The Draft Regulation of the Italian Ministry of Economy and Finance ("MEF") on the FinTech sandbox

The growth of FinTech has made it quite clear that the approach adopted to date in Italy of identifying solutions that will allow the application of the existing legal framework to new forms of business so as to avoid lacunae in the rules, is no longer workable.

Background

The Italian legislator has now acknowledged this situation and, with law dated 28 June 2019, n. 58, it has finally introduced in Italy the rules on the so-called regulatory fintech sandbox (Italy, together with the UK, Poland, the Netherlands, Lithuania and Denmark becomes the sixth country of the European Union to adopt a similar approach in terms of legislative policy for the FinTech sector). This law now forms part of the Italian legal system and introduces a financial instrument that will allow the trial of new activities performed by FinTech operators which, also using new technologies, such as AI, DLT, ICOs and cryptocurrencies, may allow an innovation on services and products in the financial, credit, insurance and regulated markets sectors.

According to article 36, paragraph 2-*quater* the trial, which will last for a maximum of 18 months and must conform to the principle of proportionality, will be characterised by reduced requirements in terms of sharecapital, simplified procedures that are proportional to the business to be performed, reduced timing for the issue of authorisations and defined limits to the permitted activity.

The provision in question lies within the context promoted by the European regulatory authorities (EBA, European Insurance and Occupational Pensions Authority, and ESMA), which, on 7 January 2019, published a joint report on regulatory sandboxes and innovation hubs within the ambit of the wider FinTech action plan.

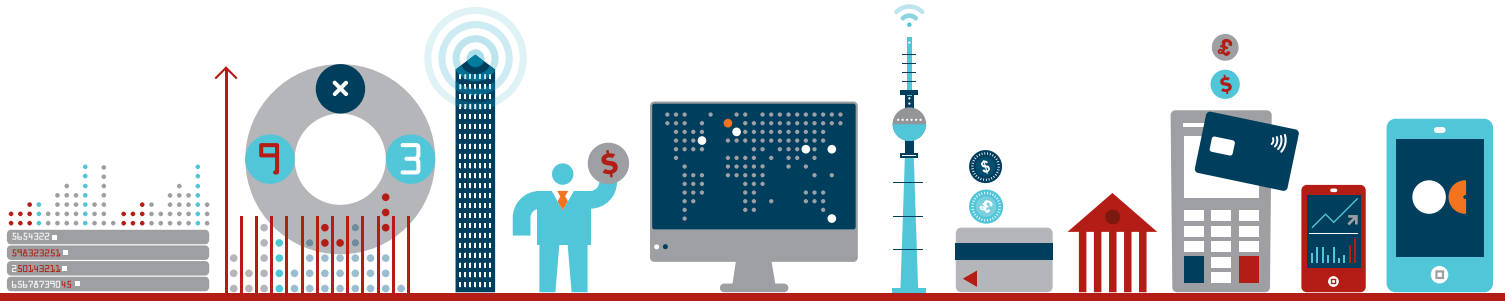
Innovation hubs, rather than regulatory sandboxes, allow interested parties to present specific requests for clarification to the competent authorities on FinTech issues (addressed to a specific and dedicated contact point) and to solicit non-binding opinions on the conformity or otherwise of financial instruments, services, business models or mechanisms for innovative distribution regarding requites in terms of authorisation, registration and/or regulation.

It does not seem that the implementation of this new tool (regulatory sandbox) should be understood as an expression of a desire on the part of the legislator to deregulate the sector, but rather, taking into account the experience in other countries, as a way of facilitating the authorisation process required to obtain the most appropriate authorisation from the competent supervisory authority (where authorisation is required) in order to render, for a defined period of time, certain "innovative services" on the Italian market, providing in any case guarantees to users.

The FinTech Committee

Law dated 28 June 2019, n. 58 also provides for the establishment within the MEF of the "FinTech Committee", with the task of identifying targets, defining programmes and putting in place actions to favour the development of techno-finance, also in cooperation with foreign entities, and to present proposals in terms of legislation and facilitate contacts between operators in the sector with the institutions and the authorities.

The Minister of Economy and Finance, the Minister for Economic Development, the Minister for European Affairs, the Bank of Italy, CONSOB (the Italian Companies and Exchange Commission), the Institute for the Supervision of Insurance (*Istituto per la vigilanza sulle assicurazioni* - IVASS), the Italian Competition Authority (*Autorità Garante della*



Concorrenza e del Mercato), the Data protection Registrar (*Garante per la protezione dei dati personali*) the Agency for Digital Italy (*Agenzia per l'Italia Digitale*) and the Tax authorities are permanent members of the FinTech Committee.

The Bank of Italy, CONSOB and IVASS ("**Supervisory Authorities**") will be granted the power to interpret the rules in an evolutionary manner, which is an extremely positive factor given the speed with which FinTech sector operators develop new ideas and businesses and the chronic slowness of the ordinary legislative procedure (both national and Community). The hope is that they are able to avoid all the negative elements operating as a brake on the adoption and development of new solutions for the offer of services in the sector.

Furthermore, the provision contained at article 36, paragraph 2-*sexies* appears very useful, according to which, pending any legislative adjustments necessary to allow the continuation of the activities of the subjects who have successfully completed the trial period, the Supervisory Authorities can temporarily authorise those entities to operate "on the basis of an updated interpretation of the sector-specific regulations in force".

The MEF's draft Regulation

As mentioned above, by way of implementation of law dated 28 June 2019, n. 58, in February 2020, the MEF finally opened a public consultation procedure regarding the draft regulation containing the operational rules of the FinTech Committees and regarding the trials of the relevant forms of business, with the aim of receiving comments form interested parties within the final deadline of 19 March 2020 ("**Draft Regulation**").

According to the Draft Regulation (article 5), the trial can be requested for a business that:

(i) is subject to authorisation or registration in a list held by at least one of the Supervisory Authorities; or

(ii) despite being subject to authorisation or registration in a list held by at least one of the Supervisory Authorities, it is not subject to that requirement because : a) the business is not carried out in a professional capacity, b) the business is not performed towards the public or is only offered to a limited audience, c) or the business is one of the excluded cases provided by the law; or

(iii) consists in a service to be rendered to an entity that is supervised or regulated by at least one Supervisory Authority and affects matters subject to regulation by the banking, financial or insurance sectors; or

(iv) is performed by an entity which is supervised by at least one of the Supervisory Authorities and affects matters subject to regulation by the banking, financial or insurance sectors.

The conditions for admission to the trial appear reasonable and sufficiently broad to include a large number of cases, while it seems less reasonable to restrict the application for admission to the trial to only those businesses having their registered office, general headquarters a branch in Italy in cases (i) and (ii) listed above.

The fundamental provision of the Draft Regulation is the requirement that, before presentation of the application for the trial, informal discussions are commenced with the Supervisory Authorities to obtain information and clarifications, while it seems a little complicated to require the interested party to indicate:

(i) the rules in respect if which it requests a complete or partial derogation during the trial period, and

(ii) the assessment of the potential risks and the indication of the measures to be adopted to control them, as it seems that said considerations should fall within the scope of competence of the Supervisory Authorities, rather than leaving this to the applicant, which is not necessarily in a position to carry out that assessment.

It does not seem very logical to require the applicant (if the business is normally subject to a licence or an authorisation issued by a Supervisory Authority) to present all the information and documents provided according to the applicable law in order to obtain the authorisation or registration. If we assume that, in a situation of potential legal uncertainty, the applicant wants to explore together with the Supervisory Authority, during the trial, ways of rendering the service that would exclude the need for said licence, it would perhaps be better to avoid burdening the operator with all these duties and costs which it thought it would not need to bear aging applied for the trial.

Article 12 of the Draft Regulation regulates the preliminary investigation procedure for admission to the trial, providing that each competent Supervisory Authority prepares a report evaluating the request, to be presented to the technical secretariat of the FinTech Committee, within 45 days from the receipt of the relevant application. The FinTech Committee, within 21 days of receiving the reports, must send any comments to the technical secretariat and during the investigation (or during the trial) the competent Supervisory Authority/ies can request an opinion from the FinTech Committee or another authority, which must be issued within a further 45 days.

In addition, each member of the FinTech Committee can call a meeting to discuss the results of the reports of the competent Supervisory Authorities and the comments made by the Committee members. This

meeting, if called, must be held within 15 days from the relevant request. If the activities object of the trial fall within the scope of competence of more than one Supervisory Authority, the trial is only permitted if the preliminary investigation by all the competent Supervisory Authorities has a positive outcome.

Initial considerations

The cases provided by the Draft Regulation for admission to the trial are certainly wide-ranging but the most important case seems to be missing, namely that in which it is impossible, a priori, to determine whether or not the activity is subject to an authorization. By way of example, the business of the account information service providers that was carried out in the past without any regulation and which today, following the intervention of the PSD2 requires a licence to operate as a payment institution, and that of the so-called exchanges, which allow the conversion into virtual currency of "fiat money" and vice versa, in respect of which there is an extensive discussion on whether and how they should be regulated and for which there is no rule that provides for operations subject to the prior issue of an authorization or licence.

Furthermore, the Draft Regulation appears incomplete with reference to cross-border operations: in fact, more and more often we see the birth and development of FinTech operators who, once established in one EU country, operate, via online platforms, in all the other EU Member States, without need to establish secondary offices or branches there. So why exclude them from the list of subjects who can access the trial? The key factor should not be whether the applicants for admission to the trial are established or have their headquarters or have a branch in Italy, but rather whether they intend to operate on the Italian market and therefore towards consumers or Italian companies (as is the case of the Financial Conduct Authority in determining whether admission to the regulatory sandbox is possible or not in the UK).

The procedure as provided in the Draft Regulation to obtain admission to the trial appears unnecessarily complex and cumbersome, so much so that it is difficult to understand how the decision to authorise or to refuse the trial can be given within 60 days from the date of the relevant application (as required by article 13, paragraph 5) taking into account the timing provided at article 12 and the consequent relative suspensions of the aforementioned term.

Many of the activities forming part of the "process" provided by article 12 could on the other hand take place during the trial, which, permitted over a reasonably long period, would allow the Supervisory Authorities (also jointly) and the FinTech Committee to carry out all the necessary checks in order to decide the outcome of the trial.

We therefore hope that the legislator is able to make some changes to the Draft Regulation to allow this tool to immediately express its potential and allow Italian and Community FinTech operators to carry out their business in Italy in a context of maximum openness to dialogue with the authorities and agreement on the regulations to be applied to them, avoiding entry into the "trial phase" proving too lengthy and complex to allow it to be profitably used.

Key contacts

If you would like to discuss any aspect of this article please contact:

Umbeto Piattelli
Partner
T +39 02 5413 1762
umberto.piattelli@osborneclarke.com