

# Banking & Finance

The Bank of Italy further defines the legal requirements for the application of the *ius variandi* in banking relations

8 May 2017

On 28 March 2017 Bank of Italy issued a note by the Governor containing new provisions that clarify the legal requirements for the exercise of *ius variandi*, i.e. the right which, under certain conditions, allows banks and intermediaries to unilaterally change the general terms of contracts previously entered into with customers (see link below).

The intervention of the Bank of Italy is connected to a previous note of 2014, in which the Authority had set forth, from a practical point of view, the obligations that banks and intermediaries must comply with if they intend to exercise the *ius variandi*.

By making reference to the previous regulation of 2014, the Bank of Italy restated the need to proceed with caution when exercising *ius variandi* and urged the banking world to be **transparent** so as to allow customers to really understand the reasons for any changes.

The innovative aspect of the note published at the end of the

note published at the end of March 2017 lies in the decision of the Bank of Italy not to simply set forth general principles, but to go into greater detail and **list the types of unilateral amendments which do not comply with the general principles**.

The Bank of Italy has established that *“the following unilateral changes are not in line with the referred principles:*

- those lacking a specific correlation between the types of contracts and the tariffs covered by the change, on the one hand, and the increase of costs behind that change, on the other;*
- those which affect tariffs, also on a one-off basis, for costs that have already been borne, which are non-recurring and have already exhausted their effects, since in these cases a problem of rebalancing does not arise[...];*
- amendments which are not justified by the costs*

*incurred at the time the relevant contracts were entered into and which do not concern exclusively the incremental part;*

- amendments which refer to a plurality of motivations [...] without setting out the link between the single prerequisites of the changes and the interventions on prices and conditions;*
- amendments which exempt certain types of customers, thus increasing the impact of the change on the remaining customers [...].”*

The practical consequences of the note of 2017 by the Bank of Italy are significant; **it cannot be excluded that a number of serial claims between banks, financial intermediaries and consumers (or consumers’ associations) arise from the failure to comply with such provisions.**

Indeed, banks and intermediaries have been expressly invited by the Bank of Italy

## Highlights

to assess whether **all unilateral amendments of general conditions made since January 2016 are compliant with the new provisions of the Bank of Italy.** At the same time, the new provisions will have to be applied to all future cases of *ius variandi*.

In order to assess the lawfulness of the unilateral amendments already carried out by banks and intermediaries, the Bank of Italy has asked the management and control bodies, with the cooperation of the compliance function, **to review all unilateral amendments made since 1 January 2016.**

At the end of this contractual *auditing* process, banks and intermediaries may be required to return money to customers: the Bank of Italy specifies that *“in case of inconsistencies, suitable corrective measures must be adopted, including, if the case may be, the restitution of any sums already received”*.

**Any corrective measures that banks and intermediaries deci-**

**de to adopt must be notified to the Bank of Italy by 31 May 2017.**

The intent of the Authority is clear and certainly appreciable: steer the banking world toward an “assisted” process of contractual adjustment in terms of both the contents (*i.e.* indication of cases of unlawful *ius variandi*) and the operating procedures (*i.e.* the intervention of corporate and compliance bodies and the adoption of corrective measures).

However, the cases mentioned by the Bank of Italy show the (inevitable) need for further interpretation in the implementation stage.

Just to mention a few examples: the actual existence of a “specific correlation between the types of contracts and the tariffs covered by the changes”; or the obligation to “set out the link between the single prerequisites of the changes and the interventions on prices and conditions” are

issues in respect of which banks and intermediaries could act in different approach.

As a result, we should not underestimate the risk that the banking world, or single institutions, may deem to have properly verified their own “archive” of unilateral contractual amendments, but that a subsequent judicial review (also before the ABF - “Arbitro Bancario Finanziario”, the Italian Banking and Financial Ombudsman) could lead to different outcomes and find certain unilateral contractual amendments to be unlawful.

Link to the bank of Italy’s note

<https://www.bancaditalia.it/compiti/vigilanza/normativa/archivio-norme/comunicazioni/com-20170328/nota-20170328.pdf>

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