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Investment Recommendations under MAR – Operative Guidelines Issued by the Italian Securities and Exchange Commission

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The Italian Securities and Exchange Commission (“CONSOB”) issued guidelines on investment recommendations (“Guidelines”) providing a clarification on the application of the main provisions of the EU Regulation No. 596/2014 (“MAR”) on the matter to all persons and firms involved in the management of investment recommendations.

The Guidelines focus on the definition of investment recommendations under MAR and better clarify, also through examples, the scope of the relevant provisions. Moreover, CONSOB’s investigating powers in connection with the dissemination of investment recommendations are also explored.

Given their practical approach, the Guidelines provide a very useful tool for the identification of investment recommendations and for the application of the relevant rules provided for under MAR.

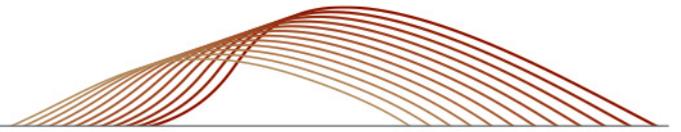
Investment Recommendations under MAR

According to MAR, an “investment recommendation” is any “information recommending or suggesting an investment strategy, explicitly or implicitly, concerning one or several financial instruments or the issuers, including any opinion as to the present or future value or price of such instruments, intended for distribution channels or for the public” (Article 3, par. 35, of MAR).¹

Under MAR, persons producing or disseminating “investment recommendations or other information recommending or suggesting an investment strategy shall take reasonable care to ensure that such information is objectively presented, and to disclose their interests or indicate conflicts of interest concerning the financial instruments to which that information relates” (Article 20, par. 1, of MAR).

Under the Guidelines, an investment recommendation may well be elaborated upon and distributed in various ways. For instance:

1. A monographic report related to a sole issuer;
2. Information for public or distribution channels, related to one or more issuers, with flexible content (e.g., short notes, morning notes, etc.);
3. Information sent on a daily basis or when particular market changes occur, by email or phone (e.g., call, chat, WhatsApp, etc.), from an intermediary to its qualified counterparties or professional clients (so-called trading ideas or sales notes);



4. A report related to a specific industry (including information on several issuers operating in the same business);
5. An interview released to media (e.g., web, television, radio, newspapers, etc.);
6. A communication issued during conferences or meetings; or
7. A communication commenting on the value (or the estimated value) of a financial instrument (e.g., the estimate of the fair value of a financial instrument).

According to the Guidelines, in order to assess whether a communication amounts to an investment recommendation under MAR, it is necessary to preliminarily assess whether they are aimed at implicitly or explicitly recommending an investment strategy.

To this end, the examples provided by the Guidelines are quite useful. In particular:

1. Sector reports are investment recommendations if a reasonable investor is led to believe that the information provided is recommending investment strategies regarding specific issuers or financial instruments; this is the case, for instance, in a report concerning a limited number of issuers;
2. Similarly, trading ideas must be considered investment recommendations insofar as they can recommend or suggest investment strategies regarding financial instruments;
3. Conversely, an evaluation of macroeconomic elements, raw materials markets, or specific industries, without any referral to financial instruments or issuers, cannot be considered investment recommendations, provided that a reasonable investor does not consider it a recommendation on investment strategies regarding specific issuers or financial instruments;
4. Similarly, communications relating to purely factual information, events, or news concerning financial instruments or issuers are not considered as investment recommendations.

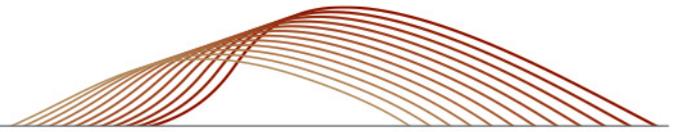
Informative Duties under MAR

Under MAR, persons providing investment recommendations have informative duties concerning conflicts of interests and the fair presentation of investment recommendations.²

The Guidelines, in furtherance of the proportionality principle set out in MAR, provide that persons spreading investment recommendations in ways such as via text messages/WhatsApp, short notes/morning notes, calls, conferences/meetings, and/or interviews, may well include a “shortcut” to an external source in order to comply with such informative duties (for instance, a link to the website of the broker).

The Guidelines also take into account informative duties for persons spreading investment recommendations issued by a third party.

According to the Guidelines, these duties are stricter if investment recommendations provided by a third party are modified (e.g., summaries or extracts, substantial modifications of the recommendation, etc.). In the event of substantial modifications, persons spreading investment recommendations issued by a third party must comply with the same information duties provided for persons issuing investment recommendations and indicate the original source of the investment recommendation.³



The Guidelines refer to EU Delegated Regulation No. 958/2016 and clarify that a substantial modification of an investment recommendation may occur if the persons disseminating recommendations extrapolate only some elements of a source recommendation or if they change the source recommendation (e.g., by changing a “buy” recommendation into a “hold” or “sell” recommendation, or vice versa, or by changing the price target).

According to the Guidelines, any substantial modification of investment recommendations is subject to a case-by-case evaluation in order to assess whether informative duties should apply. There is a substantial modification of the investment recommendation if the abstract of the investment recommendation only sets out some of the elements included in the original recommendation and, consequently, the recipient is not in a position to fully understand the essential elements.

Even the recipient of an investment recommendation issued by a third party must comply with the informative duties provided for under MAR if the investment recommendation is further disseminated. However, according to the Guidelines, these duties do not apply if the dissemination is limited to a restricted audience, provided that if the recipients have access to distribution channels (e.g., journalists and bloggers with numerous followers), the person disseminating the investment recommendation must evaluate if the recipients could disseminate the investment recommendation and comply with the relevant informative duties.

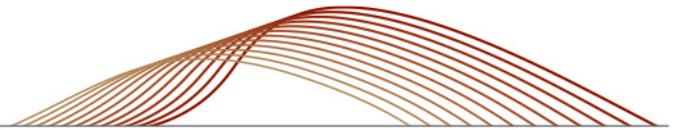
Publication of Investment Recommendations

Under MAR, competent national authorities must have the necessary supervisory and investigative powers in order to fulfill their duties under the MAR and to provide correct information to the public.⁴ As such, CONSOB can require the publication of investment recommendations in case information already disseminated could cause a false and misleading informative framework. This could happen, for instance, in the case of press agencies or online articles disseminating partial or incorrect information concerning investment recommendations.

The Guidelines state that CONSOB is entitled to require the publication of the investment recommendation when all the following conditions are met: (i) there is already information on the content of an investment recommendation; (ii) there is a significant change in the market price of financial instruments concerned by the recommendation with respect to the last price on the previous day, and/or a significant change in the volume of trade of these instruments with respect to previous days; and (iii) the investment recommendation has already been spread.

The Guidelines clarify that, in order to evaluate whether these conditions are met, CONSOB must take into account, *inter alia*, the following circumstances:

1. Press agencies, press, online articles, or blogs disseminating information regarding the content of an investment recommendation;
2. The information is the only information disseminated during the day on the issuer/financial instrument;
3. Information disseminated is specific and/or press agencies or news link the market price fluctuation and/or the volume of trade of the financial instruments to the dissemination of the investment recommendation;
4. Information disseminated is false, incorrect, or partial in connection with essential elements of the investment recommendation and, as such, the public is not provided with a complete and correct informative framework.



Conclusion

The Guidelines issued by CONSOB are intended to be an interpretive tool for firms and individuals providing investment recommendations on financial instruments or issuers.

They clarify the scope of the relevant provisions of the market abuse legal framework, including examples aimed at providing a better understanding as to their scope. Moreover, the explanation of CONSOB's powers to investigate investment recommendations is very helpful for those disseminating recommendations, giving them a clear picture of the extent of CONSOB's rights and limits.

Persons and firms involved in the management of investment recommendations should take into due consideration such Guidelines in order to properly spread the relevant recommendations.



If you have any questions concerning these developing issues, please do not hesitate to contact either of the following Paul Hastings Milan lawyers:

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¹ Pursuant to MAR, "information recommending or suggesting an investment strategy" means information (i) "produced by an independent analyst, an investment firm, a credit institution, any other person whose main business is to produce investment recommendations or a natural person working for them under a contract of employment or otherwise, which, directly or indirectly, expresses a particular investment proposal in respect of a financial instrument or an issuer"; or "produced by persons other than those referred to in point (i), which directly proposes a particular investment decision in respect of a financial instrument" (Article 3, par. 34, of MAR).

² Article 20, par. 1, of MAR; Articles 3 to 6 of EU Delegated Regulation no. 958/2016.

³ Articles 8 to 10 of EU Delegated Regulation no. 958/2016.

⁴ Article 23 of MAR.