INFORMAL ENGLISH TRANSLATION OF LETTER TO BANK OF ITALY FROM ALLEN & OVERY - STUDIO LEGALE ASSOCIATO REPRESENTING ICMA DATED 8 JANUARY 2018

Dear Sirs,

The firm Allen & Overy, representing the International Capital Markets Association (ICMA), hereby wishes to ask your Institution a question with the aim of clarifying the correct application of the current provisions on certain forms of the practice of international operators, which the above-mentioned association represents.

CASES

We make reference to the non-Italian banks (within and/or outside of the European Union – EU) which act as issuers of debt instruments (a) initially subscribed by authorised intermediaries and/or placed on the primary market with qualified investors both in Italy and other countries or (b) placed (by means of authorised intermediaries) with retail investors both in Italy and other countries.
In scenarios (a) and (b) the debt securities are issued and placed by the issuer banks according to the national and European rules for offerings of financial instruments and in particular, according to the provisions of the Prospectus Directive and the MiFID II Directive.
With reference to (a) the following cases, provided as an example, were recently brought to our attention:

i. an EU bank which in its country of origin is not authorised to collect deposits and other reimbursable funds and intending to issue and/or place debt securities (covered bonds, for example, in accordance with what is permitted by the authorities of its country of origin) in Italy on the primary institutional market;
ii. a German bank which in its country of origin is authorised to collect deposits and other reimbursable funds and intending to issue and/or place debt securities (notes according to Eurobond documentation) in Italy on the primary institutional market;
iii. a non-EU bank which intends to issue and/or place debt securities (for example, notes according to the Eurobond documentation) in Italy on the primary institutional market.

Secondarily, as indicated under (b), we are also considering the particular case of EU or non-EU banks intending to issue debt instruments and on a retail basis (Italy and other countries) via public offering according to the applicable regulations.

REGULATORY FRAMEWORK

According to article 16(3) of Legislative decree no. 385 of 1 September 1993 (Consolidated Banking Act, or TUB) EU banks can provide the activities allowed by mutual recognition (which includes, according to Art. 1(2) letter f) TUB, the activity of the collection of deposits and other reimbursable funds) without establishing branches in Italy, once the Bank of Italy has been informed by the competent authority of the state of origin.
According to article 16(4), TUB, non-EU banks can freely operate providing services in our country following authorisation from the Bank of Italy.
Bank of Italy's Circular no. 285 of 17 December 2013 contains a very broad definition of provision of services without operating site, including the provision of banking and financial activities within the territory of the [Italian] Republic by EU banks and financial companies admitted to mutual recognition by a temporary organisation.

Pursuant to the provisions of the Bank of Italy of 9 November 2016 (*Provisions for the collection of investments from various entities by banks*), Section III, paragraph 2, letter e), the acquisition of funds from entities subject to prudential monitoring, operating in the banking, financial, asset, insurance and pension segments does not form the collection of savings investments from the public.

THE QUESTION

In light of the above, we wish to ask your Institution what is the regime applicable to the above-mentioned particular cases, assuming the application of the regulations on public offerings as well as observing the obligations of intermediaries authorised to do so.
More specifically we ask:

1. If the placement of bonds via authorised intermediaries can be considered a service for the collection of investments.
2. If in light of the current regulations the activity under discussion is a service which can be provided without needing to obtain mutual recognition of the licence issued by the country of origin (for EU banks) and obtain ad hoc authorisation (for non-EU banks).
3. If the requirements established by the applicable regulations apply differently depending on whether the collection of savings investments is from qualified investors or on a retail basis.

Note that this question refers exclusively to the particular case of placement (direct or via duly authorised intermediaries) of the aforesaid bond instruments and not to other banking/financial services.
We thank you in advance for your kind attention and shall remain available for any further details.

Kind regards,

Allen & Overy- Studio Legale Associato