loans, consumer credit products and banking services, applicable regardless of where the relevant bank is based.

Moreover, the BoI also has supervision powers over: financial agents (*agenti in attività finanziaria*), which provide intermediate financing product and payment services by virtue of a direct mandate from a bank; and credit brokerages (*mediatori creditizi*), which simply create contact between financial intermediaries and borrowers.

Commissione nazionale per le Società e la Borsa (Consob)

While the BoI has banking and financial supervisory powers to ensure sound and prudent management, risk containment and the financial stability of the above entities, Consob is responsible for the transparency and fairness of these entities' behaviour towards investors. Its activity is aimed at protecting investors' interests and, in relation to this, Consob is the competent authority for ensuring (among others):

- transparency and correct behaviour of financial market participants, such as investment firms, banks, asset managers, financial advisors and other intermediaries providing investment services and activities to investors located in Italy. Consob is also the competent authority for supervision of compliance with the rules of conduct in case of distribution of insurance-based investment products (IBIPs) carried out in Italy by banks and other financial intermediaries, while any other aspects related to the distribution of non-IBIPs products are supervised by the Italian Insurance Supervisory Authority (*Istituto per la vigilanza sulle assicurazioni* – IVASS), the supervisory authority on the insurance market;
- disclosure of complete and accurate information by listed companies;
- compliance with public offering and public tender rules; and
- appropriate investigations with respect to potential infringements of insider dealing and market manipulation law.

The Financial Intelligence Unit (FIU)

The FIU is an independent body that carries out its functions with full autonomy within the BoI, with the task of analysing financial information in order to prevent and combat money laundering and the financing of terrorism.

Banking and Financial Arbitrator (ABF)

The ABF is an independent body that may be seized by customers for settling disputes between intermediaries and customers out of court. The BoI provides the means, structures and human resources required by the ABF's three panels, while respecting their decision-making autonomy.

Further, Consob launched a public consultation for the establishment of voluntary alternative dispute resolution proceedings applicable to all disputes (national or international) between consumers and professionals based in the EU, in accordance with EU legislation.

Arbitro per le Controversie Finanziarie (ACF)

In May 2016, Consob established the ACF, a financial services ombudsman, whose responsibility is to resolve disputes between retail investors and intermediaries in relation to investment services and collective asset management services.

Key legislation

EU legislation

The main pieces of EU legislation governing the supervisory duties of the BoI are Regulation (EU) 575/2013 (the Capital Requirements Regulation – CRR, as amended by Regulation (EU) 2019/876 – CRR II) and Directive 2013/36/EU (the fifth Capital Requirements Directive – CRD V), as further described in the "Bank capital requirements" section below.

CRR introduced prudential supervisory rules that are directly applicable to all European banks and investment firms. CRD V sets out the conditions to be complied with to be permitted to carry on the activity of banks, the freedom of establishment and freedom to provide services for banks in the EU, prudential control, additional capital buffers, and bank corporate governance.

The legal framework for the management of bank crises is driven by Directive 2014/59/EU (the Bank Recovery and Resolution Directive – BRRD, as amended by Directive 2019/879/EU – BRRD II) on the recovery and resolution of credit institutions and investment firms, which is aimed at strengthening and harmonising the tools available to the authorities for preventing problems and managing intermediaries' crises.

Regulatory and implementing technical standards (RTS and ITS) play an increasingly important role in banking and financial regulation. They are developed by the ESAs (notably the EBA) and adopted by the European Commission (EC) via regulations. They seek to harmonise the most complex and detailed aspects to create a complete, homogeneous and unified system of rules for the single market.

The European regulatory framework is completed by the MiFID II, IDD, AIFMD and UCITS Directives packages, which influence the banking environment in several fields (investment services, funds marketing, distribution of insurance policies, *etc*.).

National legislation

The key banking and credit law is Decree 385/1993, referred to as the Consolidated Law on Banking (*Testo Unico Bancario* – TUB), as amended and supplemented from time to time, which also implements at national level the EU legislation mentioned above. Built on principles for the allocation of powers, the TUB sets out the basic rules and standards for, and defines the areas of responsibilities of, the credit authorities (Interministerial Committee for Credit and Savings – CICR, the Ministry of Economy and Finance and the BoI), and allocates the authority to issue secondary rules and regulations on technical matters and to adopt prudential measures.

Among others, the TUB provides rules on: authorisation for banking activity; establishment of banks' branches and cross-border activities; interest in banks' capital; cooperative banks; supervision on banks (standalone and on a group basis); banking groups; bankruptcy and resolution proceedings of banks; guarantee systems for depositors; non-banking financial intermediaries; electronic money; payment services; transparency rules in banking services; consumer credit; financial agents and credit intermediaries; and sanctions proceedings.

Decree 58/1998, referred to as the Consolidated Law on Finance (*Testo Unico della Finanza* – TUF), is the fundamental law governing the financial markets. It includes rules on: supervision of financial intermediaries; professional and integrity requirements of senior management; investment services (including branches' establishment and cross-border activities of investment firms); door-to-door selling; asset management companies (including branches' establishment and cross-border activities of managers); UCITS and

AIFMD funds; market regulation; centralised management of financial instruments; listed issuers, public offers, minority shareholders' rights and proxy voting; special and saving shares; external audit; criminal and administrative sanctions; and market abuse.

Secondary sources of legislation include (i) resolutions of the CICR, which, acting on the BoI's proposals, establishes the guidelines and standards for supervisory activity based on ministerial regulations, (ii) BoI circulars, regulations and supervisory rules, and (iii) resolutions, communications and Q&A(s) of the Consob.

The BoI's legal instruments can take many forms (supervisory rules, regulations, circulars) and are usually of a distinctly technical and financial nature. The BoI also issues notices containing additional information and clarifications that are not included in a legal instrument.

Recent regulatory themes and key regulatory developments in Italy

Driven by both domestic and EU initiatives, recent years have marked significant regulatory changes, aimed in particular at strengthening the banking system, increasing transparency for clients and reducing systemic risks:

- Legislative Decree 182/2021, amending the TUB, has implemented at national level CRD V and CRR II on prudential requirements for banks, which has profoundly modernised the prudential and supervisory regulatory framework of the European banking system. Among the most significant innovations introduced by the Decree, it is worth highlighting the revision of the regulation of banking groups, the harmonisation of the regulations on the ownership structure of banks and other intermediaries to the joint guidelines of the ESAs, and the specification of the powers of the BoI in the area of additional capital requirements (Pillar 2 Requirement – P2R).

  As per the revision of the regulation of banking groups, a new regulation on financial holding companies (FHCs) and mixed financial holding companies (MFHCs) has been introduced. In very general terms, FHCs and MFHCs, being the head of the banking group and, therefore, subject to prudential consolidated supervisory, have to be expressly authorised by the BoI or the ECB to act as the parent company of the banking group. It is also envisaged that these types of companies are subject to the supervision of the competent authority and responsible for the compliance of the prudential requirements applicable to the banking group.
- On July 26, 2022, the BoI issued the provisions on ownership structures of banks and other financial intermediaries (in force as of January 1, 2023). These provisions, also implementing at the secondary level of legislation the amendment introduced to the TUB by Legislative Decree 182/2021, set out the requirements, conditions, and procedure for authorising the acquisition of qualifying holdings in Italian banks, asset management companies, payment institutions, EMIs and financial intermediaries.
- Directive 2023/2225/EU was adopted on October 30, 2023, which focuses on the protection of consumers entering into credit and financings agreements, enhancing transparency requirements applicable to banks and financial intermediaries towards clients.

The EU regulatory agenda for 2024 is also very copious:

- In December 2023, the European Council, Parliament and Commission agreed the final elements for the implementation of Basel III standards in the EU (partially already addressed in CRR II and CRD V) and, therefore, the review of the banking rules on governance and prudential requirements, proposed by the EC back in October 2021 (the so-called "banking package"), is nearly complete. In particular, the banking package

consists of a legislative act to amend CRD (*i.e.* CRD VI) and CRR (*i.e.* CRR III) and should be applicable, following final approval by the European Parliament and Council, as of January 1, 2025.

The banking package essentially aims at strengthening the resilience of EU banks in the main risk areas, namely credit risk, market risk, and operational risk, implementing new or, in certain cases, different approaches to such risks in compliance with Basel III standards. It should also be noted that, among the various amendments to the current regulatory framework made by CRD VI and CRR III, provisions related to the governance of environmental, social and governance (ESG) risks will be strengthened: in such regard, banks will have to draw up transition plans under the prudential framework that will need to be consistent with the sustainability commitments that banks undertake under other pieces of EU law and specific reporting requirements will apply to all EU banks, with proportionality for EU banks.

- The EC has adopted a package of proposals to amend MiFID II, IDD, the Solvency II Directive, the PRIIPS Regulation, AIFMD, and the UCITS Directive, with a view to enhancing the protection of retail investors and to empower the same to make investment decisions that are aligned with their needs and preferences.

Bank governance and internal controls

Governance

Composition of the board and requirements for board members

Persons with administration, management and control functions in banks must meet professional, integrity, and independence requirements, as well as competence and correctness criteria. They must also devote the time necessary for the effective performance of their duties, so as to ensure the sound and prudent management of the bank.

Specific requirements are identified in Decree 169/2020, which sets out the integrity requirements (such as the absence of sentences involving certain penalties or disqualification measures) for directors, auditors and general managers, as well as correctness criteria (such as administrative sanctions imposed for violation of regulations applicable to banks, or negative assessment by an administrative authority regarding the suitability of the directors/auditors in authorisation proceedings).

Decree 169/2020 also provides that the chairman of the board of directors, the chief executive officer, and the general manager must have gained at least five years of experience in management, supervisory or control activities in banking, financial or insurance companies or listed undertakings, while non-executive directors must have at least three years of experience in university teaching or professional activities in banking, financial or insurance sectors or management supervisory and control activities in companies operating in these sectors.

In addition, members of supervisory, management and control bodies must meet competence criteria, taking into account theoretical knowledge and practical experience of such director in certain matters (*e.g.* banking and financial regulation, risk management, internal control systems, IT, *etc*.).

The supervisory and control bodies are also required to assess their adequate collective composition, so as to ensure a variety of approaches in assessing issues and making decisions and taking into account the multiple interests that contribute to sound and prudent management of the bank. In such regard, the competences of the members of supervisory

or control bodies should be evaluated, and diversification in terms of age, gender, length of tenure, and, with regard to banks operating cross-border, geographic origin. Furthermore, pursuant to the Supervisory Provisions, at least 33% of the members of supervisory and control bodies must belong to the less represented gender.

In such regard, Decree 169/2020 provides for the identification and formalisation of the optimal adequate composition of the body, followed by a comparison of such composition with the actual composition of the body. In case deficiencies are detected, remedial plans must be defined and implemented (*e.g.* training activities for members of the body who do not have certain competences required in light of the business of the entity).

The strategic supervision body must also include independent (and non-executive) members to impartially supervise management and ensure that it acts in the interest of the bank and in a manner consistent with the objectives of sound and prudent management. The independent members of the supervisory body must be, at least, 25% of the members of such body.

Finally, pursuant to the Provision of the BoI issued on August 1, 2023, which amended the BoI provisions on organisation, procedures and internal control systems for AML purposes (the BoI Provisions on AML), banks are required to appoint, within the management body, a member responsible for AML, who must possess adequate knowledge and experience in AML matters.[2]

Decree 201/2011 (converted into Law 214 of December 22, 2011 and implemented by 2012 Guidelines and FAQ from the BoI, Consob and IVASS (the Interlocking Discipline)) provides a specific rule on the prohibition of interlocking directorates in the banking, finance and insurance sectors, according to which any individual appointed in the management board, the supervisory board, the statutory board of auditors, or as executive officer in a company or group of companies operating in the Italian banking, finance or insurance services market cannot hold a similar office in a competing company or group.

The prohibition applies if: (i) the relevant activities of the concerned companies or groups are subjected to authorisation and/or supervision from sectoral authorities (*e.g.* from the BoI, Consob or IVASS); (ii) at least two of the concerned companies or groups has an Italian annual turnover in excess of €32 million (the threshold is reviewed periodically by the Italian Antitrust Authority); and (iii) the concerned companies or groups are competitors (*i.e.* they operate on at least one of the same relevant markets).

An individual appointed to serve in two or more interlocked roles must keep only one of such roles and dismiss the other(s) within 90 days of the (incompatible) appointment(s).

Failure to do so will cause the individual to be dismissed from all of his/her interlocked offices by the competent corporate bodies within 30 days from the expiry of the above 90-day period or the knowledge thereof, or by the competent supervisory authority (*i.e.* the BoI for banks and financial institutions, or IVASS for insurance companies).

Internal committees

For larger banks or banks that are more operationally complex, the Supervisory Provisions provide for the establishment, within the strategic supervision body, of specialised committees (with investigation, advisory and proposing functions), composed by a majority of independent directors, in order to facilitate decisions especially with reference to more complex activities or activities with a higher risk of conflict of interest situations.

In general, in order to ensure the consistency of corporate governance, the competence and composition of the committees shall reflect those of the bodies in which they are established.

The composition, mandate (advisory, investigation and proposing) powers, available resources and internal regulations of the committees are clearly defined and formalised. In any case, such committees are composed in general of three to five non-executive and mostly independent members.

Larger banks or banks that are more operationally complex must appoint three specialised committees relating to "appointments",[3] "risk",[4] and "remuneration".[5] Medium-sized banks only need to appoint the "risk" committee.

In smaller banks or banks that are less operationally complex, and in general with regard to all banks, committees other than those required under the Supervisory Provisions may be appointed, but only if required by real needs, notwithstanding that the committee must be composed of at least one independent member.

These committees shall not limit the decision-making powers and responsibilities of the strategic supervision body.

Remuneration policies

Banks must apply sound remuneration policies to all staff and specific requirements for the variable remuneration of staff whose activities materially impact the bank's risk profile (*i.e.* so-called "risk takers", identified by the bank in accordance with the criteria set out in its remuneration policy).

The Supervisory Provisions provide guidance on remuneration and incentive policies and practices for banks and banking groups in compliance with CRD V and taking into account, *inter alia*, the guidelines and criteria agreed at international level, including those of the EBA and the G20's Financial Stability Board (FSB).

These policies are aimed at achieving – in the interest of all stakeholders – remuneration systems that are compliant with the long-term business values, strategies and objectives of the bank (including the sustainable finance objectives, which shall take into account ESG factors), transparent, and, as the case may be, appropriate to its size, internal organisation and the nature, scope and complexity of its activities. The remuneration must relate to the bank's results, suitably adjusted to take into account all risks, and be consistent with the capital and liquidity necessary to carry out planned activities. In all cases, the remuneration system must avoid distorted incentives that could lead to regulatory violations or excessive risk-taking for the bank and the financial system.

In particular, incentive remuneration systems based on financial instruments or linked to the bank's performance must be consistent with the risk appetite framework (RAF) and risk management policies of the bank and must also be considered in its capital and liquidity planning to avoid incentives that could conflict with its long-term interests.

The strategic supervision body (together with the remuneration committee, as the case may be) sets out the remuneration and incentive policy, submits it to the shareholders' meeting, and ensures its proper implementation. It shall review it at least once a year. The ordinary shareholders' meeting, in addition to determining the remuneration for the members of the bodies it appoints, approves (i) the remuneration and incentive policies for the members of the strategic supervision body and for the remaining staff, (ii) the remuneration plans based on financial instruments, and (iii) the criteria for the determination of remuneration in case of early termination of an employment contract or early termination of appointment.

Organisation of internal control

The internal control environment represents an essential element within the Italian banking governance system that ensures the consistency of the bank's activity with its strategies and policies in light of principles of sound and prudent management.

The Supervisory Provisions expressly state that, within the second and third level control area, banks must establish the following permanent and independent internal control functions:

- Compliance function: this function must verify the risks of non-compliance, such as the risk of incurring legal or administrative sanctions, significant financial losses or reputational damages as a result of violations by the bank of mandatory rules (*e.g.* laws or regulations) or self-regulation (*e.g.* statutes or codes of conduct).
  The compliance function presides over, through a risk-based approach, the risk of non-compliance in relation to the whole bank's business in order to ensure the adequacy of the internal procedures adopted by the bank. From an organisational point of view, the compliance function must be separate from the bank's operations.
  The compliance function must present an activity programme containing all the principal risks to which the entity is exposed, including corrective measures that may be reported to the bank's corporate bodies on a yearly basis.
- Risk management function: this function is responsible for the development and implementation of the RAF and the related risk management policies through a proper process of risk management. From a general point of view, the risk management function must work closely with the operational areas of the entity. The BoI requires ongoing and substantial interaction between the two areas.
  The risk management function must present an activity programme containing all the principal risks to which the entity is exposed, including corrective measures that may be reported to the bank's corporate bodies on a yearly basis.
- Internal audit function: this function is responsible for checking that the activities carried out by the bank are being carried out properly through an evaluation (which may also include on-site verification) of the risks and of the completeness, adequacy, functionality and reliability of its organisational structure. The internal audit function must be in constant contact with the corporate bodies of the bank in order to suggest, if necessary, possible improvements.
  The internal audit function must present an audit plan, including for the control activities that it intends to carry out during the year, to the corporate bodies of the bank on a yearly basis.

At the end of each year, the three mentioned internal control functions must provide a report to the corporate bodies of the banks that summarises activities carried out during the year and the results of the controls, indicating, as appropriate, the measures that shall be adopted in order to remedy any issue.

Lastly, the BoI Provisions on AML include, among the internal control functions, the AML function. This function plays a key role in the definition of the internal control system and the procedure aimed at preventing and managing AML risks. In very general terms, the AML function carries out an ongoing assessment of the adequacy of the AML risk management process and the suitability of the internal control system, proposing amendments to the same to better mitigate any AML risk.

Furthermore, the AML function is required to present an activity plan to the corporate bodies annually, in which the main activities to be performed in the course of the year are set out, as well as a report that summarises activities carried out during the year and the results of the controls, indicating the measures that shall be adopted to remedy any issues.

Outsourcing agreements

The regulatory framework applicable to outsourcing agreements has been significantly amended by the EBA Guidelines on outsourcing arrangements (EBA/GL/2019/02 – the

Guidelines), implemented in Italy by the BoI, which has supplemented the Supervisory Provisions accordingly and entered into force in Italy on September 24, 2021.

In accordance with the Guidelines, the outsourcing of functions cannot result in the delegation of the management body's responsibilities. Banks shall therefore remain fully responsible and accountable for complying with all of their regulatory obligations. In such regard, when outsourcing, banks must ensure that the orderliness of the conduct of their business and services provided is maintained, information flow on services provided is in force, all the risks related to the outsourcing of functions are adequately identified, assessed, managed and mitigated, appropriate confidentiality arrangements are in place regarding data and other information and, in case personal data are processed, it is done so in accordance with Regulation (EU) 2016/679.

In addition, should the outsourcing arrangement concern a critical or important function, banks must be able, within an appropriate time frame, to transfer the function to alternative service providers, reintegrate the function, or discontinue the business activities that are dependent on the function.

The Guidelines also detail the process that entities must follow prior to executing an outsourcing arrangement. In this sense, banks are required to carry out a pre-outsourcing analysis and, in particular, they shall: (i) assess whether the arrangement concerns a critical or important function and that the conditions set out for the outsourcing are met; (ii) identify and evaluate the risks underlying the outsourcing agreement; (iii) undertake appropriate due diligence on the service provider; and (iv) identify and manage any conflict of interest arising from the arrangements.

The minimum contents of the agreement between the bank and the outsourcer are also stipulated by the Guidelines.[6]

Following the formal approval by the competent body of the entity to outsource a function or activity, a prior notice must be given to the BoI or the ECB (depending on the competent authority) before the start of the outsourcing agreement, setting out the start and end dates of the agreement, a description of the activities, the name of the service provider, the countries in which the services will be provided, as well as certain other information laid down in paragraph 54 of the Guidelines.

Bank capital requirements

As a Member State, Italy is generally subject to EU banking regulatory rules and specifically to CRR, which is directly applicable to firms across the EU. From a general standpoint, CRR is intended to implement the Basel III agreement in the EU. This includes enhanced requirements for:

- the quality and quantity of capital;
- a basis for new liquidity and leverage requirements;
- new rules for counterparty risk; and
- new macro-prudential standards, including a countercyclical capital buffer and capital buffers for systemically important institutions.

The BoI's regulatory powers over capital requirements are confined to the very limited areas where CRR allows some discretion to make the necessary adjustments for integration with Italian law and specific circumstances.

Rules governing banks' relationships with their customers and other third parties

Banking activities in Italy

Under the Italian legal framework, banking activity includes the joint exercise of collection of savings and liquid funds from the public and granting loans. Collection of savings and liquid funds is mainly carried out through the receipt of deposits or other repayable funds from the public.

Banks that are duly authorised to operate in Italy may exercise, *vis-à-vis* the public:

(i) banking activity (as defined above);
(ii) any other financing activity, including related and instrumental activity; and
(iii) investment services and related activities according to MiFID. The provision of investment services is subject to the rules of the TUF and its implementing regulations, and the main supervisory authority is Consob.

Lending activity

In addition to banks, the provision of any kind of financing in a professional manner to the public is also allowed for other financial intermediaries licensed under Article 106 of the TUB as well as to payment institutions authorised according to the TUB (which may only provide financing strictly related to the payment services provided, within the limits and the operational standards set out by the BoI).

Furthermore, over the last few years, Italian companies have benefitted from several legislative measures facilitating access to financing, including the possibility of non-bank entities, including insurance companies, alternative investment funds (AIFs), securitisation vehicles and insurance companies, lending directly to qualified Italian borrowers. In particular, EU AIFs (including Italian AIFs) may be authorised by the BoI to provide loans to entities other than consumers in Italy. In addition, special purpose vehicles for securitisation transactions of receivables, incorporated under the Italian Securitisation Law, have recently been approved to provide loans to entities other than individuals and micro-enterprises.

Banking activities in Italy by foreign entities

The entering of a foreign bank into the Italian market is grounded on a "dual-track mechanism": EU banks can freely perform activities subject to mutual recognition based on the passported licence regime, while non-EU banks are subject to the BoI's full authorisation.

In light of the above and considering the European legislative framework, the available options for a foreign bank wishing to operate in Italy may be summarised as follows:

- for EU banks: establish a local branch (freedom of establishment) or carry out its business on a cross-border basis (freedom to provide services); and
- for non-EU banks: obtain the BoI's authorisation on a cross-border basis or through the establishment of a local branch.

Banks' relationships with customers

Protection of client assets

Article 96 *et seq*. of the TUB regulates the DGS, a guaranteed system to which a credit institution must adhere. According to the DGS, a person holding an eligible deposit with a credit institution may obtain, under specific circumstances (*i.e.* the insolvency of the relevant credit institution), the repayment of a maximum of €100,000. Deposits up to €100,000, which are protected under the DGS, are expressly excluded from bail-in.

Regulatory framework on AML

The EU's approach to combatting money laundering is based on the EU AML Directives.

The Italian AML and terrorism financing regime is set out in (i) the Italian Criminal Code (ICC), (ii) Decree(s) implementing EU AML Directives 2005/60 and 2015/849 (the AML Decree(s)), and (iii) the implementing regulations issued by the BoI and the other Italian authorities involved in the fight against money laundering.

The purpose of the AML legislation under the relevant provisions of the ICC is to make it a criminal offence to launder money deriving from underlying crimes of any kind. The AML Decree also aims at preventing use of the financial system for the purpose of money laundering and terrorism financing and sets out specific measures to be taken by banks, financial institutions and other entities listed in the AML Decree.

In very general terms, according to the AML Decree and the relevant implementing measures, financial intermediaries and other persons engaged in financial activities must comply with their obligations in relation to: (i) customer due diligence and adequate verification of clients; (ii) recording documents; (iii) reporting suspicious transactions to the relevant authorities; and (iv) internal controls, assessing and managing risk, and ensuring compliance with the relevant provisions. In addition, the AML Decree limits each cash transaction to €1,000.

* * *

Endnotes

1. Luigi Signorini, General Manager of the Bank of Italy, "*The evolution of banking business model and the trends in supervision*", in *Bancaria*, November 2023.
2. Such member of the management body, *inter alia*, is required to: (i) monitor the policies, procedures and measures of the intermediary, in order to ensure that the same are adequate and proportionate, taking into account the characteristics and risks to which the intermediary is exposed; (ii) assist the supervisory body in the evaluations of the organisation of the AML function; (iii) ensure that supervisory and control bodies are informed on activities carried out by the AML manager, any issue detected in AML matters in the performance of his/her tasks and any remediation plans defined in light of any deficiencies detected; and (iv) set up information flows.
3. The appointment committee supports the strategic supervision and management body in (i) the appointment or co-optation (*cooptazione*) of directors, (ii) the evaluation of the boards, (iii) the verification of the professionalism, integrity and independence requirements provided for by the TUB, and (iv) setting up succession plans for top positions in the executive body.
4. The risk committee supports the strategic supervision body in relation to risks and internal control systems.
5. The remuneration committee, *inter alia*, advises on the remuneration of staff and the remuneration and incentive systems that are determined by the strategic supervision body. In addition, it directly supervises the correct application of the rules on the remuneration of the person(s) responsible for the control functions.
6. The agreement must define, *inter alia*, the rights and obligations of the parties, the expected service levels, expressed in objective and measurable terms, as well as the information necessary for the verification of their compliance, the indication of

any conflicts of interest and appropriate precautions to prevent them or, if that is not possible, to mitigate them. It must also set out the conditions under which the agreement may be modified.

* * *

Acknowledgment

This chapter was originally drafted with the significant support of Andrea Banfi, an enthusiastic and outstanding professional who unfortunately passed away too soon. This update is in his memory.

Emanuele Grippo
Tel: +39 02 763 741 / Email: emgrippo@gop.it

Emanuele Grippo is a partner at Gianni & Origoni and is co-head of the financial market department and head of the Luxembourg desk of the firm.
Emanuele specialises in the regulation of financial services, pension and investment funds, banking and insurance regulation, as well as primary and secondary market investment solicitation and the regulation of listed issuers.
He has gained extensive experience in issues related to the distribution of banking, financial and insurance products, as well as in the set-up of banking, insurance and financial products. He also deals with structured finance and extraordinary transactions on regulated companies, with particular reference to the insurance, banking and financial sectors, including regulatory profiles, and in the definition of internal governance structures of regulated entities. He also deals with anti-money laundering regulations.
Lastly, Emanuele regularly assists Italian and foreign asset management in the set-up and launch of both retail and alternative investment funds.
Emanuele has won prestigious awards, including:

- "Professional of the Year – Private Clients/Family Office", as part of the Legalcommunity Finance Awards in 2021 and 2020.
- "Professional of the Year – Investment Funds", as part of the TopLegal Industry Awards in 2020.
- "Professional of the Year – Insurance", as part of the TopLegal Industry Awards in 2018.

Federico Cappellini
Tel: +39 02 763 741 / Email: fcappellini@gop.it

Federico Cappellini is an associate of the financial market department and specialises in insurance, banking, financial regulation, as well as anti-money laundering legislation, providing assistance both in extraordinary transactions and in ongoing activities of financial sector players, such as banks, asset managers, investment firms and insurance companies.
In a nutshell, Federico regularly assists Italian and foreign banks, insurance companies and financial intermediaries in their operations in Italy, with specific reference to the definition of products, drafting and negotiation of distribution agreements, and review of governance and internal control structures of regulated entities. Furthermore, he has expertise in extraordinary transactions concerning Italian institutions, also with regard to authorisation proceedings before the competent supervisory authorities (*e.g.* the European Central Bank, Bank of Italy, IVASS and Consob), in the prudential supervision of banks and financial conglomerates.
Before joining Gianni & Origoni in July 2021, Federico gained over three years' experience in an important law firm in Milan, providing legal support both to Italian and foreign companies on insurance, banking and financial regulation.
He graduated in Law in 2017 from the University of Trento, and attended a Masterclass at the University of Milan on financial market regulation in 2019.
He is a member of the Italian Bar and speaks Italian and English.

Gianni & Origoni

Piazza Belgioioso 2, Milan, Italy
Tel: +39 02 763 741 / URL: www.gop.it

www.globallegalinsights.com

Global Legal Insights – Banking Regulation provides in-depth analysis of laws and regulations across 19 jurisdictions, covering:

- Regulatory architecture: Overview of banking regulators and key regulations
- Recent regulatory themes and key regulatory developments
- Bank governance and internal controls
- Bank capital requirements
- Rules governing banks' relationships with their customers and other third parties

GLI GLOBAL LEGAL INSIGHTS