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## UCITS IV:

### THE COMPLETION OF THE IMPLEMENTATION PROCESS IN ITALY

On 16 May 2012, Italy completed the implementation process for Directive 2009/65/EC on undertakings for collective investments in transferable securities (the UCITS IV Directive) (Directive), almost one year after the expected date it would come into force.

On that date, the Legislative Decree of 16 April 2012, no. 47, transposing the Directive in Italy (Decree) was implemented through regulations made by the Bank of Italy and the Italian authority on securities (*Commissione Nazionale per le Società e la Borsa* or CONSOB).

This article provides an overview of the Directive and its implementing measures, as well as of the Directive's lengthy implementation process in Italy.

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### THE DIRECTIVE AND ITS IMPLEMENTING MEASURES

Enacted on 13 July 2009, the Directive repealed Directive 85/611/CEE and was to enter into force in member states' national legislation on 1 July 2011. The Directive was completed by the guidelines of the Committee of European Security Regulators (now the European Securities and Markets Authority or ESMA), as well as by the following non-legislative implementing acts adopted by the European Commission:

- Regulation (EU) no. 583/2010 concerning the Key Investor Information Document (the KIID), the document containing the key information for investors.
- Regulation (EU) no. 584/2010 on the standard notification letter and the exchange of information between national competent authorities.
- Directive 2010/42/EU concerning fund mergers, master-feeder structures and notification procedure.
- Directive 2010/43/EU on organisational requirements, conflicts of interest, conduct of business, risk management and the content of the agreement between a depositary and a management company.

### THE MOST IMPORTANT ASPECTS OF THE DIRECTIVE

The Directive aims to:

- Improve the efficiency of the financial markets.
- Enhance competition conditions among undertakings for collective investment in transferable securities.
- Ensure a greater protection for unit-holders.

The Directive has introduced a number of new measures. The most important are:

- Management companies may now create and manage harmonised undertakings for collective investments in transferable securities (UCITS) in host member states.
- UCITS may also be merged on a cross-border basis.
- UCITS may have master-feeder structures, where a feeder UCITS invests at least 85% of its assets in another master UCITS.
- The KIID replaces the simplified prospectus.
- The notification procedure between national competent authorities are simplified.

## **THE IMPLEMENTATION OF THE DIRECTIVE IN ITALY**

### **CONSOB OPERATING INSTRUCTIONS**

From 1 July 2011, the rules concerning the KIID and the simplified notification procedure came into force.

On 5 July 2011 CONSOB, in agreement with the Bank of Italy, published operating instructions on the application of the new rules concerning:

- The notification procedure between CONSOB and other national competent authorities for the marketing of UCITS in Italy.
- The notification to CONSOB from UCITS of updates of the documents transmitted with the notification letter to other national competent authorities.
- The methods of publication of the KIID and the prospectus in order to market to the public quotas or shares of Italian and foreign open-ended mutual funds.

*(For the full operating instructions, see website, [www.consob.it](http://www.consob.it) (in Italian)).*

### **THE SIMPLIFIED NOTIFICATION PROCEDURE AND THE TRANSFER TO THE KIID**

The CONSOB operating instructions require offerors who intend to market units or shares of a UCITS in Italy to first submit a notification letter, compliant with the standard model set out in Annex I to the Regulation 583/2010, to the competent authority of its home member state.

The offeror must indicate if the marketing of units or shares of the UCITS in Italy is addressed to retail investors or exclusively to qualified investors.

The competent authority of the UCITS' home member state will then e-mail CONSOB with the submitted notification letter, along with the relevant enclosures, and attest that the UCITS fulfils the conditions imposed by the Directive.

After sending the e-mail to CONSOB, the competent authority of the home member state will inform the offeror that their notification letter has been sent to CONSOB, and from then on, the units or shares of the UCITS can be marketed in Italy.

This procedure must also be followed when marketing units or shares of a new sub-fund of a UCITS already marketed in Italy.

CONSOB has published on its website the forms to be used by UCITS to comply with the simplified notification procedure, and also states that offerors must replace the simplified prospectus with the KIID by 30 June 2012.

## **ESMA'S INTERVENTION**

On 13 October 2011 ESMA published an opinion addressing the late transposition of the Directive and its implementing measures through practical arrangements to be followed by national competent authorities (see *ESMA, Opinion - Practical arrangements for the late transposition of the UCITS IV Directive, 13 October 2011*).

The practical arrangements focus on cross-border operations involving one member state that has not yet transposed the Directive. They point out that:

- The host member state authority cannot refuse a valid UCITS notification on the grounds that the Directive has not yet been implemented in the host jurisdiction.
- The home member state authority of a country which has not transposed the Directive is not entitled to notify new UCITS, unless:
  - the national legislation materially complies with Articles 12, 14, 15 and 51 of the Directive; and
  - the home member state authority is in a position to comply with Article 93 (7) of the Directive, as well as Article 31 of the Directive 2010/44/EU; or
  - the UCITS' management company complies on a voluntary basis with these provisions.
    - UCITS' management companies established in a member state that has transposed the Directive should be able to create a fund in a member state where the Directive has not been transposed, since the relevant provisions of the Directive are of a self-executing nature.
    - UCITS' management companies of a non-transposing member state can create and manage funds only if the relevant national legislation materially complies with Articles 12, 14, 15, 51 and 101 of the Directive.
    - Mergers between two UCITS which are established in the same member state that has not transposed the Directive, and where at least one of the two UCITS is marketed in other member states, should be authorised if the relevant legislation applicable to both the merging and receiving UCITS materially complies with Articles 40, 41, 42, 43 and 45 of the Directive.
    - Cross-border mergers between two UCITS established in non-transposing member states are not possible on the basis of the sole direct applicability of the Directive.
    - Master-feeder structures are not permitted if one of the two member states in which the UCITS are established has not transposed the Directive.

## **AMENDMENTS TO THE ITALIAN FINANCIAL LAW**

The Decree, published in the Italian Official Gazette on 28 April 2012, no. 99 (Ordinary Supplement no. 86), and entered into force on 13 May 2012, amended and supplemented the Legislative Decree of 24 February 1998, no. 58 (the Italian Financial Law) by introducing the following new measures:

- The definition of collective asset management now includes the marketing of management companies' own UCITS.
- Italian and harmonised management companies (those which have a registered office and head office in a member state other than Italy) can now establish and manage UCITS across borders. It is sufficient to have been authorised by the competent authorities of their home member states. The authorisation is to be acknowledged in all member states.
- Harmonised management companies which intend to carry out activities in Italy through a branch, must also comply with the rules of conduct in the Italian Financial Law.
- Master-feeder structures, envisaged for the first time under Italian law, are subject to a prior authorisation of the Bank of Italy and apply also to non-harmonised mutual funds (other than UCITS).
- Mergers of UCITS are subject to the law of the country of the merged UCITS. In this respect, the Italian law provides for a uniform set of rules applicable to cross-border, domestic and pure domestic mergers. Mergers must be authorised by the Bank of Italy, although the latter may issue standard authorisations for mergers having specific features.
- Management companies can now provide the non-core service of custody and administration of financial services also for units of UCITS set up by third parties.

#### **NEW MEASURES IN THE BANK OF ITALY AND CONSOB REGULATIONS**

On 8 and 9 May 2012, respectively, CONSOB and the Bank of Italy published on their websites amendments to the following regulations:

- The CONSOB Regulation on Issuers, adopted by means of the CONSOB Resolution of 14 May 1999, no. 11971 (the Issuers Regulation).
- The CONSOB Regulation on Intermediaries, adopted by means of the CONSOB Resolution of 29 October 2007, no. 16190, (the Intermediaries Regulation).
- The Bank of Italy Regulation of 14 April 2005 on Collective Asset Management (the Bank of Italy Regulation).
- The Bank of Italy and CONSOB Joint Regulation of 29 October 2007 (the Joint Regulation), concerning intermediaries' organisational requirements and procedures.
- The Bank of Italy Regulation of 29 October 2007, no. 1097, on, among other things, clients' assets deposit schemes (the Regulation on clients' assets deposit schemes).

#### **THE ISSUERS REGULATION**

By 30 June 2012, offerors must provide investors with an updated and free of charge copy of the KIID, before the subscription of units or shares of any UCITS.

If the distribution of UCITS is carried out by financial intermediaries, the offerors deliver the KIID to the placement agent and the latter provides the investors with it.

The KIID and the full prospectus must be made available to the public at least one day before the date scheduled for the launch of the offer in a manner that allows investors to obtain a copy of the offering documentation on a permanent form. Offering documentation is therefore published on the offerors' and placement agent's websites, as well as in the national press.

The KIID must be translated into the local language of the host member state where the UCITS is marketed; other documentation can be in English.

#### **THE INTERMEDIARIES REGULATION**

Provisions on investment services only apply to harmonised management companies acting through a branch.

The rules on inducements apply only with reference to the management of funds' assets.

Management companies may act under the execution-only modality option when they carry out the marketing of their own funds, as well as the marketing of funds set up by third parties. As a consequence, management companies do not have to assess the appropriateness of the marketed funds.

The rules of conduct provided under the Directive (and to be complied with by the asset management companies) are mostly in line with those already provided in Italy by the implementation of the Markets in Financial Instruments Directive (2004/39/EC) (MiFID).

#### **THE BANK OF ITALY REGULATION**

According to Title VI of the Bank of Italy regulation, the supervision on the functioning of funds competes with the funds' home member state authority, while the authority of the management company's home member state is competent to provide organisational and supervisory rules applicable to the management company itself.

In addition, UCITS which intend to market their units or shares must notify CONSOB.

A new chapter has been added regarding master-feeder structures, highlighting in detail the procedures for obtaining the authorisation by the Bank of Italy.

New rules have been added for feeder mutual funds that intend to invest in master mutual funds, as well as on the obligations of co-operation and information for entities managing and controlling master-feeder structures (such as, managers, depositories or auditors).

#### **THE JOINT REGULATION**

The Joint Regulation was already substantially compliant with the provisions laid down in the Directive in relation to organisational and control systems, management of conflicts of interests for asset management companies and open-ended investment companies (SICAVs). Therefore, only minor changes have been needed.

#### **THE REGULATION ON CLIENTS' ASSETS DEPOSIT SCHEME**

Depository banks are now able to carry out their specific services (except for Net Asset Value (NAV) calculations) under a general authorisations relating to the categories of mutual funds that the single depository has indicated in its submitted application to the Bank of Italy. They therefore no longer require a specific authorisation for any single assignment.

The calculation of the funds' NAV, however, requires specific authorisation.

## **TAXATION**

The UCITS tax regimes have been changed as a consequence of the Directive's implementation. In particular:

- The exemption regime from withholding tax applies to non-domiciled investors only with reference to the period in which they have held the units or the shares in Italy.
- Assignments of units or shares made through successions and donations are deemed as transfers and are therefore subject to withholding tax.
- A switch of units or shares between sub-funds of the same UCITS is deemed as a redemption and therefore is significant for taxation purposes.
- Incomes distributed by UCITS established in Italy by foreign asset management companies are subject to withholding tax to be applied directly by the foreign asset management companies.

## CRITICISMS AND CONCLUSIONS

The ambitious purpose of the Directive is at risk of being frustrated by the lack of implementation in several member states.

Thanks to CONSOB, the Bank of Italy and ESMA, the difficulties experienced during the Directive's implementation process have been efficiently tackled.

Asset managers have been eased of many of the administrative burdens they previously had when carrying out their cross-border activities, as they can now count on a uniform authorisation process, allowing them to establish, manage and market funds across member states. They can also benefit from the simplified procedures for marketing and merging funds.

Thanks to the KIID, investors can now understand the nature and risks of investment products, and be more aware of their investment decisions. This is in spite of the fact that the KIID arguably gives investors less protection than the replaced simplified prospectus, as the KIID provides:

- a “what if” approach rather than a probabilistic scenario;
- that the investment time horizon no longer has to be disclosed;
- that the descriptive summary should be replaced by an analytical one.

The same parties who point out these criticisms also complain that CONSOB has not intervened in order to change these rules. In this respect, the Italian regulator has replied that it did not have the power to change the contents of the KIID, as they were introduced in Italy through directly applicable European regulations and, in any case, changes to European legislation should be generally discouraged in order to avoid so-called "gold plating" (where the implementation of EU measures into national law goes well beyond the requirements set out in EU law, resulting in extra costs and burdens for investors and market operators, as well as putting national businesses at a competitive disadvantage compared with other member states.