

Anti-Money Laundering: New Obligations Imposed by the 2012 Guardia di Finanza Circular in Italy

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The initial source of the money laundering legislation that is still in full development is Directive 1991/308/EU (also known as the “first directive”) on prevention of the financial system from laundering the proceeds of criminal activities.

Directive 2001/97/EU (the “second directive”) on the subject of prevention of employment of the financial system for laundering the proceeds of illicit activities demands a higher standard of obligations on the part of the Member States and extends the scope of the subjects upon whom such obligations are imposed.

Italian Legislative Order 231/2007 brings into effect the Directive 2005/60/EU (the “third directive”). It introduces numerous new features applicable to professional persons¹ and imposes upon them somewhat burdensome obligations, the practical implementation of which is not always fully clear. The Guardia di Finanza (Italian Finance Police) recently intensified their monitoring of the legality of professionals’ operations insofar as they are viewed as one of the possible laundering channels. Their offices and chambers, in fact, constitute meeting places in which clients and financial brokers can collaborate. In some cases, the business transacted therein may be directed toward the concealment of dirty money.

I. Professional Associations

Ministerial Order of 4 May 2012² prescribes that certified public accountants and accounting professionals may report suspected laundering operations to the Consiglio Nazionale³ (C.N.) instead of the Unità di Informazione Finanziaria (U.I.F.)⁴ if they know, suspect, or have plausible reasons for suspecting that laundering or funding of terrorism operations are in progress or have been implemented or attempted. The C.N. forwards these reports to the U.I.F. and ensures the anonymity of the informant. The anti-money laundering provisions require that certified professionals fulfill several functions when submitting such reports:

- Consultative functions:

- in connection with promulgation by the Ministry of Justice of provisions requiring registration by professional persons;
- in connection with the periodic updating of the grounds for suspicion by the Ministry of Justice as proposed by the U.I.F.;

- Active collaborative functions:

- supplying the U.I.F. with information and other forms of collaboration as needed;
- forwarding, within the time limits that have been laid down, any notifications of suspicious operations received from their members;

- Surveillance and checking functions:

- promoting and checking compliance, from professional persons, with their anti-money laundering obligations;
- adoption of sufficient staff training measures.

Their power of surveillance is not exclusive, however, insofar as inspections can also be carried out by the Nucleo Speciale di Polizia Valutaria della Guardia di Finanza (N.S.P.V., G.d.F.).⁵

II. Checks by the Guardia di Finanza

The Italian police forces endowed with an important role in preventing and countering employment of the financial system for recycling operations and the funding of terrorism are the N.S.P.V. and the Direzione Investigativa Antimafia (D.I.A.).⁶ They are entrusted with the task of undertaking the in-depth investigation of the reports received from the U.I.F. by means of the anti-money laundering legislation.

1. The Guardia di Finanza's Powers and Limits

Legislative Order 231/2007⁷ has conferred upon the Guardia di Finanza:

- a) the freedom to avail itself of data in the register of bank relations, as part of its in-depth investigation of notifications and anti-money laundering inspections;
- b) the possibility to delegate such investigation to all its sections;
- c) electronic transmission of reports of suspicious operations and exchanges of information;
- d) the possibility to investigate persons subject to surveillance on the part of other authorities.

If its inquiries disclose taxation offences, the N.S.P.V. may take direct and independent action insofar as it is both a tax and a currency police offence.

2. Ways and Means of Checking Professional Persons

The checking of professional persons may be the outcome of:

- a report made by a professional person himself to the U.I.F. with respect to operations and/or services called for by one of his clients who felt at risk of money laundering or funding of terrorism;
- inquiries by the N.S.P.V. relating to a client of the said professional for the purpose of acquiring information possessed by the latter;
- an assumption of failure to report, by a professional person, with respect to operations and services furnished to a client who is already the subject of an investigation;
- investigation of the limitation of the use of cash by a client;
- inspections undertaken to determine the correct application of the anti-money laundering regulations.

As to the investigations that may be generated by a report to the U.I.F. concerning a suspect operation, the procedure lays down that, upon receipt of a report, the N.S.P.V. shall conduct a preliminary check in the form of a pre-investigative analysis. This step may lead to:

- no further assessment of the report because the amount of the operation and the reason for it, along with other features of the case, are not sufficient to support assumptions of money laundering;
- no further development of the report because the matter is already the subject of judicial proceedings;
- in-depth examination of the report.

In the latter case, the professional person may be required to produce copies of all documentation in his possession relating to the operation thus reported as well as information on all the operations registered and

identified; next, the firm's premises may be accessed for further examination and investigation that may reveal breaches of the anti-money laundering regulations, evidence, and elements pointing to the commission of crimes, situations of significance in taxation terms, etc.

It should be recalled that criminal acts stemming from crime may relate to "bodies endowed with a legal personality," associations, foundations, joint-stock companies and partnerships, public bodies, foreign companies operating in Italy, and individual firms.

Decision No. 18941/2004 of the Corte di Cassazione (Supreme Court of Appeal) initially ruled that administrative liability could only be attributed to bodies endowed with a legal personality in a company or having a mixed form, resulting in the exclusion of individual firms.

In Decision No. 15657 of 21.04.2011, however, this Court altered course and held that an individual firm can be likened to a legal person and absorbs the natural person who actually runs the business.

3. Anti-Money Laundering Inspections

For their so-called "sampling" anti-money laundering inspections, the N.S.P.V. or the Italian Finance Police use the powers they employ for their in-depth examination of reports of suspect operations.

In the case of professional persons, such inspections set out the following:

1. to check their correct and exact compliance with the obligations imposed by the anti-money laundering legislation;
2. to counter laundering of illicit earnings at the preliminary stage;
3. to prevent, seek out, and repress administrative and criminal offences emerging during the checking operations.

During the course of an inspection, as a first step a professional person will be required to produce the documents relating to his clients and to allow consultation of his Archivio Unico Informatico (A.U.I.)⁸ or its paper copy.

Duly authorized police officers may enter the professional's premises, look for papers and exchanges of information (e-mail inspection), and finally issue a report in two copies.

In keeping with the provisions of form 6 (checking of legal and accounting professionals),⁹ they will continue by calling for the list of the general particulars of the person's clients with indication of the date on which they did business. The next step is monitoring whether the business relationship was sufficiently screened in advance, together with the list of operations and professional services rendered, subdivided according to purpose of the amounts involved.

Attention will be paid to operations and services relating to clients whose names appear most frequently, or those who have made conferments or capital contributions to companies with goods in kind for amounts patently out of proportion to their market value, or those who have availed themselves of services directed to structured financing of transnational significance.

Other selection criteria will focus on clients with criminal, tax, or police records for offences for the purpose of gain, with evident incongruity between the amount of the operation undertaken and their earning capacity and, lastly, those classified as "persons politically exposed", trustee companies, etc.

The second step is acquisition of all the documentation held by the professional person (including e-mails) followed lastly by processing of all the material collected. An examination will be made of the identification and verification of the client and the effective proprietor in terms of time, ways and means of execution, and acquisition of the information concerning the purpose and nature of the services.

These measures may result in the detection of:

- administrative breaches;¹⁰
- situations of substantial importance in taxation terms for use in a subsequent review of the client's fiscal position;
- criminal offences, with forwarding of the information to the Director of Prosecutions.

The G.d.F. will devote particular attention to assumptions of criminal liability regarding a client who has deliberately omitted or falsified information about the reason and the nature that is expected from the professional service, whether alone or in collusion with the professional person's associates or employees.¹¹

III. Administrative Sanctions

- Failure to comply with an order to suspend the suspicious operation: fine between € 5000 and € 200,000;
- Failure to abstain from the establishment or cessation of a continuous relationship, execution of professional operations or services that directly or indirectly involve trustee companies, trusts, anonymous companies, or companies controlled by holders of bearer shares located in countries listed by the Ministry for the Economy and Financial Affairs:
 - * fine of € 5000 for operations not exceeding € 50,000
 - * fine ranging from 10 to 40% for operations exceeding € 50,000
 - * fine ranging from € 25,000 to € 250,000 if the amount of the operation is not determined or not determinable;
- Failure to keep a clientele register and/or to adopt other ways and means of registration: fine of € 5000 to € 50,000;
- Failure to report suspected operations: fine ranging from 1 to 40% of the amount of the operation not reported;
- Breach of the obligations to inform the U.I.F.: fine of € 5000 to € 50,000;
- Failure to notify the relevant Ministry of infractions encountered: fine ranging from 3 to 30% of the amount of the operation, the balance of the bank book or the account.

IV. Criminal Sanctions

- Omitted, tardy, or incomplete registration: fine of € 2600 to € 13,000;
- Breach of the obligation to identify the client: fine of € 2600 to € 13,000;

- Discharge of identification and registration obligations by resorting to fraudulent practices, e.g., impeding identification of the author of an operation constitutes an aggravating circumstance that doubles the penalties imposed;¹²
- Omission of communications by a board of auditors, surveillance committee, management supervision committee, the body named in sect. 6, first para., and all persons charged with the inspection of management: imprisonment up to one year and a fine of € 100 to € 1000;
- Violation of the prohibition of the communication of a completed report of a suspected operation other than in the cases envisaged by Legislative Order No. 231/2007: arrest for 6 months to one year and fine of € 5000 to € 50,000.

Practical Measures for the Avoidance of Sanctions

According to the specialized media, a very large number of professional offices are running the risk of closure as the result of anti-money laundering sanctions. In most cases, the regulations are being poorly applied due to insufficient and/or false information.

An inspection has the following ascertainment objectives:

- sufficient verification of the business relationship;
- storage of data and the corresponding establishment of a client's file;
- preparation of the business relationship register or the A.U.I. and recording of the data;
- effective reporting of operations suspected of money laundering or the funding of terrorism;
- communication to the M.E.F.¹³ of instances of the wrongful employment of cash.

With regard to client identification, the G.d.F. determines whether it has been founded on reliable documents, whether the identity of the actual proprietor has been ascertained and checked, and whether information has been gathered concerning the purpose and nature of the professional service requested as well as the subsequent monitoring of the information during the course of the relationship.

As to the recording of data, the aim is to determine whether it has been completed within the required term of 30 days, following acceptance of the professional engagement, or whether this information can be derived from any subsequent knowledge of the operations, or from the termination of the professional service.

The G.d.F. primarily looks for instances of failure to report to the U.I.F. and determines the pathway that led the professional person to remain unaware of the suspicious nature of a particular service.

As matters now stand, the professional person's greatest risk stems from the acquisition of insufficient information about a new client. It is thus advisable to draw up an appropriate risk profile right from the start and to review it from time to time.

In the case of suspicious operations forwarded by a professional person, the G.d.F. makes sure they are handled in accordance with the confidentiality provisions.¹⁴

A final check to which a professional person may be subjected relates to the limitation of the use of cash. Salva Italia Order No. 201/2011 of 06.12.2011 prescribes immediate application of the limit of € 1000.

Persons indicated in sect. 51 of Legislative Order 231/2007, which comprises professionals, are required to communicate and notify breaches to the M.E.F. The M.E.F., after checking the completeness of the report, has 90 days to inform the author of the breach that the G.d.F. will be notified. This is followed by a preliminary examination during which memorials by the defense may be lodged. A sanction is then imposed or the case is dismissed on the merits and shelved for procedural reasons. The proceedings end with termination. Following notification of the decision and expiry of the time for lodging an appeal, the office must send a letter calling for payment prior to the possible entry of the case on the lists by Equitalia.¹⁵

V. Anti-Money Laundering Reporting and Questions of Confidentiality and Professional Secrecy

The right to secrecy is a special form of the right to confidentiality. It safeguards a person's interest by not allowing others to know an item of information or private data. Professional secrecy involves features that may have an impact on a professional's deontological, criminal and civil liability.

Particular attention is obviously directed at the question of secrecy in the case of data and information of which a professional person has gained knowledge via a fiduciary relationship established with his client for the purpose of fulfilling a professional engagement.

The substantial breach of a right inflicted by the anti-money laundering and antiterrorism legislation thus has an impact on rights that our judicial system views as worthy of protection.

What is at stake, indeed, is the fair and reasonable equilibrium that needs to be established between common values, so as not to sacrifice civil rights and freedoms to ensure public order and national security. One cannot overlook the fact that the question of the relationship between the anti-money laundering legislation and professional secrecy is not confined to safeguarding the right to defend oneself and have access to justice – it extends to the protection of a citizen's right for access to the law. Resorting to a legal consultant to secure a better understanding of rules and regulations is a vital right.

The anti-money laundering and antiterrorism legislation is thus compelled to prescribe that reports to the U.I.F. do not constitute breaches of the obligations of confidentiality and professional secrecy. Hence, they do not give rise to any kind of liability, whether civil, criminal, or administrative for professional persons and their employees and collaborators, provided that such reports are made as follows:

- for the purposes envisaged by the legislation: professionals are required to be familiar with the legislation in order to avoid unwarranted reports that could harm the client and obviously expose the incautious informant to criminal sanctions as well as those inflicted for his unjustified breach of the obligation of professional secrecy;
- in good faith: the considerations set out above have a greater impact whenever an unjustified report is presented in good faith and not as the outcome of ignorance or carelessness.

Even so, the fact remains that the rules laid down in Legislative Order No. 231/2007 “unload” upon professional person's substantial and often unreasonable obligations that conflict with the interests of their clients and assurances of anonymity.

VI. Conclusions

In view of the limits arising from the anti-money laundering legislation, the European Commission has set out to revise the “third directive,” which is centered on the aspects associated with reporting obligations and their link with the safeguarding of personal data, together with corrective measures designed to strengthen the relationships between the regulating authorities.

Furthermore, the Italian governing body of the Gruppo d’Azione Finanziaria Internazionale (G.A.F.I.)¹⁶ has given the green light for the publication of its new indications drawn up to define the worldwide standards to be applied in the fight against money laundering and due to become law in many countries.

The new text furnishes more incisive tools for countering the illicit use of the financial system. It promotes greater transparency on the part of legal persons and identifies international cooperation as the key to the struggle against financial crime.

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1. For the purpose of this article, the term “professional persons” refers to natural and legal persons as meant by article 2 of Directive 2005/60/EU.↔
 2. Gazzetta Ufficiale (Official Gazette) No. 110,12.05.2012.↔
 3. National Council.↔
 4. Financial Information Unit.↔
 5. Special Currency Police Unit of the Italian Finance Police.↔
 6. Antimafia Investigation Board.↔
 7. D.Lgs. Decreto legislativo (Legislative Order).↔
 8. Centralised Computer Archive.↔
 9. G.d.F. Circular No. 83607, 19.03.2012.↔
 10. Sects. 57 and 58 of Legislative Order No. 231/2007.↔
 11. Sect. 55 para. 3 of Legislative Order No. 231/2007.↔
 12. Sect. 55 paras. 1-2-4 of Legislative Order No. 231/2007.↔
 13. Ministero Economia e Finanze (Ministry for the Economy and Financial Affairs).↔
 14. Communication U.I.F. 23.04.2012.↔
 15. Equitalia is a state-owned tax collection agency.↔
 16. Financial Action Task Force – F.A.T.F.↔
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