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Italy's Court of the Auditors Sets Principle of Banks' Liability for Damages When Acting as Advisors to Public Entities

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In a recent case against an international bank, Corte dei Conti (Italy's court for accounting matters relating to public entities) stated that a bank acting as a financial advisor to an Italian public entity is liable for the damages caused to the treasury of the public entity by transactions entered into on the basis of advice given by the bank.

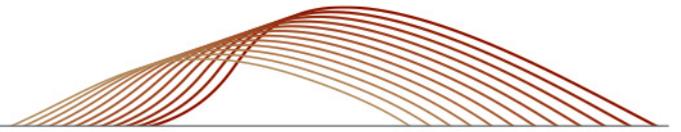
The Corte dei Conti is the court with exclusive jurisdiction on public accounting matters and, in particular, on the damages caused to the treasury of a public entity by the behaviour of a public employee. Such damages could be caused both by an activity against the law or by an activity that, even if compliant with the law, is inappropriate and causes losses of public money.

According to the [decision No 609 of 3-16 December 2015](#), a bank that provides its advisory activities in favour of a public entity becomes a part of the organisation of the public entity and its relationship with the public body could be considered similar to the one of a public employee. Therefore, as it happens in the case of a public employee, even a financial institution can become subject to the Corte dei Conti jurisdiction and held liable for any damages to the treasury suffered by such public entity.

In its decision, Corte dei Conti specifies that advisory activities include, *inter alia*, (i) the exchange of information between the bank and the public entity, (ii) the assessment of adequacy of the transactions on which the bank is advising, and (iii) the explanation, from the bank to the client, of the complexity of the transactions. On the basis of the mentioned services, a bank acting as advisor is a competent and influential consultant for the public entity and plays a specific role in the public entity's decision to enter into the transaction. In particular, given the fact that the evaluation of the bank is decisive for the public body, the bank becomes part of the public entity's decision process. Therefore, the bank could be held liable for the damages caused to the treasury of the public entity, in case those transactions have detrimental effects.

In its ruling, the Corte dei Conti underlines several circumstances that, according to the court, show that the bank acted as if it were part of the public body organization. Particularly, the Court focused on the following circumstances:

- Following the Italian public entity decision to assess options for the restructuring of its debts, in February 2001 the bank put forward a proposal for a restructuring agreement and detailed it proposing a swap agreement between the bank and the public body;



- At the beginning of June 2001, the bank provided the public body with its final proposal, whereby the Italian public entity debts would be restructured with a refinancing through bonds and with a swap agreement;
- At the end of June 2001, the public body appointed the bank as arranger of the transaction (the Italian public entity's decision to enter into the transaction mentions the bank as lead manager and bookrunner).

The decision is highly relevant to those banks acting as advisors to Italian public entities, *e.g.*, in connection with bonds issued, or derivative contracts entered into, by local authorities such as regions and municipalities. Banks should also be aware that the Corte dei Conti adopts a broad definition of public entity, and private companies in which the Republic of Italy directly or indirectly holds a stake have been found to be subject to the Corte dei Conti jurisdiction.

Banks—and international ones in particular—should be mindful of this risk when dealing with Italian public bodies and companies directly or indirectly controlled by the Republic of Italy and consider introducing appropriate risk mitigation mechanisms in their contractual arrangements and in their operating model when advising this type of client.



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