

# Client Alert

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## Recent Amendments to the Unified Financial Act

Legislative decree No. 101 of July 17, 2009 was published in the Italian Official Gazette No. 178 of August 3, 2009 (the Corrective Decree)<sup>1</sup> to amend the legislative decree n. 58 of February 24, 1998, the Unified Financial Act (*Testo Unico della Finanza*, TUF).

The Corrective Decree provides supplementary and corrective amendments involving companies that use the capital markets in Italy, and is aimed overall to complete and coordinate the regulations with certain EU directives introduced in recent years that have profoundly affected the rules of the financial markets contained in the TUF. In particular, the Corrective Decree amends the sections of the TUF that regulate: (i) public offerings pursuant to Directive 2003/71/EC<sup>2</sup> (the Prospectus Directive); (ii) the disclosure obligations of listed issuers pursuant to Directive 2004/109/EC<sup>3</sup> (the Transparency Directive); and (iii) market abuse pursuant to Directive 2006/3/EC<sup>4</sup> (the Market Abuse Directive).

The Corrective Decree also contains certain measures set to increase legal protections in favor of investors that operate in multilateral trading facilities (MTF), that, following the implementation of Directive 2004/39/EC<sup>5</sup> (the MiFID Directive), are rapidly expanding in Italy in competition with the regulated markets (for example,

AIM Italy and EuroTLX). As will be further discussed in this *Alert*, the increased protections fundamentally involve the extension of the disclosure obligations and market abuse rules to include instruments admitted to trading on the MTF which have certain characteristics.

### Amendments Regarding Public Offerings

The Corrective Decree amended article 94-*bis*, subsection 1 of the TUF, which governs the approval of the offering prospectus by Consob (the Italian Financial Authority), to implement the provisions of the Prospectus Directive requiring the competent authority to verify both that the prospectus is complete and that it is in an easily analyzable and comprehensible form.

Consequently, the new text of article 94-*bis*, subsection 1 of the TUF provides that in the prospectus approval process Consob must verify the accuracy including the consistency and comprehensibility of the information provided. This is different from the previous text, pursuant to which Consob verified "*the accuracy and the consistency and comprehensibility of the information contained therein.*" The amendment aims to clarify that the verification by Consob of the consistency and comprehensibility of the information

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regards the information included in the prospectus, and not all of the information provided by the offeror/ issuer to Consob in the context of the prospectus approval process, as could be interpreted with the prior language.

The Corrective Decree also changed the disclosure obligations in a public offering, by amending article 97, subsection 4 of the TUF, which grants Consob power to request information in order to confirm that no violations have been made of the public offering rules. Such power, which previously was limited to those issuers who were suspected of making a public offering in violation of article 94 of the TUF, is now extended to include those issuers who are suspected of having made (including in the past) a public offering in violation of the regulation.

Finally, the regulations governing subsequent sales of financial products that were sold in an offering which was exempt from the obligation to publish a prospectus, introduced in the TUF by law n. 262 of December 28, 2005 (the so-called savings law) and subsequently enacted by article 3.2 of the Prospectus Directive, were modified. The Corrective Decree provides for the addition of a new subsection 4-*bis* in article 100-*bis* of the TUF which grants Consob the power to issue regulatory guidelines regarding the rules that until now could only be interpreted by the general legislative clauses of article 100-*bis*.<sup>6</sup>

We note that, in order to guarantee more certainty to the investors relying on such rules, it would have been helpful if the legislature had set forth time limits in which Consob must issue the regulatory guidelines.

## Corporate Disclosure

The provisions regarding corporate disclosures required by the listed issuer were significantly updated by the Transparency Directive, which was gradually implemented into Italian law. In 2007 the Transparency Directive was enacted with legislative decree n. 195 of November 6, 2007 (D.Lgs. n. 195/2007), while the regulatory aspect was enacted only in April 2009 with the adoption by

Consob of resolution n. 16850 of April 1, 2009, implementing the amendments of Consob's regulation regarding issuers, n. 11971 of May 14, 1999 (the Issuer Regulation).

The Corrective Decree, following the opinion provided by the Senate, changed the mode of publication of the regulated disclosures<sup>7</sup>, by adding to articles 113-*ter* (General Provisions on Regulated Disclosures) and 114 (Information to be Provided to the Public) the obligation to publish the regulated disclosures on printed paper, with the declared purpose of providing access to non-professional investors (substantially, small investors) of the information regarding the issuers of the financial instruments in which they have invested and allowing their participation in the events of the company and the exercise of their rights as shareholders.

In doing this, however, the Italian legislature is in contrast with the fundamental principles of the Transparency Directive, which instead supports the use of the Internet and, more generally, of modes of communication and distribution of regulated disclosures which are easier, less expensive and more widespread on the pan-European level.

Such principles, moreover, were already introduced by the Italian legislature much earlier than the enactment of the Transparency Directive. In fact, with the adoption of the TUF back in 1998, the Italian legislature, following the example of EDGAR, the American system of filing and distributing information published by listed issuers, provided that the continuing and periodic information obligations should not be fulfilled by the listed issuers through publications on printed paper, but through the submission of a press release to the Italian Stock Exchange, which would then immediately make the information available to the public through its Network Information System (NIS), and through the subsequent publication on the issuer's Internet site, when available<sup>8</sup>. The Italian legislature had therefore already made the choice later made at the European level by the Transparency Directive that provides

for an electronic system of filing, distributing and storing information similar to the NIS, that, among other things, made the implementation of the new community rules easier in the Italian system<sup>9</sup>.

Pursuant to the corrective amendments, therefore, the Italian regulations take a notable step back. In establishing the mode of publication of the regulated disclosure, Consob must even require the use of printed paper for the distribution of "*regulated disclosures*"<sup>10</sup> (see article 113-*ter* of the TUF<sup>11</sup>), for the information relating to the prospectus for the admission to trading of open-end UCITS units or shares on regulated markets (see article 113-*bis* of the TUF<sup>12</sup>) and insider information pursuant to article 114 of the TUF<sup>13</sup>.

Although the general provisions from Consob have not yet been issued<sup>14</sup>, we can already note that the new provisions will make the distribution of regulated disclosures to the public extremely burdensome and complicated—it is enough to consider the number and size of the press releases that are distributed daily by issuers. The generic mention of "printed paper" seems both excessively broad and unclear, since such term does not only refer to the publication in newspapers with national circulation, expressly required by certain prior provisions<sup>15</sup>, to which it would therefore be reasonable to make coherent reference to the aims of maximum diffusion of the regulated disclosure set forth in the provisions regarding corporate disclosure in the Transparency Directive.

Article 114 of the TUF was further amended by the Corrective Decree, which broadened the group of subjects with the ability to oppose the communication to the public of inside information in the event it could cause serious injury. Article 114, subsection 6 of the TUF, of which the prior text gave such right to the listed issuers and the persons that control them, now also extends the opposition right to the category of "*listed issuers with Italy as home member state*," introduced in the TUF by D. Lgs. N. 195/2007 enacting the Transparency Directive<sup>16</sup>.

The amendment is also beneficial in that it aligns the provisions now contained in the sixth subsection with those contained in the fifth subsection of article 114, that already provided that listed issuers with Italy as home member state are required to publish information and documents needed to inform the public.

A similar change was made to article 118-*bis* of the TUF, which governs the procedures and time limits of Consob's verification of the information provided to the public by the listed issuers and that, following the corrective amendments, also applies to the listed issuers with Italy as home member state.

The Corrective Decree also addresses the corporate information of issuers of financial instruments distributed among the public with the addition of a new subsection 2-*bis* to article 116 of the TUF. The amendment extends the scope of application of the disclosure obligations to the public and to Consob pursuant to articles 114 (with the exception of subsection 7) and 115 of the TUF to the issuers of financial instruments admitted to trading on the MTF that possess certain characteristics to be established by a resolution of Consob, and under the condition that the admission to trading is requested or authorized by the issuer.

This amendment has a relevant impact on the operation of Italian capital markets, considering the recent diffusion in Italy of MTFs in competition with the regulated markets following the introduction of the MiFID Directive<sup>17</sup>. For example, AIM Italy, due to its characteristics and in the same way as the corresponding AIM in the United Kingdom (managed by the London Stock Exchange since 1995), can be reasonably assumed to be included as an MTF bound by the disclosure requirements. The corrective amendment clearly aims to provide better protection for investors that have chosen to operate on the MTFs instead of the regulated markets and, more generally, to guarantee greater transparency of information to the public.

In parallel with the modification to article 116, the Corrective Decree also amended the provisions of article 118, subsection 2 of the TUF. This regulation establishes the inapplicability of certain disclosure obligations to the public and to Consob required by article 116 in the event of financial instruments issued by banks other than shares or financial instruments that permit the subscription or purchase of shares. The Corrective Decree has now established that such an exemption is not available if the instruments are admitted to trading on the MTF.

## **Abuse of Inside Information and Market Manipulation**

### **Market Abuse**

The provisions regarding market abuse contained in the TUF have been significantly changed in the past few years following the enactment of the Market Abuse Directive<sup>18</sup>.

Along with the amendments made to the provisions regarding corporate information and with the same purpose of broadening the protections for investors in the MTF, the Corrective Decree extends the provisions on market abuse also to cover crimes and offenses committed on the Italian MTFs, such as the AIM Italy or the EuroTLX.

Article 180 of the TUF was amended, which expands the definition of financial instruments to now also include financial instruments admitted to trading on an Italian MTF, whose admission to trading was requested or authorized by the issuer.

Article 182 of the TUF was also amended, which governs the scope of application of the penalties for the abuse of inside information and market manipulation. The first subsection of the regulation now provides that the crimes and offenses of market abuse will be punished pursuant to Italian law, even if committed abroad, not only when the financial instruments are admitted or have applied to be admitted to trading on an Italian regulated market, but also when the instruments have been

admitted to trading on an Italian MTF.

The second subsection of article 182 of the TUF also provides that the penal and administrative sanctions set forth for the abuse of insider information or market manipulation will also apply to crimes and offenses pertaining to financial instruments admitted to trading in an Italian multilateral trading system, whose admission was requested or authorized by the issuer, in conformity with the new definition of financial instruments in article 180, as described previously.

Finally, the Corrective Decree amended the provisions regarding the buy-back of an issuer's own shares. Article 183, subsection 1 letter b) of the TUF, which governs the exemptions of the scope of application of the market abuse provisions, was amended to extend the exemptions to stabilization transactions of financial instruments admitted on the MTF. The reference to buy-back programs was also removed, which are neither covered by the Market Abuse Directive nor regulated on an internal level.

Along with the amendments described previously regarding the scope of application of the provisions of Title *I-bis* of the TUF, the Corrective Decree aligned the penalty provisions, adding a new subsection *3-bis* to article 184 of the TUF, which governs insider trading, and a new subsection *2-bis* to article 185 of the TUF, which governs market manipulation. Both of the amendments provide for penal sanctions for up to €103,291 and for arrest for up to three years for criminal actions related to financial instruments admitted to trading on an Italian MTF whose admission was requested or authorized by the issuer.

Consob's powers to verify violations of the market abuse provisions were also broadened with the addition to article 187-*octies* of the TUF of the possibility for Consob to obtain, in the event of necessity and also through data networks, of data contained in the relevant section of the court registries (the so-called archive of relationships with financial operators).

## Administrative Sanctions

The Corrective Decree also amends the provisions of pecuniary administrative sanctions set forth in article 190 of the TUF applicable to intermediaries and markets. In line with the amendments to the provisions regarding market abuse, article 79-*bis* of the TUF (which governs the pre-trading and post-trading transparency requirements for transactions on shares admitted to trading on regulated markets and executed on said markets within multilateral trading facilities and authorized persons) is now included in the list of provisions whose violation calls for pecuniary administrative sanctions, in order to make the violations of such regulation by intermediaries that are not also managers of MTFs or internal systems sanctionable.

### Endnotes

- <sup>1</sup> See also the scheme of the decree, Government Act n. 75, of which the complete dossier prepared by the Study Service of the Senate is available at: [http://www.senato.it/documenti/repository/dossier/studi/2009/Dossier\\_123.pdf](http://www.senato.it/documenti/repository/dossier/studi/2009/Dossier_123.pdf).
- <sup>2</sup> Directive 2003/71/EC of the European Parliament and of the Council of November 4, 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC.
- <sup>3</sup> Directive 2004/109/EC of the European Parliament and of the Council of December 15, 2004 on the harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC. See also the measures contained in Commission Directive 2007/14/EC of March 8, 2007, laying down detailed rules for the implementation of certain provisions of the Transparency Directive.
- <sup>4</sup> Directive 2003/6/EC of the European Parliament and of the Council of January 28, 2003 on insider dealing and market manipulation (market abuse). See also the measures contained in Commission Directive 2003/124/EC of December 22, 2003, Commission Directive 2003/125/EC of December 22, 2003, Commission Directive 2004/72/EC of April 29, 2004 and Commission Regulation 2273/2003 of December 22, 2003.
- <sup>5</sup> Directive 2004/39/EC of the European Parliament and the Council of April 21, 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC

and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC.

- <sup>6</sup> Article 100-*bis* of the TUF was introduced following the Parmalat and Cirio scandals in light of the procedures followed by certain authorized persons to “offer” bonds or other debt, originally sold privately to qualified investors (and therefore without the publication of a prospectus) to retail investors. The regulation provides that “an investment incentive also occurs whenever the financial products which formed the subject matter in Italy or abroad of an allocation reserved for qualified investors are, during the following twelve months, systematically resold to people who are not qualified investors and this resale does not fall within any of the cases of inapplicability provided for in Article 100.” In such circumstances, the purchaser of financial products can insist on voiding the contract and the authorized persons of the resale shall be liable for damages.
- <sup>7</sup> See note 8 below.
- <sup>8</sup> See the text of prior article 66 of the Issuer Regulation.
- <sup>9</sup> In implementing the Transparency Directive into national regulations, Consob resolution n. 16850 also removed from the Issuer Regulation the obligation to publish in a newspaper with national circulation the notice of the filing of quarterly and annual financial statements, previously required by article 83 of the Issuer Regulation, repealed by Consob resolution n. 16850.
- <sup>10</sup> “Regulated Disclosures” are defined by article 113-*ter* of the TUF as disclosures which must be published pursuant to the provisions of Title III, Chapters I and II, Sections 1, I-*bis*, II and V-*bis* and to related enactment regulations or provisions established by non-EU country authorities considered the equivalent of Consob, by:
  - 1) Listed issuers, as defined in article 1, subsection 1, letter w) of the TUF (*i.e.*, Italian or foreign issuers of financial instruments listed on Italian regulated markets);
  - 2) Listed issuers with Italy as their home member state, as defined by article 1, subsection 1, letter w-*quarter* of the TUF (*i.e.*, issuers with shares admitted to trading on Italian regulated markets or of another EU Member State, with registered office in Italy; issuers of securities with registered office in a non-EU country, for which the first application for admission to trading on an EU regulated market was submitted in Italy or Italy was later chosen as the home member state when said first application for admission was not implemented by decision of the issuer; issuers of securities with registered office in Italy or

whose securities are admitted to trading on an Italian regulated market and who have adopted Italy as the home member state); or

3) The controlling bodies of the issuers listed in points (i) and (ii).

<sup>11</sup> Article 113-ter of the TUF contains the general provisions for the distribution to the public, the filing and the storing of the regulated disclosures.

<sup>12</sup> Article 113-bis of the TUF contains the general provisions for publishing a prospectus for the admission to trading of open-ended UCITS units or shares.

<sup>13</sup> Article 114 contains the provisions for public disclosure obligations of insider information.

<sup>14</sup> With resolution 17002 of August 17, 2009, Consob introduced a temporary regime regarding notifications and regulated disclosure, temporarily restoring—until a forthcoming amendment to the regulatory provisions of the sector is introduced—the obligation to make a notification in a daily newspaper with national circulation, as had been provided until March 31, 2009 by the Issuer Regulation, before it was amended by Consob in its implementation of the Transparency Directive. The temporary regime is in force as of August 21, 2009, the day after the publication of resolution 17002 in the *Gazzetta Ufficiale*.

<sup>15</sup> See prior article 83 of the Issuer Regulation; see note 11 above.

<sup>16</sup> Article 1 of the D.Lgs. n. 195/2007, enacting article 2, subsection 1 letter i) of the Transparency Directive, introduced the letter *w-quarter*) to article 1, subsection 1 of the TUF, containing the definition of listed issuers with Italy as home member state:

- 1) *“issuers with shares admitted to trading on Italian regulated markets or of another EU Member State, with registered office in Italy;*
- 2) *issuers of debt securities with a nominal unit value of less than one thousand Euro, or corresponding value in a different currency, admitted to trading on Italian regulated markets or those of another EU Member State, with registered office in Italy;*
- 3) *issuers of securities indicated under points 1) and 2), with registered office in a non-EU country, for which the first application for admission to trading on an EU regulated market was submitted in Italy or Italy was later chosen as the home member state when said first application for admission was not implemented by decision of the issuer;*

4) *issuers of securities other than those indicated under points 1) and 2), with registered office in Italy or whose securities are admitted to trading on an Italian regulated market and who have adopted Italy as the home Member State. The issuer may choose one Member State only as the home member state. The decision shall remain valid for at least three years, unless the issuer’s securities are no longer admitted to trading on any EU regulated market.”*

<sup>17</sup> Directive 2004/39/EC of the European Parliament and of the Council of April 21, 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC.

<sup>18</sup> The Market Abuse Directive was enacted in Italian regulations, at the legislative level, with law n. 62 of April 18, 2005 (the so-called community law 2004) and on the regulatory level with Consob resolutions n. 15232 and n. 15233 of November 29, 2005, amending, respectively, the Issuer Regulation and the prior market regulation n. 11768 of December 23, 1998, later replaced by Consob regulation n. 16191 of October 29, 2007.

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