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Italian Banking and Financial Law

Supervisory Authorities and Supervision

Edited by Domenico Siclari

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Vol I, Supervisory Authorities and Supervision

Edited by

Domenico Siclari
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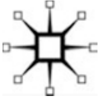

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To my wife, Annalisa, and to our son, Pietro Maria

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1
Introduction

Domenico Siclari

This book, Volume I of the four-volume series *Italian Banking and Financial Law*, provides an overview of the supervisory authorities on banking and financial markets and of the purposes and forms of supervision in Italy.

The book aims to strike a balance between theory and empirical analysis of the Italian legal system in the banking and financial sector. Chapter 1 reviews the specific features and potential evolution of Italian banking and financial law, in order to provide a frame for the entire series. After a brief overview of the historical background of banking and financial regulation, it describes some unusual features of the Italian legal system, recent reforms and legislation and, finally, its main trends and potential evolution, also related to institutional development and economic growth.

Volume I is divided into two parts. Part I, "Supervision Purposes and Forms", examines the purposes of supervision in banking, finance and insurance regulation, the forms of supervision (the obligation to provide information, powers of investigation and intervention, regulatory powers) and the ways in which money laundering and terrorism financing are countered.

Part II, "Supervisory Authorities", examines both the "political" authorities (Interministerial Committee for Credit and Savings (ICCS) and the Ministry for the Economy and Finance) and the independent, technical authorities: Bank of Italy, Commissione Nazionale per le Società e la Borsa (Consob), Istituto per la Vigilanza sulle Assicurazioni (Ivass) and Commissione di vigilanza sui fondi pensione (Covip, the Financial Intelligence Unit).

A number of issues are assessed, including: the responsibilities of different authorities, their institutional structure, their effectiveness and efficiency in exercising their powers of regulation and control; the numerous reform laws (such as Law no. 262 of 2005), and their integration into global financial markets as well as supranational legal regulatory systems, especially in the banking sector; and the devolution of the function of banking supervision at the European level with the launch of the Banking Union.

2 Context, Specific Features and Potential Evolution of the Italian Banking and Financial Law

Domenico Siclari

2.1 Context of the Italian banking and financial markets regulation

The current structure of the Italian banking and financial market which affects the overall regulatory and supervisory system, although traditionally "bank-centric" (i.e., based primarily and historically on bank activities[1]), is also related to other categories of financial and insurance intermediaries.[2]

The Italian banking system of the early twenty-first century is essentially private, but from 1861 to 1993 a market share consisted of State-owned banks, special credit institutions and, from the 1930s, banks of national interest and public-law banks. In 1990, the Amato Law transformed banks, public-law banks and many special credit institutions into companies limited by shares. The Italian banking system was also characterized by intermediaries belonging to different categories, until the enactment of the 1993 Consolidated Law on Banking cancelled all forms of specialization, allowing universal banks to operate. Besides, in the Italian market the role of cooperative banks has always been significant.

According to the recent surveys of the Bank of Italy, at the end of 2013 there were: five large banking groups, of which two were comparable in size with the leading European banks; 72 more groups; 524 banks not belonging to a group, the latter including 375 mutual banks; 19 cooperative banks; and 79 branches of foreign banks.[3] Italian banks focus on traditional business, mainly on raising funds from customers and granting loans to firms and households.[4]

Currently, bank loans amount to more than 100 per cent of the Italian GDP while deposits are around 70 per cent; the *ratio* of loans to deposits reached its historical maximum of 1.65 in 2007, and then fell due to the 2008–2009 recession and the eurozone sovereign debt crisis affecting the Italian economy since 2011. The increasing gap between loans and deposits – the "funding gap" – was mainly funded by Italian banks by issuing new bonds and borrowing funds in the foreign interbank markets.[5]

With regard to non-bank intermediaries, recent changes in the legislative framework led to a reduction in the number of firms providing investment and asset management services and loans; the profitability of asset management companies and investment firms improved, except for asset management companies specializing in real estate and private equity funds and for mutual loan guarantee consortiums (the *confidi*).[6]

In 2013 investment firms' net profit and own funds increased, while non-bank intermediaries (leasing, factoring and consumer credit companies) provided new loans to the economy. Financial companies entered the special register under Art. 107 of the Consolidated Law on Banking.[7]

Assets of Italian institutional investors (i.e., investment funds, insurance companies, pension funds, individually managed portfolios), in comparison with the other main euro-area countries, preponderantly consist of public sector securities, while the proportion of private sector bonds is not relevant.[8] Among Italian insurance companies, 41 operate exclusively in life insurance, 70 in non-life insurance and 23 in both sectors.[9]

The regulation of this market structure had a long historical development, which led to a gradual international opening of the Italian market and to the recent gradual adaptation to the European Union law.

The distinctive feature of the Italian law on the banking and financial sector resides to a large extent in the constant search for a balance, throughout history, between State intervention to protect public interests and the entrepreneurial autonomy of banks and financial intermediaries.[10]

In compliance with Art. 47 of the Italian Constitution, which states that "the Republic encourages and safeguards savings in all forms. It regulates, coordinates and oversees the operation of credit", the regulatory and supervisory role is played by public authorities such as the Ministry for the Economy and Finance, the Interministerial Committee for Credit and Savings, the Bank of Italy, the Commissione Nazionale per le Società e la Borsa (Consob) as the public authority responsible for regulating the Italian financial markets, the Supervisory Authority for the Insurance Industry (Ivass), the Ministry for Production, the Italian Competition Authority and the Supervisory Authority for Pension Funds (Covip).

The regulatory framework for the supervision of banking and financial intermediaries is based on primary (legislative) and secondary (issued by regulatory authorities on technical matters and interventions of a prudential nature) domestic sources.

In order to ensure a balance between political authority and administrative regulation, the Interministerial Committee for Credit and Savings, acting on a proposal from the Bank of Italy, should establish principles and methods for the supervision of banks.

The Bank of Italy is the supervisory domestic authority on banks. It checks that banking and financial intermediaries are managed soundly (i.e., that they carry on their entrepreneurial activity in compliance with the rules) and prudently (i.e., that they do not put their survival or the money entrusted to them at risk in order to make profits), and monitors the transparency and correctness towards customers of banking and financial transactions and services. The Bank of Italy issues technical regulations and ensures that they are applied, fosters the sound and prudent management of intermediaries by examining documentation and carrying out inspections on their premises, and imposes sanctions when provided by the law. The Bank of Italy is also in charge of promoting the regular operation of payment systems and is accordingly enabled to issue regulations to ensure the efficiency and reliability of clearing and payment systems.[11] Such payment systems oversight is included in the tasks assigned to the European System of Central Banks.

The Consob is tasked with protecting the investing public and is a competent authority for: ensuring transparency and correct behaviour by financial market participants; disclosure of complete and accurate information to the investing public by listed companies; compliance with regulations by auditors entered in the Special Register; and accuracy of the facts represented in the prospectuses related to offerings of transferable securities to the investing public. Some more recent tasks allow investigations with respect to potential infringements of market manipulation law and insider dealing.

At present it could be said, in order to explain the division of powers under the various authorities, that the supervisory role of the Bank of Italy is aimed mainly at the stability of banks and financial intermediaries, while the Consob's supervision is aimed mainly at the protection of investors. The competitiveness of the financial system should be also ensured, as we shall see, by the Competition Authority.

The Ivass supervises insurance and reinsurance business, its purpose being the sound and prudent management of insurance and reinsurance undertakings, alongside transparency and fairness in the behaviour of

undertakings, intermediaries and other insurance market participants with regard to stability, efficiency, competitiveness and the smooth operation of the insurance system. It also watches over the protection of policyholders and of those entitled to insurance benefits as well as consumer information and protection. The role of the Ministry for Production is to take the measures required by the law within the frame of insurance policy lines set by the government.

The Covip is an independent administrative authority charged with overseeing the proper functioning of the pension funds, so as to protect the savings of their members for a supplementary pension.

For Italy, the Financial Intelligence Unit (FIU) was established at the Bank of Italy on 1 January 2008 pursuant to Legislative Decree 231 of 2007, issued in implementation of Directive 2005/60/EC. It is charged with receiving and analysing reports on suspicious transactions and other information related to money laundering, the associated predicate offenses and the financing of terrorism, and with transmitting the results of its analyses to the competent bodies for subsequent investigation.

The objectives of such supervision are: stability of the financial system, safeguarding faith in the financial system, protection of investors, competitiveness of the financial system, observance of financial provisions. The supervisory authorities, within the extent of their duties, may require authorized intermediaries to communicate data and information and to transmit documents and records.[12] They are empowered to supervise banks and financial intermediaries, and to intervene when necessary. The law also gives these authorities the right to convene the board of directors or the shareholders' meeting, to impose restrictions on some activities and to adopt measures such as special administration and compulsory administrative liquidation.

In accordance with advanced international standards, the supervisory approach is: "consolidated", to detect the intermediaries' overall risks and safeguards; "risk-based", to assess all relevant risks through the application of standard analysis schemes; and "proportional", to grade controls in proportion to the intermediaries' size, systemic relevance and specific problems.[13] The supervisory functions should be exerted observing the principle of increasing the value of the decision-making autonomy of authorized persons, in a search for a difficult but necessary balance between protecting the public interest and freedom of business.[14] The European Banking Union is obviously expected to have a strong impact in the institutional setting of the regulatory and supervisory Italian system.

2.2 The historical evolution of the banking and financial regulation

2.2.1 From the unregulated banking market after Italy unification to the 1936 Banking Law

From Italy's political unification in 1861 to the introduction of the 1936 Banking Act there were five regulatory regimes, most of them introduced as a reaction to financial crises.[15] The timing of the subsequent regulation stressed the failure of the pre-existing regulatory regime in preventing bank failures.[16]

From 1861 to 1892 there was a mixed regime based on market discipline, self-regulation and some legislation, after which, from 1893 to 1906, a stricter regime of issuing-bank regulation was set. In the third period, from 1907 to 1925, growing consensus arose towards commercial bank regulation, which resulted in a new regulatory regime and the first commercial bank legislation (1926–1930). The last, very long, regulatory regime persisted from 1931 to 1992, a lapse of time imposed by the 1936 Banking Act.

Concerning issuing banks,[17] in 1874 the Minghetti Law[18] created a level playing field in this sector, regulating the different tenders: legal tender; non-convertible banknotes issued by the Banca Nazionale; convertible banknotes issued by the other issuing banks; and illegal tender banknotes issued by private agents.

With reference, however, to commercial banks, in 1870 a royal decree required them to send monthly balance sheets to ministerial authority. In 1882 Art. 177 of the Code of Commerce imposed this form of disclosure to the *Tribunale di commercio* (Trade Court) and, from 1888, to the civil and criminal courts. A law regulating the *Casse di risparmio* (savings banks) and *Monti di Pietà* (pawn banks) was introduced in 1888.

In 1875 competition arose between bank deposits and postal savings, when post offices started raising funds from the public (mainly from the most populous classes) as agencies of the *Cassa Depositi e Prestiti* (CDP), that managed these funds, ensuring a flow of credit to local government.[19]

In this period, the liberal stance[20] considered it sufficient to rely on self-regulation by commercial banks, due to the still-minimal use of deposit currency and to the centrality of the banks of issue in Italy's financial system. Besides, the economic orthodoxy believed that the introduction of some regulation would necessarily have "crowded out market discipline and thus eliminated an effective tool of crisis-prevention".[21]

The Issuing Bank Law in 1893 introduced new regulations for issuing banknotes and led to the foundation of the Bank of Italy, with the merger of three existing institutions (the Banca Nazionale and the two Tuscan banks). After the 1893 law a government committee proposed – though no law was passed – setting aside three tenths of the capital of joint stock banks as a guarantee for deposits.[22]

A growing consensus towards commercial bank legislation began only in 1907 with the expansion of the model of mixed banks:[23] "the main characteristic of this period…is the large importance acquired by bank vis-à-vis industry: bank has taken on the function of foundation of the industrial firm; bank capital…in this phase has become the propeller and at the same time the dominator of industry".[24]

After the 1907 stock market crisis, the previous deregulatory regime was changed, and a few years later the Law of 20 March 1913, no. 272, was passed, thereby introducing the "single capacity" principle, under which stockbrokers could only act on behalf of their clients and not on their own behalf, while allowing a new form of State control over the Chambers of Commerce. The Bank of Italy was identified as the agent responsible for the stability of the banking sector, on the basis of the "domino effect" argument of avoiding big bank failures which could lead to chain reactions.[25] Several proposed laws aimed at protecting the small depositors of commercial and cooperative banks, through the regulation (via obligatory reserves) and supervision (via periodic on-site examinations) of deposit-taking institutions,[26] though none was passed for fear of blocking credit support to the expansion of the economy.

Liberal economists were still opposed to the regulation of commercial banks: Luigi Einaudi defined the proposals as an interfering act of the "legislating Roman bureaucracy",[27] arguing that it would "safeguard capitalists", because small depositors could turn to savings banks or to postal saving institutions already regulated by law.

The final conviction on the need for regulation matured after the First World War, when a new banking crisis in 1921[28] oriented the political debate towards a discipline based on bank–industry separation, limiting over-banking and competition (because of the recent institution of numerous small banks and the cut-throat competition between them), and depositors' safeguard, by specific provisions of the law, through the promotion of financial education of depositors or via deposit insurance.[29]

The need for a regulation of deposit-taking institutions, through the imposition of a fixed capital-to-deposit ratio was not, however, shared by all economists: for example, Maffeo Pantaleoni believed that in

safeguarding deposits it was not capital that counted, but the type of investment of such deposits.[30]

In 1926 a Banking Act was passed[31] that required, in order to limit over-banking, an authorization by the Ministry of Finance for the creation of a new bank or branch and for mergers and acquisitions. The new regulatory regime concerning all deposit-taking institutions also introduced minimum capital and reserve requirements and quantitative limits on credit, and first gave the Bank of Italy some supervisory powers, in terms of on-site inspections and information disclosure.[32]

The crisis of 1929 consolidated the phase of State intervention in the economy, and in 1934 a clear-cut separation between bank and industry was imposed.[33] With the signing of the three *Convenzioni* (special agreements) between the State and each of the main universal banks (Banco di Roma, Banca Commerciale Italiana and Credito Italiano), the industrial assets of these banks were transferred to the State-owned *Istituto per la Ricostruzione Industriale* (IRI), which also took control of these banks.

The new re-regulation stance resulted, therefore, in approving the 1936 general Banking Law,[34] which identified as a supervisory authority the *Ispettorato per la difesa del risparmio e per l'esercizio del credito*, subject to a Committee of Ministers, led by the Prime Minister, that made use of the Bank of Italy to exercise its functions. This Inspectorate had a huge discretionary power, dictating instructions and deciding on many regulatory issues case by case.

The 1936 Banking Law established a complete regulatory regime for two separate categories of institutions, distinguished according to the maturity of their liabilities, whether short-term or medium- and long-term. The law confirmed the separation between banks and industry, subjecting investments in industrial firms and the purchase by commercial banks of certain types of assets to the Inspectorate's authorization.

The new regulation limited competition, considered as a source of banking instability, because the wild competition between banks in order to attract the largest number of depositors had brought about high interest rates on bank deposits. Under the new law free branching was banned and some compulsory mergers and liquidations were imposed. The model of "structural regulation" was so set and shaped by the Bank of Italy as supervisory authority.[35]

According to the economic theory,[36] guaranteeing financial stability was the main objective of the 1936 banking regulation: to this purpose competition was sacrificed, thus leading to inefficiency as well. Extensive public ownership of the banks and the straightjacket on the banking system contributed to the underdevelopment of the Italian financial

system, by stifling financial innovation. The primacy of the paradigm of the financial stability characterizes the Italian legal banking system until the 1980s, when the European Union law began to undermine it by basing the system on the principle of competition, with the introduction in 1990 of a general antitrust law.[37]

2.2.2 Art. 47 of the Italian Constitution and regulation in the second half of the last century

The prescriptions of the 1936 Banking Act were maintained after the Second World War, with an exception concerning the abolishment of the Inspectorate. The Economic Commission of the Constituent Assembly set up in 1946, in fact, decided to retain the existing regulation, without altering any aspect of it. For example, this Commission stated that "in harmony with the criteria that inspire the current banking law (criteria that, even with respect to the current economic conjuncture, we believe must remain unchanged), [industrial] credit must be operated by special institutions, clearly separated from the ordinary credit ones and authorized to collect funds corresponding to the maturity of their assets".[38] In order to preserve banking specialization, the Commission also stated: "strict laws have to be dictated for such institutions to eliminate the danger of interference between the managements of ordinary credit and of industrial credit, in order to preserve the guiding principle of the current banking law, confirmed and honed by experience".[39] For this reason, the doctrine considers Art. 47, para. 1, of the 1948 Italian Constitution as the rule that under Italian law is the constitutional basis for financial regulation,[40] had only a non-innovative and programmatic nature vesting the 1936 Banking Act with a constitutional value.[41]

The Decree of 14 September 1944, no. 226, suppressed the Inspectorate. Both its role and the task of the Committee of Ministers were devolved upon the Minister of the Treasury; the supervisory function over banks was transferred to the Bank of Italy. This provisional arrangement, as determined by emergency decree, was consolidated by the Decree of 17 July 1947, no. 691, which established the Interministerial Committee for Credit and Savings and devolved the supervisory functions of the now defunct Inspectorate onto the Bank of Italy.

The high degree of supervision on the protection of savings, in terms of exercise of the banking and currency matters, was entrusted to the Interministerial Committee for Credit and Savings, however, that in exercising such powers "for the findings of its jurisdiction and the enforcement of its decisions... makes use of the Bank of Italy". At the

theoretical level, the assignment of the supervisory function to the central bank was, among other things, explained by the economic theories illustrating the connection between monetary policy and credit supervision. Such connection was therefore the grounds for charging the Bank of Italy with banking supervision, invoking the transmission mechanism of monetary impulses through the discipline of credit, which could restrict or expand through the operation of the discount rate.[42] The development of the material Constitution soon led to the clear recognition of the Governor of the Bank of Italy as policy-maker in the field of credit, exercising functions of political direction in the industry through his powers.

A few advances in terms of market regulation were made from the second half of the last century, greatly improving the regulatory factors.[43] We can recall the figure of the civil servant Guido Carli, as Governor of the Bank of Italy in the sixties, President of the Confederation of the Italian Industries and then Minister of the Treasury,[44] one of the main architects of the modernization of the Italian economy. Carli, in order to give birth to a real money market and a real financial market, set himself the goal of simplifying the complex and multi-layered regulation of the post-war period, encouraging the emergence of new categories of intermediaries, including the asset management companies, and creating a level playing field free from arbitrary barriers.

The management of inter-bank deposits was liberalized in 1962; until that year, banks could not deposit their funds with other banks without the express authorization of the Bank of Italy. Only in 1963 was the Central Credit Register established, until then locked up by the fear that it could constitute a breach of banking secrecy, by giving banks the opportunity to learn about the overall financial situation of their clients, thus improve their allocative efficiency.

Law no. 216 of 1974 set up the Commissione Nazionale per le Società e la Borsa (Consob), the public authority responsible for regulating the Italian financial markets that is also, under Law no. 281 of 1985, an independent administrative authority with legal personality and autonomy. This consolidates the public oversight on the securities market, too, aimed at the protection of the investing public.[45] Law no. 576 of 1982 established the Istituto per la vigilanza sulle assicurazioni private e di interesse collettivo (Isvap – Supervisory Authority for Private Insurance Undertakings and Insurance Undertakings of Public Interest).

The Single European Act in February 1986 having laid down the stages of the process for the removal of the remaining trade barriers dividing the EU national markets, the Treaty of Maastricht of February 1992 then

set out the basis for the single currency and the European System of Central Banks. In the 1980s the banking supervision of the Bank of Italy began the transition from "structural" supervision, which used powers of authorization to shape the structure of the market, to "prudential" supervision, based principally on general rules of conduct.

In 1990 the completion of liberalization had brought an end to foreign exchange controls, which had been in place in Italy, facilitating the international integration of the Italian economy and the financial system. A law on commercial banks and groups was passed (called the "Amato-Carli" Law): it established a level playing field for bank operators, indicating the joint stock company as the general model for banking business, laid a basis for the privatization of banks and regulated credit groups.

Also in 1990 a law on securities business was passed, regulating securities intermediaries and stock markets, and finally a general Law no. 287 on safeguarding competition, by introducing antitrust principles and instruments into the Italian legal system.[46]

2.2.3 The transposition of the Second Banking Directive into Italian law: the Italian banking legal system moved "toward the neutrality" of supervisors

In 1992 the banking specialization which had characterized the credit system since 1936 was abolished and universal banks were allowed by the transposition of the Second Banking Directive, that legalized the fundamental rules for the financial sector.

The banking legal system started moving, of course, "toward neutrality"[47] under European law. The approval in 1989 of the Second EU Banking Directive, its transposition into national law and the enactment of the Consolidated Law on Banking in 1993 realized instances of the single European market, launching a regulatory framework aimed at ensuring equal treatment for all operators within the European Community. The principles of mutual recognition and the "single passport", a system allowing financial services operators legally established in one Member State to establish or to provide their services in other Member States without further requirements, were introduced into domestic law. Further principles were the transparency of ownership, freedom of establishment and freedom to provide services in all EU States, and the principle of home country control, which consists of attributing to the country of origin the power to oversee the stability of its credit institutions.

The acceptance as a principle of the free movement of capital erased from Italian legal system the interventionist State vision connected to

the concept of mixed economy, the content of the Maastricht Treaty being incompatible with the idea of economic planning. The new regulatory regime does not lend itself, then, at least in theory, to a use of administrative powers by the banking supervisor such as to exert a political direction of the industry.

The principle should now be neutrality as regards the organizational structure chosen by credit companies. The "neutralization" is meant as a reduction of the political control on the banking sector and the renewal of the relative discipline within the technical framework, this being also reflected in the degree of independence accorded to the supervisory authority.

In some cases, the doctrine begins to pose the inverse problem concerning the amplitude and the constitutionality of the regulatory powers granted to the Italian independent authorities[48] which are not included in the democratic circuit set by the Constitution in relation to the activity of public administration; therefore the attribution to independent authorities of such broad powers exerted independently of the political decision of Parliament is questionable.[49]

2.2.4 From systematization and codification of the national regulation to the European Banking Union

On the occasion of the implementation of the Second Banking Directive, the necessary amendment of the 1936 Banking Act led to a systematization and codification of various laws hitherto in force in banking and credit matters.

The Legislative Decree no. 385 of 1 September 1993, generally known as the Consolidated Law on Banking, was then issued; it established the tasks of the public credit authorities (the Interministerial Committee for Credit and Savings, the Ministry for the Economy and Finance, the Bank of Italy), assigning them power to issue secondary legislation on technical matters and interventions of a prudential nature.

As far as the regulation of the financial market is concerned, after the law no. 1 of 1991 on the subject of Italian investment company (società di intermediazione mobiliare – SIM), Legislative Decree no. 58 of 24 February 1998, generally known as the Consolidated Law on Finance, has taken steps to bring into a single piece of legislation various laws hitherto existing on financial matters. This systematization is also an attempt at simplifying and clarifying the legislation on the financial sector, in order to increase, as a result of the certainty of the rules applicable, the attractiveness of the country to foreign investors.

Legislative Decree no. 209 of 7 September 2005 set the rules for supervision over the insurance and reinsurance business, confirming the assignment of regulatory powers to the Minister for Production and to Ivass as supervisory authority.

After the financial crisis began in 2007, the need to overcome the pattern of harmonized national supervision and to remedy the defects of the fragmentation of supervisory activities distributed among various national authorities, prompted the European Union to launch the well-known Banking Union, to break the vicious circle between sovereign debt and the difficulties of the banking system, to safeguard financial stability and to shelter citizens from the real costs of the financial crisis.[50] The Italian legal system is currently subject to the modifications necessary to ensure the full operation of the new supervisory mechanisms.

This has been done in the hope that it will soon achieve the main objectives of the supervision reform, such as: the convergence of the supervisory approaches towards best practice at the European level, eliminating the risk of a race to the bottom among jurisdictions; a system of controls only at the European level, avoiding harmful overlaps of national powers; improving the quality, quantity and comparability of information on the banking market, in order to restore the confidence of savers and investors in banks.

2.3 Some specific features of the Italian banking and financial legal system

2.3.1 A rule-based regulatory system in progress

The Anglo-Saxon debate about contrasts between the rule-based control model and the principle-based control model is also reflected in Italy, in the fear of excessive use of discretion on the part of public supervisors, potentially favoured by a growing production of administrative rules.

In this regard, it should be noted that the exercise of even greater discretion than in the past on the part of public supervisors is desirable only because it may allow a broader explanation of the autonomy of the industry.

The structure and content of public scrutiny on the markets has historically followed the evolution of the economic Constitution and market trends. There was a progressive change in the subjective structure of such control, which had originated from the need to calibrate the degree of control to the current dimensional and qualitative parameters of each single intermediary, relying on intermediaries to carry out certain functions of "self-control".

After the successful restructuring of public oversight, now "neutral" under the pressure of European legal order and after the enactment of the Consolidated Law on Banking in 1993, we are now facing a reshaping of the very structure of subjective control.

The Italian supervisory methodology is based on the Supervisory Review and Evaluation Process (SREP), according to the standards defined in the Basel II framework, to check whether intermediaries have the appropriate capital and organizational safeguards, on the basis of the proportionality principle, in terms of both intensity and frequency of assessments.[51]

In addition to the control so far mainly exercised by the supervisory authorities, the control on the intermediaries and markets is now to be exercised largely by the intermediaries themselves as well.

There are several examples of this kind in the market: the so-called manager (usually the Chief Financial Officer) charged with preparing the company's official financial reports under the new corporate legislation, *sub* Art. 154-*bis* of Consolidated Law on Finance, inserted in 2005, that draws annual, half-yearly and other periodic financial reports; the supervisory body provided for by Legislative Decree no. 231 of 2001; the new audit committee; the New Product Committee (NPC), suggested by the European Banking Authority, supposed to be an instrument of internal governance aimed at promoting conscious and responsible innovation within the company.

In the Italian legal framework, therefore, control over the financial markets is no longer exercised only by the public, through the various authorities of the sector, but also by the market participants themselves. The control model of supervision has changed in the wake of several factors: the privatization of public banks; the consolidation of the banking system and the consequent increased size and complexity of the intermediaries; the increased level of competition and the internationalization of financial innovation.

This process is also induced by the globalization of markets and the rules in the current international financial architecture now being established at the supranational level, often with the help of such intermediaries.

In the structure of subjective control, public supervision, therefore, now joins the "self-control" of intermediaries. These more advanced forms of control and the characteristics of risk-based supervision should have the purpose of enhancing the autonomy and the entrepreneurship of the supervised entities. In particular, a crucial role is now being recognized for banks in their internal governance in order to ensure their

sound and prudent management, since the provisions transposing Basel II, borrowing the best practices of the market, recognize the responsibility of each bank in defining its risk profile, the risk measurement and proportioning of capital resources required for the performance of its business.

This process was completed with the transposition of the Directive 2004/39/EC on Markets in Financial Instruments (MiFID),[52] under which the public authority subsumes the best practices of market operators and proposes these practices in terms of supervisory rules. It recognizes a broad autonomy given to intermediaries with respect to the structuring, in the manner considered most consistent with its size and operational complexity, the functions of risk control, audit and compliance, according to criteria of proportionality and autonomous choices that are assessed only *ex post* by the supervisory authority.

Finally, the new rules on corporate compliance function, tasked with the monitoring and management of the compliance risk, created a new second-level control that operates within the bank to ensure compliance with relevant regulations.

A broader problem that plagues the Italian model of regulation, then, is the lack of implementation of legislative reforms, also directed to attract capital and foreign investment in the financial market and the economy of the country.

Reforming the national regulatory framework is not enough; it must then be implemented.[53] The Italian administrative system is currently perceived as one of the main obstacles to a higher growth of the productive system.[54] Some causes of this ineffectiveness are deeply rooted and date back to the Italian unification: a strong administrative tradition; an excessive political influence over the administration; the relevance of the juridical culture. Some reactions to these inefficiencies have been in some cases the sources of further problems: for example, an immoderate number of laws and administrative acts, often over-complicated.[55]

It is worth reminding that one recent issue of an Italian Review of Economic and Markets Law is entitled “Law and Disorder: Italy under Rules Attack”.[56] It is therefore essential to reorganize the judicial system to make it more efficient and reduce the bureaucratic burden on business, as a factor that influences the impact of structural reforms. The current effort is to overcome the limits of the regulatory State by simplifying the regulation: in his latest book, Professor Cass R. Sunstein offers us an interesting perspective on how to render regulation more user-friendly and effective (in particular, indicating the need for default decision rules according to the principle “make it automatic”).[57]

To achieve an institutional framework conducive to entrepreneurial competitiveness and ability to attract foreign investments, it is necessary to start again, with a greater reforming action, with the primary intent to streamline a complex and redundant regulatory framework, defining for the economic activity rules that are clear, easy to apply and stable over time. This regulatory framework will be useful in stimulating competition and encouraging the reallocation of resources towards activities with higher growth potential. It is also crucial to work on public administrations, which are called upon to apply those standards, elevating their levels of efficiency and effectiveness.[58]

2.3.2 The Italian supervisory model and the potential conflict between the different objectives of the regulation and supervision

Financial regulation can of course serve a number of different purposes,[59] that can conflict.[60]

In the Italian case, the supervisory model[61] – where the Bank of Italy is entrusted with prudential supervision over credit institutions, investment firms and all other financial intermediaries to ensure the stability of the financial system, while the Consob is responsible for the transparency and conduct of investment services and for the disclosure of information made available by issuers – led to a potential conflict between the different objectives of the regulation and supervision.

For a long time in fact, primacy has been given to the objective of financial stability at the expense of the objective of competition between intermediaries.[62] This is also why those two objectives (financial stability vs competition) were assigned by the Law to the same supervisors – the Bank of Italy for banks and Ivass for insurance companies – until Law no. 262 of 28 December 2005 also entrusted to the Competition Authority some responsibilities in overseeing competition in the banking and insurance sector.

In detail now, the new Section 20 of the 1990 Competition and Fair Trading Act,[63] as amended by Section 19, subsection 11, of Law no. 262 of 2005, and by Section 2 of Legislative Decree no. 303 of 29 December 2006, establishes that in the case of operations involving insurance companies the measures shall be adopted by the Competition Authority after hearing the advice of Ivass, which shall be issued within 30 days of receiving the documentation underlying the measure. If such advice is not issued within 30 days, the Authority may adopt the measures within its power. The deadline for the procedure before the Competition

Authority shall be suspended until the latter receives the advice of Ivass, or anyway during the above-mentioned 30 days.

Regarding operations to acquire the control of banks, which constitute a merger subject to prior notification to the Competition Authority, the measures to be issued by the Bank of Italy for the assessment of sound and prudent management, and by the Competition Authority as for the assessment of the state of competition on the market, shall be adopted within 60 days of the date on which the request is submitted together with the required documentation. Moreover, the Competition Authority may, at the request of the Bank of Italy, authorize an agreement in derogation of the prohibition of restricting freedom of competition, in the best interest of the efficiency of the payments system, for a limited period, and a merger involving banks or banking groups which creates or strengthens a dominant position, in the best interest of the stability of one or more parties involved.

2.3.3 Cooperative banks special rules

Even in Italy, as in other EU countries,[64] the cooperative banks are an important part of the banking system and have been concerned by recent proposals of reform of their regulation.[65]

Currently, cooperative banks are divided into *banche popolari* and *banche di credito cooperativo*, for which the 1993 Consolidated Law on Banking establishes special rules dealing with members, operations, transformations and mergers, profits distribution and allocation. Each member has one vote regardless of the number of shares held: this is the special rule that distinguishes the corporate governance of these banks from other commercial banks.[66] No person may hold shares in excess of a certain limit.

The Bank of Italy, in the interest of creditors, where there is a need for capital strengthening or with the intent of rationalizing the system, shall authorize the transformation of *banche popolari* into *società per azioni* (i.e., joint stock companies) or mergers involving *banche popolari* which result in the formation of *società per azioni*. The Bank of Italy, in the interest of creditors and where considerations of stability are involved, is required to authorize mergers between *banche di credito cooperativo* and banks of a different nature which result in the formation of *banche popolari* or banks having the form of *società per azioni*.

To implement the mutual purpose, *banche di credito cooperativo* must grant credit primarily to their members. The Bank of Italy must authorize individual *banche di credito cooperativo* to operate primarily with persons other than members for fixed periods only where considerations of stability are involved.

Banche popolari must allocate at least 10 per cent of net profits for each year to the legal reserve. Profits not allocated to the legal reserve or other reserves, allocated elsewhere as established by the bylaws or distributed to members, must be allocated to charities or social welfare. *Banche di credito cooperativo* must allocate at least 70 per cent of net profits for each year to the legal reserve. A portion of net profits for the year must be placed, in the amount and manner established by law, into mutualistic funds for the promotion and development of cooperation. Profits not so allocated, not used to increase the value of the shares, and not allocated to other reserves or distributed to members, must be allocated to charity or mutual aid.

The evolution of certain cooperative banks in large listed banks showed that in certain cases, special rules for listed cooperative banks can represent a relevant deformation of market rules.[67] The 2007 "Report on the Retail Banking Sector Enquiry" by the European Commission has indicated as negative elements the barriers to the entry in the market due to the special cooperative voting rule and certain practices that restrict competition through network cooperation, tolerated by the competition authorities for system benefits.

Therefore, reform legislative proposals referred to the need for modifying some cooperative governance rules:[68] because, first, in the larger cooperative banks listed in regulated markets the pursuit of the profit objective has overtaken the mutualistic and, moreover, the current legal framework regarding ownership limits, and restricted voting rights can limit capital raising, especially so as to avoid the bank's resolution in situations of potential distress by new capital injections.

Reform proposals also regarded mandatory conversion to limited company status, simplifying the process for accepting new members. Some proposals aimed to maintain the cooperative status, granting institutional investors the right to appoint board members, while other more radical proposals aimed to substitute the current one person-one vote system with a one share-one vote system.

A point – perhaps temporary – of compromise in the reform process has recently been achieved by facilitating the scope for raising capital by the issuance of new capital instruments, by enhancing control over management, reforming the board composition and election procedures and enhancing shareholder activism.

In line with the findings of the parliamentary investigation, Art. 23-*quater* of Decree-Law no. 179 of 2012 amended the provisions relating to the governance and structure of the cooperative banks and cooperative companies listed, in order to allow some statutory autonomy for

them to calculate the shares of capital relevant for the exercise of specific equity rights concerning the definition of the meeting agenda and the election of a list vote of the Board.

The Consolidated Act on Banking has been modified on several points, first raising the limit of shareholding, whether direct or indirect, in the banks from 0.5 to 1 per cent of the share capital, without prejudice to the right to provide stricter limits in the statute, though not less than 0.5 per cent. Notwithstanding the limits thus set, the statutes may set at 3 per cent the participation of banking foundations, where the limit is exceeded due to mergers. The Act also allows the statute of *banche popolari* to make the admission as a member conditional on the possession of a minimum number of shares, whose absence leads to the forfeiture of the quality assumed. That is in order to ease the capitalization of the company.

Finally, to trigger a new aggregation process in the Italian banking system involving former biggest *banche popolari*, Law-Decree no. 3 of 2015, named “Investment Compact”, has established a threshold (the cooperative bank’s revenue cannot be higher than €8 billion at the consolidated level) over which the special regulation for cooperative banks cannot be applied. If the threshold is surpassed, the bank’s managing body has to summon an assembly meeting; if the assets are not reduced under the limit within one year, and there is no decision either to transform the bank in to a joint-stock company or to liquidate it, the Bank of Italy can forbid it from engaging in new operations, can enforce a special administration or asking the ECB to revoke the noncompliant bank’s authorization.

2.3.4 Specific characteristics of the Italian special framework for crisis management system

The Italian crisis management and resolution model, established by the 1936 Banking Law and partially modified by the Consolidated Law on Banking,[69] showed “an unquestionable success”.[70] This model, intended to preserve the value of the firm and to protect its productive organization and customer relationships, was gradually extended to other financial intermediaries.

The first characteristic to stress is that it is the gradual and non-automatic, but discretionary and proportional approach of the Bank of Italy that directs, coordinates and controls all the procedures, rather than the courts, as is the case for commercial enterprises under the Italian Bankruptcy Law:[71] that occurs because the stability and efficiency of the financial system are common objectives both for crisis management and supervisory activity.

The forms of intervention are proportionate to the real nature and size of the problems, depending on the severity of the weaknesses, according to the proportional approach: this is a big difference from the "prompt corrective action" used, for example, in the United States.[72]

The graduation of the forms of intervention depends on how serious the crisis proves, and regards preventive measures (supervisory warnings, requests or advice), corrective measures (requesting intermediaries to adopt corrective measures on organization, risk or capital), extraordinary measures (strengthening the organization; restrictions on operations; prohibition of carrying out certain transactions; limitation of activities already carried out or of the network; operations on capital) up to special administration, essentially intended to the reorganization or recovery of the banks, and compulsory administrative liquidation, designed to bring the bank's business to an end.

The Bank of Italy has a central role in this model, whose strength definitely lies in its capacity to coordinate supervisory activities with the central bank's liquidity provision: this is another characteristic of the Italian special framework for crisis management system, very relevant during the financial crisis.[73]

However, the most distinctive character of the Italian model minimizes the disruptive effects of the liquidation, through an informal management on market, because the Bank of Italy usually arranges mergers and acquisitions with other banks, to protect depositors while assuring continuity of the business: the special resolution measures are thus accompanied by contracts for the sale of assets and liabilities to another bank. The acquiring bank normally pays the liquidator a goodwill for the business taken over, sufficient to fill the gap between assets and liabilities. In these transactions, however, competitive criteria are adopted in the selection of the "intervening bank", in order to preserve market discipline.

Considering that the transfer of assets and liabilities is the most used way to liquidate the bank without disruptive effects, it is believed that this supervisory approach is not an alternative to liquidation but a method of liquidation, in the sense that it should be considered as a "bank restructuring and resolution" measure and as a "banking liquidation" approach.[74]

This mode of management of banking crises has prevented bank runs until now in Italy, avoiding charging depositors and other creditors with the costs of the crises, working together with deposit guarantee schemes and the lending-of-last-resort functions performed by the Bank of Italy.

2.3.5 Former public banks and banking foundations: a peculiar model

In Italy the privatization of State-owned banks was conducted in the 1990s according to the model based on the establishment of banking foundations as the result of a series of legal reforms that began with Law no. 218 of 1990 and Legislative Decree no. 356 of 1990 (the "Amato Laws").[75]

The different activities (commercial banking activity and philanthropic activity, donating part of their profits to public interest initiatives) of the former public savings banks, which had a long tradition in Italy since the nineteenth century, were assigned to separate entities: banking activities to new banks in the form of joint stock companies with a profit-making purpose; philanthropic activities to banking foundations, as non-profit organizations.

The shares of the new commercial banks were and are controlled, to varying degrees, by the banking foundations, but the members of their boards cannot have management roles in the banks of which they are shareholders.[76] Their economic return in the form of interest and dividends and the income from the trading of financial instruments, after covering the operating costs and partially reinvesting in asset management to maintain the integrity of the capital, must be used to carry out the philanthropic activity for the purposes of promoting the social and economic development of their region.

According to Art. 2 of Legislative Decree no. 153 of 1999, banking foundations are private legal persons with statutory and management autonomy, pursuing only the end of the social and economic development of their region. They cannot exercise business activities or credit functions. The particular nature of the banking foundations as private legal entities, autonomous and self-governed, with their own assets managed not for profit, but to meet the general interests of the region, was confirmed by the Constitutional Court Judgment no. 303 of 2003.[77] The uniqueness of this model lies, therefore, in the social utility functions carried out by a person that is still private, in favour of the regions that have benefited from the philanthropic former public savings banks.

Specific rules have been laid down to guarantee the performance of such functions attributed to the banking foundations.[78] According to Art. 7 of Legislative Decree no. 153 of 1999, they must diversify the risk of their investment portfolio and must achieve a return on investments that is consistent with the requirements of the grant-making activity. Under Art. 1 of Legislative Decree no. 153 of 1999, banking foundations must direct their activities exclusively in the areas admitted, preferring

those with greater social relevance for the region in which they operate. Given their private autonomy, these foundations have to indicate in their statutes the relevant sectors in which preferentially to allocate funds and the other areas in which they have decided to operate. In fact, in Italy the main sectors getting such funds are the arts, cultural activities and heritage.

Again to ensure the pursuit of the public interest established by law, supervision over these foundations is attributed to the Ministry of the Economy and Finance, to check: their compliance with the law and the statutes; the sound and prudent management of the foundations; the profitability of the assets and the effective protection of the interests recalled in the statutes. Art. 52 of Decree Law no. 78 of 2010, with a rule of interpretation, has made it clear that the supervision of legitimacy on the foundations of a banking origin, referred to in Art. 10 of Legislative Decree no. 153 of 1999, is attributed to the Ministry of Economy and Finance until, as part of a comprehensive reform of the private legal persons referred to in Title II of Book I of the Civil Code, a new authority is set up in this field. The foundations keeping a direct or indirect control over the banking companies will remain subject to the supervision of the Ministry of the Economy and Finance even after the establishment of such a new authority.[79]

2.4 Recent reforms and legislation

2.4.1 Recent scandals and recent reforms: Law no. 262 of 2005

The financial scandals in the opening years of the millennium[80] led to the launch of a special fact-finding investigation by the Italian Parliament. The analysis and proposals in the final document of the survey, approved by the joint V and VI Committees of the Chambers in their meeting of 18 March 2004, have been the basis for the development and drafting of various bills and unified legislative proposals on the reform of the protection of investors and the financial markets.

Law no. 262 of 28 December 2005 contained provisions safeguarding savings and governing financial markets. The innovations introduced by Law no. 262 of 2005 related to both the regulation of the financial market, with an improvement in the corporate governance of intermediaries and listed companies through a tightening of sanctions, and the competence of the supervisory authorities in the financial markets.[81]

With regard to the regulatory reform of the financial market, we can mention the new rules aimed at shifting the focus of supervision from

controlling the transparency of information to overseeing governance.[82] For example, new Art. 147-*ter* of the Consolidated Law on Finance, introduced by Law no. 262 of 2005 regarding the election and composition of the listed companies' board of directors, established that the Statute must provide for members of the board of directors to be elected on the basis of a list of candidates and define the minimum participation share required for their presentation, which should not be more than one-fortieth of the share capital or otherwise established by the Consob with the regulation taking into account capitalization, floating funds and ownership structures of listed companies. The lists indicate which directors hold independent requisites established by law and by the Statute.

To ensure greater control by minority shareholders, under new Art. 148, para. 2, the Consob establishes the rules for the election procedure by list vote of a member of the board of auditors by minority shareholders that are not directly or indirectly associated with the shareholders that submitted or voted the first list in terms of votes received. New Art. 148, para. 2-*bis*, established that the Chairman of the Board of Auditors must be appointed by the shareholders' meeting among the auditors elected by the minority shareholders. New Art. 126-*bis* established that shareholders who individually or jointly account for one fortieth of the share capital may ask for the integration of the list of items on the agenda, specifying in their request the additional items they propose or presenting proposed resolution on items already on the agenda.

With regard to disclosure of information to the public, new Art. 114, para. 5, established that the Consob, on a general basis or otherwise, may require the issuers, the subjects which control them, listed issuers for which Italy is the home Member State, the members of the board of directors, the members of the internal control body, managers and persons with a major holding or who are parties to a shareholders' agreement to publish in the manner it shall establish the information and documents needed to inform the public. Where such persons fail to comply, Consob shall publish the material at their expense. In accordance with new Art. 124-*ter*, the Consob shall establish the disclosure formats for the codes of conduct regarding corporate governance issued by stock exchange companies or trade associations.

Law no. 262 of 2005 also introduced the figure of a manager charged with preparing a company's financial reports: new Art. 154-*bis* establishes the Statute of listed issuers with Italy as the home Member State provides for the professional requirements and the procedures to appoint the manager charged with such reports, subject to the mandatory advice

of the internal control body. Documents and communications of the company, disseminated in the market and regarding information on accounts including mid-year reports, shall be accompanied by a written declaration by the general manager and the manager charged with the company's financial reports attesting their conformity with document results, books and accounts records.

A reform of the supervisory authorities and activities was brought in by Title IV of Law no. 262 of 2005, regarding, in a special way, the organization of the Bank of Italy. This law changed the mode of its Governor's appointment and removal, thereby getting rid of the self-referentiality of this institution; adopted the principle of collective decision-making, thereby putting an end to the Governor's unique power in the exercise of functions; determined the term of the Governor's office; prescribed compliance with the principle of transparency of administrative action; provided for the general principles relating to both proceedings for the adoption of regulations and general acts and proceedings for the adoption of individual measures.

Subsequently, the Governor abolished the requirement for banks to give prior notice to the supervisory authority for extraordinary operations: thus, the banking legal system appeared to be moving towards the abandonment of moral suasion as a tool of political market control and the affirmation of the principle of legality in the exercise of administrative power.[83]

2.4.2 The anti-crisis regulation

Even in Italy the financial crisis that had started in 2007 brought about a re-regulation of the financial sector and a strengthening of public oversight.[84]

The need to face the 2008 financial market crisis[85] resulted in a decisive Government intervention in the banking system that can be articulated into four forms of State intervention: a financial form, which aims to increase the liquidity of banks ensuring their debt exposure; a proprietary form, involving the purchase of shares or the increase in subscription of the capital of banks by the State in the event of capital inadequacy; a functional form, which refers to the payment of a substantial financial contribution by the State to banks, meant to align the supply of credit by banks receiving public aid, in order to avoid a credit squeeze that would further aggravate the crisis; and a regulatory form, which aims to strengthen public supervision on the banking and financial sector and to extend its scope to prevent new episodes of instability and crisis in the markets in the future.[86]

One problematic aspect of these emergency rules involved encroachment on the conduct of the free private enterprise guaranteed by the Italian Constitution. For example, we may recall the legislative suspension of the opportunity to request the redemption of the shares in hedge funds contained in Art. 14, para. 6, of the Decree-Law of 29 November 2008, no. 185, the Anti-Crisis Decree aimed at stabilizing the Italian economy during the financial turmoil: in order to safeguard the interest and equal treatment of participants, it authorized the regulation of hedge funds such that until 31 December 2009 the management of the savings company could in specific cases suspend a redemption in proportion to the shares for which each subscriber had requested a refund (known as the gate). The shares left unredeemed were in this case treated as a new application for reimbursement submitted the first day after the partial redemptions.[87]

Another exception to the general principles of Italian law was the administrative ban on short selling by the Consob, as the national supervisory authority in the financial markets. In detail, for a period of time, the Consob, by means of a number of different resolutions hard on each other's heels, banned the practice of short selling for certain classes of shares: it provided in particular that the sale of shares of banks and insurance companies listed on Italian regulated markets and traded should be assisted by the availability or even the ownership of the securities by the time of the order until the date of settlement of the transaction, thereby essentially prohibiting the sale if not assisted by the availability of the title.[88]

2.4.3 Liberalization, competition and consumer protection

Financial market development, complexity of products and complexity of the customers' decision process[89] pushed the Italian regulator and supervisory authorities to enhance more effective measures for clients' protection.[90] The rules on the transparency of contractual conditions and the correctness of relations with customers allow clear and correct information on the products and services supplied by intermediaries, avoiding the risk of disputes with customers and loss of reputation.[91] Legislative Decree no. 141 of 2010 has transposed into Italian law the rules on credit agreements for consumers from Directive 2008/48/EC, meant to harmonize the regulatory and administrative provisions of the Member States.

In the light of the socio-economic context, characterized by a deep economic and financial crisis and the consequent reduction in credit supply for families and retail customers in particular, the legislator has intervened in order to ensure greater transparency in relations between

banks and customers and, overall, to strengthen the tools of consumer protection.

Finally, with regard to the cost of current accounts and bank commissions, Law no. 147 of 2013 (Art. 1, paras 584 and 585) allows the transfer, without additional cost to the customer and within the period of 14 working days, of payment services related to a payment account from one service provider to another. Without prejudice to the account relationship established by the original provider of payment services, the customer may transfer the payment service to a different lender.

This modified the discipline of the Consolidated Act on Banking in respect of the *jus variandi*, namely the right to unilateral change in terms and conditions, by Legislative Decree no. 141 of 2010 and then by Decree-Law no. 70 of 2011. In more detail: it established the conditions under which the bank and the customer may agree on the faculty of the institution to unilaterally amend certain terms and conditions; the scope of such changes has been limited; some provisions detailed the information to be provided to the client in relation to such changes, taking into account whether the client is an individual or a business.

The Bersani Decree, ratified as Law no. 40 of 2007, had already eased early repayment of mortgages, eliminating the penalties that banks had applied for new mortgages. The new Art. 120-*quater* of the Consolidated Act on Banking allows the debtor to take advantage of the portability of mortgages without penalties or other charges of any nature. Decree-Law no. 1 of 2012, *sub* Art. 27-*quinquies*, has also shortened the time limit for the completion of the procedure and has amended the amount of damages in case of delay.

2.4.4 Recent trends in the field of company law and financial markets regulation

In Italy, after the corporate law reform by Legislative Decree no. 6 of 2003 granting more statutory autonomy to companies,[92] company law and financial markets regulation follow the lines of action of the European Commission in the field of corporate governance within the wider European trend of modernization of the company law,[93] given the globalization of the markets and the increasing competition among jurisdictions.

Recent regulatory interventions in the field of financial markets and listed companies have been aimed at the protection of a wide range of interested parties:[94] first of all, shareholders and stakeholders – by disclosure of corporate information, protection against hostile takeover bids, gender balance in the governing bodies of the company – and also

creditors and depositors, through the discipline of accomplished professionals in the field.

To facilitate a mode of financing alternative to bank credit for new businesses, a new regulatory regime has been drawn on equity crowdfunding, that is, the collection of risk capital by innovative start-ups via online portals. Some provisions were contained in the Italian Decree Law no. 179 of 2012 titled "Further urgent measures for the growth of the country", for the purpose of stimulating economic growth in Italy, delegating to Consob the task of regulating certain aspects of this activity, in order to create a reliable environment that can instil trust in investors. The new Regulation adopted by the Consob on 26 June 2013 states that only subjects authorized by the Consob and listed in the register kept by that authority can manage a portal for the collection of risk capital, besides banks and investment firms already authorized to provide investment services and noted in the special section of the Consob register. A bank-centric model was therefore chosen for the management of this new financial activity.

To increase gender equality in the boardrooms of listed companies,[95] Law no. 120 of 2011 introduced new Art. 147-*ter*, para. 1-*ter*, into the Consolidated Law on Finance providing that, with regard to the election and composition of the board of directors, the Statute of listed companies also lays down that the selection of directors to be elected should be based on a criterion granting a balance between genders. At least one-third of the directors elected must consist of the less-represented gender, and this selection criterion applies for three consecutive mandates. If the composition of the board of directors resulting from the election does not comply with the selection criterion provided for in the present section, the Consob warns the company involved that it must comply within four months of the warning. In the event of non-compliance, the Consob applies a fine from €100,000 to €1,000,000, according to the criteria and methods laid down in its own regulations, meanwhile setting a new three-month term for compliance. In the event of further non-compliance, the members elected lose their place on the board. The statute regulates the methods of formation of the lists and the cases of replacement during a mandate in order to guarantee compliance with the above-mentioned selection criterion. Also regarding the composition of internal control bodies, new Art. 148, para. 1-*bis*, of the Consolidated Law on Finance established that the articles of association of the company state moreover that the division of members shall be made in such a way that the less-represented gender must obtain at least one-third of the regular members of the board of auditors. These gender

equality rules also apply to State-owned companies by Decree of the President of the Italian Republic no. 251 of 2012.

Decree Law no. 91 of 2014 introduced measures on the whole to simplify and encourage the listing of companies on the financial markets, in addition to statutory interventions. In particular several points in the Consolidated Law on Finance have been amended to encourage and facilitate access to the market for venture capital enterprises, small and medium-sized in particular. Some changes are directed to introduce a definition of small and medium-sized companies with listed shares (SMEs), which is necessary to apply a new lighter regulatory regime for these smaller companies. The minimum capital required for the establishment of a corporation is consequently reduced, from €120,000 to €50,000.

Decree no. 91 of 2014 has introduced into the Consolidated Law on Finance a discipline on the increase of the vote, deferring to the statutory autonomy of the companies the ability to predict voting shares plus the benefit of long-term shareholders. In detail, new Art. 127-*quinquies* provides that the articles of association may specify that increased voting rights may, up to a maximum of two votes, be attributed for each share belonging to the same subject for an uninterrupted period of no less than 24 months starting from the date of registration. In such a case, the articles of association may also take into consideration that the subject holding the voting right may irrevocably renounce the increased votes wholly or partly. The articles of association establish the methods for the attribution of the increased vote and for checking the relative conditions, with the possibility of including, in any case, a specific list. Unless otherwise ruled by the articles of association, the vote increase is also calculated to determine the quorum for the constitution of the shareholders' meeting and for resolutions with regard to the share capital quotas. New Art. 127-*sexies* establishes, in derogation from Art. 2351 Section 4 of the Italian Civil Code, that the articles of association cannot contemplate the issue of multiple-voting shares. Multiple-voting shares issued before the start of trading on a regulated market maintain their features and rights.

In connection with this reform, it is believed that multiple-voting shares can bring advantages such as encouraging company listings, stimulating more active participation in the company's life and increasing potential efficient recapitalization, but precise rules are needed to avoid risks of greater conflict of interest for the controlling shareholders and to protect minority shareholders in an equivalent manner.[96]

Of course, the activities of alternative investment fund managers (AIFs), accounting for significant amounts of trading on financial

markets, can contribute to increasing the risks in the financial system, so that Directive 2011/61/EU aimed at regulating these activities to create an internal market in a harmonized regulatory framework. In Italy, Legislative Decree no. 44 of 2014 has transposed this European legislation, providing for the application of rules of conduct, transparency and disclosure of capital requirements, organizational and risk control similar to those provided by the management company of harmonized funds. Under the new rules, European managers authorized under the Directive can sell the AIFs they manage freely throughout the European Union, in respect of professional investors; they can also manage hedge funds reserved for professional investors in other countries of the European Union on a cross-border basis or by establishing branches.

2.4.5 Insurance sector regulation, between financial stability and customer protection

The development of the insurance sector regulation follows, on the one hand, the need to strengthen public supervision of intermediaries and increase the contrast of typical risks of the insurance business, especially after the financial crisis that began in 2007,[97] and, on the other hand, instances of liberalization of contracts with consumers, to increase the transparency of the services, customer protection and the degree of competition in the market offer.

Directive 2009/138/EC on the taking up and pursuit of the business of insurance and reinsurance of course harmonizes the laws of the Member States in the field of insurance, in order to provide businesses with a legal framework to carry on business in the internal market.

Within such a framework the Italian regulatory and supervisory authorities are planning to develop Solvency II, a complex of legal rules, implementing measures and standards of practice meant to improve the quantity and quality of the capital requirements of insurance companies.[98] The primary objectives of the supervision are capital adequacy and the adequacy of the governance system of insurance undertakings.

This new regulatory framework, therefore, aims to give the supervisors the appropriate tools to determine the overall solvency of insurance and reinsurance companies, with quantitative and qualitative measures that influence the understanding and management of risk.

On the other hand, the "first liberalization package" by Decree-Law no. 233 of 2006 prohibits, for example, insurance companies and their sales agents from adopting new contractual clauses of exclusive distribution and the imposition of minimum prices or maximum discounts, applicable in respect of consumers contracting, under penalty of nullity.

After the "second liberalization package" by Decree-Law no. 7 of 2007, recent major liberalization measures have been operated by Decree-Law no. 1 of 2012 (the "liberalization" Decree) and by Decree-Law no. 179 of 2012. Decree-Law no. 1 of 2012 included several provisions designed to make the insurance industry more transparent and competitive in order to reduce the cost of insurance policies through the fight against fraud. Decree-Law no. 179 of 2012 prohibited the automatic renewal of the compulsory insurance contracts against civil liability for the use of motor vehicles and crafts, for which it also provided the definition of "basic agreement" containing all the clauses necessary for the fulfilment of compulsory insurance.

2.5 Conclusion and potential evolution

The overall regulation of the Italian banking and financial markets, focused on pursuing the primary objective of the intermediaries' stability, has so far proved its effectiveness, considering in particular that during the crisis that began in 2007, the Italian State did not contribute financially to the rescue of any bank by using taxpayers' money.[99] This is in full implementation of Art. 47 of the Constitution, the primary rule of Italian law, which requires protection of savings in all their forms.

To avoid conflicts between the tasks of regulation and supervision, especially where their pursuit was entrusted to the same authority, in 2005, as we have seen, the law also conferred the power to protect competition in the banking system to the Antitrust authority: therefore, the Italian legal system is becoming more sensitive to the new needs of protection coming from the market, assigning, albeit with some delay, equal weight to the different objectives of regulation and supervision.

An important consideration, supported by recent empirical studies, deals with the relationship between the strengthening of regulation and capital adequacy of intermediaries: in Italy the extension of regulation since the 1920s has not resulted in a lower capital adequacy of banks, because the ratio between capital and reserves and the total assets shares, stocks, loans and securities rose continuously after the 1950s.[100]

For that reason, the experience of Italy does not fulfil the theory that the progressive extension of public regulation in the twentieth century led to banks being less risk averse, because the growth of the safety net for intermediaries would have prompted banks to reduce the capital base and to increase assets, as in the United States and the United Kingdom.[101]

A recent trend in Italian law is using finance to the advantage of economic growth. Decree no. 91 of 2014 (labelled "competitiveness") has made changes to the Code of Private Insurance in the field of the investment of insurance companies, so that it becomes possible for insurance companies to grant loans in favour of subjects other than individuals and micro-enterprises, in line with some EU countries (e.g., France and Germany). For the first time the Italian legal system has allowed insurance companies to grant loans to companies, subject to certain specific conditions.

In reality, this is not a farewell to the traditional bank-centric system, based on the exercising of credit reserved to banks, because under these new rules banks can also continue to carry out their functions in assessing creditworthiness, unless the insurer would describe the organizational structures implemented for borrowers' screening and monitoring proving able to understand and manage credit risk and to use banking best practices.[102]

In financing growth, the many recent regulatory measures that have led to increased competition among market players may also represent a privileged instrument for effective market growth, because increased competition strengthens the welfare of consumers and indirectly promotes technological development.[103]

As for the discipline of the crisis management, confirming the validity of the Italian model of regulation,[104] based on crisis management administrative proceedings, and not on the judicial model, the guidelines adopted at the supranational level after the financial crisis led towards a strengthening of the administrative authority's powers, both towards creditors and directors: that again in prospect of a deeper European integration.

While completing the transfer of functions in the context of the European Banking Union, there is a need for coordination between the (residual) functions of the national supervisory authorities and the European ones, also with regard to the homogeneity of supervisory best practices, providing a framework of certain and uniform rules throughout the Single Market.[105]

Concerning the harmonization of payment instruments required by the Single Euro Payments Area (SEPA) project, designed to extend European integration to non-cash euro retail payments to foster efficiency and competition within the euro area,[106] the Italian legal system will have to try to overcome for good certain characteristics still used in the transfer of funds through the banking and financial system: it will be

worth raising the degree of protection of consumer payment services,[107] also preventing money laundering by means of cash, unfortunately still much used in Italy.[108]

It will also be essential, given the close relationship between competition and growth in the long run, to continue cooperative activities between the Italian Competition Authority and the Bank of Italy to coordinate and make more effective the implementation of their institutional mandates in the field of consumer protection,[109] through the exchange of information, enabling each to take into account the initiatives taken by the other in order to: ensure effective protection of consumers in dealing with the banking and financial intermediaries; promote efficiency and consistency of administration action; contain the supervisory burden on intermediaries; and avoid overlaps in their actions to protect consumers.

For economic growth it is becoming more and more essential to promote financial inclusion of the poorest classes, that is, those that might not otherwise access the banking system and the most basic means of payment, by also offering financial services to the underbanked: which by now is no longer responding only to a need for social equity, but also to the need for a better functioning of the Single Market.[110] Italy is on the first rungs of this ladder, and efforts in this field should now be intensified (e.g., through the use of postal banking[111]), always maintaining a balance between free market and State intervention.

The regulation of the financial markets deals with numerous areas of intervention: systemic risk in securities markets also deriving from financial innovation; financial stability in post-trading market infrastructures and derivatives clearing; the development of securities markets, also as a source of capital alternative to banks' credit; and investor protection and the restoration of trust in securities markets, via better information disclosure and corporate governance quality. For the codes of conduct regarding corporate governance issued by stock exchange companies or trade associations, it will be crucial to make effective the application and to solve, in Italy in particular, the problem of deceptive measurements as well as the problem of the erosion of responsibility.[112]

Considering that a better regulation of financial intermediaries has a direct impact on long-run growth,[113] the Italian legal system is intended, while retaining some of its characteristics, to conform not only to the European Union law, but also to rules enacted by the different *fora* of supranational regulation,[114] thus merging gradually into the global regulation of financial markets.[115]

Notes

1. M.C. Schisani (2008), "I caratteri originali del mercato finanziario italiano (1861–1914)" in A. Cova, S. La Francesca, A. Moioli and C. Bermond (eds) *Storia d'Italia. Annali*, Vol. 23, *La Banca* (Torino: Einaudi); S. La Francesca (2012), "Italy and Banks' Role from 1861 to 2011" *Bancaria*, Vol. 68, No. 1, p. 51.
2. After the 1907 crash and the subsequent financial market regulation, the Milan stock exchange had the primacy among local stock exchange markets existing alongside the banking sector, but the financial market remained a small one. According to F. Bonelli (1971), *La Crisi del 1907* (Torino: Fondazione Einaudi), 159, the 1907 crisis dropped "the illusion [...] that the stock exchange [was] an institution able to play a functional role in the mobilization of savings to finance [the country's] industrial development".
3. Bank of Italy, *Annual Report at Ordinary Meeting of Shareholders*, Rome, 30 May 2014, p. 141.
4. On the basis of consolidated financial statements data collected by the ECB, in 2012 loans were 68 per cent of the assets of the Italian banking system, compared with a euro-area average of 58 per cent (Bank of Italy, *Annual Report at Ordinary Meeting of Shareholders*, Rome, 30 May 2014, p. 141).
5. R. De Bonis, F. Farabullini, M. Rocchelli, A. Salvio and A. Silvestrin (2013), *A Quantitative Look at the Italian Banking System: Evidence from New Time Series since 1861*, Department of the Treasury, Working Papers No. 9, Rome, p. 5.
6. Bank of Italy, *Annual Report at Ordinary Meeting of Shareholders*, Rome, 30 May 2014, p. 153.
7. Ibid., p. 154.
8. Ibid., p. 156.
9. Ibid., p. 160.
10. F. Capriglione (1978), *Intervento pubblico e ordinamento del credito* (Milan: Giuffrè).
11. See A. Sciarrone Alibrandi (2004), "La sorveglianza sui sistemi di pagamento: evoluzione morfologica, strumenti e limiti" *Banca, borsa, tit. cred.*, I, p. 437.
12. Regarding the potential use of signals arising from financial markets as a complement to the information set available to banking supervisors see F. Cannata and M. Quagliariello (2005), "The Value of Market Information in Banking Supervision: Evidence from Italy" *Journal of Financial Services Research*, Vol. 27, No. 2, p. 139.
13. G. Boccuzzi (2011), *Towards a New Framework for Banking Crisis Management. The International Debate and the Italian Model*, Rome, Bank of Italy Legal Research Paper No. 71, October 2011, p. 186.
14. Allow me, in this regard, to refer to D. Siclari (2011), *Gli intermediari bancari e finanziari tra regole di mercato e interesse pubblico (The Banking and Financial Intermediaries between Market Rules and Public Interest)* (Napoli: Jovene).
15. According to A. Gigliobianco and C. Giordano (2012), "Economic Theory and Banking Regulation: The Italian Case (1861–1930s)" *Accounting, Economics, and Law*, Vol. 2, No. 1, p. 4.
16. E. Galanti (2008), "La storia dell'ordinamento bancario e finanziario italiano fra crisi e riforme" in E. Galanti (ed.) *Diritto delle banche e degli intermediari finanziari*, Vol. V (Padova: Cedam).

17. In 1861 the banks of issue were Banca Nazionale del Regno d'Italia, Banca Nazionale Toscana, Banco di Napoli and Banco di Sicilia; Banca Toscana di credito per le industrie e il commercio d'Italia was added in 1864; Banca Romana was added in 1870. After the crisis of 1893, the issuing banks were reduced to the new Banca d'Italia, Banco di Napoli and Banco di Sicilia, while in 1926 Banca d'Italia became the only bank of issue and the central bank of Italy (see R. De Bonis, F. Farabullini, M. Rocchelli, A. Salvio and A. Silvestrin (2013), *A Quantitative Look at the Italian Banking System: Evidence from New Time Series since 1861*, Department of the Treasury, Working Papers No. 9, Rome, p. 3).
18. Law 30 April 1874, No. 1974.
19. Currently the CDP also issues securities to reschedule the debt of local authorities (municipalities, provinces, regions).
20. G. Toniolo (1990), *An Economic History of Liberal Italy, 1850–1918* (London: Routledge).
21. A. Gigliobianco and C. Giordano (2012), "Economic Theory and Banking Regulation: The Italian Case (1861–1930s)" *Accounting, Economics, and Law*, Vol. 2, No. 1, p. 16.
22. See C. Vivante (1895), *Relazione sulla riforma delle società commerciali* (Torino: Fratelli Bocca).
23. M. Vasta and A. Baccini (1997), "Banks and Industry in Italy, 1911–36: New Evidence using the Interlocking Directorates Technique" *Financial History Review*, Vol. 4, No. 2, p. 139.
24. R. Bachi (1914), "I lineamenti della recente evoluzione dell'economia italiana" in R. Bachi (ed.) *L'Italia economica nell'anno 1913. Annuario della vita commerciale, industriale, agraria, bancaria, finanziaria e della politica economica* (Città di Castello: Lapi), pp. 300–301.
25. J.D. Magee (1911), "The Italian Banking System" in *Proceedings of the Academy of Political Science in the City of New York*, Vol. 1, No. 2, *The Reform of the Currency*, p. 431 ss.
26. G. Majorana (1914), "Il credito e le banche" in V.E. Orlando (ed.) *Primo trattato completo di diritto amministrativo*, Vol. VII, Part II (Milan: Società Editrice Libraria).
27. L. Einaudi (1913), "La burocratizzazione del credito e le proposte di vincolo pei depositi a risparmio" republished in *Rivista di Politica Economica* (1968), 3, March, p. 343.
28. P. Sraffa (1922), "The Bank Crisis in Italy" *The Economic Journal*, Vol. 32, No. 126, pp. 178–197.
29. G. Toniolo (1995), "Italian Banking, 1919–1936" in C. Feinstein (ed.) (1995) *Banking, Currency and Finance in Europe between the Wars* (Oxford: Clarendon Press).
30. According to M. Pantaleoni (1996), "Le Casse di Risparmio e gli Istituti Bancari" republished *Il Risparmio*, Vol. 44, No. 6, p. 1305, "the advocates of State interference believe that the depositor is a perfect imbecile, that bank managers are all scoundrels exempt from any legal responsibility and that bureaucracy [...] is omniscient, honest and active. If depositors were truly imbeciles then regulation would perpetuate their state, whilst its absence would promptly teach them to be more circumspect".
31. Alongside the royal Decrees of 7 September 1926, No. 1511, and of 6 November 1926, No. 1830.

32. G. Guarino (1993), "Il profilo giuridico" in G. Guarino and G. Toniolo (eds) *La Banca d'Italia e il Sistema Bancario 1919–1936* (Roma-Bari: Laterza).
33. See S. Battilossi (2009), "Did Governance Fail Universal Banks? Moral Hazard, Risk Taking, and Banking Crises in Interwar Italy" *Economic History Review*, Vol. 62, No. 51, p. 101; F. Barbiellini Amidei and C. Giordano (2014), "The Redesign of the Bank-Industry-Financial Market Ties in the U.S Glass-Steagall and the 1936 Italian Banking Acts" in P. Clement, H. James and H. Van der Wee (eds) *Financial Innovation, Regulation and Crises in History* (London: Pickering & Chatto Publishers).
34. See M. Porzio (1981), "La legge bancaria: un tentativo di intervento globale sul mercato del credito" in M. Porzio (ed.) *La legge bancaria. Note e documenti sulla sua "storia segreta"* (Bologna: Il Mulino), p. 14; S. Cassese (1988), *Come è nata la legge bancaria del 1936* (Roma: BNL); F. Belli (1981), *Le leggi bancarie del 1926 e del 1936–1938* in *Banca e industria fra le due guerre. II. Le riforme istituzionali e il pensiero giuridico* (Bologna: Il Mulino), p. 203 ss; F. Capriglione and G. Sangiorgio (1986), *La legge bancaria: evoluzione normativa e orientamenti esegetici*, Banca d'Italia – Quaderni di ricerca giuridica della Consulenza legale, No. 7, Rome.
35. This way of modeling the banking sector has been described by some commentators as "an administrated oligarchy": see R. Costi (2007), *L'ordinamento bancario* (Bologna: Il Mulino), p. 59.
36. A. Gigliobianco and C. Giordano (2012), "Economic Theory and Banking Regulation: The Italian Case (1861–1930s)" *Accounting, Economics, and Law*, Vol. 2, No. 1, p. 50.
37. Law 10 October 1990, No. 287.
38. Ministero per la Costituente (1946), *Rapporto della commissione economica presentato all'Assemblea Costituente. Vol. IV, t. I, Credito e assicurazione. Relazione* (Rome: Istituto Poligrafico dello Stato), p. 217.
39. Ibid., p. 237.
40. See S. Amorosino (2005), "I modelli delle vigilanze pubblicistiche sui mercati finanziari" *Bancaria* Vol. 3, No. 3, p. 34; S. Amorosino (2014), *Manuale di diritto del mercato finanziario* (Milan: Giuffrè), p. 8.
41. See F. Merusi (1981), "La posizione costituzionale della banca centrale in Italia" *Rivista trimestrale di diritto pubblico*, No. 4, p. 1081.
42. The credit-money link and the consequent need for a unified framework was also pointed out at the time by the Constitutional Court in its early years, when it considered the credit function "of immediate public interest, in its full extent, because credit circulation definitely influences the money market" (Constitutional Court, judgment of 24 November 1958, No. 58).
43. See G. Della Porta (1960), "The Italian Banking System: Bank Legislation and Credit Control in Italy" *Review of the Economic Conditions in Italy*, No. 14, p. 178; F. Masera (1966), "International Movements of Bank Funds and Monetary Policy in Italy" *Banca Nazionale del Lavoro Quarterly Review*, Vol. 79, No. 12, p. 311.
44. I. Visco (2014), *Guido Carli e la modernizzazione dell'economia (Guido Carli and Modernization of the Economy)* (Rome: LUISS University), 28 March 2014.
45. See R. Rordorf (2000), "La Consob come autorità indipendente nella tutela del risparmio" *Foro it.*, No. 5, p. 147; F. Capriglione (2002), "Società e Borsa (Consob)" *Enc. dir. Agg.*, Vol. VI, p. 1022.

46. See G. Di Gaspare (2003), *Diritto dell'economia e dinamiche istituzionali* (Padova: CEDAM).
47. See F. Capriglione (1994), *L'ordinamento finanziario verso la neutralità (The Financial Market Law towards Neutrality)* (Padua: CEDAM).
48. F. Merusi and M. Passaro (2002), "Autorità indipendenti" *Enc. dir. Agg.*, Vol. VI, p. 186.
49. L. Carlassare (2008), "Fonti del diritto (dir. cost.)" *Enc. dir. Annali*, II, t. 2, p. 549. In financial regulation literature the theme is recurrent: about increasing political accountability and modifying the "regulatory architecture" to reduce the possibility of capture see, recently, A.J. Levitin (2014), "The Politics of Financial Regulation and the Regulation of Financial Politics: A Review Essay" *Harvard Law Review*, Vol. 127, p. 2049.
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100. R. De Bonis, F. Farabullini, M. Rocchelli, A. Salvio and A. Silvestrin (2013), *A Quantitative Look at the Italian Banking System: Evidence from New Time Series since 1861* (Rome: Department of the Treasury), Working Papers No. 9, p. 7.

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112. See, in this regard, S. de Colle, A. Henriques and S. Sarasvathy (2014), "The Paradox of Corporate Social Responsibility Standards" *Journal of Business Ethics*, Vol. 125, No. 2, p. 177.
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114. See S. Battini (ed.) (2007), *La regolazione globale dei mercati finanziari* (Milano: Giuffrè); G. Della Cananea and A. Sandulli (eds) (2013), *Global Standards for Public Authorities*, Studies in transnational public law No. 1 (Naples: Editoriale Scientifica).
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Part I

Supervision Purposes and Forms

3
Supervision Purposes in Banking, Finance and Insurance Regulation

Anna Maria Antonietta Carriero and Domenico Piccolantonio

3.1 Why banks should be supervised: the debate[1]

The economic and financial literature includes conflicting points of view on banking sector policies and on the best choices promoting sound banking around the world.

The starting point of any discussion is the importance of banks for economic growth and, above all, the relevance of a well-functioning banking system to mobilize and allocate savings efficiently, to scrutinize funded firms, to foster economic welfare. The crises of the early twenty-first century demonstrate the strong impact of an unstable banking system, the negative externalities of bank failures, and the so-called domino effect of runs on the banks that could provoke high social costs even in countries where deposit insurance does exist.

That is the reason why financial stability is a prime aim to pursue; Authorities should be equipped by appropriate powers and tools, but they should have the ability to balance technical solutions without being over-supportive or over-intrusive. In this context, banking supervision should promote stability in conjunction with the efficiency and competitiveness of the system as a whole.

The comprehension of such issues is fundamental to explain why prudential supervision is crucial to the efficient functioning of the financial system and the rationale of agencies responsible for banking supervision, with specific powers and responsibilities.[2] The academic debate on whether banks are special and need to be supervised reveals that the main justification of public intervention in the banking sector relies on the inherent instability of the banking industry and the consequent threat to the stability of the financial system, a threat lying in the ultimate nature of banks that transforms short-term liabilities into illiquid long-term credits.[3]

The primary focus of supervision is to bring the banking system to an optimum level, always changing,[4] and to reduce market failures. Other researchers provide evidence indicating that a restrictive approach, such as the so-called structural supervision, may not only lower banking efficiency but even increase the probability of a banking crisis; in this perspective, encouraging market monitoring as an alternative kind of regulation can boost bank performance.

The Basel Committee on Banking Supervision in 1997 issued a comprehensive set of Core Principles for Effective Banking Supervision (Basel Core Principles), last updated in 2012, with the aim of improving the strength of financial systems. In order to focus attention on our mandate, we would like to underline the starting sentence of Principle 1, Essential Criterion 1, which requires clear responsibilities and objectives to be stated for each agency involved in the supervision of banks. Another crucial rule is stated in Criterion 1.2, according to which: "The primary objective of banking supervision is to promote the safety and soundness of banks and the banking system. If the banking supervisor is assigned broader responsibilities, these are subordinate to the primary objective and do not conflict with it".

As elaborated below, the Italian legislator in the 1993 Consolidated Banking Law (CBL) had already fixed supervisory purposes, calling credit authorities to be more transparent and accountable.

In the early 2010s a deep global crisis, starting in 2008 and still in progress, has also highlighted the need for centralised banking supervision, in order to cope with the international aspect of the most important banks and to cut the link between sovereign risk and banking risk. The main pillars of the new architecture are the Single Supervisory Mechanism (SSM) and the Single Resolution Mechanism (SRM).

The SSM was established on the basis of UE Council Regulation no. 1024/2013, allocating specific tasks to the European Central Bank in the prudential supervision of banks; it came into force in November 2014. Supervision is conducted at European level; intermediaries qualified as significant "will be subject to centralized supervision, with the coordination of the ECB and the participation of the national authorities…supervision of the other banks will remain in the hands of the national authorities".[5]

The constitutional basis of the SSM is Art. 127.6 TFEU, according to which European Central Bank (ECB) can be entrusted with specific tasks concerning policies relating to the prudential supervision of credit institutions.

It is worth noting that the new tasks are being exercised by ECB without prejudice and separately from monetary policy.[6] National competent Authorities continue to exercise other competences not transferred to ECB, such as powers in the field of transparency of relations between banks and customers and anti-money laundering.[7]

SSM is undoubtedly a great achievement in European integration; it implies banking supervision across the euro area, founded on a complex and multi-layered system of European and national competences.[8] Being a single system means that ECB and NCA are called to pursue the objectives of prudential regulation in the performance of supervisory tasks.

We can conclude that the prudential purposes and powers attributed to ECB and NCA by EU law or national laws have been allocated in a composite system (SSM).

3.2 First legislative clues of supervisory aims in the distribution of competences in the securities sector. The exception of competition law (no. 287/1990)

In 1983 and 1991 two laws were issued in Italy in order to regulate financial intermediaries acting as asset management companies and investment firms.

The first, Law no. 77/83, introduced structured supervision of asset management companies (AMC) that provide collective portfolio management. Even though the primary legislation was not particularly clear in attributing powers, for the first time the Bank of Italy (BoI) and the Consob were actually involved in a common supervision on those financial entities.

Law no. 1/91, regulating investment firms, introduced aim-oriented Supervision, a model for purpose in which supervisory powers are exercised on the same intermediary by the Bank of Italy (BoI) or by the Consob alternately, depending on the purpose. In more detail, the BoI was empowered to supervise stability while the Consob was responsible for the aspects of transparency and duties of conduct. Even though aim-oriented supervision was not the only possible model to choose, commentators appreciated the legislative option to clearly declare supervisory aims and to call authorities to cooperate, in order to reduce the excessive burden of double regulation.

But the model for purpose suffered from an important exception in the field of competition. Law no. 287/90 introduced new provisions to safeguard competition; in this context a new Authority was instituted

in charge of supervising all economic sectors, except from the banking sector, in which the power to ensure the observance of competition rules was attributed to the Bank of Italy, also responsible for prudential supervision.[9]

The exception was immediately criticized by commentators particularly since the banking sector has always been a closed sector, averse to competitive pressures and protected by an overregulation; the choice, according to some, would have prevented the unfolding of real competition and would have preferred stability.[10]

Finally, Law no. 262/05 removed the exception and clarified attributions of the so-called independent Authorities acting in the Italian system.[11]

3.3 The 1993 Consolidated Banking Law: Art. 5

The 1993 CBL was enacted in a general context emphasizing the importance of the rule of law in the activity of public powers.

In particular, Law no. 241 of 7 August 1990, regulating administrative proceedings, fixed the fundamental principles to be observed in the administrative process, such as time limits for the adoption of measures, indication of the person responsible for the process, and the reasons for its decisions. That law, considered a milestone in the direction of a democratic and transparent approach in the exercise of administrative powers, strongly influenced the new banking regulation and was explicitly recalled in CBL Art. 4, according to which, insofar as they are compatible, the provisions of Law 241 apply.

Supervisory purposes were explicitly mentioned for the first time in Art. 5 of that same 1993 CBL. The innovative provision, appreciated by the majority of commentators, was in line with the above-mentioned stream of the period, underlining the crucial importance of the rule of law also in the field of the so-called independent administrative authorities.[12]

From a legal point of view, the first aim to pursue in the banking sector is the protection of savings in all their forms, fixed by Art. 47 of the Italian Constitution and legal basis for the existence of independent authorities.

In order to understand the relevance of the choice, we can observe that the explicit legislative mention of supervisory purposes tends to limit the technical discretion of authorities in charge of supervision, in order to balance flexibility of control and certainty for supervised entities. In this sense, the 1993 CBL overcame the traditional neutrality of

the previous discipline under which different purposes, such as monetary policy and economic programme aims, could be pursued by supervisory authorities.[13]

On the other hand, the co-existence of different aims introduces elements of complexity in the effective exercise of discretionary powers of the supervisory authorities, especially when there is no indication of priority between them or when they can in some cases be considered in conflict with one another.[14]

A typical example of conflict of interests for the authorities could be how to reconcile, in some cases, the general aim of stability with the goals of competitiveness and transparency.[15] Supervisory authorities have to balance purposes according to constitutional principles, and to the hierarchy deriving from the same law and the European framework.

3.3.1 Overall stability

Stability is the primary objective of bank regulation and supervision, and is also a crucial issue for central banks, even in those countries where the latter are not formally mandated by their charter to conduct prudential supervision.

There is no widely accepted definition of financial stability, but there have been many attempts to reach a definition of it, essentially through the opposite concept of financial instability or crisis.[16]

Most authors are in favour of such a definition, based on a system approach and so focusing on the resilience of the financial system as a whole. In this context, a single individual banking failure cannot be a proof of financial instability. This definition excludes the existence of a trade-off between monetary and financial stability requiring a clear assignment of purposes to authorities.

Other definitions are based on a practical approach, and equate financial stability with situations without any banking crisis and with asset price stability.[17]

Apart from the difficulty in agreeing on a suitable definition of financial stability, the central bank's role in contributing to such an aim is at stake and, in particular, prudential supervision plays a crucial role, also considering the wide range of tools "to define, monitor and enforce the rules of the game".[18]

According to a positive, constructive approach, with practical relevance, financial stability was defined in the following terms: "A financial system is in a range of stability whenever it is capable of facilitating (rather than impeding) the performance of an economy, and of dissipating financial imbalances that arise endogenously or as a result of

significant adverse and unanticipated events".[19] The definition introduced the concept of range of stability, because financial stability is considered a continuum rather than a static condition, because finance is undoubtedly dynamic and composed of many interlinked elements (infrastructure, intermediaries, markets).

Systemic stability, as we mentioned above, is the primary and traditional purpose of supervision, and more in general, a pillar for the economic stability; this main purpose is formalized in the legislative framework of many countries.

The essence of stability to be pursued is the overall stability of the financial system as a whole, bearing in mind that banking supervision cannot prevent insolvency in any case. Nonetheless, overall stability requires a constant and ongoing control by supervisory authorities of the technical situation of single intermediaries, avoiding on the one hand an excessively protective attitude and on the other a lack of supervision. To pursue stability as a whole, authorities need deep individual analyses on single intermediaries and their behaviour, in order to predict problematic situations.

Stability should be reached by balancing different technical solutions: capital requirements, mismatching of maturities, liability management, sound governance, prevention and early intervention by authorities, and so on.

3.3.2 Sound and prudent management

The expression of sound and prudent management is taken by European directives, even though some references to sound exercise of credit activity can be found in the preliminary works of the Italian Constitutional Chart during discussion concerning purposes and criteria of public controls on banks.[20]

In the context of European directives, sound and prudent management is mainly used in the area of holdings of capital in banks; it means all the qualities and conditions that banking shareholders must ensure to obtain the necessary authorization by supervisory authorities.

In the CBL, sound and prudent management is both a crucial purpose for the authorities and a parameter for supervised entities. Both as supervision purpose, and as rule of conduct for intermediaries this objective – referred to single intermediaries – is shaped in a flexible way, in order for its content to be able to relate to different contexts and according to a certain logic in each case. According to some commentators, "sound

and prudent management" is too vague a formula, hiding and authorizing a wide exercise of discretional power.[21]

As mentioned above, CBL Art. 5 did not fix a hierarchy among general supervisory purposes essentially because the correct balancing of objectives is the core of discretionary powers of authorities; nonetheless, sound and prudent management is, in a certain sense, the application of general purposes to single cases; in other words, there is no contradiction, but genuine complementarity between general purposes and prudential regulation or measures oriented to sound and prudent conduct.[22]

As to legal categorization, the sound and prudent management formula can be framed among the general clauses of the Italian civil law, along the lines of good faith. With regard to the content, sound management means a management: (a) oriented to profitability, typical target of a firm; (b) immune from the effects of crime or interests other than those of the entrepreneur; (c) correct towards customers and competitors. Prudent management is conduct that wisely takes all typical banking risks into account.

Finally, it can be useful to analyze the meaning of punctual recall to sound and prudent management in some articles of CBL in relation to the general purpose mentioned just above. Starting from Art. 14.2[23] and trying to interpret other articles where sound and prudent management is cited (Art. 19.5; Art. 19.7; Art. 20.2; Art. 56.1; Art. 57.1), some authors emphasized the obligation for the supervisory authorities, in administrative evaluation, not to consider other general purposes, such as the needs of the financial system as a whole, or its safeguarding. In those cases the action of authorities is to be governed exclusively by technical and prudential aspects concerning the single supervised entity, avoiding any considerations of the impact on the financial system.[24]

3.3.3 Efficiency and competitiveness in the financial system

In theory, the efficiency and competitiveness of the financial system have been explicitly mentioned as essentially having been previously neglected in the banking sector, in favour of stability.

In the view of some authors, in fact, in the 1936 Italian banking legislation, free competition was considered a source of instability. In fact, provisions issued in that year limited competition among banks essentially because "regulators were concerned that price competition in the market for deposits would induce banks to take excessive risks in their investments or to engage activities outside of their core banking business".[25] The 1936 Banking law allowed supervisory authorities to impose price caps (Art. 32)[26] and denied banks other competitive tools,

such as free branching and, more in general, attributed wide discretionary powers to them, to be exercised in order to reach economic planning purposes.[27]

In the first version of Art. 5 of CBL, the term "competitiveness" was absent; it was added in accordance with the advice of the competent Parliamentary Commission (Finance and Treasury of Senate) in order to emphasize the role of competition towards efficient structures in comparison with solutions centred only on administrative measures. In this way, competitiveness was fully included in the core function of supervisory authorities.[28]

The 1993 CBL attributes the same level of stability to efficiency and competitiveness, following recent findings of economic studies according to which stability in a systemic perspective is the consequence of efficiency, so that they are complementary goals. Compatibility between competitiveness and stability can be drawn by the reference to overall stability that can be reached in a competitive environment.[29]

Other authors observed that in a short-term perspective a trade-off between the two goals can undoubtedly possible; in this case authorities are called to balance objectives in a reasonable, discretionary way.[30]

Competition as mentioned above is, in turn, a precondition for banking efficiency.[31]

3.3.4 Compliance with provisions concerning credit

Compliance with provisions concerning credit, if compared with other supervisory purposes, can appear as a residual objective whose meaning is to stress the need for supervised intermediaries to comply with all the provisions of the financial sector.

In fact, this aim embraces a large number of regulations concerning the banking sector, such as the rules on bank checks and drafts, as well as provisions related to the prevention of money laundering and terrorist financing, and testifies to the relevance attributed by the legislator to the genuine compliance with sectoral provisions as well as the attribution to supervisory authorities of their specific role to verify, through on-site inspections, the observance of all rules coherent with their attributions.

It is clear that supervisory authorities are not required to investigate irregularities or violations unrelated to banking sector; should they come across such violations, they would have to report them to other competent authorities.

3.4 The slow path of transparency from intermediate target to direct aim of supervision

The rules on the transparency of contractual conditions and the correctness of relations with customers were introduced in the Italian banking and financial framework through a first law on transparency, issued in 1992 (154/1992), immediately followed by another law the same year (142/1992), transposing a European directive on consumer protection.

In 1993 both laws were included in Title VI of the CBL, and the Bank of Italy was designated as the authority in charge of verifying the application and the enforcement of the new discipline.

This legislative choice was, together with competition profiles, considered as another exception to the rule of aim-oriented supervision; the rationale behind the choice was founded in the fundamental role of information disclosure requirements to promote competitiveness, as well as to protect the weaker counterparty of the regulated entities.

This is the reason why transparency and correctness were not explicitly mentioned in the text of Art. 5 of CBL as direct supervisory purposes, but were considered as an intermediate step towards the competitiveness of the financial system,[32] an essential element for a sound and prudent management or as a practical application of the residual purpose of compliance with the rules of the financial sector.[33]

In 2010, Legislative Decree no. 141 modified the text of Art. 127 of CBL, and included transparency and correctness among the purposes of supervision, emphasizing the importance of fair conduct in financial affairs and increasing consumer protection.

From the outset, the Italian legislator had in mind a dual provision oriented towards the protection of bank customers: first, a group of *ex ante* disclosure requirements, in order to ensure that the public would receive clear and correct information on the products and services supplied by intermediaries; second, a group laying down rules for the balance of contractual relationship in favour of the weaker party, that is the client.[34]

Two examples were CBL Arts 117.8 and 120;[35] the first empowered the Bank of Italy to standardize the content of contracts and securities designated by a particular name or on the basis of specific qualifying criteria; the second fixed value dating and methods of computing interests. But unfortunately at that time the provisions included in the second group were underestimated in their potential application.

Only recently other legislative interventions have increased the number and content of obligations oriented to balance the contractual relation in favour of retail customers (consumer artisans, micro-firms) and to promote, in fact, transparency and a substantial correctness.

3.5 CLF. Purpose and main goal of supervision[36]

According to Art. 5 of the Consolidated Law on Finance (CLF), the main goals of supervision are: maintenance of confidence in the financial system; investor protection; stability, proper functioning and competitiveness of the financial system; and compliance with the provisions on financial matters.[37] That list of goals and the strong similarity with the one under CBL is symptomatic of the regulatory approach aimed at the reduction of the rules on specialization that restricted the competition between entities (Brescia Morra).

The rule is a key element in the transition from the so-called structural supervision model to the "prudential supervision" model. The first is based on restraints and controls on both the entire enterprise and specific aspects of it, while the second defines a set of rules that apply generally to all operators. This makes it clear that the supervisory activity is based on rules aimed at enhancing the entrepreneurial nature of financial intermediation and the independence of the choices of enterprise, in a context designed to promote competitiveness and efficiency.[38]

This provision substantially mirrors the analogue Art. 5 of Consolidated Banking Law (CBL), but it adds further dimensions to that approach by addressing the issues of partition/sharing of responsibility and coordination between the different supervision authorities (mainly Bank of Italy and Consob).

What is the purpose of addressing the finality of supervision by setting out a provision which is all about general principles? The goal is to identify the rationale and conditions of legitimacy for those powers, while at the same time setting limits on the exercise of those powers, especially where they are discretionary. This is the expression of a more general principle, according to which the legislator, while setting out the powers, also has to make explicit the assumptions and limitations of administrative action by the indication of the pursued purpose (B. Bianchi, 1998).

Why supervision over non-banking financial intermediaries? First of all, the activity of non-banking financial entities implies similar risks, and so calls for same requirements of investor protection – in case of crises and against the improper conduct of intermediaries – which have already been mentioned as regards banks. Furthermore, they often

belong to wider groups whose overall stability may also been affected by the specific risks taken by the non-banking entities which are controlled; then again, even with regard to these intermediaries as well for banks, potential systemic risks and spillover effects may harm the stability and proper functioning of the entire financial system (M. Fratini, 2012). Finally, it raises the issue of equal treatment for entities which perform the same or similar activities (i.e., the level playing field).

Although the current system of supervision is commonly and succinctly described as a model for purpose, base of it is represented by the institutional model which has been gradually abandoned by the legislator, evolving towards the current architecture. With the market evolution, the original design has been revised, morphing into the functional model and then becoming the model for goals.[39] This model has been reinforced by Legislative Decree no. 303/2006, which introduced new provisions enhancing coordination between Law no. 262/2005 (the Savings Law), the CBL and the CLF.[40]

To clear things up, banks are supervised in accordance with the institutional model, as the Bank of Italy is responsible for both the stability of such entities and transparency and fairness.

Investment companies, fund and management companies – and to some extent even banks when they operate outside the traditional scope of traditional banking, paying and investment services – supervision is implemented based on the model for objectives: this evolution was required in relation to the increasing integration of financial markets and the activities of the various financial intermediaries operating there.

According to this model, Consob is responsible for overseeing the aspects of transparency and fair conduct of the operators, as well as those relating to consumer protection, while the Bank of Italy must act to ensure containment of the risks and stability profiles of intermediaries.

The right to designate different authorities to monitor compliance with the provisions on financial contributions is also provided by the MiFID Directive, Recital 59. Still more precisely, Art. 49 of the Directive provides that where a Member State designates more than one competent authority the roles of the same should be clearly defined.

Finally, insurance companies remain aware of the original design, because a specific authority, the Ivass (recently included under the umbrella of the Bank of Italy) supervises all the activities of the intermediaries, from birth to decline and exit from the market.

It is clear, therefore, that the current supervisory architecture is the result of the overlap – or amalgam – of regulations issued at a later date as a result of the evolution of the markets, which may have produced

heterogeneity in the exercise of supervision, resulting in different treatment of supervised entities and the risks of distortion of competition. In addition, in some areas controls have been duplicated, while there are still some gaps (or uncertainties) in other regulatory areas.

In this sense, it can be said that the structure of supervision of intermediaries is constantly evolving and this is the result of two important factors: first of all, the legislator must take into account the growing overlap between different financial intermediaries' activities, which recommended the adoption of uniform rules of supervision, and the need for certainty in the identification of the competent authorities to carry out checks on an individual basis (B. Bianchi, 1998); the second factor is represented by the awareness of effective supervision, aimed at preventing crises for those entities which are particularly weak and exposed to the risks.

In this perspective, we understand the reasons why at the international level, partly as a result of the events arising starting from 2008, emphasis has been placed on action to prevent the crisis of all intermediaries and, in particular, of the banks, which are the entities that most of all can favour the propagation and amplification of systemic risks.

If the ultimate goal of supervision is to ensure the smooth functioning of financial markets, this goal can only be achieved if investors retain a high degree of confidence, otherwise any transaction would be impracticable or even paralysed.

3.6 Collaboration among authorities and information sharing

The explicit obligation of co-ordination between the authorities responsible for overseeing the securities sector encourages administrative efficiency in order to avoid costly duplication of controls over the intermediaries.

Indeed, from an economic perspective the competitiveness of the operators also depends on the legal and institutional framework and on the efficiency of public administration. So the CLF confirms on the one hand the unity of the supervisory function and on the other hand the principle of standardization of controls regardless of the institution which holds and exercises them, confirming the approach already established by the Eurosim Decree, and thus avoiding the distortion factors arising from competitive mechanisms (B. Bianchi, 1998).

The first example of cooperation is represented by the provision of regulatory oversight, to the extent that each competent authority, when

issuing the secondary regulation, must request the formal opinion of the other authority. Then again, the wording of Art. 5, para. 4, of the CLF – "Banca d'Italia and Consob exercise the powers of prudential supervision" – and para. 5 of the same article, which set out that those authorities must operate in a coordinate manner, are both the expression of a general principle according to which each authority cannot ignore the pursuit of the objectives and targets whose care is entrusted to the other (B. Bianchi, 1998); as a consequence of this approach, the other goal explicitly provided by the legislator is the reduction of the burden imposed on supervised entities.

Even Art. 49 of the MiFID Directive has stated the obligation of close cooperation between the competent authorities, to be achieved through the exchange of information needed to perform their respective duties and tasks.

The overall structure of cooperation between those two authorities can be defined as a multi-level system. The Bank of Italy and the Consob are obliged to exchange information about the irregularities concerning the entities supervised by both and the measures which need to be taken. Other than that, there is a general obligation to share information which belongs to the provision according to which the two authorities cannot oppose each other any confidentiality. The relationship between BoI and Consob is set out by a Memorandum of Understanding (MoU), dated 31 October 2007 (*see infra*).

At the European level there is a similar system of information sharing between European and national authorities. The ability to cooperate and exchange information is provided for by Art. 4, para. 3 of the CLF, even with authorities outside the EU, provided that the non-EU country regulation provides for rules on confidentiality.

In addition, all information received by the Consob and the Bank of Italy from other European authorities – national, EU or non-EU – may not be disclosed by either of them to others or even to other Italian authorities, including the Ministry of Treasury, without explicit consent. The relationship between the Bank of Italy and Consob with other administrations is subject to further discipline, including administrative and judicial, especially in the context of proceedings relating to liquidation or bankruptcy.

The above-mentioned 2007 memorandum was signed by BoI and Consob to comply with the provisions of Art. 5-*bis* of the CLF, according to which the two authorities have to enter into a MoU in order to coordinate their supervisory functions and to minimize the burden on supervised entities. This document outlines the responsibilities of each authority and the methods of implementation.

The memorandum, other than establishing principles and rules of conduct with regard to the powers of regulatory oversight, disclosure and on-site supervision, set out precise rules with respect to the issuance of opinions by each authority on the measure of its competence, as well as reciprocal disclosure obligations on the decisions and measures taken by each one exclusively, starting with the investigation of irregularities.

A key aspect of this MoU concerns the establishment of standing committees; in particular: the Strategic Committee for the study and exchange of information on topics relevant to the coordination of supervisory activities, for the definition of guidelines on communication, and for the resolution of significant issues associated with the application of the protocol; a Technical Committee, tasked with assessing the questions that require a joint response, discussing issues that require changes or additions to the Rules or the implementation of guidelines, implementing the guidelines set out by the Strategic Committee, and assessing all other matters of a technical nature to improve the coordination of supervisory functions entrusted to the two Authorities.

3.6.1 Collaboration vs independence

The consistency of approaches by different authorities called to supervise the same entities is a consequence of the supervisory function unity principle and has different implications.

First of all, it has to be underlined that this topic became particularly sensitive when there is a joint/common decision of both authorities over a single act or operation: in those cases, the legislator has solved the issued by designating a Leading or Competent Authority, which is primarily responsible for the decision towards the supervised entity and the public, but who has to obtain the opinion – mandatory and non-binding – of the other authority involved; in this scenario, the authority which is formally in charge in relation to the purpose to be achieved, is bound to await the consent of the other.

The adoption of the opinion by the competent authority implies a sharing of responsibility with the leading authority and, from a more objective point of view, should also facilitate, at least theoretically, a more timely evolution of secondary legislation according to market evolution, especially in the securities sector.

On the other hand, the fundamental implication of the general principle of inherent coherence of supervisory action is that in all other cases, implying the autonomous exercise of own powers by each authority, they cannot ignore the pursuit of the goals and targets whose care is entrusted to another authority.

In this regard, it is worth debating whether this prohibition takes the form of an obligation to be borne by the other. Rather than a real obligation, we believe that it can be represented as a burden arising from the above-mentioned general principle of unity of the supervisory function and from the other principle of mutual cooperation between the authorities; this last, in particular, involves a professional diligence that is achieved, by asking other authorities for all the information considered as useful with regard to any topic which could be adjacent to that of its own competence.

3.7 Responsibility of supervisionary authorities and recoverability of failure (*culpa in vigilando*)

The topic of the direct responsibility of the authorities for failure while performing their tasks is quite controversial. In the last years the Supreme Court called for a direct responsibility of authorities and recognized a right of compensation for those who can prove they have suffered damage resulting from the misuse of prudential supervision powers.

Those points, belong to the application of the principle laid down by Art. 2043 of the Civil Code (c.c.), concerning the non-contractual liability, according to which compensation can be granted only for the damage which is caused to individuals and which can be qualified as unfair. The other conditions for the application of Art. 2043 c.c. are represented by the fault or the negligence of the entity who causes the injury and the causal link between that behaviour and the damage in question.

For decades, the only subjective situations considered as deserving compensation were the "absolute" subjective rights, as real rights and, according to some, personality rights; on the other hand, claims on credit rights were not included. Since the eighties, some Courts also considered as deserving compensation some legal positions that did not have the characteristics of an individual right: nevertheless some of these were assimilated to the individual right in order to make them fall within the definition of "unfair damage"; in this regard, the identification of a right to the integrity of the assets and/or the freedom to contract was emblematic.

The latest evolution, in chronological order, of the concept of "unfair" damage is represented by Judgment no. 6681/2011 of the Supreme Court. In this case, the Consob was obliged to pay compensation for damage caused to a group of investors because it had not used due diligence while exercising its supervision powers. Moreover, although the "unfairness" of the damage was admitted, the assessment on the degree of injustice was assigned to the judge, who had to decide according to a case-by-case approach, going through the identification of legal interests and balancing the interest of the subject claiming the damage versus the point that the author of the potentially harmful fact (the supervisor) was intended to provide protection to a general interest. This assessment has to be made in order to ascertain whether the sacrifice of the first was justified by the protection granted to the latter, deemed as prevalent.

Going back to the Court, the first pronunciation of the Supreme Court which addressed the issue of standards of Consob control activities (Judgment no. 3132/2001) recognized the responsibility of the supervisor in relation to a financial transaction whose the essential data and information contained in the prospectus were found to be false, and it was ascertained that there had been a total lack of investigation activity by the Consob.

With reference to the discretionary nature of the choices involved in prudential supervision, it was pointed out that even in this context public administrations (and supervisor) must act within the limits imposed by law, but also in accordance with the principle of *neminem laedere* (hurt nobody). On the basis of these considerations, the Supreme Court recognized that the parties economically harmed by the lack of controls had a subjective right to the "economic integrity"; this was configured as a hindrance to the freedom of contract, in the sense that the investor would not have made the investment decision if he had been aware of true information about the issuing company.

The Supreme Court position generated mixed feedback amongst the authorities. Some welcomed the possibility that the investor could hold a subjective right; others, expressed criticism about the creation of a new category of subjective rights (the "integrity right"), because if the authoritative and discretionary Consob activity aims at protecting a public interest, savers may only hold a "legitimate interest".

However, the Supreme Court's Judgment no. 6719/2003 once again stated the subjective right of an investor who complains a damage arising from a breach of the obligations of supervision on credit institutions and

financial markets. The judges supported their decision on the basis of a partition of jurisdiction introduced by Law no. 205/200, stating that this case fell into the category of "purely compensation disputes involving damage to persons or property" (which the legislature excludes from the scope of the exclusive jurisdiction of the administrative courts). This approach attracted criticism from the authorities and, indeed, the Judgment no. 204/2004 of the Constitutional Court repealed the above-mentioned jurisdiction limit of the ordinary courts.

In any case, the Supreme Court reiterated the above-mentioned reconstruction (Order no. 15916/2005 and Judgment no. 5396/2007), pointing out that the claim for damages subsequent to the breach of the obligations of supervision should be referred to the ordinary courts, since only the controversies in the field of public services are attributable to the jurisdiction of administrative courts, whose competence comes into question when the government exercises its powers in respect of "qualified entities" and not against private consumers; hence it follows the reconstruction of the position of the investor in terms of subjective right to compensation for the damage suffered.

Revisiting the last pronunciation by the Supreme Court (no. 6681/2011), it is worth mentioning that even in first and second degree of judgment, both courts stated that Consob was liable for the breach of the general rule of *neminem laedere* ex Art. 2043 of the civil code, arising from granting the authorization despite the evident technical issues in the balance of financial companies, as well as for its failure to inspect the mediator activity in a timely manner.

The Supreme Court confirmed the Consob conviction, arguing that the authority not only supervises the securities market but also plays a role of guarantee of public and private savings. Therefore, the granting of the authorization by the Consob would not be a simple declaration, but an act of discretion coming from the assessment of reliability, integrity and transparency requirements. According to the Supreme Court's pronunciation, Consob is bound to carry out a diligent and prudent valuation of the variables in the securities markets; these assessments represent a guarantee for all the entities that make use of credit, not only to the extent set out in Art. 47 of the Constitution of the Italian Republic, but also according to the principle of *neminem laedere*, under penalty of paying damages.

The Supreme Court, while identifying a causal link between the Consob's failure to act and the damage, also assessed as "unfair" the damage resulting from the loss of savings invested. In this way, the Court

reasserted the balancing point between the conflicting interests that the supervisor oversees: investor protection versus the right of free economic enterprise.

Notwithstanding the above-mentioned judgment by the Supreme Court, which could contribute in the future to the consolidation of a trend in pronunciation by other courts, this position appears unsatisfactory from different points of view.

First of all, it is based on a generic right to the integrity of identifiable assets. Indeed, qualifying the investor's position as a subjective right (of protection) would also give him or her a legitimate right of control over supervisory activity, which, on the other hand, has an authoritative and discretionary nature.

Indeed, the claim cannot arise only from the outcome or the lack of supervision by the authority *per se*, because this assumption is based on a qualified relationship between the tort-feasor and the injured party, which is not explicitly considered by any provision; it is therefore necessary to ascertain a subjective position that may be qualified in terms of subjective right. On the other hand, the claim of the investor is linked to the exercise of these powers by the authority, whose misuse, however, does not grant to any third party other rights than those connected to the "legitimate interest".

In addition, even the authorities and the courts that recognize a right of compensation connected to a subjective right have made recourse, to justify its existence, to the controversial category of the free expression of the will of negotiation. This reconstruction has been criticized by those who say that it masks a judgment of injustice of the damage and that the situation which the damage is assumed to arises from cannot represent the source of protection of individual rights in the absence of rules which confer an autonomous, subjective situation with respect to the assets of the individual.

Finally, a few practical considerations should be borne in mind, given that the use of civil liability as a means to improve the efficiency of supervision is likely to cause unintended consequences such as the possible reversal of the cost of compensation on the community. Although this effect can be avoided by careful use of other supervisory powers – mainly related to supervision over the intermediaries' fairness towards to customers, designed to help avoid the adverse effects arising from the transfer on the final price of goods and services of the costs incurred by intermediaries for defaulting behaviour – it is also to be taken into consideration the fact that the possibility of being sued for non-contractual liability could retard the prudential supervision activity

and lay an excessive burden on it, with unnecessary excesses of zeal causing bottlenecks in the market and thus indirect potential damage to final investors/consumers.

3.8 Insurance sector: the legislative source[41]

Supervisory purposes in the insurance sector are defined in Art. 3 of Legislative Decree 209 of 7 September 2005 (the Code of Private Insurances, hereinafter CPI).

The provision is innovative in comparison with the previous legislative framework; in fact, as in banking sector, neither Law no. 576/82, that instituted the supervisory authority for the insurance sector (Isvap), nor other laws adding new attributions to the Isvap mentioned supervision purposes.[42]

Art. 3 CPI revokes similar provisions of the banking and financial sector (namely Art. 5 CBL and Art. 5 of CLF), connotes supervisory functions in a purposeful approach, tending towards the achievement of a progressive integration between banking, financial and insurance sectors.

The economic integration of the three sectors of financial market is an ever-increasing process concerning ownership structures, products, distribution channels; even if the three sectors are still regulated by different legislative texts, they have some similarities, such as the clear mention of supervisory purposes.

It is worth noting that the objective of ensuring full integration between banking and insurance sector, through a close connection with banking supervision – also in terms of governance[43] – is explicitly recalled by Art. 13 of Law no. 135/12, that established the new supervisory authority of the insurance sector (Ivass instead of Isvap).[44]

From a general point of view, and for the insurance sector as well, the provision is the clear expression of the legislative will to affirm the centrality of rule of law in the exercise of administrative powers by the supervisory authority; in this case, by virtue of the explicit reference to Art. 5.2 CIP, purposes fixed by Art. 3 shall guide and also inspire regulations issued by Ivass; speaking therefore of broad regulations or, in Italian, *regolamenti per obiettivi*.[45]

According to Art. 3, supervisory purposes are: (a) sound and prudent management of insurance companies; (b) transparency and fairness of conduct of insurance firms, intermediaries and other insurance professionals. They should be exercised with regard to: stability, efficiency, competitiveness and good functioning of insurance system.

It could be interesting to analyse the relation between purposes, as the wording of Art. 3 CIP is slightly different from the mentioned, homologous articles of the CBL and CLF. In fact, it is clear that the so-called general, or macro-objectives (stability, efficiency and competitiveness of the insurance sector) are considered at a different level, as they were intermediate aims to pursue in order to reach primary purposes (sound and prudent management and transparency).

3.9 The sound and prudent management of insurance companies

The criterion of sound and prudent management has become the guiding principle for supervision activities and the guideline for the supervising entity.

As in the banking sector, the formula for sound and prudent management has a communitarian origin, being present in some European Directives regulating the insurance sector (92/49/CEE and 92/96/CEE). But in the new legislative framework outlined by CIP, the purpose takes on a pervasive meaning and is recalled not only as general object to achieve, but also as a guide for the exercise of administrative powers in other articles concerning the regulatory powers of Ivass (Art. 5 CIP cited), and conditions for the licensing of insurance and reinsurance firms (Art. 14 and 59 CIP).

We have already mentioned the "broad" regulations as a special feature of the insurance sector;[46] to better understand the concept and its innovative scope we have to examine Art. 5 CIP that attributes to Ivass the power to adopt "any regulation necessary for the sound and prudent management of undertakings and for transparency and fairness of supervised entities and to this end shall disclose all appropriate recommendations and interpretations".

Many authors emphasized the special nature of such a kind of regulatory power, which is considered too wide and lacks clear identification, especially in comparison with typical regulatory powers of other independent authorities in the financial sector.[47]

As to the meaning, in the insurance sector the two adjectives: (1) sound and (2) prudent – that should characterize management of insurance companies – from a literary point of view mean profit-oriented conduct and awareness of the risks typically associated with insurance and against moral hazard respectively.

According to some commentators, the introduction of such a clause creates an over-positive perspective because it tends to stress the

observance of the rule of law by authorities and to make mandatory the best practices of the insurance sector;[48] the recourse by the legislator to a flexible and generic formula has been interpreted by other authors as a way to allow wide discretionary powers by authorities.

The recourse to sound and prudent management as a purpose common to the three sectors of the financial market can be more useful when interpreted from a wider point of view, according to which supervision is more prudentially oriented than in the past and embraces a global evaluation on the organizational and internal controls measures of supervised entities.[49]

3.10 Stability and competitiveness

In the insurance sector, stability is also a traditional and consolidated aim for administrative authorities, exercised through a wide range of powers directed to their undertakings.

Stability of undertakings is still considered today a goal fundamental to the safeguarding of policyholders and, from a more general perspective, savings. In this context many commentators identified the basis of administrative controls in the insurance sector in two different articles of the Italian Constitution: the first, Art. 47, concerns the safeguard of savings in all their forms and can also be applied to life insurance, where there is a need of protection for a policyholder who is also a depositor; the second is Art. 41.2, which allows public controls on a private, economic initiative in order to ensure its social utility.[50]

Apart from the legal terms of reference to justify administrative controls in the insurance sector, we would like to focus on what stability should mean for such firms. With the typical content of the insurance and reinsurance contract in mind, it can be easily understood that an undertaking can be considered stable when it is able to fulfil its obligations even after a long time. To this end supervisory authorities are called to issue prudential measures concerning regulatory capital, technical reserves and solvency, to limit insolvency risk and contagion risk.

According to the new legislative approach of the financial sector, also inspired by communitarian provisions, the stability of undertakings must be combined with efficiency and with competitiveness in the products and services market. Competition among intermediaries is a key element of financial markets and must be pursued by authorities promoting high standards of transparency and efficiency.

The dynamic meaning of competition in the European market increased the relevance of regulatory activity in this field. There are many examples of Isvap regulations having been issued to improve the levels of competition and, at the same time, to enhance consumer protection (regulations no. 4/2006, no. 23/2008).

3.11 Transparency and fairness[51]

Art. 3 of the Insurance Code refers, for the purposes of supervision, to the pursuit of the objectives of fairness and transparency of agent behaviour in terms of consumer protection. The provision is the transposition of the corresponding Art. 5 of CLF. It outlines the basic principles set out in the enabling Law n. 229 of 29 July 2003; in this case, Art. 4, para. 1, letter b of that Act recalls these purposes, stressing that the transparency of the contractual clauses and the information conveyed to the customer should be evaluated "having regard also to the accuracy of the advertisements and to the process concerning the settlement of claims, including the structural aspects of this service". This approach has been strengthened by EU legislation, since EU Regulation 1094/2010 establishing the European Agency for supervision of insurance companies and pension funds (Eiopa) mentions this purpose among the "public values".

Not just in banking and finance but also in the insurance sector compliance with the rules of transparency represent a complex system designed to promote the understanding and comparability of products, with particular reference to the expected returns, the guarantees offered to consumers and the price structure.

The economic analysis shows that in some cases the free market mechanisms are not sufficient to ensure accurate information and full competition in the absence of provisions ensuring the rights of the contractual parties deemed the most vulnerable. The main reason lies in the externalities of such information asymmetries that characterize the range of financial and insurance products; potential buyers, who are the "weaker counterparties", often ignore some of the characteristics of such products and consequently are unable to take their decisions with full awareness. Those rules aim at protecting the right of the consumer to be accurately informed and ultimately to be aware of the risk/return provided by each product.

There are significant interrelationships and synergies between the transparency and honesty enhancement in relationships companies/clients and supervisor activity, insofar as the protection of consumers in the banking, financial and insurance markets responds to the need to

boost customer confidence and therefore also reflects the public interest to preserve a financial and insurance system that is more stable and efficient.

Within the limit left to private autonomy in defining the contents of the contract, the rules of transparency apply both at the time of the negotiation and at the moment of the conclusion of the contract and even during the execution, with a broader scope than just the case of "trade without agreement".

Transparency thus becomes synonymous with good faith and fair dealing; this is confirmed by more recent court decisions which explicitly refer to the principle of good faith, deemed as able to include both the traditional hypothesis of the unjustified breaking off of negotiations and the lack of information or of a real intent of concluding the contract by one of the parties (Supreme Court, case no. 6526/2012).

Thus, the principles and rules of transparency and those of behaviour correctness do indeed complement each other. They differ since the first mainly refer to the clarity and completeness of the contractual and extra-contractual information (primarily advertisements), while the fairness rules refer to the behaviour of the contractual parties. In this sense, it is clear that formal observance of the rules of disclosure alone is not enough to ensure compliance with the principle of fairness as well. For this purpose it has been widely recognized that a set of excessively detailed rules could paradoxically widen the intermediaries' discretionary boundaries, introducing further behavioural flexibility. The stronger contractual counterparty has a set of information about the expectations of the consumer and the loopholes in the legislature that allow him or her to circumvent the rules with greater ease. In addition, detailed rules favour the shift of attention from the results to procedures – the principle of fairness is the expression of the broader good faith principle, evoking clarity and solidarity between the counterparties (Carriero).

In other words, the golden rule that "too much information is no information" is clearly evident; sometimes the excess of information increases the risk of asymmetric information, since technical and abstruse information threatens to overshadow the truly relevant information that the average consumer could understand in a simpler scenario.

Even if this kind of argument increases the risk of taking us too far, touching on topics related to the effective level of consumers' financial education and to the need to favour "financial inclusion" (which falls outside the scope of our analysis), it is worth mentioning that the transparency rules introduced by the MiFiD Directive try to rationalize the

landscape, distinguishing between different consumer categories (retail clients, professional clients and eligible counterparties) and offering a level of protection graduated on the corresponding need for protection (Carriero).

Nevertheless, even with the features introduced by the MiFID, the current system remains quite complex and does little to reduce the risks of circumvention of over-detailed rules. It is also true that effective consumer protection tools are completed by effective control over the activities actually performed by intermediaries, starting with supervision over the compliance rules and internal control systems of the intermediaries. This activity acquires the typical connotations of prudential supervision oversight; in this perspective, consumer protection and classic prudential supervision not only come from the same rationale and could be opportunely integrated but also can easily merge and interact, covering common ground.

This high level of integration between the purposes of stability, competitiveness and protection of policyholders is confirmed by the wide array of powers attributed to Ivass, from the power to request information and to impose sanctions up to the possibility of imposing an inhibition. This last power – along with the strongest provision of Art. 128-*ter* of CLB, according to which the Bank of Italy can order the repayment of sums unduly paid and other consequent behaviour – poses the problem, already seen with reference to Consob and to the protection of financial transparency, of the accountability of supervisors for *culpa in vigilando*, from which it is possible to derive a right of compensation for damages in the name of the alleged infringement of a subjective right.

Despite the fact that these powers can be configured in terms of forms of direct and unmediated protection of subjective positions, once again we recall the concerns already expressed with regard to the principles stated by the Supreme Court with reference to the liability of the Consob. The exercise of such powers never gives rise to a corresponding right of compensation for the individual in absence of an explicit legislative provision in this regard; the exercise of such powers, although it could affect the balance of interests between intermediaries and customers, is not aimed at protecting individual subject positions, but at restoring widespread imbalances which have arisen from flagrant and generalized violations of law affecting entire categories or the total number of customers. Also, we need to point out the weakness of the arguments that brought back the relationship between the individual and authority on the field of compensation for the damage, since it limits supervisors'

discretion, calling into question their responsibility, both when they have exercised their prerogatives and, paradoxically, even when they have individually decided not to exercise them.

In conclusion, although a simplification of the transparency rules can be envisaged by the elimination of some redundancy, but taking into account the above-mentioned array of provision transposed by the MiFID Directive (which is a maximum harmonization directive), it is clear that the various legislative interventions have given a strong boost to the evolution of the relationships between intermediaries and customers, creating conditions to strengthen the effective degree of protection for them and contributing to increase the advantages (even for the financial and insurance intermediaries) and to enhance the spreading of the "transparency culture".

3.12 Conclusions[52]

The extent and scope of prudential supervision powers has been gradually broadened and enriched over the years, responding to the need of protection for larger categories of interests; this has been mainly due to innovation in financial products and to the development of the financial markets.

Market development has led to growing integration between banking, financial and insurance entities, with closing interrelations particularly on the side of interbank deposits; over the last 20 years financial conglomerates have increased their market share, offering current and potential customers new products and services that include banking/ financial and insurance features.

This had a strong impact, on the one hand, on the need to face the risks arising from these close interconnections between intermediaries, even when operating in adjacent or different markets; on the other hand, there was a call for strengthening consumer protection, as a result of the diversification and complexity of the products offered.

Thus the purposes of supervision have gradually been enriched to include in all three areas (banking, finance and insurance) the topics of global financial stability (so-called macro-prudential supervision) and consumer protection, represented by contractual transparency and by fairness in relationships between intermediaries and customers.

This step-by-step evolution and enlargement of the scope of prudential supervision has led to questions about any possible contradictions between the different purposes, particularly with regard to compatibility

between the objectives focusing on sound and prudent management, and ultimately, on the strengths of the economic, equity and financial entity supervised over those commonly attributed to consumer protection.

In this regard, on the basis of the above considerations, the concept of consumer protection should be clarified. It is clear that the supervisory authorities do not take any actions or decisions oriented to the direct protection of the individual, and cannot in any way intervene in a contractual relationship between a specific agent and a single customer. Instead, the Bank of Italy, Consob and Ivass protect common interests, carrying out an action requesting the raising of the actual degree of transparency and fairness in the relationship between intermediaries and customers; the result of this activity ranges from reminders to brokers – or penalties – to the more pervasive powers of inhibition and restitution, which, in this sense, can be translated in practice into a form of protection of subjective positions, even if they refer not to the individual but to entire categories of consumers.

Once the terms of the activities carried out by the competent authorities in this field have been clarified, it is clear that there is no contradiction between these goals and the priority relating to the protection of sound and prudent management by the intermediary; on the contrary, the action aimed at improving the level of transparency and fairness of the broker–customer relationship has a definitely positive impact on the confidence of consumers and, therefore, the consolidation of relations with the clients, resulting in greater solidity of the structure's business of a financial undertaking.

Ultimately, we are witnessing the unification of the purposes of supervision in all areas considered here, which led to the convergence of practices and – if not of the rules, which must necessarily reflect the specificities of the different markets – at least of the guiding principles. However, this process is not yet complete, because it must be enriched in this epoch of an institutional dimension resulting from the creation of the European structures as a link between the national, or even centralized, systems at the Euro-area level. While the financial and insurance world, seeing that harmonization, while continuing to be based in legislative output of the EU Commission, goes so far as to identify common binding technical standards and to write a single handbook, MEP, to the European agencies, ESMA and Eiopa, the banking industry is migrating towards a surveillance mechanism that moves towards a single harmonized and shared set of rules. This is a result which – although at the time limited to the "significant" banks

and whilst excluding areas (which remain national) such as transparency and anti-money laundering – is made possible precisely because it is based on a set of principles and on broadly shared aims at a European and international level.

It is desirable that the difficult but exciting first steps taken by the European giant will represent the opportunity for a greater convergence towards a "least common multiple" of the purpose of protection of public interests drawn up by the national supervisory authorities in the early decades of the twenty-first century, characterized by recurring crises and growing challenges.

Notes

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7. See O. Capolino, The SSM: Legal and Institutional Foundations, Banca d'Italia, Legal research, no. 75, p. 60.
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14. About the possible trade-off between purpose see R. D'Ambrosio (no. 11 above).
15. See A. Frisullo (no. 9 above).
16. For a wide overview of definitions and descriptions of financial stability centred on its absence see Garry J. Schinasi, "Defining Financial Stability", IMF Working Paper 04/187, Annex, p. 13. Among cited authors T. Padoa Schioppa, no. 2 above, according to whose opinion financial stability is "a condition where the financial system is able to withstand shocks without giving way to cumulative processes which impair the allocation of savings to investment opportunities and the processing of payments in economy".
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36. Domenico Piccolantonio
37. R. Costi – L. Enriques, Il mercato mobiliare, in Trattato di diritto commerciale diretto da G. Cottino, vol. VIII, 2004, Padova, Cedam, p. 299 ss; B. Bianchi, commento Art. 5, in Commentario al Testo unico delle disposizioni in materia di intermediazione finanziaria, Tomo I, 1998, Padova, Cedam, p. 64 ss; L. Gaffuri, I servizi e le attività di investimento: disciplina e aspetti operativi, Milano, Giuffré, 2010, p. 65 ss; M. Fratini – G. Gasparri, Il testo unico della finanza, vol. 1, 2012, p. 184; F. Del Bene, Strumenti finanziari e regole Mifid. Compliance, autorità di vigilanza e conflitti di interesse, Assago, Ipsoa, 2009, p. 186 ss; G. Mazzotta – A. D'avirro, Profili penali del controllo nelle società commerciali, Milano, Giuffré, 2006, p. 72 ss.
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41. Anna Maria Antonietta Carriero
42. For a wide reconstruction of the institution of Isvap and its location in the financial legislative framework, see M. Scalise and P. Mariano, pages from 674 to 923, Le Autorità amministrative indipendenti (no. 11 above).
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49. For this perspective see G. Carriero (no. 37 above), p. 17. The author recalls, inter alia, Isvap regulation no. 20/2008 on internal controls, compliance and risk management.
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51. Domenico Piccolantonio
52. Anna Maria Antonietta Carriero and Domenico Piccolantonio.

4

Supervision Forms: Obligation to Provide Information, Powers of Investigation and Intervention, Regulatory Powers

Michele Miraglia

4.1 Introduction

This chapter offers some suggestions for a though and brief reconstruction of the Italian regulations of the supervision forms. The national legislator has regulated financial markets considering them as a set of economic systems, traditionally divided into the banking market, the capital market and the insurance market. Bearing in mind the classical tripartite division and moving from a conceptual approach to the function of the supervision, it provides below the detail of the specific Italian law provisions regarding obligation to provide information, powers of investigation and intervention and regulatory powers, showing interest in the points of convergence between different disciplines or aspects of fitting dictated mainly by the European legislator.

4.2 The function of the supervision

4.2.1 The concept of banking supervision

As agreed at the international level,[1] the supervision of banking organizations is an essential component of a strong economic environment, given the pivotal role played by the banking system in the execution of payments and in the mobilization and redistribution of savings.

The task of supervision is to ensure that banks operate in a proper and prudent manner and have adequate capital to cope with the risks arising from their activities. A rigorous and effective banking supervision

provides a public good that the market is not always able to offer and, together with an effective macroeconomic policy, it is really important for the financial stability of a country. If it is true that a good banking supervision is costly, the cost of defective supervision has proved to be even higher.

To grasp the concept of banking supervision and its effectiveness consider the following profiles:

a) the primary objective of supervision is to maintain stability and confidence in the financial system, thereby reducing the risk of loss for depositors and other creditors;
b) supervisors should encourage and pursue market discipline by encouraging good corporate management (through an appropriate structure and definition of the responsibilities of the board of directors and senior management of a bank), and improving the transparency and supervision of the market;
c) in order to perform their duties effectively, the supervisory authorities should have operational independence, powers and means to obtain information both locally and abroad, as well as the power to enforce their own decisions;
d) the supervisory authorities must have a clear understanding of the nature of the activity performed by banks, and must make sure, as far as possible, that the risks taken by them are properly managed;
e) effective banking supervision presupposes that the risk profile of individual banks will be evaluated and that adequate resources will be allocated for the purpose of such supervision;
f) supervisors must ensure that banks have resources commensurate with the degree of risk taken, including adequate capital resources, sound management and effective control systems and accounting records;
g) it is essential to work closely with the other supervisory authorities, in particular when the banking organization's operations have an international dimension.[2]

Banking supervision should promote an efficient and competitive banking system that responds to the needs of the public with financial services of high quality at a reasonable cost. It should be recognized that there is in general a positive correlation between the level of protection provided by the Supervisory Board, and the cost of financial intermediation: the lower the tolerance of the risk assumed by the individual banks and the financial system, the more pervasive and costly tends to be the

supervision, with possible adverse effects on the innovation and allocation of resources.

The supervision cannot, and should not, provide assurance that banks will not fail. In a market economy, the possibility of failure is part of risk-taking. The way failures are treated and related costs supported is essentially a political issue on which depends whether and to what extent public funds must be allocated to support the banking system: this question, therefore, cannot always be entirely within the competence of supervisors. However, the latter should have appropriate rules and procedures for the resolution of critical situations.

The exercise of effective supervision requires the support of certain infrastructural elements: where these elements are lacking, supervisors should ensure that the government will put them in place (possibly contributing to their definition and implementation). In some countries, the responsibility for authorization to engage in the banking business is distinct from the function of the current supervisory power: well then, apart from the jurisdictional instance, it is essential that the authorization process be based on the requirements as stringent as the current supervision that constitutes the main object of this document.

The basic principles for banking supervision constitute the necessary basis for the realization of a robust surveillance system: they represent necessary requirements which may, however, not in themselves be sufficient in all situations.

4.2.2 Regulation and banking supervision

Efficient financial markets are one of the basic prerequisites for a functioning economy and play an important role in the stability and development of a State. They are essential for the development and structural change of an economy.

But because self-regulation of financial markets is often not enough, the States or federations of States adopt different measures of regulation to prevent market failures (correcting market failure). The "invisible" hand in the market, that is, the efficient mechanism that acts *ex post*, which should lead to an optimal allocation of resources, is enriched by the "visible" hand, acting *ex ante* in the shape of state economic policy.[3]

Particularly after the comprehensive collapse of the last global financial crisis, the call for modernization and a tightening of the regulatory work has been increasingly felt on both a national and an international scale: indeed, financial markets require a clearer framework of state regulation and control that ensures greater security for financial market

participants.[4] This is especially true for investors in the banking sector, for the trust granted them and which play an important role.

Both concepts, banking regulation and supervision of banks, play an important role in this investigation, and must therefore be clarified more closely. The financial regulation of markets generally means establishing State rules that can drive the financial market's operators; predefined rules have the task of stimulating, organizing, strengthening and protecting the financial markets.[5] Here it is not only a matter of putting in place an active State guide to the market, but also of putting infrastructures together and permanently influencing the financial markets, in this way adjusting the free play of economic forces through legal, institutional, competent, instrumental and procedural regulations, and material and international directives. These complex instruments relate to the banking sector, so we are talking about banking regulation. This concept can be defined as the activities of qualified institutions, with the national legislator and the supervisory authorities at the forefront, establishing standards by means of which we can control the behaviour of banks on the basis of apprehension or care for the safety of the banks.[6]

The supervision of banks is, however, the special control exercised by the State on the credit institutions and institutions for the provision of financial services: it belongs to the classic administrative interference, which means the right of the public hand to interfere in the market mechanism to ensure the stability of the financial and banking system. Therefore, in addition to observation the concept embraces the formal verification of violations of rules as well as the implication and the imposition of sanctions in the credit sector.[7]

The difference represented between the banking regulation and the supervision of banks is of great significance in the European context: while the banking regulation has focused in large measure at the EU level, the supervision of banks has long been decentralized and has become the responsibility of the national authorities; and (at the time of writing) it is about to undergo strong centralization at Community level.

4.2.3 The institutional, functional and regulatory aspects of banking supervision

Referring to the above reflections, a distinction can be drawn between institutional, functional and regulatory aspects of the concept of banking supervision.[8] Considered from an institutional viewpoint, this concept includes whole organizations which exercise control tasks on banks: we

have to consider, inter alia, different institutions with different structures and different areas of expertise, according to their different countries.

From a functional perspective, however, we could mean the supervision of banks as an activity of state bodies currently aimed at observing the lending institutions, autonomous in their business administration, in order to persuade them to respect and comply with the laws and rules designed for this purpose: so in this context, the supervision of banks means constant supervision of credit institutions, from the beginning of the administration to the end of the commercial activity.

Finally, from a regulatory point of view the concept of banking supervision applies to all the legal rules that relate specifically to the banking and credit institutions:[9] in this sense, the definition of the supervision of banks is very close to the concept of banking regulation.[10]

In this chapter, after referring originally to the banking regulation and the regulatory perspective, we shall focus mainly on the institutional and functional perspective.

4.3 The supervision forms in Italy: a brief history

The period from 1936 to the early 1970s was characterized by substantial stability in the Italian banking system and by almost total immobility in the regulatory framework: the system of supervisory controls applied over that long period of time was structural, focusing on interventions to model directly the structure and the operation of supervised entities according to the overall objectives of the credit policy; interventions that have materialized in the exercise of discretionary and ample powers of authorization.

At the end of the 1970s, the objective of stability gradually became associated with that of efficiency in competition: during that period there was in fact a growing awareness that over-emphasis on stability could lead to a lowering in the level of competitiveness of the banking industry and thus an unintended loss of efficiency, and that the prolonged application of strict entry controls had mitigated the competitive incentives. The emphasis on competition led to the almost total dismantling of structural controls in favour of non-discretionary instruments of control of banking risks. The choice of the new model of banking supervision, although primarily aimed at increasing the competitiveness of intermediaries, has not neglected the preservation of the underlying principles of stability.

So the decision was taken to introduce mandatory minimum capital ratios, which correlate the amount of risk to which a bank is exposed

with the size of its assets. The introduction of capital ratios seals the transition from one structural type of supervision, based on the instrument of authorization and the imposition of operational constraints, a kind of prudential supervision, based on the respect of the general rules of conduct, in principle, not waived, which constitute the frame within which each intermediary can operate in full autonomy.[11]

Now, in the mid-2010s, banking supervision is embodied in the issue of prudential rules and standards of reliability and correctness of management. This is done in line with the rules of the European Community and the directions elaborated in other international locations, in the exercise of powers of authorization relating to the fundamental moments of banks' life, in the verification of the quality of management, in the interventions into business situations to prevent the deterioration of the technical profiles, in managing the crises in situations of overt pathology, in the interaction with corporate and, more generally, with the targeted recipients of the rules through the recourse of public consultation and forms of dialogue before defining normative actions.[12]

Pursuant to Art. 4, para. 2 of the Consolidated Law on Banking of 1993 (Testo Unico Bancario, TUB), the Bank of Italy establishes and publishes in advance the principles and criteria of supervision, thus outlining the fundamental mode of the relationship between the Supervisory Board and the supervised entities.

In compliance with this rule and Art. 19 of Law no. 262/2005, the Bank of Italy publishes an annual report to Parliament and to the government, setting out the criteria used in the control and the interventions made.

The TUB foresees three main forms of supervision of banks and banking groups: informational, inspectional and regulatory or prudential.

4.4 The obligation to provide information

The powers of supervisory information are governed by Arts 51 and 52 of the TUB.[13]

According to Art. 51[14] banks are required to submit statistical reports, any other information or document requested and annual budgets to the Bank of Italy, in the manner and within the time limits established by it.

Art. 52[15] provides, however, that the Board of Auditors and the people responsible for carrying out statutory audits of the accounts, must without delay inform the Supervisory Board of all the acts and deeds of which they came to know about in the exercise of their tasks, which

may constitute an irregularity or an infringement of the rules governing banking: one can see, therefore, how the board of auditors can and should play a very important activity to help the organs of supervision to achieve the purposes of Art. 5 TUB.

In this brief overview, we must also consider Art. 66 TUB on the collection and dissemination of information to the Bank of Italy by persons subject to consolidated supervision.

The periodic information provided for by the intermediaries as the basis on which to analyse and monitor the status of the intermediaries themselves, with the aim of preventing any crisis or widespread instability, thanks to the prompt identification of any criticality.[16] This triggers the fact that the same supervised subjects are to employ a significant amount of human and financial resources, due as much to the broad range of the requested information as to the frequency of the adjustments to be put in place as a consequence of the information required by the supervision. Information systems fed by statistical reports are designed to provide the institute with a representation of the intermediary that allows the appreciation of both the financial and economic situation and the risks that characterize the management, as well as the analysis of the transactions entered into by type, duration, sector and geographical location of the counterparties. Control over intermediaries is based on the collection and processing of a significant amount of data and information acquired through periodic statistical reports and through a variety of sources that are primarily administrative in nature. Some of the information received by the Institute is quantitative, and the rest is qualitative.

The matrix of the accounts is the main tool for data acquisition and statistical accounting of the situation of banks in terms of quantity.[17] However, the requirement to find the time needed to detect signs of deterioration in the technical and organizational profiles leads to the conferring of increasing importance to qualitative information, such as the situation of the local environment, ownership structure, strategic lines of business, capabilities and reliability of the management, and the organizational structure and the internal controls: these elements of information may be acquired through inspection, surveillance or other forms of investigation.

4.5 The powers of investigation and intervention

Art. 54 TUB[18] stipulates that the Bank of Italy may conduct inspections at banks and ask them to exhibit any documents and records it deems

necessary.[19] They are subjected to supervised audit, as are authorized persons pursuant to Art. 1, letter r of the Consolidated Law on Finance of 1998 (Testo Unico Finanza – TUF), who are authorized to provide the services and/or investment activities (including SIM, SGR and SICAV), to persons subject to consolidated supervision and supplementary financial intermediaries and Institutes of electronic money.

The inspection is a necessary complement to that exercised at a distance allowing you to observe and evaluate correctly across the continued confrontation with corporate officers and managers of the operating segments as well as through the acquisition of data and newssite consistency of organizations with respect to the propensity of the risk of intermediaries, the functionality of the governance arrangements and the effectiveness of the internal control system, the reliability of the accounting data and information reported, and correct behaviour, even towards the customers.

The inspector is a public official: he or she has the power to access the entire resources of the information intermediary, in order to acquire the necessary documents for the conduct of the investigation, and the duty to detect all cases, including criminal, found during the inspection.

The inspection process is divided into three stages: pre-inspection; with confirmation; representative. The pre-inspection analysis is carried out on the basis of information provided to the Bank of Italy and of the valuation elements already available, in order to identify the technical or managerial worthy of further investigation. The confirmation phase checks the verification activities in the intermediary. The representative phase consists in formalizing the results of the inspection in a document.

The paths of inspection analysis are generated by the principle of proportionality: in fact, the structure of the said paths and the analysis techniques are calibrated to the dimensional characteristics and the complexity of the intermediaries. Even the carrying out of the investigation is shaped by the aforesaid principle: in fact, those in charge of the investigation fit the routes and operations to the level of concern of the business situation.

The methods of analysis are in general applicable to banks, banking groups and the intermediaries supervised by the Bank of Italy, subject to the necessary modifications required by the specific operational features of the different subjects of investigations.

There are three types of assessment: extended spectrum; targeted/issues; follow-up. The extended spectrum findings, aimed at the analysis of the overall situation, may relate to a single broker or a banking group;

the survey does not extend to any aspect of business management, but concerns only the risks and transverse profiles relevant to the pursuit of the goals of supervision. The targeted inspections relate to specific areas of activity, areas of risk or operational or technical aspects: they can span multiple intermediaries belonging to the same group. As part of this type they detect Inspection issues, which were held at more intermediaries (or more groups), in order to ascertain the existence of systemic risks. The follow-up findings are directed to verifying the outcome of corrective actions either taken by the initiative of the intermediary, or solicited by the Bank of Italy.

The inspections are concluded with a report in two parts: the first, addressed to company representatives, contains the overall outcome of the investigation and critical analysis; and the second, a description and analysis of the key elements of evaluation obtained during the inspection and overall judgment on the intermediary, as well as assessments of major risks and the transverse profiles (profitability and capital adequacy). The inspection report concludes with the approval of the results by the governor[20] and is thus an act of the Bank of Italy, not of those in charge of the investigation.[21]

When irregularities are such as to require the initiation of enforcement proceedings, the Bank of Italy will contest them formally to the parties concerned in accordance with the procedure laid down in Arts 145 TUB and 195 TUF: within 30 days of receipt of the letter of protest, the interested parties may make known to the Supervisory its own counter-deduction. The process must be completed within 240 days after the deadline for submission of the counter-deduction.

4.6 Prudential supervision

4.6.1 The size of macro-prudential and micro-prudential

The concept of prudential supervision comes from the Anglo-Saxon system where the term "prudential supervision" primarily intends instruments of preventive vigilance. It should also give due consideration to how the term "conservative" is not always clear and well defined.

However, even though we accord to the above considerations, we develop the following explanations.

The proposal of the Committee of experts, under the leadership of Ulrich Zimmerli, who wrote a report for the financial supervision reform in Switzerland in the years 2003–2005 may be useful for the definition of the concept of prudential supervision: the complex tools to be used

in a system of supervision to ensure the solvency of the institutions supervised as well as the stability of the overall financial system.[22]

Two aspects are clearly included in this definition of prudential supervision: the sizes of the macro-prudential and the micro-prudential. If on the one hand, micro-control means the supervision of individual institutions, on the other, macro-prudential supervision means the overall stability of the financial system.[23] The size is also usually associated with micro-supervisory authorities, while the macro-prudential is with the central bank.[24]

An examination of the literature in that field shows the broad spectrum of the concept of "prudential supervision".[25]

The significance of macro-prudential supervision is highlighted particularly in relation to the ongoing effects of the 2008 financial crisis.

Experts such as Jacques de Larosière[26] and Jonathan A. Turner[27] state that the inadequate supervision of banks at the macro level has been one of the reasons for the emergence of the crisis, or rather continues to be: in other words, the attention focused on macro-dependent measures on watch banks has contributed to the creation and the outbreak of macro risks. In this context, the word "macro-prudential" has become a catchword that is increasingly used to create a solution to the financial crisis.[28]

4.6.2 The distinction between macro and micro-prudential supervision in the building up of the reform of the financial market in Europe

A precise definition of the concept of prudential supervision is required because the distinction between the macro- and micro-prudential dimensions was explicitly emphasized by the European Union. As noted, the reform of the European supervision is based on two pillars: on the one hand – at micro-level – better control of individual institutions is proposed, but on the other – at a macro-prudential level – the stability of the entire financial system.

This distinction corresponds to the understanding of the concept proposed long before the reform of the European Central Bank: "micro-prudential supervision (...) includes all on and off-site surveillance of the safety and soundness of individual institutions, aiming – in particular – at the protection of depositors and other retail creditors; macro-prudential analysis (...) encompasses all activities aimed at monitoring the exposure to systemic risk and at identifying potential threats to stability arising from macroeconomic of financial market developments, and from market infrastructures".[29]

However, the creation of a European structure of financial control based on micro-prudential and macro-prudential columns appears to be a logical solution: as authoritatively discussed,[30] the micro and macro-prudential measures are two sides of the same coin. In other words, in order to prevent future financial crises and therefore ensure the stability of the system, efficient financial market supervision is required at two levels.

For these reasons, a quick digression is necessary in order to understand the measures that characterize the concept of prudential supervision of banks.

4.6.3 The structural basis of banking supervision: indivisibility, information asymmetries and possible negative effects on the outside

According to an economic perspective, the individual regulatory measures of the State must always be justified in the form of creation and enforcement of the rules. This also applies to the interventions in the free play of market forces.

In the light of economic welfare reflections, in fact, the market serves as the most efficient mechanism for the optimal distribution of goods: therefore state intervention in entrepreneurial freedom is allowed only if a market process does not lead to the desired result of economic assistance, because the market fails, meaning it is not able to perform or does not perform its functions adequately in a comprehensive manner.[31]

As the basis of the economic reasons for a market forces regulation, the following factual elements of market failure are valid: indivisibility, information asymmetries and negative external effects. They will be briefly presented below, with particular reference to the banking sector, albeit without any pretence of completeness and comprehensiveness in terms of a purely economic profile.

In the ideal model of perfect competition it is assumed that all goods and factors are divisible at will. The indivisibilities (also known as increasing scalar products) mean a rejection of this model when is becomes concentrated at one side of the market. In this case a small number of bidders produces a large amount of products more effectively than a plurality of small bidders, which together produce the same amount of products: consequence of this is a lowering of the average costs per unit of production in growing amount of products.[32] An extreme case of this phenomenon is the natural monopoly: in this situation a firm focuses entirely upon itself the market demand of an asset in an important branch because it produces a more favourable

cost than any other number of bidders.[33] In such circumstances, there is the danger that such a bidder will take advantage of his or her position and provide poor-quality products in smaller quantities or at inflated prices. The indivisibilities and/or natural monopolies relate to important facts of the failure of the market and can serve as a justification for state influence; their practical significance for the banking sector, however, is rather limited. Empirical results actually deny their existence in the credit market; therefore, according to a prevalent opinion,[34] it is impossible for them to be taken as grounds for state intervention in the banking market.

Another important source of market failure is the asymmetric differentiation of information. The economic model of the complete competition for which all financial market participants are fully informed is rarely achieved.[35] A normal informative situation is characterized by a unequal informative position, that is, the contractual partners are individually informed of only certain factual circumstances or of the behaviour of the other (partner). These problems, which are related to different aspects of the distribution and processing of information in financial markets, are summarized in the specialized literature under the concept of asymmetric information.

Asymmetric information may arise both before and after the conclusion of the contract. If there is an assumption of asymmetric information before the conclusion of the contract, market failure can arise in the form of adverse selection. This means that it is no longer possible to eliminate high-quality products, because people who are possibly interested are not willing to pay an appropriate price when there is a lack of information.

With regard to the banking sector, there are two possible scenarios that can lead to adverse selection.[36] In the first case, the information deficit is on the side of the bank: banks are not always sufficiently informed about the solvency of their customers, so they can miscalculate the risk they face in providing credit. Consequently, they offer a standardized rate of interest to all beneficiaries of a loan, regardless of their solvency. This can lead to the borrowers most at risk being willing to pay higher interest rates, squeezing out other applicants for that credit.

In the second case, the information asymmetry is the responsibility of the borrower: he or she is unable to obtain all the information needed to adequately assess the safety and/or the probability of loss of its share of investment. In addition, it can lead to disorderly conduct with respect to the terms of the contract on the basis of information asymmetries which occur after the conclusion of the contract, in which case there is the

so-called moral hazard.[37] This concept refers to decreased accuracy in the conduct of financial institutions thus relying on the fact that others, especially the State, will share the eventual damages. The more widely the service given the greater the probability of such practices, and the counter-service acts timely in separate ways.

With regard to the banking sector, it is not uncommon for the opportunistic behaviour of bank management to succumb to the temptations of a high-risk economic policy. In other words, lenders try to exploit the advantages of knowledge in their favour, regardless of the contractual agreements. Meanwhile, between banks and their customers, the opportunities and risks are distributed mostly to the advantage of the banks, and it is impossible for investors to observe or estimate the possible change of position of the bank's risk.

Finally, external effects, also called externalities, represent a further deviation from the ideal of perfect competition, in which the profits of a particular market operator are influenced only by him- or herself. In real markets, the economic activity of an individual often has an immediate impact on the possibilities of production or consumption by another individual. Externalities therefore means the influence one individual can have on another in the form of profit (positive externalities) or costs (negative externalities).[38]

In the system of banking supervision, the negative externalities are the prime candidates for relief: indeed, there are certain negative externalities that – as in the case of a bank run – are capable of causing a systemic financial crisis. In this regard, it is worth noting that just a single insolvency may cause certain negative externalities: it is, therefore, of primary importance to observe changes that affect a single intermediary which could spill over to others, in which case the risk of crisis for the entire economic system is seriously increased, and State intervention is justified.

Certain negative externalities may be the result of bad news about the economic situation of the banks. The confidence of depositors or creditors of the banks is shaken by both authoritative information and unsubstantiated rumours. Of these reports, it is the fears of bank insolvency or the publication of high annual losses or losses in individual business that are the most influential – but because of disparities in the reproduction of information, investors are unable to properly assess the risk structure of their own bank, and assume that it is similar to that of the banks about which the bad news is circulating. This leads to a sudden and complete withdrawal of deposits: this phenomenon, known as a bank run or banking panic, leading in turn to liquidity

problems at multiple credit institutes, even if they are fundamentally sound. Consequently, the market's natural mechanism fails on the basis of informal contagion, triggering a chain reaction.[39]

There can also be a market crash if the crisis spreads through complexities in the banking and financial markets (the institutional virus). Currently, in the early part of the twenty-first century, credit institutes are closely linked to each other because of the globalization of financial markets. However, modernization, internationalization and integration – in fact, all the positive elements of the structure of the current credit market – represent potential crisis factors; the insolvency of a single credit institution may impair the ability of functioning for the entire financial system or cause the collapse of other banks, leading to complications among banks and causing a longer chain of insolvency (the domino effect). The spread of a crisis in this fashion integrates systemic risk:[40] the risk that a systemic event can cause difficulties for the entire banking system, not only nationally but also across borders, and it is the most important reason for banks to be regulated and controlled.[41] Obviously in this situation, domestic legal measures designed to monitor banks at the national level are insufficient, as clearly demonstrated by the 2008 international crisis.

Finally, it should be noted that the risk of infection as a result of the default of a single intermediary bank is increased as a result of financial integration and the creation of the single currency in Europe. The complexity of the structure of the credit market community, on the one hand, represents a useful opportunity from a purely economic point of view; on the other, it constitutes a real danger to the stability of the financial system within the EU.[42] Since the European supervision of banks is organized primarily on the traditional basis, there is a well-found fear that in a specific case the supervisory authorities of the Member States will either underestimate the risk of cross-border contagion or neglect it, being unable to take the correct steps because of lack of coordination with the authorities of other countries, even if they are members of the same Union.

As will emerge later in this work, the new European system of financial supervision was instituted to prevent the systemic risks that constitute a real threat to the security and stability of the financial markets and to be able to react properly and timely in the event of a crisis. The Europeanization of financial supervision is not only the response to current developments in the European financial market, but also a prerequisite for a further deepening of integration in the financial field.

4.6.4 The objectives of banking supervision

Two main aims of banking supervision are traditionally distinguished: on the one hand, the protection of the entire banking system and, on the other, the protection of depositors or creditors of the bank.

For the people's economy, the banking sector plays a special role: of course, although banks in most countries are private companies, they exert important public functions. They, however, have devised a system of payment that is treated as a kind of public good. In view of this functional principle, credit intermediaries are considered as financial institutions that interact as part of the market between those that ask for capital and those that offer it; that is, they take capital from those that offer it and distribute it to those that request it. In this sense the stability of the banking system is considered as a public good whose protection requires and justifies state intervention in the form of works of regulatory and supervisory practices.[43] It is also of great significance for the development of integration processes and economic growth within the EU, representing a public good to be safeguarded not only nationally, but also internationally.

The European Central Bank has defined the concept of stability of the financial market as follows: "Financial stability can be defined as a condition in which the financial system – comprising of financial intermediaries, markets and market infrastructures – is capable of withstanding shocks and the unravelling of financial imbalances, thereby mitigating the likelihood of disruptions in the financial intermediation process which are severe enough to significantly impair the allocation of savings to profitable investment opportunities".[44] According to this definition, the stability of the financial system is defined as a situation in which the system is able to withstand possible shocks. And as banks form an essential part of the international markets and represent "the heart of the financial system", it is essential that there is a stable and healthy banking sector for the realization of the aforementioned overall stability and to maintain the confidence of investors.

Meanwhile, creditors or depositors of the banks require greater protection than that given to the creditors of other companies, mainly due to the characteristics – already mentioned above – of the operations of the bank and its impact on the whole system statement. The depositors are unwitting investors, since they are not necessarily aware of how the bank, to whom they have entrusted their money, takes it. This situation requires special protection, and moreover, the depositors' money is of value in feeding the economic circuit: but only if depositors have

confidence in their bank and the whole banking system will they hand over their money to the intermediary that will take it to help finance households and businesses. It is therefore evident that in order to stem the asymmetry of information between bank lenders and credit institutions, the State must exercise control over banks to provide a guarantee for the investor: the creditors may still, however, lose confidence in the safety of their deposit relatively rapidly.[45] It is in the State's interest to prevent this loss of confidence from happening, as when there is confidence in both individual lenders and in the entire banking system, it is the presence of those investors' assets that results in successful investment banking.

4.6.5 The regulatory measures for the prevention and management of crises of disruption in the financial market

To achieve all the goals briefly described above and prevent financial turmoil in the market, the state has several tools at its disposal. They are divided in various ways and differ substantially within the preventive and the protective regulations. The preventive tools tend to minimize the probability of bank insolvency so should reduce the risks for banks. in contrast, the aim of the protective tools is primarily damage-limitation: their function is to limit the consequences of an existing crisis as far as bank lenders, and indeed the entire system, are concerned.

The set of documents below forms the Financial Safety Network.[46] The main purpose of the measures forming that network is financial stability: every country has such a network that strengthens the stability of its financial system.[47] There are three key elements of this safety net:

a) a supervisory board of banks;
b) the central banks' role as Lender of Last Resort; and
c) deposit guarantee systems.

Regardless of their different responsibilities and different competencies, the protective and preventive tools are in a close and complementary relationship to one another within the financial safety net. It has been said that as preventive tools of prudential supervision of banks aim to reduce the risk, with their help the *ex ante* bank insolvency, the crisis, can be minimized. The category includes, for example, part of the rules on equity.

The protective tools of control over banks protect financial stability and should prevent individual banks' problems spreading out to the entire banking system. Among the protective tools are those that are

organized on a contractual basis (contractual actions) and those that are used in crisis situations (the discretionary instruments). The first group includes the guarantee schemes of deposits, and the second, central banks in their role as Lender of Last Resort.

4.6.6 The regulatory prudential supervision in the Italian system

Art. 53 TUB[48] gives the Bank of Italy the power to enact, in accordance with the resolutions of the Comitato Interministeriale per il Credito e il Risparmio (CICR), general provisions relating to capital adequacy, risk containment in its various forms, equity interests, and the administrative and accounting and internal controls.[49] These are implemented in the specific rules contained in the instructions issued by the Bank of Italy.

According to Art. 53, paras 3, letters a and b, TUB, the Bank of Italy has the power to summon corporate officers and to order the convening of the governing bodies. The meetings involve both the corporate ladder and middle management, and may relate to the examination of the main strategic and operational profiles (e.g., statutory amendments and proposed mergers) or be aimed in-depth at specific operating sectors (finance area, area receivables, information systems, etc..). The talks may also allow the acquisition of updated information elements on the implementation of the initiatives undertaken by business managers and on interim results.

The objective of the convocation of the collegial bodies may relate to any aspect of business management provided they are relevant to the achievement of the objectives of supervision. Given the vagueness of the provision of law, it is believed that they are subject to the power to call all corporate bodies, whether they are holders of deliberative functions of executive function or control.[50]

Among the self-regulatory functions carried out by the Bank of Italy is the power to determine the technical forms of the balance sheets of banks and financial institutions, attributed by Art. 5 of Legislative Decree no. 87/1992, and this is not repealed insofar as this attaches competence to the supervisory jurisdiction. A more specific examination of the regulatory activities that the Bank of Italy may play reveals an important distinction between the issuing of general measures and issuing of measures of a particular nature that are intended to address individual needs. The general measures relate to certain aspects of capital adequacy and risk containment. The provisions adopted by the supervisory board is to ensure that every broker has minimum adequate capital resources to cover the risks arising out of banking as a whole: the banks in the exercise

of their complex activities are exposed to a multitude of risks of various kinds that can have an internal or external source, that is generated by events or facts unrelated to the business processes. While internal risks may be affected by management decisions, those depending on external factors are not influenced.

The Bank of Italy, at the instigation of the European legislation and in connection with the provisions within the Basel Committee, will always aim for continuous adaptation of bank capital by virtue of the specific nature of the functions that this aggregate is called to perform within the ambit of bank management; functions which can be summarized as follows:

1) having, at the time of incorporation of the company, the necessary funds to launch operations;
2) cushioning unexpected losses, in order to safeguard depositors' confidence in the soundness of the bank;
3) factoring an expansion of activities beyond the possibilities of the resources collected from depositors;
4) strengthening the capacity of the bank to use, where appropriate, external sources of financing to meet its commitments.

Risk containment in particular is implemented through the establishment of a set of prudential rules, among which are:

a) the prediction of the solvency ratio, to be determined in an amount corresponding to the ratio of regulatory capital (capital plus reserves) and assets of the bank;
b) the provision of specific limits for transactions involving risk-taking particularly focused on the part of the bank;
c) the limitation on acquisition of properties and investments in other companies as part of a bank and the banking group;
d) the introduction, first by Law no. 262/2005 (which in Art. 8 changed Art. 53) and then by Legislative Decree no. 303/2006, a number of limitations concerning the obligations contracted with the bank by those who perform administration, management and control at the bank: this hypothesis is possible only in the presence of a prior authorization by the board of statutory auditors and unanimous authorization.

Another important aspect concerning the limitation of risk in relation to which the Bank of Italy issues general provisions is related to the "risk

central", an information-collection service about the debt level exposure of each bank and each intermediary of each financial entity entrusted to it: the risk central is a database that is confidential, but can be accessed by banks and financial intermediaries in order to assess the exposure of each client and therefore the degree of risk connected with the granting of new concessions.[51]

In terms of organization and internal controls, it is also planned that:

1) the banks should establish systems for detecting and verifying the information on the trend of cash flows;
2) the function of the liquidity risk management is independent of the operational management of liquidity risk;
3) the internal audit function carries out periodic checks on the adequacy of the system of collecting and processing information on the system of measurement of liquidity risk on the process of revision and update of the emergency plan, and evaluates the functionality and reliability of the complex system of controls on the management of liquidity risk.

Finally, the Bank of Italy has imposed specific obligations to inform the public about the liquidity position and the principals of governance and risk management, to encourage a more complete assessment of the soundness of these principals and the relevant exposure.

In brief, it should be noted as falling within the scope of prudential supervision, that the rules dictated by the Bank of Italy to implement the provisions of Arts 19 et seq. TUB involving the requirement of authorization by the Bank of Italy for the acquisition of equity interests in banks, where such acquisition confers, directly or indirectly, a significant investment, an investment that is able to assign control of the bank or influence on itself, in relation to voting rights or other rights conferred, or participation in any case exceeding 5 per cent represented by shares or voting.

Following the coming into force of Art. 19 of Law no. 262/2005, the power of authorizations of mergers involving banks is as follows:

The Bank of Italy has control designed to ensure that the operation will ensure a sound and prudent management.

The Antitrust Authority is to verify that the merger does not harm the competitive structure of the market, that does not lead to a restrictive understanding of freedom of competition or an abuse of a dominant position within the sense of the Law no. 287/1990.

The protection of the sound and prudent management of the bank falls into the same field of prudential supervision, as does the regulation of the obligation to report to the Bank of Italy and to the same subsidiary bank, the holding of significant investments in a bank or the existence of any relevant para-social shares in whatsoever form agreed (Art. 20 TUB): the Bank of Italy may suspend voting rights that may have been the subject of concerted action, that might jeopardize sound and prudent management.

To conclude, it suffices to state that the Bank of Italy is also entrusted with the task of issuing provisions in matter of organization and corporate governance, with the aim of ensuring sound and prudent management and the overall stability of the financial system, the fundamental objectives of regulation and supervisory controls. Its objectives are: the clear distinction of roles and related responsibilities, the appropriate allocation of powers of administration and control, the balanced composition of the organs, the effectiveness and efficiency of the control system, the management of all types of risk, the adequacy of the information channels.

The rules generally entrust to the autonomy of intermediaries the task of identifying the government arrangements that respond more to the operating characteristics and business strategies. The choices must be carefully considered and motivated by the intermediaries, also in relation to the costs associated with the adoption and operation of the chosen system. These choices must then be presented to the Bank of Italy as part of a corporate governance project, with the approval of the body that has the strategic supervision, with the favourable opinion of the controlling body.[52]

4.7 The supervision forms of the securities market in Italy

The powers of control over the securities market in Italy are essentially reserved for the Minister of Economy, the Bank of Italy and Consob, and, for regulated markets, the management company of such markets.

Of course, as already noted above, while the powers of the Minister of Economy and the Bank of Italy are not limited to the exercise of supervisory functions on the securities market, Consob finds its raison d'être substantially in the performance of such functions.[53]

In particular, the powers of the Minister of Economy can be distinguished as (i) powers that the said Minister exercises towards Consob and (ii) powers to which he or she is entitled with respect to the activities and operators in the securities market: the Minister is provided with

regulatory powers that are reflected in the determination of the integrity and professional requirements of significant shareholders and corporate officers, as well as with sanctioning powers in relation to management companies of regulated markets.

Broadly speaking, it could be inferred that the Italian legislator has defined the boundaries between the Bank of Italy and Consob, giving control over the stability of the financial system as a whole to the former and control over the transparency and fairness of conduct to the latter.

With particular reference to intermediaries, the TUF (Art. 5) takes care to point out that the Bank of Italy is responsible with respect to the limitation of risk and financial stability, while the Consob is in charge of supervision on transparency and correctness: in this respect, it should be noted that the stability, competitiveness and the proper functioning of the market are not a goal, but an effect of controls over the stability, transparency and fairness of behaviours that the supervisors should carry out. The Bank of Italy has control over the issuance of securities in excess of certain thresholds, whereas Consob, denied control over access to the securities market, exerts exclusive supervisory power over offers to the public, with regard to the protection of investors and to the efficiency and transparency of the market for corporate control and the capital market.

A major and important role in the supervision of mutual funds and SICAV, as well as other important powers, are also the preserve of Consob, as are the powers it has over the supervision of investment firms and banks that provide investment services: in either case its powers are focused on compliance with disclosure and fairness duties. Also, Consob almost exclusively exercises supervision over regulated markets, the management companies of the same, intermediaries admitted to trading thereon and issuers that are listed on those markets and, in particular, on the information that they need to provide the public. In addition, Consob performs regulatory functions, supervision and administration with respect to the operators and the activities of the securities market. Its regulatory function is expressed primarily through the issuance of regulations, such as those relating to appeals by the public, regulated markets, supervision of investment firms and insider trading.[54]

The control functions of the Consob are of great importance; that is, the set of activities it has to enact in ensuring compliance with the rules provided by the law and by Consob in the exercise of its legislative powers: these are rules that essentially require issuers and operators to disclose necessary information to the market and to observe certain codes of behaviour.

According to Art. 6 of the TUF, in the exercise of the functions of regulatory supervision, the Bank of Italy and Consob must observe the following principles:

a) enhancement of the decision-making autonomy of qualified entities;
b) proportionality, to be intended as a criterion for the exercise of the power appropriate to the achievement of the goal, with the smaller sacrifice of the interests of the subjects addressed;
c) recognition of the international financial market and safeguard of the competitive position of Italian industry;
d) facilitation of innovation and competition.

For the matters covered by Directive 2006/73/EC by the Commission of 10 August 2006 (MiFID Level 2), the Bank of Italy and Consob may maintain or impose additional requirements in the regulations to those provided for by this Directive only in exceptional cases where such requirements are objectively justified and proportionate, taking also into account the need to address specific risks to investor protection or market integrity that are not adequately considered by the European provisions and if at least one of the following conditions is satisfied:

1) The specific risks which the additional obligations aim to face are particularly significant, given the structure of the Italian market.
2) The specific risks which the further obligations aim to face emerge or become evident after the enactment of the European provisions relevant to the matter.[55]

Instrumental to the accomplishment of the above regulatory oversight are the powers of supervision and inspection information which the Consob may avail itself. Regarding the first, in accordance with Art. 8 of the TUF, the Bank of Italy and Consob may, within their respective competences, request of the qualified subjects the communication of data and information and the transmission of documents and records in the manner and within the time limits they set out; such powers may be exercised in respect of the person carrying out the audit of the accounts. In this regard, the Board of Statutory Auditors is required to inform the authority without delay of any acts or facts of which it becomes aware in the exercise of its duties, which may constitute an irregularity in the management or a breach of the rules governing the activities Sims, the asset management company or SICAV.

Consob may also carry out inspection at the offices of issuers, investment firms and banks, companies managing mutual funds and SICAV: inspections should, however, be carried out in a manner and in such form as to ensure the exercise of the rights granted to the inspected subjects.

Finally, it would be useful to point out that Consob has also administrative functions within the securities markets, contributing to the organization of the same.

4.8 The supervision forms of the insurance market in the Italian system

The Code of Private Insurance (CAP), that is, Legislative Decree September no. 209/2005, reorganizes the entire set of insurance laws, making major changes and innovations, taking into account the most recent legislative measures that, broadly speaking, have affected the regulation of financial market intermediaries.

The CAP – in the wake of and together with Legislative Decree no. 142/2005, implementing Directive no. 2002/87/EC on financial conglomerates, and Law no. 262/2005, containing provisions for the protection of savings and the regulation of financial markets – helps to draw a renewed model for public control over private finance.

The insurance reform, certainly in view of the construction of an efficient system of control, in the light of the supervision on financial conglomerates,[56] now puts Ivass on an equal footing with the other supervisory bodies (Bank of Italy and Consob), having levelled the relative powers and conferred on them the fully-fledged role of supervisors in the field.

In fact, the functions relating to the supervision of the activities of insurance and reinsurance have been redrawn along the lines of what has already happened in the banking and investment services with the Consolidated Law on Banking and the Consolidated Law on Finance, Title I of the CAP, where the purposes of the function of supervision are explained. The reorganization in terms of the organic law on the supervision on the activities of insurance and reinsurance is mostly due to Title XIV of the CAP. The provisions provide for adjustments arising from the reform of company law and the supervisory activities specifically geared to the preservation of capital adequacy as well as the verification of the correctness of conduct towards policyholders and third parties.[57]

In general, Ivass has been given extensive regulatory powers with respect to entirely new matters or matters which are object of deregulation, giving

the institution a powerful instrument that can dominate and indeed influence the entire life of an insurance company. In brief, Ivass' powers of intervention and investigation are contained in Arts 188–189 of the CAP, with particular reference to supervisory information and the establishment of general provisions (Arts 190–191); the CAP continues with the regulation of supervision over the technical management and financial position of insurance and reinsurance companies, including those operating in Italy which have their registered offices in other Member States of the European Union (Arts 192–195) and, in this respect, fall under the scrutiny of Ivass amendments to the bylaws and the implementation of the programme of activities (Arts 196–197). Basically, the forms of supervision in the insurance sector are the same as the other two sectors of the financial market, namely banking and securities, to which reference is made for convenience.

Also of significance in the CAP is a call for transparency and consultation in the formation of the implementing provisions of the code; certain aspects stand out, such as invitations for Ivass to cooperate with the other national and EU supervisory authorities. These elements denote the new style of supervision and represent the trend of financial market regulation, which is also found in Law no. 262/2005 on the protection of savings and particularly in Legislative Decree no. 142/2005 relating to financial conglomerates.

Moreover, at a general level, cooperation between supervisors, also thanks to European Community laws, is becoming a requirement and a necessity of the control model of the financial system, as against the establishment of a supervisory authority only, while in the background Union Banking has moved increasingly close.

4.9 Conclusion

The obligation of Italian supervision to provide information, powers of investigation and intervention and regulatory powers that emerged in the discussion above may not be well understood and evaluated without reference to the supranational context, specifically European, which has an influence over a national situation. The ongoing financial and economic crisis drew the attention of the nation states, including Italy, to the fact that the stability of the financial markets, international as well as European, cannot be assured in an exclusively domestic context. The increased interdependence of financial institutions, however, produces a greater likelihood of systemic risk. Therefore, the developments of the market cannot follow a reform of the structure and forms of supervision

which in recent times has accelerated considerably and will impact on specific facets of Italian domestic reality.

Notes

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2. In general, for further information on the concept of supervision in Italy, see L Arcidiacono, *La vigilanza nel diritto pubblico. Aspetti problematici e profili ricostruttivi* (1984), Milano Giuffrè ed.; S Valentini, *Vigilanza (dir. amm.)*, in *Enciclopedia del Diritto XLVI* (1993), Milano Giuffrè ed.; M Stipo, *Vigilanza e tutela (dir. amm.)*, in *Enciclopedia Giuridica Treccani, XXXII* (1994), Roma. In particular, for further information on the concept of supervision in the financial market, and especially credit, see F Bruni, "Politica monetaria, regolamentazione finanziaria e vigilanza" (1992), in *Giornale degli economisti e annali di economia*, 27; P A Cucurachi, *I profili organizzativi dei sistemi di vigilanza bancaria* (1997), Milano Giuffrè ed.; G Molle and L Desiderio, *Manuale di diritto bancario e dell'intermediazione finanziaria* (2000), Milano Giuffrè ed., 15; S A Loddo, *Banca Centrale, vigilanza ed efficienza del mercato del credito* (2007), Milano Giuffrè ed.; R Costi, *L'ordinamento bancario* (2007), Bologna Il Mulino ed., 527; F Giorgianni and C M Tardivo, *Manuale di diritto bancario* (2009), Milano Giuffrè ed., 209; P Bontempi, *Diritto bancario e finanziario* (2009), Milano Giuffrè ed., 47; A Antonucci, *Diritto delle banche* (2012), Milano Giuffrè ed., 227; C Brescia Morra, *Il diritto delle banche. Le regole dell'attività* (2012), Bologna Il Mulino ed., 163; S Tirelli, "La vigilanza sui mercati finanziari: tentativo di una definizione" (2013), in www.diritto.it.
3. N Kohtamäki, *Die Reform der Bankenaufsicht in der Europäischen Union* (2012), Tübingen, 7.
4. R U Fülbier, "Regulierung. Őkonomische Betrachtung eines allgegenwärtigen Phänomens" (1999), in *Wirtschaftswissenschaftliches Studium*, 468; M Lehmann, "Grundstrukturen der Regulierung der Finanzmärkte nach der Krise" (2011), in *Working Papers on Global Financial Markets*, 22.
5. R U Fülbier, "Regulierung. Őkonomische Betrachtung eines allgegenwärtigen Phänomens" (no. 5 above), 468; S Käppel, *Auswirkungen der Harmonisierung des europäischen Bankenaufsichtsrechts auf die Effizienz von Kreditinstituten* (2009), Frankfurt am Main, 5; M Fehling and M Ruffert (eds), *Regulierungsrecht* (2010), Tübingen; M Döhler and K Wegrich, "Regulierung als Konzept und Instrument moderner Staatstätigkeit" (2010), in *Der modern Staat. Zeitschrift für Public Policy, Recht und Management*, 31; S Handke, "Ein konturloser Begriff mit Konjunktur: Das deutsche Verständnis von Finanzmarktregulierung" (2010), in *Der modern Staat. Zeitschrift für Public Policy, Recht und Management*, 55; A Lefterov, "How Feasible Is the Proposal for Establishing a New European System of Financial Supervisors?" (2011), in *Legal Issues of Economic Integration*, 38, 35.
6. N Dötz, *Bankenregulierung – regelgebunden oder diskretionär?* (2002), Lohmar/Köln, 5.
7. A Fest, *Zwecke, Ansätze und Effizienz der Regulierung von Banken* (2008), Berlin, 22.

8. H Humm, *Bankenaufsicht und Währungssicherung* (1989), Berlin, 35; S Glatzl, *Geldpolitik und Bankenaufsicht im Konflikt. Die Pflicht der Mitgliedstaaten zur Unterstützung der EZB im Bereich der Preisstabilität unter besonderer Berücksichtigung der Bankenaufsicht* (2009), Baden-Baden, 90; N Kohtamäki, *Die Reform der Bankenaufsicht in der Europäischen Union* (no. 4 above), 10.
9. S Glatzl, *Geldpolitik und Bankenaufsicht im Konflikt. Die Pflicht der Mitgliedstaaten zur Unterstützung der EZB im Bereich der Preisstabilität unter besonderer Berücksichtigung der Bankenaufsicht* (no. 9 above), 91.
10. R M Lastra, "The Governance Structure for Financial Regulation and Supervision in Europe" (2003), in *Columbia Journal of European Law*, 10, 49; I Begg, "Regulation and Supervision of Financial Intermediaries in the EU: The Aftermath of the Financial Crisis" (2009), in *Journal of Common Market Studies*, 47, 1108.
11. R Costi, *L'ordinamento bancario* (no. 2 above), 23; F Giorgianni and C M Tardivo, *Manuale di diritto bancario* (no. 2 above), 66; A Antonucci, *Diritto delle banche* (no. 2 above), 11; C Brescia Morra, *Le forme della vigilanza. La disciplina dei controlli pubblici sulla finanza*, in F Capriglione (ed.), *L'ordinamento finanziaria italiano* (2010), Padova Cedam ed., 301.
12. A Pezzuto, "Il sistema dei controlli di vigilanza sugli intermediari bancari" (2011), in *Mondo bancario*, 3–4, 2.
13. R Costi, *L'ordinamento bancario* (no. 2 above), 541; A Antonucci, *Diritto delle banche* (no. 2 above), 228.
14. G Berionne and A Tarantola, *Art. 51*, in F Capriglione (ed.), *Commentario al testo unico delle leggi in materia bancaria e creditizia* (2012), Padova Cedam ed., vol. 2, 599.
15. V Troiano, *Art. 52*, in F Capriglione (ed.), *Commentario al testo unico delle leggi in materia bancaria e creditizia* (no. 15 above), vol. 2, 615.
16. P Bontempi, *Diritto bancario e finanziario* (no. 2 above), 64.
17. A Pezzuto, "Il sistema dei controlli di vigilanza sugli intermediari bancari" (no. 13 above), 6.
18. C Barbagallo, *Art. 54*, in F Capriglione (ed.), *Commentario al testo unico delle leggi in materia bancaria e creditizia* (no. 15 above), vol. 2, 666.
19. R Costi, *L'ordinamento bancario* (no. 2 above), 544; P Bontempi, *Diritto bancario e finanziario* (no. 2 above), 66; A Antonucci, *Diritto delle banche* (no. 2 above), 230.
20. A Pezzuto, "Il sistema dei controlli di vigilanza sugli intermediari bancari" (no. 13 above), 16.
21. Ibid.
22. Expertenkommission Zimmerli, *Integrierte Finanzmarktaufsicht (gesetzgeberische Folgearbeiten zum Schlussbericht der Expertengruppe Finanzmarktaufsicht; Bericht Zufferey)*; I Teilbericht (2003), 20: "*Bislang existiert keine anerkannte Definition des Begriffs 'prudentielle Aufsicht' (in Englisch 'prudential supervision'). Es handelt sich um einen Sammelbegriff für das Instrumentarium in einem Aufsichtssystem, das die Solvenz der beaufsichtigten Institute sowie die Stabilität des Finanzsystems gewährleisten soll. Die umfassende Aufsicht beruht dabei auf den Pfeilern einer Bewilligungspflicht einer bestimmten Tätigkeit und der laufenden Überwachung der Bewilligungsvoraussetzungen und weiteren regulierten Sachverhalten*".
23. P Clement, "The Term 'Macroprudential': Origins and Evolution" (2010), in *Bank for International Settlements Quarterly Review*, 61.

24. T Padoa-Schioppa, *Regulating Finance. Balancing Freedom and Risk* (2004), New York, 116.
25. C A E Goodhart, *Financial Regulation. Why, How and Where Now?* (1998), London, 5: "systemic regulation is about safety and soundness of financial institution for purely systemic reasons. (...) On the other hand, prudential regulation is about safety and soundness of financial institution vis-à-vis consumer protection, in that the consumer loses when an institution fails, even if there are no systemic consequences". In this regard, the regulation and supervision designate especially the preventive practices of regulation and control that focus on ensuring solvency, safety and soundness of individual financial institutions. On this aspect of prudential supervision, see M J Flannery, *Prudential Regulation for Banks*, in K Sawamoto and Z Nakajima and H Taguchi (eds), *Financial Stability in a Changing Environment* (1995), New York, 284: "regulatory structures, which seek to reduce the likelihood that individual banks will fail". Even some German authors highlight this microperspective the prudential supervision of banks in translating German "prudential regulation and/or prudential supervision as *Solvenzaufsicht*, that is, solvency supervision: this concept basically refers only to the examination of banks and other financial institutions, above all, however, insurance companies, through the control authorities with a view to safeguarding their regular solvency". In this sense, see L Frach *Finanzaufsicht in Deutschland und Großbritannien: Die Bafin und die FSA im spannungsfeld der Politik. Mit einem Vorwort von Jochen Sanio* (2008), Wiesbaden, 22. See, also, F C Mishkin, "Prudential Supervision: Why Is It Important and What Are the Issues?" (2000), in *National Bureau of Economic Research Working Paper 7926*, 9: "prudential supervision in which government establishes regulations to reduce risk taking and the supervisors monitor banks to see that they are complying with these regulations and not taking on excessive risk, is thus needed to ensure the safety and soundness of the banking system".
26. J De Larosière, *Report of the High-Level Group on Financial Supervision in EU* (2009), Bruxelles.
27. FSA, *The Turner Review. A Regulatory Response to the Global Banking Crisis* (2009), London, 83.
28. L Papademos, "The Banking Supervision Committee of the ESCB and its Contribution to Financial Stability in the EU" (2007), in *Zeitschrift für das gesamte Kreditwesen*, 382; P Clement, "The Term 'Macroprudential': Origins and Evolution" (no. 24 above), 59; M Grande, *Banking Regulation and Supervision – Developments and Prospects at the Global and EU Levels*, in S G Grieser and M Heemann (eds), *Bankaufsichtsrecht: Entwicklungen und Perspektiven* (2010), Frankfurt am Main, 23.
29. European Central Bank, *The Role of Central Banks in Prudential Supervision* (2001), Frankfurt am Main, 3.
30. T Padoa-Schioppa, *Regulating Finance. Balancing Freedom and Risk* (no. 25 above), 119; A A Weber, "The Reform of Financial Supervision and Regulation in Europe, Speech at the Institute of International and European Affairs, Dublin, 10.03.2010" (2010), in *Bank for International Settlements Review*, 29.
31. R U Fülbier, "Regulierung. Őkonomische Betrachtung eines allgegenwärtigen Phänomens" (no. 5 above), 469; A Fest, *Zwecke, Ansätze und Effizienz der Regulierung von Banken* (no. 8 above), 20; M Fritsch, *Marktversagen und*

Wirtschaftspolitik. Mikroökonomische Grundlagen staatlichen Handelns (2011), München, 72.

32. S Käppel, *Auswirkungen der Harmonisierung des europäischen Bankenaufsichtsrechts auf die Effizienz von Kreditinstituten* (no. 6 above), 7.
33. M Fritsch, *Marktversagen und Wirtschaftspolitik. Mikroökonomische Grundlagen staatlichen Handelns* (no. 32 above), 160.
34. H E Büschgen and C O Börner, *Bankbetriebslehre* (2003), Stuttgart, 301; A Fest, *Zwecke, Ansätze und Effizienz der Regulierung von Banken* (no. 8 above), 49; S Käppel, *Auswirkungen der Harmonisierung des europäischen Bankenaufsichtsrechts auf die Effizienz von Kreditinstituten* (no. 6 above), 8.
35. N Kohtamäki, *Die Reform der Bankenaufsicht in der Europäischen Union* (no. 4 above), 15; M Fritsch, *Marktversagen und Wirtschaftspolitik. Mikroökonomische Grundlagen staatlichen Handelns* (no. 32 above), 249.
36. F C Mishkin, "Prudential Supervision: Why Is It Important and What Are the Issues?" (no. 26 above), 2.
37. C A E Goodhart, *Financial Regulation. Why, How and Where Now?* (no. 26 above), 10; S Käppel, *Auswirkungen der Harmonisierung des europäischen Bankenaufsichtsrechts auf die Effizienz von Kreditinstituten* (no. 6 above), 10.
38. M J Flannery, *Prudential Regulation for Banks* (no. 26 above), 294; M Fritsch, *Marktversagen und Wirtschaftspolitik. Mikroökonomische Grundlagen staatlichen Handelns* (no. 32 above), 80.
39. M Knittel, *Geldpolitik und Stabilität des Bankensystems. Das Liquiditätsproblem aus Sicht der Theoriegeschichte und der gegenwärtigen Finanzmarktentwicklung* (2007), Frankfurt am Main, 16.
40. European Central Bank, *Financial Stability Review* (2009), Frankfurt am Main, 134: "(systemic risk is) (...) the risk of experiencing a strong systemic event. Such an event adversely affects a number of systematically important intermediaries or markets (...). The trigger of the event could be an exogenous shock (...), which means from outside the financial system. Alternatively, the event could emerge endogenously from within the financial system or from within the economy at large".
41. G G Kaufman and K E Scott, "What Is Systemic Risk, and Do Bank Regulators Retard or Contribute to It?" (2003), in *The Independent Review. A Journal of Political Economy*, 7, 372; C A E Goodhart and R M Lastra, "Border problems" (2010), in *Journal of International Economic Law*, 705; C Georg, "The Effect of the Interbank Network Structure on Contagion and Financial Stability" (2010), in *Working Papers on Global Financial Markets*, 12, 3; C Georg, "Basel III and Systemic Risk Regulation – What Way Forward?" (2011), in *Working Papers on Global Financial Markets*, 17; M Lehmann, "Grundstrukturen der Regulierung der Finanzmärkte nach der Krise" (no. 5 above), 3. See, also, C Ohler, "International Regulation and Supervision of Financial Markets After the Crisis" (2010), in *European Yearbook of International Economic Law*, 29: "the reform of financial market regulation will have to deal a broad range of problems ranging from monetary policy, financial reporting standards, corporate governance of financial institutions and remuneration schemes to questions of capital adequacy and supervisory control. All in all, the focus on the systemic aspects of financial stability will have to become stronger, since the current crisis disclosed structural shortcomings in this field".

42. M Schüler, "How Do Banking Supervisors Deal with Europe-wide Systemic Risk?" (2003), in *Zentrum für Europäische Wirtschaftsforschung Discussion Paper 03–03*, 2; J Goddard, "European Banking: An Overview" (2007), in *Journal of Banking and Finance*, 31, 1916; M Flamè and P Windels, "Restructuring Financial Sector Supervision: Creating a Level Playing Field" (2009), in *The Geneva Papers on Risk and Insurance. Issue and Practice*, 34, 11; H Mertzanis, "The Financial Crisis and the Future of European Financial Supervision Structures" (2010), in *Capco Journal (The Capco Institute Journal of Financial Transformation)*, 29, 139.
43. For further information, L Dragomir, *European Prudential Banking Regulation and Supervision. The Legal Dimension* (2010), London-New York, 25; S Dullien and H Herr, "Die EU-Finanzmarktreform. Stand und Perspektiven in Frühjahr 2010" (2010), in *Friedrich Ebert Stiftung Internationale Politikanalyse*.
44. European Central Bank, *Financial Stability Review* (2009), Frankfurt am Main, 9. See H Mertzanis, "The Financial Crisis and the Future of European Financial Supervision Structures" (no. 43 above), 138; C Ohler, "International Regulation and Supervision of Financial Markets After the Crisis" (no. 42 above), 16; L Papademos, "The Banking Supervision Committee of the ESCB and its Contribution to Financial Stability in the EU" (no. 29 above): "(…) it may be preferable (…) to define financial stability as absence of instability".
45. M Fehling and M Ruffert (ed.), *Regulierungsrecht* (no. 6 above), 10; N Kohtamäki, *Die Reform der Bankenaufsicht in der Europäischen Union* (no. 4 above), 23; D Wojtczak, *Uslugi bankowe w regulacjach Unii Europejskiej* (2012), Warszawa.
46. F C Mishkin, "Prudential Supervision: Why Is It Important and What Are the Issues?" (no. 26 above), 7; M Schüler, "How Do Banking Supervisors Deal with Europe-wide Systemic Risk?" (no. 43 above), 14; S Schich, "Financial Crisis: Deposit Insurance Related Financial Safety Net Aspects, Financial Market Trends" (2008), in *Organisation for Economic Cooperation and Development Journal*, 95, 2; N Moloney, "EU Financial Market Regulation after the Global Financial Crisis: 'More Europe' or More Risks?" (2010), in *Common Market Law Review*, 47, 1326.
47. C A E Goodhart and D Schoenmaker, "Burden Sharing in a Banking Crisis in Europe" (2006), in *Sveriges Riksbank Economic Review*, 2, 34.
48. C Clemente, *Art. 53*, in F Capriglione (ed.), *Commentario al testo unico delle leggi in materia bancaria e creditizia* (2012), Padova Cedam ed., vol. 2, 630.
49. R Costi, *L'ordinamento bancario* (no. 2 above), 553; F Giorgianni and C M Tardivo, *Manuale di diritto bancario* (no. 2 above), 197; P Bontempi, *Diritto bancario e finanziario* (no. 2 above), 67; A Antonucci, *Diritto delle banche* (no. 2 above), 232; C Brescia Morra, *Le forme della vigilanza. La disciplina dei controlli pubblici sulla finanza* (no. 12 above), 301.
50. A Pezzuto, "Il sistema dei controlli di vigilanza sugli intermediari bancari" (no. 13 above), 5.
51. D Siclari, *Modelli di sussidiarietà orizzontale. La centralizzazione delle informazioni sui rischi di pagamento* (2007), Padova Cedam ed.
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54. F Capriglione and M Pellegrini, *I mercati finanziari*, in M Pellegrini (ed.), *Elementi di diritto pubblico dell'economia* (2012), Padova Cedam ed., 505.
55. D Siclari, "Gold plating e nuovi principi di vigilanza regolamentare sui mercati finanziari" (2007), in www.amministrazioneincammino.it; A Miglionico, *La tutela del risparmio fra intervento pubblico e gestione privata* (2011), Napoli Jovene ed., 90.
56. V Troiano, *I conglomerati finanziari. Le forme di vigilanza* (2009), Padova Cedam ed.
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5

Prevention and Countering of Money Laundering and Terrorism Financing

Pierpaolo Fratangelo

5.1 Introduction

The Italian anti-money laundering (AML) and combating the financing of terrorism (CFT) regime is very comprehensive and articulated. The general framework set up in 1991 with Law no. 197/1991 has been updated a number of times until the need to transpose the provisions of Directive 2005/60/EU (Third anti-money laundering directive) created the conditions for a major legislative reform in 2007, giving shape to the current system.

Legislative Decree no. 109 of 22 June 2007 and Legislative Decree no. 231 of 21 November 2007 (Italian AML Law) are the final product of a long and complex process influenced by various endogenous and exogenous factors.[1] Italy has historically been exposed to a high rate of criminality, the large majority related to mafia-type organizations, but also to other forms of illegal activity such as corruption and tax evasion, which produces a huge amount of laundered money;[2] thus, the Italian Authorities have gained extensive experience in designing a sophisticated enforcement machinery aimed at cutting down the economic power of crime. This machinery leverages both repressive measures, such as the criminalization of money laundering (Art. 648-*bis* of the Penal Code), and a preventative strategy that channels financial transactions through regulated entities subject to defined responsibilities in order to prevent illicit funds from accessing the lawful economy.

In this respect, Italy experimented with legal and operative tools that proved a model for other countries: for instance, the preventive system of confiscation for assets in possession of persons belonging to mafia-type

organizations, in force since the 1960s, or the "single electronic archive" (*Archivio Unico Informatico* – AUI) enacted in 1991 are unique features of the Italian system that have inspired international best practices.

At the same time, awareness and implementation of AML/CFT preventive measures in Italy have been enhanced by the implementation of EU obligations.[3] The stability and reputation of the internal market can be damaged by flows of dirty money or money used for terrorist purposes; in line with international best practices, the Union issued legislative acts designing measures to prevent these flows from taking advantage of the freedom of capital movements and the freedom to supply financial services. Since 1991, three directives have progressively laid a common AML/CFT regulatory framework within the EU;[4] a fourth directive is forthcoming.[5]

Finally, the globalization of criminal activities has put additional pressure on countries to have proper tools in place in order to ensure effective and timely action against launderers and terrorists. In this respect, participation in the Financial Action Task Force (FATF) – the AML/CFT global standard setter – has been a strategic factor for Italy to keep its AML/CFT system aligned to international best practices. For Italy, the recommendations elaborated in the framework of the 2005 FATF mutual evaluation conducted by the IMF under the Financial Sector Assessment Program have been one of the main drivers to review and update the national system.

The institutional setting designed in 2007 redefines the roles and competences of the different actors (Minister of Economy, Supervisory authorities, FIU, police forces, etc.), laying heavy emphasis on coordination between the authorities involved. The 2007 reform also gave the opportunity of conducting a general review of AML/CFT requirements, widening the scope of application, introducing important principles such as the risk-based approach for the customer due diligence process, strengthening important tools for record-keeping purposes like the single electronic archive, and enhancing the framework presiding over the reporting of suspicious transactions.

5.2 Theoretical elements of AML/CFT legislation for the financial sector

Money laundering is the activity aimed at transferring illegally obtained money or investments through an outside party in order to conceal their true origin. Such processing may involve disguising the beneficial owner of either the actual criminal proceeds or of other property that might be subject to confiscation. Money laundering may be carried out

with or without the knowledge of the financial institution or counterparty to financial transactions, although actual or implied knowledge is generally required for a party to be considered guilty of the crime of money laundering.[6]

Money laundering allows criminals to reinvest illegal proceeds in legitimate business activities; the subsequent influence gained by criminals on the legal economy through money laundering may be very important: according to UNODC, the estimated amount of money laundered globally in one year is 2–5 per cent of global GDP, or $800 billion – $2 trillion in US dollars as at 2012.[7]

On the other hand, the financing of terrorism, while not necessarily dealing with funds of illegal origin, is a criminal activity aimed at providing financial or economic support to terrorist acts. It shares with money laundering the objective and the techniques of disguising the beneficial owner and its real intentions.

Combating money laundering and terrorism financing are key elements in promoting a strong and sound financial system. Money laundering and terrorism financing can weaken individual intermediaries, as well as representing a threat to a country's overall financial sector reputation.

The adverse consequences for financial institutions are generally described as:

i) reputational; when the clients that provide a stable deposit base and make reliable borrowers lose confidence in an institution connected with money laundering/terrorism financing and take their business elsewhere;
ii) transactional, when impaired internal processes or relations with other banks impede the institution's functions or raise its operating and funding costs; and
iii) legal, due to the risk of lawsuits, adverse judgments, unenforceable contracts, fines and penalties, including licence withdrawal and management dismissal (with a possible lifetime ban on participating in the financial industry).

Anti-money laundering legislation requires financial intermediaries to have a thorough knowledge of their customers as well as a full understanding of the transactions they put in place. To this end, financial intermediaries have to design a customer due diligence (CDD) process that allows them to monitor customers' activities and detect suspicious transactions. As soon as they ascertain such suspicious, financial

intermediaries should file a Suspicious Transaction Report (STR) to competent authorities that will further investigate the matter. As pointed out by the Basel Committee on Banking Supervision, these requirements are "to be seen as a specific part of the banks' general obligation to have sound risk management programmes in place to address all kinds of risks, including ML and FT risks".[8]

As countries around the world are coming to terms with the adoption and implementation of anti-money laundering legislation, the issue of how to enforce the related obligations is gradually gaining importance. Public regulators play a crucial role in assisting financial institutions to understand the full extent of their CDD and STR obligations and to ensure that those obligations are successfully applied. Effective supervision is as essential to the success of a country's AML/CFT system as is a comprehensive and adequate legislative framework.

5.3 The AML/CFT institutional setting

Legislative Decree no. 231 of 2007 designed a new AML/CFT architecture distinguishing the responsibilities of the actors involved, pursuant to their role and activities. It also provides for coordination mechanisms and the exchange of information between different parties.

The Ministry of Economy and Finance is in charge of general policy making and domestic coordination in the AML/CTF area. The Ministry also oversees relations with EU bodies and international organizations (e.g., FATF and Moneyval) entrusted with drawing up policies and laying down standards in AML/CFT sector, and it ensures fulfilment of the obligations deriving from Italy's membership of these international bodies and organizations.

The Ministry is assisted in its tasks by the Financial Security Committee (FSC), an inter-governmental body originally created in 2001,[9] whose status, functioning and powers are provided for by Legislative Decree no. 109 of 2007. The Committee is chaired by the Director General of the Treasury. Other FSC members include the Ministries of Foreign Affairs, Home Affairs, and Justice; the Bank of Italy; the Unità di Informazione Finanziaria (UIF); Italy's financial intelligence unit (FIU); Consob, Italy's securities market regulator; Ivass, Italy's insurance supervisor; the Guardia di Finanza or Financial Police; the Carabinieri (paramilitary police); the National Anti-Mafia Directorate (DNA); and the Anti-mafia Administration or Direzione Investigativa Antimafia (DIA).

The FSC's activities include the prevention of money laundering and terrorist financing, and the implementation of international economic

sanctions. The Committee has far-reaching powers that include waiving provisions of the Official Secrecy Act to obtain information from all government ministries. Legislative Decree no. 109/2007 also empowers the FSC to submit proposals to the competent UN or EU authorities on the listing or de-listing of individuals or entities subject to restrictions on financial transactions and/or asset freezes for CFT purposes.

From 1 January 2008, the AML Law established the UIF within the Banca d'Italia as the new Financial Intelligence Unit, following the suppression of the Ufficio Italiano dei Cambi. The UIF is responsible for collecting and analysing suspicious transaction reports. In line with international standards, the UIF performs its functions autonomously and independently, using human, technical and financial resources and instrumental goods provided by the Bank of Italy. The organization and activity of the UIF are governed by a regulation of the Bank of Italy.

Financial sector Supervisory Authorities (the Bank of Italy, the Consob and Ivass) oversee the respect of AML/CFT obligations by supervised entities. To this end, the Supervisory Authorities have been entrusted with the task of issuing implementing provisions for supervised entities on customer due diligence and internal organization requirements;[10] the Supervisory Authorities are also responsible for conducting controls in the area and applying sanctions for violations detected.[11]

The AML Law entrusts the Bank of Italy with a leading role since it is the Authority responsible not only for setting the implementing provisions on the keeping of the single electronic archive for all those intermediaries who are obliged to have it,[12] but also for issuing implementing measures for some intermediaries not under its direct (prudential) supervision, such as trust companies.[13] The ratio for this relies on the activities traditionally performed by the Bank of Italy in the AML/CFT sector since the coming into force of the former Italian AML Law (no. 197/1991).

For designated non-financial business or professions (DNFBPs), the AML Law entrusts competent professional colleges and associations with the task of fostering and verifying, in accordance with the principles and in the manner laid down by sectoral legislation, compliance with the AML obligations established in Legislative Decree no. 231/2007. The Ministry of Justice exercises general oversight over the activities of professional colleges and associations.

Finally, the Bureau of Antimafia Investigation (*Direzione Investigativa Antimafia*) and the Special Foreign Exchange Unit of the Guardia di Finanza shall carry out investigations in relation to reports transmitted by the FIU. The Special Foreign Exchange Unit of the Guardia di Finanza may also carry out controls on some financial entities to verify compliance with AML/CFT obligations.

Legislative Decree no. 231/2007 places great emphasis on cooperation between the authorities involved. To this end, by way of derogation from the obligation of professional secrecy, financial sector supervisory authorities cooperate with each other and with the FIU, the Guardia di Finanza and the Bureau of Antimafia Investigation, including exchanging information, in order to facilitate the performance of their respective functions. Specific memoranda of understanding may also be signed with foreign authorities. Furthermore, where the judicial authorities have cause to believe that money has been laundered through supervised intermediaries, they shall notify the competent supervisory authority and the FIU, in order to take the proper action.

5.4 Personal scope of application of the AML/CFT obligations

Legislative Decree no. 231 of 2007 requires financial intermediaries to adopt suitable and appropriate systems and procedures in relation to the obligations of adequately verifying customers, reporting suspicious transactions, retaining documents, retaining internal control, assessing and managing risk, ensuring compliance with the relevant provisions, and communicating to prevent the carrying out of money laundering transactions and terrorist financing. They must fulfil their obligations taking into account the information in their possession or acquired in connection with their institutional or professional activity.[14]

For the financial sector, the obligations set by the AML Law are supplemented by regulations issued by supervisory authorities which offer sector-specific guidance in the implementation of these requirements. The regulations cover in particular the manner of fulfilling the obligations on CDD as well as the design of internal organization, procedures and controls.[15]

Art. 11 of the AML Law submits a wide range of intermediaries to the CDD and record-keeping requirements. In some instances, the sectoral coverage has even gone beyond international standards (e.g., tax collection agencies). In particular, the scope of application notably includes:

- banks;
- Poste Italiane S.p.a.;
- e-money institutions;
- payment institutions;
- investment firms (*società di intermediazione mobiliare* – SIM);
- asset management firms (*società di gestione del risparmio* – SGR);

- variable capital investment companies (*società di investimento a capitale variabile* – SICAV);
- insurance companies;
- stockbrokers;
- tax collection companies;
- financial intermediaries entered in the register referred to in Art. 107 of the 1993 Banking Law;
- financial intermediaries entered in the register referred to in Art. 106 of the 1993 Banking Law;
- fiduciaries entered in the register referred to in Art. 199 of the Consolidated Law on Financial Intermediation;
- the Italian branches of the persons referred to above whose head offices are in a foreign country, and the Italian branches of harmonized security investment fund management; and
- Cassa Depositi e Prestiti.

Legislative Decree no. 231/2007 also submits to AML/CFT obligations other categories of financial actors such as: micro-credit institutions; fiduciaries referred to in Law 1966/1939; financial salesmen; insurance brokers; loan brokers; financial agents. However, the implementation of CDD and record-keeping requirements is designed to take into account the specificity of their activities: thus, for example, financial agents acting on behalf of another financial intermediary shall conduct CDD on occasional transactions even below the legal threshold of €15,000, but may fulfil record-keeping requirements by simply transmitting CDD information to their principal.

Finally, Legislative Decree no. 231/2007 requires other subjects to apply only reporting requirements to the FIU. This is the case for: central securities depositories; companies operating regulated markets in financial instruments and persons that operate structures for trading in financial instruments and interbank funds; companies operating settlement services for transactions in financial instruments; companies operating clearing and guarantee services for transactions in financial instruments; and offices of the Public Administration.

5.5 Customer due diligence

5.5.1 The general regime

The AML Law requires financial intermediaries to perform customer due diligence when establishing a business relationship or when carrying

out occasional transactions involving the transmission or transfer of means of payment amounting to €15,000 or more, regardless of whether the transaction is carried out in a single operation or in several operations that appear to be related, so as to carry out a split transaction.[16] Regardless of any applicable derogation, exemption or threshold, CDD should also be performed when there is a suspicion of money laundering or terrorist financing or when there are doubts about the veracity or adequacy of previously obtained customer identification data.

CDD implies the identification and verification of the customer and, where applicable, of the beneficial owner (i.e., the natural person who ultimately owns or controls an account and/or the person on whose behalf a transaction is being conducted);[17] the obtaining of information on the purpose and intended nature of the business relationship is also required. Financial intermediaries must ensure ongoing monitoring of the relationship in accordance with the money laundering/terrorism financing risk profile assigned to each customer on the basis of the information acquired.

When financial institutions are unable to comply with CDD requirements laid down by AML Law, they may not establish the relationship or carry out transactions or professional services, or they must terminate the continuous relationship or professional service and assess whether to make a report to the FIU (Art. 23). For this purpose, the Ministry of Economy issued in 2013 an interpretative note which describes a model procedure that intermediaries should follow in order to alert the customer to the consequences of non-collaboration and, if this persists, to gradually terminate the relationship.[18]

CDD procedures should allow ongoing monitoring of customers in order to periodically review their risk profile.

Obliged subjects should have in place policies and procedures to detect unusual or potentially suspicious transactions. To that end, they may make use of electronic screening software dedicated to the monitoring of transactions. Enhanced CDD should apply whenever banks assess that a relationship or a transaction is high-risk.

5.5.2 The risk-based approach

Pursuant to the international standards and European legislation, the Italian AML Law requires financial intermediaries to apply CDD requirements by following a risk-based approach. According to this principle, the intensity and scope of customer due diligence is to be calibrated to the risk of money laundering (ML) and terrorism financing (TF) associated with the individual case (business relationship and/or transaction).

The ML/TF risk is a function of three factors: threat (persons, object or activity with the potential to cause harm); vulnerability (things that may be exploited by the threat or that may support or facilitate its activities); and consequence (the impact or harm that may be caused). Assessing the ML/TF risk means that intermediaries have to determine how the identified ML/TF threats will affect them: they must analyse the information obtained to understand the likelihood of these risks occurring and the impact that these would have if they did occur. Once said risks are identified, the intermediaries have to decide on the most appropriate and effective way to mitigate them.

To assess the level of this risk, which gives rise to the application of differentiated measures of CDD – simplified or enhanced in relation to cases of lower or higher risk respectively – intermediaries may apply the general criteria indicated in Art. 20 of AML Law. These criteria make reference, for the customer, to legal form; principal activity, behaviour, geographical area of reference and – either for individual transactions or for a continuous relationship – to the type, the manner of performing, the amount; the frequency, the reasonableness, the geographical area of destination. Financial intermediaries should not enter business relationships whose risk is not acceptable.

As specified in the Bank of Italy's 2013 CDD guidance, the risk-based approach nonetheless cannot lead to failure to comply with the obligations that the law or these regulations clearly and expressly establish for addressees, without leaving them any room to assess the actual situation.[19] This is the case in which freezing obligations are provided for vis à vis persons entered in the EU lists, including those issued in accordance with the resolutions of the United Nations to counter terrorist financing and the activity of the countries that threaten peace and international security. It follows that it will not be possible to enter into or continue business relations with persons included in such lists, except within the limits and under the conditions expressly laid down.

5.5.3 Simplified due diligence

Art. 25 of the AML Law allows intermediaries to apply simplified due diligence when the customer is in one of the following categories:

a) Italian and EU financial institutions, as well as banks established in non-EU countries with equivalent legislation.[20]
b) Offices of the public administration and institutions and entities that perform public functions in accordance with the Treaty on European Union, the Treaties on the European Communities or subsidiary European law.

c) Persons for whom the Ministry for the Economy and Finance has issued a decree, after consulting the Financial Security Committee authorizing the application, in whole or in part, of simplified measures pursuant to Art. 26 of Legislative Decree no. 231/2007.

Simplified due diligence implies that obliged subjects are exempted from applying customers' identification and verification requirements, even though they must nonetheless gather sufficient information to establish whether the customer belongs to one of the categories that benefits from the exemption. The simplified customer due diligence requirements will not apply where there is a reason to believe that the identification made is unreliable or where it does not permit the necessary information to be acquired.

Furthermore, as a result of this exemption, obliged entities are allowed not to record relationships or transactions with the above-mentioned customers.

Obliged entities are also authorized not to apply customer due diligence in respect of:

a) life insurance policies where the annual premium is not more than €1,000 or the single premium is not more than €2,500;
b) supplementary pension schemes governed by Legislative Decree no. 252/2005, provided that they do not envisage redemption clauses other than those referred to in Art. 14 of such decree and may not be used as collateral for a loan except in the circumstances provided for by the legislation in force;
c) compulsory and supplementary pension regimes or similar systems that provide retirement benefits, where contributions are made by way of deduction from income payments and the rules do not permit the re-assignment of a member's interest except to his survivors;
d) electronic money, where, for non-reloadable devices, the maximum amount stored in the device is no more than €150 or, where, for reloadable devices, a limit of €2,500 is imposed on the total amount transacted in a calendar year, except when an amount of €1,000 or more is redeemed in that same calendar year by the bearer pursuant to Art. 3(3) of Regulation (EC) 1781/2006;
e) any other product or transaction characterized by a low risk of money laundering or terrorist financing that satisfies the technical criteria established by the European Commission, if authorized by the Minister for the Economy and Finance.

5.5.4 Enhanced due diligence

Intermediaries have to apply enhanced CDD measures when there is a greater risk of money laundering or terrorism financing, as well as in the cases expressly indicated by the AML Law (Art. 28), which are the following:

1) when the customer is not physically present (non face-to-face transactions);
2) in the case of correspondent accounts with non-EU respondent institutions;
3) in respect of transactions or relationships with politically exposed persons (PEPs).

Enhanced measures may comprise the request of additional information from the customer, closer and more frequent monitoring of transactions, the need for prior approval by banks' senior management.

For PEPs in particular, the law requires that banks should: establish adequate risk-based procedures to determine whether the customer is a PEP; obtain the authorization of the general manager or the person performing an equivalent function before establishing a continuous relationship with such customers; take all necessary measures to establish the source of wealth and source of funds that are involved in the continuous relationship or the transaction; and conduct enhanced ongoing monitoring of the continuous relationship or professional service. Bank of Italy 2013 CDD guidance indicates that enhanced measures should apply not only to foreign PEPs, but also to domestic PEPs if the risk assessment so requires.

For correspondent banking, Italian banks must gather sufficient information about the respondent institution to fully understand the nature of the respondent's business and to determine, on the basis of public registers, lists, acts or publicly available documents, the reputation of the institution and the quality of the supervision to which it is subject. Banks are also called to assess the quality of the anti-money laundering and counter-terrorism financing controls to which the respondent institution is subject and to obtain the authorization of the general manager, his or her delegate or the person performing an equivalent function before opening new correspondent accounts.

If banks are unable to comply with these obligations, they have to refrain from establishing the relationship or carrying out transactions, or have to terminate the relationship or professional service and make a report to the FIU when appropriate.

AML Law (Art. 28.6) expressly prohibits the opening or maintaining of correspondent accounts with a shell bank (or with a bank known to allow a shell bank to use its accounts).

5.5.5 Reliance on third parties

Italian financial institutions may rely on third parties to conduct CDD, although they retain ultimate responsibility for fulfilling this obligation. Reliance is possible provided that the requisite identification data are collected by qualified subjects such as:

a) Italian financial intermediaries referred to in Art. 11(1) of AML Law;
b) credit institutions and financial institutions of Member States of the European Union;
c) banks with their registered office and head office in countries not belonging to the European Union, provided that such countries are members of the FATF, and branches in such countries of Italian banks and of banks of other FATF member countries;
d) professionals referred to in Art. 12(1) of AML Law, in respect of other professionals.

Following this regime, the identification and verification of customer are considered as satisfied, even in the absence of the customer, when suitable attestation is provided by one of above-mentioned subjects with whom customers have continuous relationships or whom they have engaged to perform a professional service in connection with which they have already been identified in person.

The attestation must be able to confirm that the person who has to be identified and the holder of the account or of the relationship established with the attesting intermediary or professional are identical, and also confirm the exactness of the information transmitted at a distance. The attestation may consist in a credit transfer drawing on the account for which the customer has been identified in person, containing a code issued to the customer by the intermediary that must make the identification.

In no case may the attestation be issued by persons that have no physical establishment in any country. Furthermore, where doubts arise at any time about the customer's identity, the obliged entities have to carry out a new identification that establishes his or her identity with certainty.

In case of a customer whose contact was made through a financial agent or a loan broker, the intermediary may conduct identification by

obtaining the necessary information from these subjects, even without the physical presence of the customer.

In the case of consumer credit, leasing, electronic money issuance and other types of transaction indicated by the Bank of Italy, the identification may be made by external collaborators tied to the intermediary by a special agreement in which the requirements established by Legislative Decree no. 231/2007 are specified and the procedures for satisfying them are regulated in accordance therewith.

5.6 Record-keeping requirements

Obliged entities must retain the documents and record the information acquired in satisfying the customer due diligence requirements for use in any investigation into, or analysis of, possible money laundering or terrorist financing conducted by the FIU or other competent authorities.[21] In particular:

a) In the case of customer due diligence, they shall retain a copy or the references of the documents required for a period of ten years after the continuous relationship or professional service has ended.
b) In the case of transactions, continuous relationships and professional services, they shall keep the supporting evidence and records, consisting of the original documents or copies admissible in court proceedings, for a period of ten years following the carrying out of the transaction or the end of the continuous relationship or professional service.

The information shall be recorded promptly and in any case not later than the 30th day following the carrying out of the transaction or the opening, variation or closure of the continuous relationship or the end of the professional service.

Banks and other financial institutions are required to maintain records in a standardized customer database called the single electronic archive (*Archivio Unico Informatico* – AUI). The single electronic archive shall be set up and managed in such a way as to ensure the clarity, completeness and immediacy of the data, their retention according to uniform criteria, maintenance of the chronological order of the data, the possibility of deriving integrated records, and ease of consultation. It must be structured in a way that limits the burden on obligated institutions, takes their operating particularities into account, and simplifies recording.

Financial intermediaries belonging to the same group may use a single service centre to keep and manage their own archives so that a delegate may extract integrated records at group level, including for the purposes of suspicious transactions reporting. The logical distinction and separation of the records of each intermediary must always be ensured.

Pursuant to Art. 7 of AML Law, in December 2009 the Bank of Italy issued implementing measures on the recording in the single electronic database.[22] The document contains technical provisions that implement the requirements set by the AML Law. A code is provided for each type of transaction, and data is captured about the maker of the transaction, any representative or principal or beneficial owner involved, the counterpart for wire transfers, the institution and branch involved, and other transaction details.

Authorized financial institutions are required to monthly aggregate the information stored in the AUI and report it in a uniform format to the UIF for statistical analysis purposes. The data is aggregated by class of transaction, and any reference to the customers is removed. The UIF analyses the data and can request specific transaction details if warranted.

5.7 Suspicious transactions reporting

Obliged entities and persons are required to file a report of any suspicious transactions to the FIU whenever they know, suspect or have reason to suspect that money-laundering or terrorist financing is being or has been carried out or attempted. Suspicion may arise from the characteristics, size or nature of the transaction or from any other circumstance ascertained as a result of the functions carried out, also taking into account the economic capacity and the activity engaged in by the person in question, on the basis of information available to the reporters in the course of their work or following the acceptance of an assignment.

The Bank of Italy's provisions for internal organization, procedures and controls of March 2011 detail the requirements that banks have to comply with in handling and reporting suspicious transactions. The document also defines the role and responsibilities of the corporate officer in charge of the reporting duties.

Red-flag indicators, adopted and periodically updated by the competent authorities acting on a proposal from the FIU, and models of financially anomalous conduct, issued and disseminated by the FIU, are designed to facilitate the identification of suspicious transactions.[23] The information that a report must contain is determined by the FIU with its instructions.[24]

Reports must be made without delay, where possible before the transaction is carried out. The FIU may suspend transactions that are suspected of involving money laundering or terrorist financing for up to five working days, provided this does not compromise investigations that may be under way.

Reports on suspicious transactions do not violate confidentiality obligations and, if made in good faith and for the purposes of the law, do not entail liability of any kind (civil, criminal or administrative).

The FIU analyses the suspicious transaction reports and transmits them, together with the financial analyses performed, to the Special Foreign Exchange Unit of the Finance Police and Bureau of Antimafia Investigation.

The FIU dismisses reports that it deems to be unfounded, while keeping records thereof for ten years to allow the investigative bodies to consult them.

5.8 Organization and internal controls

The inadequacy or absence of sound ML/FT risk management exposes financial intermediaries to serious risks and may prejudge the stability of not only the single intermediary but of the financial system as a whole. Recent international cases, including robust enforcement actions taken by regulators and the corresponding direct and indirect costs incurred by intermediaries due to their lack of diligence in applying appropriate risk management policies, procedures and controls, have highlighted these risks.[25]

In this perspective, AML Law requires financial supervisory authorities to issue specific provisions on corporate organization and internal controls in order to ensure the correct fulfilment of AML/CFT obligations and the effective management of risks.

Thus in March 2011 the Bank of Italy issued provisions on internal organization, procedures and controls intended to prevent the use of intermediaries for ML and TF purposes. The regulation – which came into force on 1 September 2011 – requires intermediaries to have appropriate organizational arrangements and procedures to deal with the risk of being involved, wittingly or unwittingly, in money laundering and in terrorism financing. Intermediaries must introduce procedures designed to ensure the full knowledge of the customer, the traceability of financial transactions and the detection and reporting of suspicious transactions.

Great emphasis has been placed on the contribution of corporate bodies responsible for the overall supervision of the company. To this

end, the corporate bodies (strategic body, management body, control bodies), each according to their powers and responsibilities, are required to define business policies consistent with the principles and rules against money laundering; to adopt appropriate policies to preserve the integrity of the company; to implement organizational and operational measures aimed at avoiding the risk of involvement in cases of money laundering and financing of terrorism; to carry out checks on compliance with the regulations and the appropriate risk management procedures; and to ensure a system of information flows to the corporate bodies and within them that is adequate, complete and timely.

Supervised entities are required to establish a dedicated anti-money laundering function. This function, which must be independent and adequately staffed, must have access to all the enterprise's functions and to all information relevant to the performance of its tasks. These consist primarily in verifying on an ongoing basis that the company procedures are consistent with the objective of preventing and countering violations of law and regulations and of the enterprise's own AML/CFT regulations. To this end, the anti-money laundering function checks the suitability of the system of internal controls and procedures adopted and suggests the organizational and procedural modifications necessary or useful to guarantee adequate safeguards against the risks, providing, if necessary, advice and assistance to the corporate bodies and top management.

Intermediaries must also appoint an officer responsible for reporting suspicious transactions to the FIU and should define a process for assessing anomalous transactions. The suspicious transactions report officer may not have direct responsibilities in operations areas or be hierarchically dependent on persons with such responsibilities; the role is attributed by law to the legal representative, but it may be delegated to the AML officer.

In the case of groups, strategic decisions on matters relating to the management of the risk of money laundering and terrorist financing are made by the corporate bodies of the group's parent company; that parent company, however, must involve and inform the corporate bodies of its subsidiaries of its decisions. In this vein, the anti-money laundering function may be outsourced to the parent company, but nonetheless every subsidiary must have an officer or a special AML unit that oversees AML/CFT processes and procedures. For Italian cross-border groups, without prejudice to compliance with the specific obligations under host country law, the procedures in place at branches and subsidiaries must be in line with the Italian group's own standards and such as to ensure the sharing of information at consolidated level.

5.9 Limitations on the use of cash

International studies indicate that the use of large cash payments has repeatedly proven to be very vulnerable to money laundering and terrorist financing. Therefore, EU legislation requires Member States to introduce controls on cash payments above the threshold of €15,000 for trading transactions in high-value goods, such as precious stones or metals, or works of art. Taking into consideration national specificities, Member States may decide to adopt stricter provisions, in order to properly address the risk involved with large cash payments.

Italy is a country where traditionally the use of cash is very common: 83 per cent of commercial transactions are settled in cash as compared to a European average of 65 per cent.[26] A number of reasons explain such a massive use of cash: social habits, economic costs linked to alternative means of payment, and financial illiteracy in the Italian population, and also the possibility of exploiting for illegal purposes the characteristics of anonymity and circularity of banknotes and coins. In this last respect, cash is used not only by criminal organizations to launder their profits, but is also a favourite instrument for other crimes which plague Italian society, such as corruption and tax evasion.

The strategy inaugurated with the provisions of Legislative Decree no. 231/2007 aims at deterring money laundering (and its most frequent predicate offences) by severely reducing cash transactions between private parties and channelling cash transactions through regulated entities subject to defined CDD responsibilities. This is in order to encourage the use of more traceable means of payment.

Thus, Art. 49 of the Italian AML law prohibits the use of cash or negotiable bearer instruments when the value of the transaction between private parties exceeds the threshold of €1,000,[27] except in case of transactions carried out with banks, e-money institutions and the postal service.

For the same purpose, bank and postal cheques issued for amounts of €1,000 or more as well as bankers' drafts, postal money orders and promissory notes must carry the personal or business name of the beneficiary and the "not transferable" clause. The AML Law specifies that banks and Poste Italiane S.p.A. must issue cheques with a pre-defined "not transferable" clause; customers may make a written request for cheques without this clause, but have to pay a stamp duty of €1.50 for each cheque, and tax authorities may ask banks and Poste Italiane to communicate their names.

Finally, the AML Law stipulates that bearer bank or postal deposit books may not have a balance of €1,000 or more. Bearer bank or postal

deposit books with a balance of € 1,000 or more in existence on 31 March 2012 must be closed by the bearer, or their balance reduced to below said amount. If the bearer bank or postal deposit books are transferred, the transferor must, within 30 days, communicate the identifying particulars of the transferee and the date of the transfer to the bank or Poste Italiane S.p.A.

It must be recalled that the limitations on the use of cash set by AML Law are the centrepiece of other public policies adopted in Italy to promote the use of more traceable means of payment. This is the case, for example, for the provisions contained in Law Decree no. 201/2011 (the "Save Italy" decree)[28] which require that all payments made by public services should be made using wire transfers or other electronic means that allow traceability; cash payments are still possible only for amounts below the threshold of €1,000.

5.10 The sanction regime

Violations of AML/CFT obligations set by Legislative Decree no. 231/2007 are considered under a twofold sanction perspective: criminal and administrative.

Pursuant to Art. 55 of AML Law, failures to comply with certain CDD (identification of customer and beneficial owner, information on the purpose and the nature of relationship or transaction) and record-keeping (failed or late recording of data in the appropriate timeline) provisions are punished with imprisonment and/or a fine.[29] Terms of punishment are doubled if violations are conducted using fraudulent means such as obstructing the identification of the person who carried out the transaction. A criminal sanction is also provided for members of corporate control bodies who fail to report to supervisory authorities violations detected in the exercise of their duties.[30]

Other criminal offences are related to tipping-off (i.e., disclosure of the STR being filed or any other matter which might prejudice the investigation to the suspect of the investigation)[31] and to credit card frauds.[32]

From the administrative point of view, Art. 56 of AML Law allows the Supervisory Authorities to impose pecuniary sanctions between €10,000 and €200,000 whenever they detect violations of obligations set in their implementing regulations. In the case of loan brokers and financial agents, the self-regulatory organization Organismo degli Agenti e dei Mediatori may also activate the procedure for deletion from the register for serious infringements of the obligations imposed by Legislative Decree no. 231/2007.

In these instances, AML Law provides that administrative sanctions are generally administered by the Bank of Italy except in the case of insurance companies and agents, audit companies, tax collection companies and trust companies for whom the competence for imposing administrative sanctions goes to Ivass, Consob, the Ministry of Economy and Finance and the Ministry of Economic Development respectively.

Of course, these sanctions are without prejudice to the measures that Supervisory Authorities may decide to adopt if the violations referred to in Art. 56 put the sound and prudent management of the intermediary at stake. Therefore, pursuant to their prudential powers, Supervisory Authorities may request corrective measures and monitor their implementation; they may prohibit intermediaries from carrying out new transactions or close a branch. In the most serious cases, Supervisory Authorities may also consider activating the special administration or the compulsory liquidation procedures provided for by sectoral legislation.

Art. 57 of AML Law notably entrusts the Ministry of Economy and Finance with the power to impose administrative sanctions for failure to report to the UIF suspicious transactions with a fine of from 1 to 40 per cent of the amount of the non-reported transaction and for failure to create the single electronic archive with a fine of €50,000 to €500,000. Other major violations considered in this article are related to failures to comply with the suspension measures decided by the UIF (fine €5,000 to €200,000), with the prohibitions on relationships with shell banks (fine €10,000 to €200,000) or with the high-risk countries indicated by the Ministry of the Economy and Finance itself (fine €5,000 to €250,000).

Finally, Art. 58 of AML Law entrusts the Ministry of the Economy and Finance with the power to impose pecuniary administrative sanctions for failure to comply with the limitations to the use of cash. In particular, it stipulates a fine of from 1 to 40 per cent of the amount transferred, with a minimum of €3,000, in the case of violation of the prohibition of cash transaction. Violations of the limits on bearer bank or postal deposit books balance are punished with a fine of from 30 to 40 per cent of the balance.

Financial institutions are obliged to report breaches in the limitations on the use of cash to the Ministry of the Economy and Finance; failure to comply with this requirement implies a fine of from 3 to 30 per cent of the transaction amount, passbook balance or account balance.

5.11 Counter-terrorism financing

The financing of terrorist activity has been a criminal offence since 2001 (Art. 270-*bis* of the Penal Code), with prison terms from 7 to 15 years.

Financial institutions are also obliged to apply CDD requirements to detect possible terrorism financing activities and are required to report suspicious activities related to terrorism financing. In this last respect, the document on red-flag indicators for the financial sector issued by the Bank of Italy in 2010 contains a section dedicated to terrorism financing, describing tailor-made anomalies such as transactions with geographical areas considered to involve a high risk of terrorism financing or with countries subject to international economic sanctions as well as transactions implying abuse of non-profit organizations for the purpose of terrorism financing.

Furthermore, Legislative Decree no. 109/2007 requires financial intermediaries to automatically freeze financial and economic assets linked to terrorists designated by the EU. This implies periodic screening activities on existing customers and on new clients. To facilitate the detection of terrorists, the UIF publishes the EU, UN and US Government lists of terrorist groups and individuals for the benefit of financial institutions. Obliged entities should also communicate the freezing measures applied to the UIF and also to the Special Foreign Exchange Unit of the Finance Police when economic resources are concerned.

At the end of 2013, Italy has frozen assets amounting to €35 million and USD 3.6 billion, belonging to 70 persons and entities designated by the UN Security Council and the EU.[33]

5.12 Counter proliferation finance

The proliferation of weapons of mass destruction relates to activities tied to the conception and realization of programmes aimed at developing war weapons of a nuclear, chemical and biological nature. These programmes, carried out outside the scope and limits of the international agreements in force, constitute a serious threat to international peace and security, as confirmed by the UN Security Council Resolution 1540 (2004) that imposes an obligation on Member States to adopt specific financial measures to counter the proliferation of weapons of mass destruction, and highlights the risk that this phenomenon could encourage the purchase of war materials by terrorists.

The UN and the European Union consider the financing of these proliferation programmes to be illegal and equal to the actual proliferation itself, and have issued prohibitions on financial assistance and support to parties involved in these programmes. Security Council Resolution 1673 (2006) reaffirmed these obligations and underlined the need that all jurisdictions adopt appropriate measures to tackle the problem.

Additional and specific measures to prevent and combat proliferation were adopted by the Security Council against the People's Republic of Korea (Resolutions 1695 (2006); 1718 (2006)) and Iran (Resolutions 1737 (2006); 1747 (2007); 1803 (2008); 1929 (2010)).

The European Union and its Member States, in the context of the EU Strategy against the proliferation of weapons of mass destruction, adopted by the European Council in December 2003 and re-examined in December 2008, support the international community's initiatives to prevent and counter this phenomenon. Within this framework, specific measures were issued which were aimed at implementing the measures adopted by the UN (see Common Positions 2007/140/CFSP and 2008/652/CFSP, and Council Regulations 329/2007, 423/2007 and 267/2012).

In May 2009, the Bank of Italy issued operational guidance in order to provide Italian intermediaries with guidelines on the conduct to follow and the controls to carry out in relationships and transactions undertaken with counterparties involved, directly or indirectly, in programmes to develop weapons of mass destruction.[34] Specifically, intermediaries must use the information obtained during the CDD process concerning their customers and the transactions they carried out in order to evaluate if the relationship and transactions (including corresponding accounts as well as business relations such as joint ventures, loans in pool, etc.) regard, directly or indirectly, persons or entities involved in programmes to develop weapons of mass destruction.

Intermediaries must also adopt monitoring procedures able to detect if the identification information acquired during ordinary CDD matches that contained on the list of persons and entities sanctioned under the EU legislation in force or identified in a decree issued by the Ministry of Economy and Finance together with the Ministry of Foreign Affairs, upon proposal by the FSC, in accordance with Legislative Decree no. 109/2007. This is in order to apply measures to freeze assets and business activities.

When there are transactions and relationships that have a high risk of involvement in proliferation activities, intermediaries must adopt enhanced control measures aimed at carefully monitoring the evolution of the relationship.

In cases of correspondent relations, Italian intermediaries, pursuant to enhanced CDD measures provided for in Legislative Decree no. 231/2007, must verify the regularity of their relationships with parties that have a high level of risk for proliferation, also based on specific red-flag indicators (anomalies concerning the counterparty, the transaction's features, the geographical area of activities, etc.).

When intermediaries, in the context of the CDD procedure, are unable to adopt enhanced control measures, they cannot start business relations nor carry out the transaction nor put an end to the relationship, but must assess whether to report it to the FIU in accordance with Art. 41 of Legislative Decree no. 231/2007.

Intermediaries must notify the FIU within 30 days from the date of the coming into force of relevant EU regulations of the freezing measures adopted on funds and economic resources, indicating the parties involved as well as the amount of capital and available funds frozen.

5.13 The Italian system in perspective

With the enactment of the AML Law in 2007, Italy not only addressed the deficiencies identified by FATF but provided the country with a new institutional setting that boosted its defences against money laundering and terrorism financing. The new toolkit allows Italy to ensure proper vigilance and to stand as a model for other countries.

The introduction of the risk-based approach has been a major turning point for the Italian financial system. The new regime spurs intermediaries and designated professions to abandon a bureaucratic attitude in favour of an approach where they have to identify, assess and understand the ML/TF risks to which they are exposed and take AML/CFT measures commensurate to those risks in order to mitigate them effectively. This allows intermediaries and designated professions to be more flexible and proactive; the whole system gains in effectiveness.

Yet the continuous evolution of criminal activity with new techniques and technology means that authorities must constantly work to capture criminal innovation, and this makes it necessary to review and strengthen the legislative framework periodically. In this perspective, the AML Law will undergo a major revision as soon as the fourth EU directive comes into force.[35]

The proposal tabled by the European Commission is principally aimed at giving effect to changes to the international standards on AML/CFT maintained by FATF. However, there are some areas in which it has gone further to seek to strengthen international co-operation and harmonize the approach to AML compliance across Europe. In particular, the new text will increase the emphasis on the risk-based approach, and moves away from the current system of exemptions from CDD requirements based on third country equivalence. Each Member State will be required to carry out a risk assessment at national level and make the findings available to regulated firms to help them conduct their risk assessments.

The proposal also aims to increase transparency by requiring companies and trusts to hold information on their beneficial ownership, and to make this information available to supervisors and parties conducting due diligence on them. A more comprehensive and dissuasive sanction toolkit is foreseen as well.

These changes will further strengthen the Italian AML/CFT system by putting in place a framework which focuses on greater effectiveness and improved transparency in order to make it harder for criminals to abuse the financial system.

Notes

1. Banca d'Italia – Banking and Financial Supervision Department. The views expressed in this article are those of the author and do not necessarily represent those of the Banca d'Italia.For a historical description of the different phases of the Italian AML/CFT legislation see R. Razzante & I. Borrello, *La normativa antiriciclaggio in Italia: genesi e sviluppi*, in R. Razzante (ed.), *Il riciclaggio come fenomeno transnazionale: normative a confronto* (2014) Milano Giuffrè ed., 179–238.
2. Some macro-economic estimates indicate that between 1981 and 2001 money laundering in Italy reached 12 per cent of GDP. See P. Pinotti, *The Economic Costs of Organized Crime: Evidence from Southern Italy* (2012), Banca d'Italia, Temi di Discussione, no. 868.
3. A.M. Carriero, *La prevenzione e il contrasto del riciclaggio*, in E. Galanti (ed.), *Diritto delle banche e degli intermediari finanziari* (2008) Padova CEDAM ed., 1272.
4. Council Directive 91/308/EEC of 10 June 1991, European Parliament and Council Directive 2001/97/EC of 4 December 2001, European Parliament and Council Directive 2005/60/EU of 26 October 2005.
5. See European Commission, *Proposal for a Directive of the European Parliament and of the Council on the Prevention of the Use of the Financial System for the Purpose of Money Laundering and Terrorist Financing* (2013), Bruxelles. For a general description of the proposal see L. Starola, *La proposta di IV direttiva antiriciclaggio: novità e conferme*, in Corriere tributario 15/2013.
6. IMF, *Financial System Abuse, Financial Crime and Money Laundering* (2001), Washington, DC, pp. 7–8.
7. UNODC, *Money Laundering and Globalization* (2012), available at the following http address: http://www.unodc.org/unodc/en/money-laundering/globalization.html. Some analyses have also tried to estimate money laundering at national level: for example, a recent study argues that money laundering accounts for 19 per cent of GDP in the EU-15 and for 13 per cent in the United States, see M. Bagella, F. Busato, A. Argentiero, *Money Laundering in a Microfounded Dynamic Model Simulation for the US and the EU 15 Economies* (2009), in Review of Law and Economics, 5(2), 879–902.
8. BCBS, *Sound Management of Risks Related to Money Laundering and Financing of Terrorism* (2014), Basel.

9. This body was established under Law 431 of 2001, in the wake of the 9/11 terrorist attack.
10. See Banca d'Italia, *Provvedimento recante disposizioni attuative in materia di organizzazione, procedure e controlli interni volti a prevenire l'utilizzo degli intermediari e degli altri soggetti che svolgono attività finanziaria a fini di riciclaggio e di finanziamento del terrorismo, ai sensi dell'articolo 7, comma 2, del Decreto Legislativo 21 novembre 2007, n. 231* (2011); Banca d'Italia, *Provvedimento in materia di adeguata verifica della clientela, ai sensi dell'articolo 7, comma 2, del Decreto Legislativo 21 novembre 2007, n. 231* (2013a); Consob, *Disposizioni attuative in materia di adeguata verifica della clientela da parte dei promotori finanziari, ai sensi dell'art. 7, comma 2, del Decreto Legislativo 21 novembre 2007, n. 231 e successive modifiche* (2013); Consob, *Provvedimento recante disposizioni attuative in materia di adeguata verifica della clientela da parte dei revisori legali e delle società di revisione con incarichi di revisione su enti di interesse pubblico, ai sensi dell'articolo 7, comma 2, del Decreto Legislativo 21 novembre 2007, n. 231* (2014); Ivass, *Regolamento n. 41 del 15 maggio 2012 concernente disposizioni attuative in materia di organizzazione, procedure e controlli interni volti a prevenire l'utilizzo delle imprese di assicurazione e degli intermediari assicurativi a fini di riciclaggio e di finanziamento del terrorismo, ai sensi dell'articolo 7, comma 2, del decreto legislativo 21 novembre 2007, n. 231* (2012); Ivass, *Regolamento n. 5 del 21 luglio 2014 concernente disposizioni attuative circa le modalità di adempimento degli obblighi di adeguata verifica della clientela e di registrazione da parte delle imprese di assicurazione e degli intermediari assicurativi, ai sensi dell'articolo 7, comma 2, del decreto legislativo 21 novembre 2007, n. 231* (2014).
11. The Single Supervisory Mechanism of the Banking Union does not change the competence of the Bank of Italy in the anti-money laundering area. Recital (28) of Council Regulation no. 1024/2013 states that the prevention of the use of the financial system for the purpose of money laundering and terrorist financing remains in the domain of national authorities. The ECB will cooperate, as appropriate, with the national authorities to ensure a high level of protection against money laundering. See C. Barbagallo, *Il rapporto tra BCE e autorità nazionali nell'esercizio della vigilanza* (2014), Università LUISS Guido Carli, Roma.
12. Banca d'Italia, *Provvedimento recante disposizioni attuative per la tenuta dell'archivio unico informatico e per le modalità semplificate di registrazione di cui all'articolo 37, commi 7 e 8, del Decreto Legislativo 21 novembre 2007, n. 231* (2013b).
13. See Banca d'Italia (2011) e Banca d'Italia (2013a, 2013b).
14. Legislative Decree no. 231/2007 also applies to certain categories of professionals (DNFBPs) that fall outside the financial sector and the competence of financial supervisory authorities (see Arts 12, 13 and 14).
15. See on the point G. Castaldi & G. Conforti (eds), *Manuale Antiriciclaggio* (2013) Bancaria ed.
16. Legislative Decree 231/2007 recalls that a split transaction is a "single transaction from the economic standpoint whose value is equal to or higher than the limits established by this decree that is carried out by way of more than one transaction, each with a value lower than such limits, effected at different moments and within a fixed lapse of time set at seven days, without

prejudice to the existence of a split transaction when there are elements for considering it to be such" (Art. 1, para. 2, lett. M).

17. In line with EU legislation, Legislative Decree 231/2007 has an annex with technical criteria that identify the beneficial owner. In particular, in the case of companies the beneficial owner is the natural person or persons who ultimately own or control a legal entity through direct or indirect ownership or control over a sufficient percentage of the capital stock or voting rights in that legal entity, including through bearer share holdings, provided that it is not a company listed on a regulated market; a percentage of 25 per cent plus one share shall be deemed sufficient to meet this criterion. If this criterion is not met, the beneficial owner is the natural person or persons who otherwise exercise control over the management of a legal entity. Similar criteria are also listed for other legal entities and arrangements, such as foundations and legal trusts.
18. MEF, *Articolo 23 del decreto legislativo 21 novembre 2007, n. 231, come modificato dal decreto legislativo 19 settembre 2012, n. 169* (2013).
19. R. Cercone, *L'adeguata verifica della clientela nel settore bancario e finanziario*, in G. Castaldi & G. Conforti (eds), *Manuale Antiriciclaggio* (no. 15 above), 147.
20. Equivalent non-EU countries are listed in a decree issued by the Ministry of the Economy and Finance, following an intergovernmental agreement made at EU level (so-called white list). The current list is contained in the Ministerial Decree of 1 February 2013 published on the O.J. no. 37 of 13 February 2013.
21. The AML Law (Art. 36.6) also specifies that "data and information recorded pursuant to this chapter may be used for tax purposes in accordance with the provisions in force". In this respect, the *Guardia di Finanza* makes large use of the data stored in AUI to combat tax evasion and other fiscal crime investigations.
22. The 2009 Instructions were revised in 2013 in conjunction with the publication of the CDD Instructions. The revised measures came into force on 1 January 2014.
23. The Bank of Italy, acting on an FIU proposal, issued red-flag indicators for financial intermediaries in August 2010. See Banca d'Italia, *Provvedimento recante indicatori di anomalia per gli intermediari* (2010).
24. The procedure to file STRs is built around an internet-based system called INFOSTAT-UIF. For further reading see UIF, *Istruzioni sui dati e le informazioni da inserire nelle segnalazioni di operazioni sospette* (2011).
25. See, for example, the $1.9 billion agreement reached between HSBC and US Authorities in 2013 to resolve charges of enabling Latin American drug cartels to launder billions of dollars (http://www.bloomberg.com/news/2013–07–02/hsbc-judge-approves-1–9b-drug-money-laundering-accord.html).
26. European Central Bank, *The Social and Private Costs of Retail Payment Instruments: A European Perspective* (2012), Occasional Paper no. 137, Frankfurt Am-Main.
27. The original threshold of €5,000 was initially increased to €12,500 (Law Decree 112/2008) and later re-established at €5,000 (Law Decree 78/2010), then reduced to €2,500 (Law Decree 138/2011). The current threshold of €1,000 was set by Law Decree 201/2011.
28. Approved in Law no. 214 of 22 December 2011.

29. Failure to identify customer and beneficial owner is punished with a fine between €2,600 and €13,000; failure to identify the individual on whose behalf a transaction is carried out is punished with imprisonment from six months to one year and a fine between €500 and €5,000; failure to provide information on the purpose and the nature of relationship or transaction is punished with imprisonment from six months to three years and a fine between €5,000 and €50,000; failure to record data or late or incomplete recording is punished with a fine of €2,600 to €13,000.
30. This crime is punished with imprisonment up to one year and a fine between €100 and €1,000.
31. This crime is punished with imprisonment from six months to one year or a fine between €5,000 and €50,000.
32. This crime is punished with imprisonment from one to five years and a fine between €310 and €1,550.
33. UIF, *Relazione annuale* (2014), p. 63.
34. Banca d'Italia, *Indicazioni operative per l'esercizio di controlli rafforzati contro il finanziamento dei programmi di sviluppo di armi di distruzione di massa* (2009).
35. See note no. 5. The EU Council and the European Parliament agreed on a common text on the fourth AML Directive on 17 December 2014 together with the new Fund Transfer Regulation (see http://italia2014.eu/en/news/post/dicembre/money-laundering/).

Part II

Supervisory Authorities

6
The Interministerial Committee for Credit and Savings (ICCS) and the Ministry for the Economy and Finance (20 Years after the Consolidated Law on Banking)

Sandro Amorosino

6.1 The configuration of the Interministerial Committee for Credit and Savings (ICCS) in the Consolidated Law on Banking

Art. 1, para. 1, letter a, of the Consolidated Law on Banking (CLB) describes the ICCS, the Ministry of Economy and Finance and the Bank of Italy as the credit authorities.

The noun "Authorities", referring to public administration, requires the allocation of power (*auctoritas*)[1] to a certain subject or field; in the case of CLB this is the credit sector. In fact the word "credit" is an understatement and it is a thing of the past because now the Authorities take care of all banking activities, in particular the ICCS but also more generally the collection of savings (Art. 11 CLB).[2]

The credit authorities are the top bodies of Italian legal banking system: the CLB dedicating their Title I (Arts 2–9).

The expression "top bodies" is a summary because it includes public organizations with different legal natures that had a wide range of functions in 1993, when the CLB was adopted.

The ICCS and the Ministry of Economy are organs of Italian Government in the normative model of the CLB. Both of them carry out administrative functions of policy, and the Ministry carries out direct administrative management.

At the time the CLB was issued, the Bank of Italy was definitely the top administrative body in the Italian legal credit system,[3] in its supervisory role having both regulatory powers and direct administrative powers.

At the same time, the full allocation (since 1981) of the "currency government", the strong concentration of informal governance power over the banking sector, the full autonomy of its operations and the approach, after the Maastricht Treaty, towards the European Monetary Union and the European System of Central Banks, were setting up the Bank of Italy more and more as an administrative authority independent of Government.

Given this evolution, the editors of the CLB did not "pour" in the same CLB the provisions of d.l.C.p.S. no. 691 of 1947 that constituted a directive power, and therefore a superordination, of the ICCS against the Bank of Italy, but were believed to retain some powers by the Minister, both regulatory and administrative, in their specific powers of sanction (see below).

The fact is that the substantial evolution of reciprocal roles has fed back – in the practices and behaviours of Government – on the balance of the real relations between the three Authorities outlined in the abstract in the normative model of the CLB.

And, in fact, already in the first commentary on the CLB[4] it was authoritatively claimed[5] that the ICCS was a remnant of a past State interventionist stance in which the allocation to the Government of a political function on credit market was conceivable, namely the definition of the credit policy (such as for an insurance policy), which was incompatible with a system of open and competitive European-style regulated market.

It must be said, however, that Art. 2, para. 1 of CLB assigns to the ICCS "the high supervision of credit and savings protection", but not the definition of credit policy.

Hence the contradiction between the political connotations of the ICCS – as a committee of ministers – (and the same minister, then, of the Treasury) and the functions actually (objectively) allocated to him, given that supervision is definitely an administrative function; more precisely, one of high administration.[6]

It also explains the dialectical contradiction between those who supported the political nature of the functions of the ICCS[7] and those who[8] supported their administrative nature.

Consistent with the assertion of the political nature of the ICCS was, then, the denial of the nature of independent administrative authority of the Bank of Italy, which at that time remained, it was argued,[9] "still

tied, at least formally, to a political organ, such as supervisory board of the credit market and the economy".

The divergence of views is explained in part by the contradiction within the CLB – apparently unnoticed at the time –having taken the ICCS from d.l.C.p.S. no. 691 of 1947 to Art. 2 of the CLB, while – after just a short time – CLB Art. 6 had announced the principle of the conformation of the credit authorities with European Community legislation: regulations, directives and decisions by the European Commission and the European Court of Justice.

In other words, no consideration was given to the immanence and the strong, progressive pervasiveness[10] of European Community law relating to banking, its guidelines inspiring the principles of the Single Market regulated on the basis of the principles of competition in which firms operate rather than on the basis of State intervention.

On the other hand, the contradiction is the result of the positivist–normativist methodological view[11] still firmly established in legal academic study, focused on the legal form of the law, leaving aside the practices, behaviours, interpretations consolidated (and the real balance of power between the current public organizational structures); focused, that is, on the *written rules*, ignoring the *real rules*, the living law.

And it is precisely in the light of the living law, formulated over the last 20 years, that the provisions of Art. 2 CLB, which governs the ICCS, must be reread.

In this perspective some irrefutable facts emerge clearly:

1) Supervision has resulted in infrequent deliberations by the ICCS, essentially bearing the regulation of specific activities or objects, therefore taking the shape of administrative policy on specific points.
2) The text of the resolutions was constantly being drawn up and proposed by the Bank of Italy and then fully implemented by the Committee; the only procedural anomaly, with respect to the requirements of Law no. 262 of 2005 on the protection of savings is the lack of prior market consultation; the Bank of Italy proposes a pre-emptive remedy for this anomaly, by focusing on the regulatory proposals it intends to bring to the ICCS.
3) Resolutions have often made direct transpositions, without any legislative mediation, in the self-executing European Community directives.
4) Prediction (CLB Art. 9) of the faculty of the ICCS complaint against measures by the Bank of Italy, qualifying as a kind of improper hierarchical appeal,[12] has fallen almost entirely into disuse because, as has been pointed out, there has been just one case in over 20 years.

In short, the 20 years after the CLB evidenced a progressive weakening of the ICCS in the face of changes in the scenario that saw on the one hand the consolidation of the configuration of the Bank of Italy as an authority independent of Government, guaranteed by the European treaties as constitutional value, but also by the material "economic Constitution";[13] and on the other hand, in more general terms, the Europeanization of the political stance and the regulatory and supervisory public activities on banking.

6.2 Strangeness of the ICCS to the new European banking legislative system and its marginalization in the national administrative reality

Both of the aforementioned profiles lead to the European institutions.

"Twenty years after" the CLB (to borrow the title of the novel by A. Dumas[14] in which the Three Musketeers find themselves overwhelmed by the history of France) the scenery, both institutional and regulatory, has changed radically.

The monetary policy of the Euro countries has been placed in the hands of the ECB; not only that, but the credit policy is the prerogative widely practised by the ECB; the regulation and supervision of the banking sector is now – via a very complex mechanism – up to agencies and organizations in Europe.[15]

For present purposes – schematizing at best – the institutional scenario and the regulatory framework is subverted.

Of the three CLB credit authorities, only the Bank of Italy, as part of the ESCB and an independent national authority, has retained an important role (albeit with the subtraction of competence in the field of banking supervision).

The most important consequences of the new European institutional system, with regard to the ICCS and the Ministry of Economy, are threefold:

1) The consolidated European standardization in banking, that by the 1990s had led Professor Predieri to qualify national standards as "subprimaria" (since legislative policy was formulated by the EU).
2) A complex of European Authorities was added to manage the most important parts of the banking sector.
3) Some of these Authorities have adopted implementing regulations which have gradually decreased the residual regulatory space left for national authorities.[16]

From the brief summary above, the changed European scenario impinges on the CLB, in practice leaving only the Bank of Italy in place, by virtue of its legitimacy in Europe. The role of the Minister of Economy will be outlined in Section 6.3. Regarding the ICCS, it has been shown[17] that such a body is now completely marginalized, having become more a sort of *reliquato*, a foreign body, than the new European mechanism of supervision.

Administrative practice confirms the findings made in the light of the new European regulatory system. It was found[18] that during the years of the financial crisis – when a role of coordination between political and technical was postulated for it – the ICCS, which could well have invited the presidents of the other Italian financial supervision Authorities, in fact met only a few times, having been *de facto* replaced by the Committee for the safeguarding of financial stability (see Section 6.4).

After all, it seems to be a secondary issue if there will in practice be a repeal of the provisions of the CLB relating to the ICCS or if, conversely, the less "energizing" of the proposals or questions on which ICCS should decide will be left out (renewing the *escamotage* used – as stated by Professor Crisafulli – at the end of the 50s, against the former High Court for the Sicilian Region, once the new Italian Constitutional Court had been established, which must obviously be the sole body of constitutional justice in the Italian Republic).

6.3 Content and limitations of the existing powers of the Minister of Economy as Credit Authority

CLB Art. 3 gives both the Minister of Economy and the Minister of Finance their own powers – widespread according to the terminology of the Act – powers of subrogation of the ICCS, in its functions, in case of urgency: in this case the Committee must be notified, but ratification need not be obtained at the first meeting of the Board.

This does not seem to prove recent cases of exercise of this substitutive power, especially because of the configuration – in the administration action – of the ICCS as a policy regulatory body, where there is generally no need of emergency measures.

With regard to its functions, they are specific skills, related to heterogeneous matters. Among others: the determination by regulation, after consulting the Bank of Italy, of the requirements of banks' shareholders;[19] extraordinary administration proceedings and compulsory liquidation of banks (at the proposal of the Bank of Italy); the regulation of the activity of micro-credit; the criteria for entry in the relevant register

pursuant to Art. 106 CLB and the appointment of members of the body which holds the list; the regulation of the activity of payment services; the determination, after taking the viewpoints of Consob and Bank of Italy into account, of the rules of transparency and fairness with regard to government bonds.

Is it possible to identify a common thread linking all these attributions? The answer is obvious.

The lowest common denominator of the regulatory requirements of the shareholders and representatives of banks and the decision to have the extraordinary administration or compulsory liquidation can be found in the fact that there are administrative measures – the first, general, with a prescriptive content; the second, singular – that affect, limit or exclude individual and company subjective rights. The authors of the CLB therefore believed that the Minister, the centre of attribution of political responsibility, should adopt them.

It is a concept that now seems formalistic and now incongruous because it is halved. Formalistic, not to say a façade, because both in terms of requirements and in terms of crisis management the role of the Bank of Italy is immanent, on a substantive standpoint, which in the first case contributes substantially to the drafting of the regulations and in the second case is also formally decisive, as the ministerial procedure of crisis management has an unfailing regard for the proposals of the Bank of Italy (and its proposals are almost always adopted, even in the motivations, by the ministerial decision). "Halved", because the Law on the protection of savings (no. 262 of 2005) has of course removed the function of the imposition of administrative sanctions from the Minister and given it to the Bank of Italy.

This has of course opened up the diverse, delicate issue of the violation of the principle of rule of law in the separation of powers, for the concentration in a single administrative body of the function of inquiry (investigation of the offence) and of the function of deciding whether to impose sanctions (see, in this regard, ECHR Judgment of 4 March 2014 – 19640/2010, Grande Stevens and other v. Italy).

It has also opened up the further problem of the required amendment of the Regulations of Supervisors, concerning the regulation of penalty proceedings, in order to guarantee the right to be heard fully and equally (see Council of State, Sec. VI, order no. 04491/2014).

Staying with the role of the Minister, it seems incongruous that the sanctioning authority has been removed but has retained regulatory powers (relating to requirements) and administrative powers (in

the field of crisis management), which affects individual rights in an entirely equivalent manner.

Outside the plexus of the most important functions, now called, the other remaining competency of the Ministry in the field of banking and financial instruments is on the one hand fully justified: in the field of securities, payment services, access by foreign entities to pursue the activities referred to in Art. 106 CLB and on the rules on transparency of operations. In all these cases there may also be some relevance of political choices. On the other hand, competencies are understandable, since they concern matters such as micro-credit and the credit guarantees for small businesses, which relate to large audiences, with which the Government wants to keep in touch.

6.4 The unavoidable need for collaboration between the Government sphere and the Financial Supervisory Authorities

The progressive marginalization of the ICCS has not eliminated, but has on the contrary highlighted the need to introduce some collaboration relating to the incandescent matter of the financial markets, without prejudice to the respective spheres of competence, between the Minister of Economy and Financial Supervisory Authorities.

As, indeed, happens in all financially advanced countries.

The proof is that in May 2005 (not *suspecto tempore*, therefore, with respect to the financial crisis), the European Union signed a "Memorandum of Understanding on cooperation between the Banking Supervisors, Central Banks and Finance Ministries of the European Union in Financial Crisis situations" to ensure the necessary coordination, at both national and supranational level, between the Supervisory Authorities and the Finance Ministers.

The need is even greater, of course, in the time of financial crisis.

On 7 March 2008 the Ministry of Economy, the Governor of the Bank of Italy and the Chairmen of the Consob and Isvap signed a Memorandum of Understanding for cooperation in the field of financial stability that provides for "the exchange between authorities information and assessments to safeguard the stability of the Italian financial system, the prevention and management of financial crises with the potential effects of a systemic nature".

The protocol provides the establishment of the Committee for the Safeguarding of Financial Stability, chaired by the Minister of Economy

and consisting of the Governor of the Bank of Italy and of the Presidents of the Consob and Isvap (now Ivass).

It is a “light” structure, in which the presence of the Minister of Economy, alongside the leaders of the independent technical authorities, shows that the function of financial market stability is at the same time inseparably political and technical, as it is on a ridge that has, so to speak, fallout on both sides: one of the measures to be taken by the Government and Parliament and that of supervisory activities in the proper sense.[20]

In summary, it is a structure of technical cooperation policy, which denies the theories of strict separation between the two spheres, which does not exist anywhere in the world.

The Italian Committee for Financial Stability is the national-level interface of the policies formulated at the international level by the Financial Stability Board, and at the European level by competent institutions. In this regard, the Committee should coordinate the reception in different, and complementary, national regulations of the international policies (formulated, e.g., by the Basel Committee) and of the European regulations.

In strictly legal terms, the Committee (CSSF) arises from an administrative agreement of collaboration – according to Art. 15 of Law no. 241 of 1990[21] – which has been implemented at the organizational level in the establishment of a body of permanent cooperation.

The legal basis of the agreement in turn resides, on the one hand, in the principle of cooperation among all the Financial Supervisory Authorities and the Minister of Industry, as set out in the CLB, in Consolidated Law on Finance and in Private Insurance Code, and more generally in the principle of administrative cooperation which underlies Art. 15 of Law no. 241 of 1990.

In practice, as has been mentioned, the CSSF has taken over the ICCS for all matters relating to financial macro-stability, despite having no specific legislative legitimacy.

Various issues have been raised about the *nature*, *functions* and *procedures* of the Committee. As regards its nature, it is clear that the ICCS is not a political body, as it was in the original regulatory model. The determination of national policy in the field of financial markets (in the broad sense) is not up to the ICCS, for the reason that the policy has now been subsumed in the headquarters of the EU. Instead, the ICCS has a technical-political characterization, since its activity is directed primarily to exchange of information, assessments and forecasts as a qualified source of both political (including for the participation of Minister to ECOFIN),

and technique, because of the powers of the three Financial Supervisory Authorities, as well as their participation in the various European agencies in the sector (and the Bank of Italy also to ESCB).

The ICCS is, therefore, the place of institutionalized pooling of information and forecasts for all matters relating to the financial macro-systemic market scenarios, for the development of common assessments.

It is also the seat of coordination with regard to the implementation of guidelines and perceptive acts, of various kinds, from the international and European organizations.

The Committee may express common assessments (*consensus*) and technical policies, formal or informal (and therefore can remain confidential), to which all its members are required to implement coordinated, *mutatis mutandis*, in their respective spheres of competence.

It does not adopt administrative measures instead and therefore should not follow formalized processes, although reports of its meetings shall be drawn up.

Finally, it has been questioned[22] as to whether it is only a collaboration body or a coordination body.

The question is not an idle one as in Italian administrative law these notions are conceptually distinct.

Coordination is an organization formula[23] that modulates the relationship between subjective figures that are on an equal level (e.g., Bank of Italy and Consob) most of the time, depending on the definition of the design of the coordination, which is in essence a programme of coordinated actions. It may provide for the institutionalization of co-ordinating bodies, usually referred to as committees or commissions.

In a sense, *weak coordination* indicates the development of common guidelines whose implementation is essential to the convergence of the behaviours of the entities that coordinate.

Collaboration is instead a principle of administrative action, which is declined, in legal terms, in a general obligation of cooperation, but does not necessarily rise to a organized relationship.

Collaboration can take the form of agreements, understandings, agreements and operational programmes, becoming more and more compelling, graduating from mere political pacts, policy acts, complex programmes, and the organization of operational activity of common interest to agreements containing obligations.

There are, therefore, cases of coordination and cases of collaboration. Of course, all cases of coordination achieved require collaboration. Conversely, a partnership does not imply a relationship of co-ordination, nor is it necessarily inherent in it.

In the case of the CSSF you can configure both the collaboration and a weak form of coordination.

6.5 The inextinguishable immanence of political decision

The brief overview above would be incomplete if it were not for the fact that, especially with regard to national banking systems, the global financial crisis has favoured the arrival of State policy-makers, especially Governments, on the scene, through the adoption of both emergency regulations and administrative acts or negotiations (concerning, e.g., the acquisition of shareholdings in banks' capital or the issue of public guarantees for their debts).

Member States, in various forms and gradations, could not remain indifferent[24] to the crisis of the banks.

In the case of Italy, the Government – finding the overall resilience of the banking system (with one exception clearly established, due to the mismanagement of the bank) – has drawn up, two types of tools through emergency decrees: on the one hand (in Decree Law no. 155 of 2008, converted with amendments by Law no. 198 of 2008) the authorization of the Minister of Economy to subscribe for, and ensure, at market conditions, capital increases decided by Italian banks in a situation of capital inadequacy established by the Bank of Italy. In this case, the shares were to be shorn of the right to vote and redeemable by the issuer. The mechanism provided by Decree Law no. 155 of 2008 has raised many questions by interpretive scholars, but has remained completely unused.

On the other side, with Decree Law no. 185 of 2008, converted into Law no. 2 of 2009, Government provides for the possibility for the listed banks to issue securities convertible into equity and included in the calculation of regulatory capital, which the State could subscribe to market conditions (the Tremonti Bonds). The issuing bank, as well as committing to the repayment of principal and the payment of interest, shall enter into commitments for the amount and conditions of credit to provide for small and medium-sized enterprises.

Also the legislative framework and especially the regulations (ministerial) of the Tremonti Bonds has generated many discussions among scholars, out of all proportion compared to the use of the regulations by the Italian banking system.

Here we wish to point out the fact of systemic reaffirmation of the *primacy of political decision* for *crisis management*. Something that the lawyers more versed in systemic analyses do not get tired of remembering.[25]

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7
The Bank of Italy

Francesco Capriglione

7.1 The origins of the Bank of Italy and the historical economic context

The Bank of Italy was founded at the end of the nineteenth century (with Law no. 449 of 10 August 1893) in the context of a deep revision of the issuing banks existing at the time.[1] Its establishment took place following the merger by incorporation of the National Bank and the Tuscan Bank of Credit for Industry and Commerce into the National Bank of the Kingdom of Italy, and the establishment of three institutions (Bank of Napoli, Bank of Sicilia and Bank of Italy) with the power to coin money and marked a particularly important stage in the evolution of Italy.[2]

In order to frame the events represented, it is important to note that Italian political unity in the nineteenth century took place at a point when the country was at an economic level characterized by the absence of the industrialization process which had long been in place in some other European countries. In addition, it is worth noting that there was a lack of an advanced financial system able to support the development of an industrial base and overcome the significant delays which characterize its formation.[3] Therefore, there was a regulation focused on strictly monetary issues, with a lack of interest in the activities of banks which at the time were not subject to special rules.

More specifically, there was a trend of the regulator to contain monetary liquidity, in order to ensure stability of the system. This goal was achieved through significant periodical restrictions of money issuances in the market.[4] In particular, the adoption of legislative measures was common (significant in this regard was Law no. 1920 of 30 April 1874) which predetermined the scope of intervention by central banks

in order to prevent the expansion of circulation, considered a danger to be avoided in every manner.

With specific regard to the financial sector, it is important to note the influence of some ideological currents (of German origin) showing the role of financial capital in the organizational model of production.[5] According to such views, particular attention is paid to the need for a systematic construction based on the competition of all social classes as well as to the presence of the State in the conduct of economic processes.[6] It outlines the grounds of a theoretical construct (developed in the subsequent years in a changed sociopolitical horizon) in which the State plays a central role in the economy. In this perspective, the State is allowed to own companies, to grant financial support of economic initiatives and to enact rules governing particular sectors of activity.[7]

The enactment of the Law of the issuing banks (Testo Unico degli istituti di emissione, Law no. 204 of 29 April 1910) represented a significant step in this process. It determined indeed, at a regulatory level, the amount of money that the institutions at hand were allowed to issue, adding that rule to the repletion of their operations and the relationships between them and the political authorities. Law no. 204 submitted such institutions to government supervision, setting barriers to the expansion of circulation:[8] for the first time in Italian history prevented indiscriminate use of political power indebtedness at the issuing banks (setting the maximum limits within which it was allowed, as well as a precise repletion of the concessions of the ordinary advances to the State).[9]

In a nutshell, we identify the basis for a definition of the relationship between political authority and technique in the creation of the monetary base. In this context, it is important to highlight how the goal of economic stability should be pursued. The system recognizes the right of a subject to coin money, characterized by its technical value, whose specific feature is its independence from political power (required position of autonomy).[10]

7.2 Evolution of the regulatory framework

As has been authoritatively written, the evolutionary phases of the Bank of Italy are the same as the different stages of the transformation process of the Italian economy that went from a backward state to an advanced one.[11] The analysis of the different stages of this process allows us to capture the transition from a system of pluralism subjective issue to the unification of the function at a single institution.

Also significant is the gradual assignment to the Bank of Italy of specific powers of supervision over the banking sector: these powers were determined in accordance with the original form of the institution, thus affecting its formal legal qualification (which is inevitably drawn in a field of public law). On the substantive level, those functions confer on a specific position of centrality in the control of monetary stability.

Legislative measures adapted in 1926 and created to claim a monopoly of issuance, were followed by renewal of the monetary power to a single subject, and subsequently by the preparation of a complex system of protection of savings, which "allow you to overcome the problem related to operational coordination between the three banks of issue".[12] A solution is therefore adopted to connect to the phenomenon of credit-money, avoiding the division of power that had prevented the issuance of a complex regulatory framework governing the financial and banking sector. In sowing the seed of the discipline of banking supervision, the Legislator entrusted the Bank of Italy with a major role in the performance of functions in the public interest therein taken into account.

The definition of related tasks – and, therefore, in the same legal position of the institution – was then completed by the Banking Reform of 1936 (see R.d.l. no. 375 of 12 March 1936, as amended) with which it accentuated the importance of the public law put in place by the Bank of Italy.

The guiding principles of this reform are summarized in the allocation of legislative powers to specific authorities (political and technical) and in the prediction of appropriate forms of operational links between them (hence the convergence of the intervention of political direction, remitted to the Committee of Ministers, in the administrative activity, which is headed by the Inspectorate for the protection of savings and the provision of credit). It follows that even in the 1950s an important convention defined the administrative planning of the industry, referring to the possibility of translating the Directives of political authority in measures of secondary legislation (with general and *erga omnes* effects).[13] The Bank of Italy was an immediate participant in this mechanism of formation of the rules (designed to regulate all the members' financial arrangements); it was the Governor placed at the head of the Inspectorate, using the Directorate for Vigilance set up at the same central bank for the conduct of its business.[14]

After the war, the Italian legislature felt the need to explicitly put the position of the Supervisory Board of the Bank of Italy at a normative level. Hence the institutionalization (which took place with dlCpS no. 691 of 17 July 1947, which also replaced the Credit and Savings

Committee of Ministers) during the same period of the functions that the previous law of 1936 had formally assigned to the Inspectorate, a body of the State that has never worked independently, having been suppressed by dl lgt. no. 226 of 14 September 1944.[15]

During Italy's industrial reconstruction and the subsequent industrial and economic growth, the Bank of Italy favoured economic recovery not only through a careful action of liquidity control – which allows the scaling of the expansion of domestic demand and consequently an increase in productivity and employment – but also by giving technical advice to the Government on the most significant financial problems.[16] The close link between money and credit interacts positively on the effectiveness of the interventions of the Bank of Italy; it detects inertia at the top of the financial Italian system, especially with regard to the shortage and/or non-performance of the functions of the associated political (ICRC and the Ministry of Treasury), and calls for an intervention of substitution of the Bank of Italy, whose action appears in these cases needed for the continuity of the system itself[17] (opening up more and more frequent use of the monetary instrument, which becomes the predominant means of intervention in the address of the banking sector).[18]

During the last decades of the nineteenth century, the Bank of Italy was at the centre of a significant process changes involving bank intermediaries (Law no. 23 of 10 February 1981, which aimed to bring all the special credit institutions under the Banking Act, and Law no. 218 of 1990, reform of the public bank), driving the reorganization of the governance of bank corporations and privatization processes that had been one of the most important consequences of the affirmation of market principles in Italy. In a disciplinary context oriented to overcoming the mechanism of single authority of supervision (the Consob was established in 1974, Isvap in 1982 and the Antitrust Authority in 1990), it will cooperate in the process of transition from a managed system to a competitive environment, which had as its premise the assumption of organizational models consistent with the need for an expansion operation necessitated by new levels of competitiveness.[19]

Since its effectiveness in 1979, the European Monetary System (EMS), which seeks to create an area of monetary and exchange rate stability within the Community, the intensification of the process of economic integration (which finds its expression in approval of the Single Act, which was signed in 1986 and intended to fix the stages of the process of elimination of physical, technical and tax among the CEE countries) sees the Bank of Italy engaged in the role of promoting agent of change.

The Bank of Italy, through the review of the monetary aggregates, manages to increase the efficiency of markets and the reactivity of the rates of interest; it also introduces new procedures for clearing and settlement of transactions between banks, thus giving extra vitality to the interbank deposit market and the mobilization of required reserves.[20] The evolution of the institutional structure Europe after the Treaty of Maastricht in 1992 marked a turning point in the history of the Italian central bank.

As we will see later in this chapter, there is the prospect of a single monetary policy and exchange, first, a single mechanism of supervision, and then, reverting to the European context, the definition and choice of technical intervention. This causes multiple reflections on the role and functions now attributed to the Bank of Italy. Strong limitations on its agent are identified more clearly than in the past, as the agent is expected to lead (as the European legislation provides for the other central banks of the Eurozone) a collaborative and co-ordination with the ECB; this is, however, in the presence of a reality that, in view of the construction of a more cohesive organization, requires forms of harmonization that innovate deep in the existing structure.

7.3 Legal status, structure and functions of the Bank of Italy

Originally the Bank of Italy had a private structure because, despite being constituted within the law, it had taken the form of a public limited company with a registered capital of 300,300,000 shares of £1,000 each. This capital structure is geared towards its officers of private law, and will over the course of time result in interpretative uncertainties with regard to the legal nature of the Bank.[21]

A clarification regarding the definition of the problem in question is set partly in the provisions of Articles 20 and following of the Banking Act of 1936, in which, in the identification of the nature of Institute of Public Law, the Bank of Italy joins the specification of the subjective type of participants in its capital (Article 20), methods of reimbursement to the shareholders and subscription of new shares (Article 21). Also significant is the presence in the Institute of important functions (emission, treasury, banking supervision) that lead back to the essence of many public elements, justifying the title to the same given by the Italian legislature.

The structural changes that occurred in 1936 did not prevent some commentators from arguing that the Bank of Italy has a private nature[22]

or, at least, it should bring internal organization to the logical ordering typical of the corporation.[23] Oriented in this sense are the expected movement of shares and the granting to their holders of the right to a dividend, and the allocation of specific powers to the General Assembly of the participants and the presence of administrative bodies (Board of Governors) and control system (Board of Auditors) that refer to the corporate model. In this logic we find the account written by a member of the Bank of Italy, according to which the process of deprivatization, implemented at the time, "does not involve the legal form of the Institute".[24]

The Enterprise thesis was certainly superseded due to the institutional position of the central bank in the Italian legal system and the functions that it implements over time. In light of these factors it is possible to share the view that years ago, though it can be deduced from the same unequivocal configuration of a "public body definitely" entrusted with tasks of general interest (monetary stability, protection of savings, etc.), a qualification was recently reiterated in Article 19 of Law no. 262 of 2005, and in Article 1 of the Statute of the Bank of Italy (see the final version approved on 27 December 2013).

This public qualification did not involve at the time substantial innovations in the structure of the institution, which has always preserved its character of wide organizational autonomy, including financial and managerial. Indeed its structure, based on the criteria of functionality and efficiency (Article 2 Statute), is divided into a number of central bodies (Assembly of the Participants, Board of Directors, Statutory Auditors, Directory, Governor, Director General and two Deputy Directors-General) (Article 5 Statute) and in a complex of branches (Article 28 et seq Statute), headed by a Director (Article 32 and following Statute) that carries out its functions on the basis of regulations issued from the central Administration.

The assembly of the participants responsible for the matters specified in the Statute has no authority over those involving the exercise of public functions conferred by the Treaty, the Statute of the ESCB and of the ECB, the EU regulations and the law onto the Bank of Italy or the Governor in pursuit of institutional goals (Art. 6, para. 2, st.). The High Council, consisting of the Governor and 13 directors, is the body in general administration and management supervision of the Institute (Art. 19, para. 1, st.); whose responsibility is to establish internal Nomination Committee, whose task is to detect specific requirements of professionalism, integrity and independence in candidates in live for appointment or re-election (Art. 15, para. 5 of st.). It shall consider and approve the proposal of

the Executive Board, the draft budget and the allocation of net income (Art. 19, para. 3, letter A), together with other features including sensing the "opinion" regarding the appointment of the Governor (Art. 18, para. 1, st.), the appointment of the Director-General and the two Deputy Directors-General (on the proposal of the Governor) (Art. 18, para. 3, st.), as well as the approval of the annual budget and the determination of organic plant personnel (Art. 18, paras 3, letters b and 3e, st.).

The board of auditors shall act as a check on the Directors of the Bank for the observance of the law, the statutes and the General Regulation (Art. 20, para. 3, st.), and verify the proper keeping of accounts and the proper recording of accounting entries (Art. 20, para. 4, st.). The Directorate (composed of the Governor, the General Manager and two Deputy General Managers) has the power to take action (with external relevance) relating to the exercise of the functions in pursuit of institutional goals of the institution, in addition to other responsibilities arising from the participation of the Bank of Italy in ESCB (Art. 22, paras 3 and 4); it shall act by majority vote. The Governor shall convene the Executive Board and shall preside at meetings (the validity of which requires the presence of three members); in case of equality in the deliberations of the Executive, the Governor has the casting vote (Art. 23, paras 2 and 3). The Governor shall represent the Bank of Italy vis-à-vis third parties and has the powers reserved to the members of the decision-making bodies of the ECB under the Treaty and the Statute of the ESCB.

The current configuration of these bodies is profoundly innovative compared to that existing before Law no. 262 of 2005. In fact this legislative measure, recognizing the Directory skills mentioned above, has revolutionized the existing *potestative* scope the Governor. The latter ceases to be the *dominus* of a reality based on powers sometimes exercised in a manner which (even if they relate to current regulations) highlight their holder's confidence in the absoluteness of the same. In the new regulatory logic of the hierarchical structure of the Bank of Italy, a collegial body is now to be established at the pinnacle of the institute in substitution of the single judge who had characterized the structure.[25]

The adoption prescribed in the ruling in question, a policy of collegiality in the institution of measures – and, at the same time, the prediction of the obligation of the Executive to take majority decisions, without prejudice, in case of equality of votes, according to the desire expressed by the Governor – is indicative of a *legis voluntas* that intends to reform the existing legal reality, adapting to the dictates of an advanced democratic logic (which connects to the presence of "critical voices" to avoid dangerous distortions in the exercise of official duties).[26]

It can be said that there is an abatement of the process of "progressive concentration of the powers of the central bank of chief in the figure of the Governor",[27] a process which in the past had strongly influenced the position of the latter "beyond any pretence of conceptual separation between it and the body".[28] Indeed, at present the Governor – while denoting specific centrality in the definition of the roles and powers of the institution in question – certainly has lost his previous connotation of being a higher-level figure to the entire structure of the institution; that authority has, then, disposed of the role of primacy which was held in the past and its function is reconducted in areas that do not allow any possibility of encroachment. Added to this is the particular mode of appointment of the Governor (prepared with Decree of the President of the Republic according to the proposal of the Prime Minister, after deliberation by the Council of Ministers, after consultation with the Board of Governors of the Bank of Italy) and the clarification of the term of office (six years, renewable only once, in the face of interpretations that speculated the term "indefinite") that are clearly intended to reduce the role played by the same authoritative body in the past. As for an analysis of the functions of the Bank of Italy, it should be said immediately that they reflect the institutional role that is recognized by the regulation of the economy, in response to "the purposes of internal and external balance", as there was no way of observing a protagonist of the last century.[29]

Of course, the creation of the single currency and the adhesion of Italy within the EMU – as previously mentioned and will be discussed in more detail later – have greatly reduced the functions of the Bank of Italy. No longer does it have the power to coin money; the task of ensuring the financial stability of the country, a prerequisite for a sustainable development of the economic system, is now based on complex intervention (in respect of credit intermediaries) that it heads based on forecasts with applicable regulations of the industry. The activity of banking supervision is its action to ensure the "sound and prudent management" of belonging is for the financial[30] are flanked by them to promote the smooth functioning of the payment system (through the direct management of the main circuits and exercising powers of direction), the management of services on behalf of the State (tasks such as cash receipts and payments for public sector activities), and activities, all of which the institution pursues on the basis of accurate analysis and research in the economic, financial and legal fields.

From another perspective, Bank of Italy has been entrusted with tasks related to its membership of the Eurosystem as well as to its function of central banking, dealing with international relations (in coordination

with other authorities in different modes of control, participating in the cooperation in the seats at the European groups and multilateral organizations, and taking steps to technical assistance for emerging countries). Referring to the result of the discussion, that is, the consideration of the aspects related to the location within the monetary union, it should be pointed out here that the Bank of Italy – in order to implement the decisions taken at the European level in the national territory – puts in place various operations (with intermediaries, open market operations, foreign exchange, etc.) that contribute to the overall stability and efficiency of the Italian financial system.

7.4 Revaluation of its capital

Appearing worthy of special consideration, changes went to the institutional framework of the Bank of Italy by Law no. 5 of 2014 and the reform of its Statute approved by the Presidential Decree of 27 December 2013.

In order to bring clarity, removing an anachronistic situation still present in the shareholder system of the Bank of Italy, the regulator – with Decree Law no. 133 of 2013, converted into the above-mentioned Law no. 5 of 2014, which are found in the provisions authorizing the Bank of Italy to increase its capital through the use of statutory reserves amount to €7,500,000,000 – marked a sharp turn to the benefit of legal certainty and a better organization of the mentioned institute.

The conflicting interpretations which arose in the past have been overcome in order to reconduct the equity participation in the Bank of Italy to public qualification of the holders of its shares. The technical details that characterize the capital increase and the constitutive essence of the shares (pertaining to the subjects that participate in the same) place; however, the problem of ascertaining the extent of the rights exercisable by the holders thereof – and, therefore, the influence that the latter may exercise in shaping the governance powers of the Institute – results in the test concerning the possibility that may in extreme cases prefigure a few limitations to its independence.

In this regard, it should be noted that the legislation in question fixed thresholds to the possession of shares of capital in order to ensure a participatory process equi-ordered and, therefore, aimed at avoiding situations of prevalence by certain holders over others. At the same time, it established the maximum share (6 per cent) of the stream of annual dividends to be distributed ("out of the net profits") identifying the categories of "institutional investors" to which they may belong

(banks, insurance companies, foundations ex Legislative Decree no. 153 of 1999, corporations and pension funds, insurance, pension funds pursuant to Legislative Decree no. 252 of 2005). It also establishes that all holders of shares must have registered at an administrative office in Italy; a territorial requirement which is strictly conditional on the possession of participation.

Finally, the establishment of a market share is intended to confer effectiveness onto the regulatory system, since with the functioning of this market the opportunity arises to avoid the permanence (in time) of participatory situations that, because of their significant size, legitimize the holders thereof to boast a primary position in the ownership structure of the Bank of Italy. As has been pointed out by the Bank of Italy, part of the reserves arising from monetary *seigniorage*[31] is excluded from the economic rights of the holders of the shares. It also detects positivity in overcoming the ruling contained in Articles 39 and 40 of the former statute of the Bank of Italy provisions which legitimized the distribution of dividends and receipt of additional amounts from the reserves resulting from the previous year's budget.[32] There is a clear legislative intent to exclude the claims of holders of shares on the statutory reserves, clarifying the limits within which it is possible to recognize the future assignment to them of an income flow of entities related to the current value of the investments.

From another perspective it should be noted that the technical way in which one realizes the revaluation of the equity shares of the Bank of Italy (centred on a rise of "capital through the use of statutory reserves") is the complaint filed by an association of consumers to the Commission EU so that it "is active" in order to verify a possible violation of the rules on "State aids".[33] This is because the concept of aid always underlies the contribution of a pecuniary advantage, usually for a *datio*, namely the transfer of money or other goods and/or services from the sphere of the State (system) or other subjects related to it the exercise of State powers and functions. It must be considered likely that the legislature did not intend to deny participants the opportunity of benefiting from a proper increase in the value of the shares held by them; if we consider a different option, the legislation implicitly committed an unjustified impoverishment, to their detriment.

This suggests that in this instance we cannot register a case of violation of the ban on State aid where the latter was only configurable if the revaluation of the shares had been resolved in a transfer of value entity other than that originally expressed by the nominal amount of the securities in question.[34] Moreover, the lawfulness of the operation is also

confirmed by the judgment of the ECB, which has focused on analysing the different aspects of the same positive evaluation for the purpose of financial independence of the Italian Central Bank.[35]

On closer examination, the complex discipline in question is not free from criticism. This is particularly true with regard to compliance with the timing of the consultation process of the ECB,[36] the constraints imposed by the requirement of territoriality to the holding of investments (permitted only to persons who have the legal and administrative headquarters in Italy), as well as the interpretative doubts regarding the exercise of voting rights (in particular, those relating to the approval of the budget) recognized by the new Statute of the Bank of Italy to the shareholders able to carry out forms of influence on the governance of the Institution.[37]

From this arises the hope of a new intervention of the legislature that would eliminate the concerns represented just now, susceptible to increase in practice!

7.5 The problem of the autonomy of the Bank of Italy

The autonomy of the Bank of Italy is a long-standing problem. Considering the role and functions of the institution, many scholars believed that the organizational model adopted by the Governor was meant to keep the institution free from the interference of the political forces.[38] More specifically, given the view that in the key constitutional "level of government" of the subject at the head of the Bank of Italy,[39] it is significant the thesis arguing that the Article 47 Italian Constitution states the precondition for identifying the central bank an Institution of government based on the legitimacy technique.[40] The independence of the latter is given, then, in a field of material constitution, avoiding criticism (otherwise) be envisaged where he had proceeded on the basis of formal legal arguments. Properly understood, this thesis summarized adequately the action of the Bank of Italy for reasons of economic necessity not detached from autonomy of analysis (in search of optimum tools for the achievement of the objectives pursued).

Focusing the attention on the organizational model of the Bank of Italy led to the recognition of the specific importance of the process of appointment of the Governor by the statutes of the institution, approved by Royal Decree 11 June 1936, no. 1067, for an internal body (Board of Governors); the appointment would only subsequently be submitted to the President of the Republic, which provided by decree "sponsored by the Chairman of the Council of Ministers in consultation

with the Minister of the Treasury, after consultation with the Council of Ministers" (Art. 19, paras 1 and 6) . This mechanism was considered by the prevailing orthodoxy as foreordained to guarantee the independence of the central bank, enabling exclusion (which is presupposed in it) from interference by the political power.[41] In fact, it was in the presence of a complex process in which each of the appointing authorities who competed expressed *a proprium* evaluation due to its sphere of responsibilities. Hence the decision to exclude any form of intervention in the appointment of the executive, the act taking shape as mere approval of the Government which could only enforce a power to cancel *ex post* in that field.[42]

With regard, then, to the independence of the Bank of Italy as Supervisory Authority, it can be said that there is no doubt that it was commissioned by the same regulator, since a guarantee to that effect was already clearly placed in wartime economic legislation (Article 5, para. 1, DLCPS 691 of 1947) which prevented any possible interference (either direct or indirect) with the participants, excluding the competence of the High Council in the matter of credit and financial supervision.

That said, the fact should not be omitted that such reconstructive hypothesis seems to have lost value with the known events that have affected the summit of the Bank of Italy at the beginning of the millennium. These events highlighted the limitations of the controls required on the public sector (compared with particularly reckless operating techniques devoid of any respect for the rules), or the damaging effects of the failure and/or insufficient adaptation of the organizational model of the "independent administrative authorities" to the new realities arising from the process of economic internationalization in recent decades.

Following these events, there was a sort of distrust of the legislature against the Bank of Italy, such as to induce the pointing out – in Article 19 of Law no. 262 of 2005 – that it must operate "in accordance with the principle of transparency" and subject disclose motivations underlying of the acts issued; for this action is brought back via the same rules to ensure that the principle of legality would be upheld in each case.[43]

It is evident that the provision needed to set up a framework on top of the assets of the central bank were likely to prevent future situations in which the supervisory interventions might take the configuration of apodictic and isolated choices attributable to the head of the institution; choices that are being taken out of context by the other participating members of the Directorate, the character of an incomprehensible authoritarianism *per se* being unacceptable because it was contrary to the evolution of key democratic institutions in the Italian system.[44]

This explains, then, the reform of the procedures for the appointment of the Governor (at present identifiable in the process highlighted above),[45] as well as the expected obligation to account to the Bank of Italy "for its actions to Parliament and the Government with semi-annual report on its activities"; both the premise of a possible future prevalence of politics over technique, which certainly would be the case in the event that the procedures now introduced would induce a loss of autonomy in the Bank of Italy.

With the accession of Italy to the EU, no changes have occurred in the institutional paradigm of the central bank. The independence of the institution from external interference (activated by political subjects, or by participating in its capital) remains an inescapable assumption of an *agere* prudent and compliant "with the principles and objectives of the ESCB", oriented towards the recent instructions of the ECB, which has connected the need for capital adequacy with the objective of the financial independence of the Institution.[46]

7.6 The establishment of the UEM and the loss of monetary power

In the arduous journey which was implemented step by step from EMS to EMU, as is inferred from the given document known as the Delors Report, the creation of a "single currency" marks a very important stage in the process of European economic integration, creating expectations of the most intense forms of unification between the Acceding States.[47] Indeed, the single currency responds to the purpose (currency convertibility, liberalization of capital movements, full integration of financial markets, fixed exchange rate system) deemed appropriate to ensure increasing levels of osmosis in Europe. It thus overcame the perspective of the previous model of economic unification in favour of a programmatic design aimed to provide a practical approach between the Member States of the Community.

It is particularly significant that this took place at a point in history characterized by the collapse of the Berlin Wall, just before the reunification of Germany and the breakup of the Soviet Union and the Communist Party in the USSR. This explains the particular significance ascribed to the strengthening of the powers, functions and powers of the bodies in the said housing project. This, however, does not correspond – as has been pointed out by a supporter of European unity – to a strengthening of the "interest in the community" or any inescapable pre-commissioning of each hypothesis programmatic aiming to institutionalize instances of

political union. In the search for appropriate solutions to overcome the constraints that stood in the realization of the objectives pursued, the prevailing tendency is to circumscribe the technicality of the proposed formula on which to base the new construction.[48]

We must, however, emphasize that the primary purpose of the decisions taken at Community level (at the beginning of the 1990s) was the preservation of the irreversibility of the Union. The Treaty of Maastricht of 7 February 1992, validating the programme in question, carries the shocking novelty of the replacement of the national currencies with a single currency. The definition of a particular institutional framework as the basis for this design was aimed at creating a situation of parity among EU States, through lines of monetary policy, the responsibility for which should be entrusted to a new institution able to make centralized and collective decisions. Hence the prediction of a difficult process of economic and legal convergence (to be implemented at an earlier stage than that of the single currency), which should promote innovative patterns of sharing and, more generally, the creation of stability and progress conditions.[49]

In that way, the result is that the Eurosystem carries out its functions mainly through the bodies of the ECB which are connected "in the first place, the uniqueness of the function of issuing and management of the currency and therefore the transfer of a sovereign function of the Federated States of the federation".[50] Following on from that is the recognition of a decisive role in that institution, whose powers are summed up in the maintenance of price stability, which are related "powers to be exercised in autonomy, consistent with the achievement of that end".[51] They include, however, the limitations that characterize the government of monetary policy to the same delegate, whose scope is limited, at least in the initial stage of its operation, to the avoidance of deflation and inflation, plus special advisory functions as regards "the prudential supervision of credit institutions and other financial institutions" (Art. 105, para. 6, Tr. EC and 25 of its Statute).

It is clear, however, that the establishment of EMU has had an impact on the operating mode of the monetary function (issuing currency and liquidity governance), since the latter, taken from the central banks of the Member States of the Community, has been shifted onto a supranational basis and attributed to a complex organization, the European System of Central Banks (ESCB), which relies on the ECB.

The legal literature has offered multiple and significant interpretative hypotheses of the structure in question. It is estimated that the impact of the phenomenon on the economic and financial realities of the EU

States, stressing that the replacement of the national currency with only one, should be considered a defining event for the process of integration of the European market.[52] The research was, therefore, focused on the examination of the transfer of a sovereign function from the context of social nationalization to an apparatus of command that is qualified and purely technical. Divergent views have emerged, many of which, in order to reduce the scope of that event, have reduced the essence to a mere "rational redistribution of powers".[53]

Many years ago, in deepening the rationale underlying the technical solution adopted in the European Union, it seemed to be consistent with the optimization of the possibilities of development of the community plan that there should be the construction of a building in which closer economic ties would have to lead – at a legal level – to a reduction of sovereignty (in order to remove obstacles to the institutionalization of a different way of exercising the power of money).[54] There was comfort in the well-established interpretation of the principle of international law according to which the States – in order to facilitate trade and economic activities with other countries – can take decisions designed to overcome any impediments;[55] that, taking into account that in the presence of the "progressive commissioning crisis of the traditional sovereign functions of the State in the field of management and control of economic processes", it may be necessary to come to a "verticalization of local functions".[56]

With regard to the solution of the European single currency problem, it is clear that the reality of the market, interacting on the fundamental basis of the traditional State-building, has innovated the basic elements of its model, legitimizing changes in line with the intuition of those to whom the concept of sovereignty had joined the criticism of the modern state conception and its attributes.[57] Therefore, it can be said that the international trend in the Eurocentric factor has become a catalyst in changing the concept, which – compared to diversifying the consolidated view to the application of "notional orders of Pandectist to the laws subsequent to the ancien regime"[58] – has become a prerequisite of a new pluralistic context in which it is given a kind of "decentralization stratified classical sovereignty".[59]

In light of these considerations, the central banks of the countries that have joined the single currency – and therefore, so far as is relevant, the Bank of Italy – have committed to cooperating (and working) by means of the organs of the EMU, contributing to the monetary policy decisions taken in the euro area and doing other tasks that are assigned to the same components as the Eurosystem.

More specifically, the central banks of these countries, serving the scope of safeguarding the financial system and fostering the integration at the European level, are required to achieve the objectives in question with an *agere* that is credible, transparent and accountable; behaviour that, in relations with the EU and national authorities must comply with the provisions of the Treaty, even though they are in compliance with the principle of independence. They therefore at a European level, contribute to the strategic decision-making process of the ECB, by participating in the activities of the organs of the latter and, in particular, the General Council (composed of the Chairman and the Vice-President of the ECB and the governors of the NCBs of all EU Member States) and the Governing Council (composed of the members of the Executive Board and the governors of the NCBs of Member States that have adopted the euro). At the national level, they implement the decisions listed above, in accordance with the principle of decentralization, pledging to provide good organizational and administrative management and to perform efficiently the tasks assigned to them.[60]

Concluding this point, it can be said that with the establishment of the EMU, as a result of the loss of purchasing power of money, the role of the Bank of Italy – despite being scaled internally (as notified to the other central banks of Eurosystem) has opened (unlike in the past) is one of cooperation that strengthens the identity of the institution anchored in the European reality. Of course it is starting on a path that, although it may appear more restrictive than its existing configuration, can allow it to strengthen ties with all members of the Union, taking advantage of existing synergies and creating innovative forms of osmosis.

7.7 European structural changes of the financial system: the creation of the SEVIF

The financial crisis that struck the continent in 2007 to a great extent has led the authorities to revise the European summit of the financial structure in order to redesign the procedures for the exercise of banking supervision and to prevent recurrence of events of this kind. A Working Group led by J. de Larosière (which had been entrusted with the task of identifying innovative criteria in the supervisory system applicable in the financial sector) has developed a schema regulation that, as has been pointed out in the literature, achieves an appropriate "degree of financial integration…where the mechanisms for cooperation and coordination

between national authorities are not fit to…achieve homogeneous models of control over economic activities in the EU".[61]

As a result, an authorization framework (ESFS) was created anew, meant to "preserve financial stability, create confidence in the financial system and ensure adequate protection of consumers of financial services". The installation of this structure rests on two pillars, first is the European Systemic Risk Board (ESRB), headed by the President of the ECB (in charge of monitoring and evaluating the potential risks to financial stability arising from macroeconomic processes) while the second composed three new European Supervisory Authorities (EBA, EIOPA and ESMA), accompanied by a network of national authorities that cooperate with them.

Consequently, if the intervention of the ESRB is summed up in the issue of inputs and guidelines for the prevention of macro-systemic risks, the EBA (which is responsible for the supervision of the banking sector), can be explained as a separate power aimed to develop and adopt standards of supervision; while finally, the action of ESMA and EIOPA is aimed at ensuring the regularity of the financial markets and the insurance and occupational pensions respectively.[62] The effectiveness of the supervision performed by the outlined network of authorities is clear, taking into account that on the one hand a common commitment to the unification of forms of control for all the cross-border groups becomes conceivable, and on the other, at a micro-prudential level, the actions of the new authorities assume in substance a role very close to that of third-level strengthened committees (given that their action is in line with the principles of subsidiarity and proportionality, as enshrined in the EU Treaty).[63]

The reform in question (which came into force in January 2011) allows organizations of the European financial summit to give concrete answers to the questions raised by the cyclical nature of the market through the provision of corrective proportionate to the difficulties that operators undergo.[64] The institutional anchoring of the ESRB to the European Central Bank and the ESCB inferred from the particular composition of the supervisory body, emphasizing its centrality in the redefinition of the instruments of macroeconomic policy (which deal with the risks arising from the interconnection of markets). Similarly, the network of authorities responsible for micro-prudential supervision aims to remedy the shortcomings of the previous structure; and indeed, the actions in question are aimed at preventing regulatory arbitrage (by actions strengthening the consistency, effectiveness and consistency of regulation and supervision), control risk (through a

constant monitoring of markets and financial activities) and to protect service users.

It is in the presence of innovations in managing the supervisory interacting not only on the size and type of intervention supervision put in place by the Bank of Italy (on basis of EU expectations), but also on the institutional position of the latter.

In this regard, it should be pointed out that in the past it appeared difficult to recognize the independence of the Bank of Italy from politics, considering the unequivocal indications provided by the legislature of the Consolidated Law on Banking (Articles 2 and 4). In fact, the "high supervision" in the field of credit and savings protection attributed to the ICRC gave reason to believe that an act of the Bank of Italy lacking political legitimization, had to be understood as being devoid of legitimacy. This is because such a characterizing link failed, apparently running out of the guarantees arising from the presence of an adequate system of check and balances, which in Anglo-Saxon countries ensures the dialectic necessary for the operation of market democracy.[65] In other words, the reference to the politics of the ICRC, in a timely constancy of legislative provision to that effect, could be considered an inescapable prerequisite for the validation of social interests provided in the strategies adopted by the Bank of Italy; this was a view supported by the fact that the Acts-Directives serve as a preparatory function with respect to the exercise of administrative powers, hence the conclusion of ascribing responsibility to the policy choices made in the technique.

However, this argument does not seem to become more sustainable in the light of the provisions of the Union that have made changes to the top of the financial system in Europe. In this regard the aforementioned input and guidelines for the prevention of macro-systemic risks emanating from the ESRB must be taken into account, as well as supervisory standards that are part of the EBA, which, as mentioned above, are both carriers of regulatory guidelines designed to overlap with the ICRC Directives.

It is obvious that it is a disciplinary system that – with regard to the formulation of the regulatory processes activated in Italy – tends to replace the national instrument that comes from Europe. This implies some sort of substantial depletion (or at least re-sizing) of the function of the Interministerial Committee for Credit and Savings, which consequently reverses its ability to affect the decisions of the Bank of Italy.

Perhaps it is now time to think of a review of the relationship, according to Italian regulation, between the Committee and the Banking Supervision Authority!

7.8 The European Banking Union and the resizing of the supervisory role of the Bank of Italy

The creation of the ESFS, intended to make a significant improvement to the forms of control of the financial European markets, turned out to be insufficient to immediately remedy the negative effects of the financial crisis that arose in 2007. There remain, in fact, a number of obstacles to the hoped-for recovery of confidence in the markets, and for complete harmonization of supervision in the EU. From another perspective, the difficulties related to the implementation of the monetary union emerge fully, seen as a common move towards the progressive limitation of the sovereignty of the States: they echoed to the accentuation of never-silenced eurosceptic tendencies and the onset of instances to recover national identity.[66]

In such a scenario, the end of the recession, the growth of debt-to-GDP ratios and the credit crunch are clearly connected to the overcoming of the systemic crisis; the attempt to correct the short-term imbalances accumulated during the course of decades, and the initiation of policies of fiscal austerity and hardship (which is not accompanied by appropriate interventions spending review, sometimes practised) did not (at least in some countries, such as Italy) produce the positive outcomes expected.[67]

What we see is therefore the need to have regard to an operational programme (activated by the current leaders of the EU) to promote greater cohesion and unity, such as to eliminate or at least reduce the profound differences that still characterize the European reality. It is the reason why the bodies of the EU summit – to ensure the financial stability of the Union through new structural reforms which have more effectively overcome the risks arising from the crisis and definitively set them out – made the decision at the end of June 2012 to generate "a single supervisory mechanism for the euro zone", signing an agreement for the realization of European Banking Union, marked by significant "involvement of the ECB".[68]

It came at a turning point in the means of exercising supervision, arising from the belief that it would only be a comprehensive review of the rules by which finance is governed – or, more precisely, the banking intermediaries sector – that could initiate the appropriate forms of rehabilitation. It is in the presence of a challenge which assigns an innovative project of reform to strengthen the process of European integration; the project is aimed at achieving the objectives of uniformity and equality among intermediaries, which are connected with higher

levels of competition and, therefore, the possibility of improving coordination and cooperation between the EU States. The linchpin of this construction is the presence of a single point in front of qualified entities (operating in the European financial system): this in fact identifies the essential premise of equal positions.

This project is about the need to overcome the asymmetries that have formed a disintegrating factor (caused by the lack of mechanisms for risk sharing) in the face of the crisis.[69] In the background is the widespread awareness that from 1999 to 2007 diversification in the euro area has widened,[70] that only by giving the ECB "direct responsibility for leading 150 European banks" does it becomes possible to overcome the fragmentation of forms of control existing in the EU, being able to "break the loop between banks and sovereign countries and the moral hazard related to rescue by the taxpayer, the big banks".[71]

Such disciplinary option is fraught with problems with regard to the identification of the Banking Union criteria. In legal terms EU Regulation no. 1024 of 15 October 2013, relating to the single mechanism, provides for the subjugation of the entire eurozone to regulatory requirements that strictly govern the exercise of banking; a mechanism which belongs to the European Central Bank in accordance with the provisions of Article 127 of the Treaty on the Functioning of the EU (which states that the Council must act unanimously after consulting the European Parliament and the Central Bank, entrusting it with specific tasks for the prudential supervision of credit institutions).

It must be considered, therefore, that the adjustment in question is intended to extend the regulatory apparatus of the EU Member States, while being strongly advised not to let the wealth of knowledge of the national supervisory authorities be dispersed. Unsurprisingly, the research focuses on the translation of supervisory tasks to the ECB, evaluating both the rationale for the inclusion in the latter of the powers in question,[72] and their compatibility with the regulatory function recognized by the EBA;[73] this in the knowledge that with the push for unification "comes into play the issue of the transfer of sovereignty".[74]

There is no doubt that the progress of the EU countries towards forms of progressive limitation of sovereignty appears to be particularly complex. In fact, the realization of the Single Mechanism only implies another form of reduction of "national sovereignty", since it results in a substantial reduction of the power of supervision of the competent domestic authorities. Hence the "further consideration that the crisis has increased the prevalence of a technical neutrality 'on' policy options", with the risk of a suspension of the traditional principles of democracy.[75]

The analysis of the aforementioned Regulation no. 1024/2013 allows us to deduce that the scope of the new tasks assigned to the ECB, which is responsible for routine interventions put into action in the performance of supervision (i.e., risk prevention, authorization of new operations of credit institutions, valuation of investments qualified assessment of minimum capital requirements, and verification of "capital adequacy"). This is therefore control activities articulated in different directions that take into account the different profiles (those constituting the possible diseases) that characterize the life of intermediaries; hence referring to a number of measures that have until now given content to home supervision. This, in the obvious assumption that there should also be attributed to the latter the investigative powers necessary to perform its new functions.

In face of the fact that reconnaissance of the new powers of the European Central Bank, it is not easy to identify the role reserved in the context drawn by the European legislator, the national audit institutions.

It is true that these are called from the complex regulatory examination to carry out an intense collaboration with the body (the new disciplinary paradigm) in the centre of the single mechanism – but that fact, as has been pointed out in authoritative texts, is unlikely to affect the "substantial centralization of prudential supervision … in the head … of this institution would assume that exclusive jurisdiction … to the accomplishment of a series of tasks".[76] Considering the new powers of control, although it is required to coordinate its action with that of the EU States (which are responsible, however, for an active participation in the exercise of supervision), it will implement a "banking supervision conform to common standards at a high level throughout the euro area".[77] Assessments, the latter essentially shared by the Governor of the Bank of Italy with the statement that "the ultimate responsibility for all banks in the euro will reside in the ECB with … degrees and different methods depending on the characteristics of intermediaries".[78]

That being so, it becomes possible to address the issue concerning the consequences of the SSM on the role in the perspective due to national supervisors; this is a problem that is reflected in the position that may in the future be taken by the Bank of Italy, and must comply with the requirements in these areas. More specifically, it refers to the mode of utilization of human resources and facilities (currently available to the national central banks of the countries acceding to the EU), which probably will be – in short – too large in relation to the actual consistency of the functions which are subtended.

A solution, in this respect, has been justified on the possibility of pivoting on the excellence of certain apparatuses of supervision to deduce – in reference to a mechanism of variable geometry competition between national institutes and supranational – the possibility of their operational expansion to European level.[79] It is consequently clear that it is intended to set up a model to implement a full operational harmonization between the European and national authorities; the thesis is that perhaps in its entirety it does not evaluate the effectiveness of the means employed by the single mechanism, nor the contributions which different Member States should participate in the exercise of the functions attributed to it.

Arguably, a more appropriate procedure for the use of human heritage at the disposal of the national supervisory bodies (resulting probably in an excess of the needs of the SSM), as will be specified more fully in the following paragraph, is that identified by assuming the "centralization in the same tasks currently spread across multiple administrations of control, all now framed". It is clear that the definition of the future path of national supervisory bodies is still uncertain; subject to the need to ensure at least a balanced reconciliation between the forms of intervention related to the latter and those attributable to the ECB. This compares with the simultaneous need to maintain adequate levels of allocative efficiency (in terms of human resources and the organizational means used), or with reference to the reality of individual Member States, in relation to the technical-administrative staff headed by the European Central Bank.

7.9 The Bank of Italy and the institutional reforms of the Italian financial sector

In view of the outlined curtailed powers related to the official duties of the Bank of Italy, there is a disciplinary orientation to confirm the assignment of a primary position of the entity in the context of public bodies in the Italian financial sector which are to be entrusted with tasks of supervision of financial intermediaries and markets.

Legislative Decree no. 231 of 21 November 2007 implementing Directive no. 2005/60/EC (on the prevention of the use of the financial system for the purpose of laundering the proceeds of crime and financing of terrorism) took effect from 1 January 2008, transferring to the Bank of Italy the powers and duties of the Italian Foreign Exchange Office (UIC), with its instrumental resources, human and financial, simultaneously closing that office. On this was established the Bank of Italy Financial

Intelligence Unit for Italy (UIF), with broad powers and duties of information analysis to detect and prevent money laundering.[80]

Another perspective detects the centrality recognized by the Italian legislature to the Bank of Italy in the system of ADR relating to banking and financial transactions, and in the case of consumer credit subject to Title VI of the Consolidated Law on Banking; Article 128-*bis* (rule introduced by Article 29 of Law no. 262 of 2005, which ordered the activation of the ADR – Alternative Dispute Resolution, tools to facilitate forms of litigation) has referred to a decision of the ICRC the determination of the criteria operational procedures of deciding; provision of law which was implemented by the Committee by Resolution no. 275 of 29 July 2008, which was followed by the enactment of the Bank of Italy's decision of 18 June 2009 concerning "Provisions on the systems of ADR – with disputes relating to transactions and banking and financial services", establishing the *Arbitro Bancario e Finanziario* – ABF).[81]

In particular, the expansion in the tasks of the ABF and its methods of execution – a body to which the Italian Constitutional Court has unequivocally denied the status of "judicial authority" as not making a judgment[82] – has shown that it fulfils a function that can be attributed to that of supervision of the Bank of Italy[83] – a conclusion, moreover, recognized by the same exponents of the latter considering the purpose of the Arbitrator[84] or considering it included "in the more complex picture of banking supervision".[85]

Moreover, the innovations of the regulation of forms of "non-bank financial intermediation" brought in by Legislative Decree no. 141 of 2010 move in the direction of an expansion of the scope of the recipients of subjective measures of supervision of the Bank of Italy. In creating clarity on the overall picture of these forms of intermediation, the regulator – with the reform of Title V of the Consolidated Law on Banking (Articles 106 and following) – outlined the subsystem in which the subjects are framed in such activity to the public.[86] The wording of Article 106 – jointly referring to the category of non-banking financial intermediaries operating against the public interest – relates to enrolment in a "special register", held by the Bank of Italy, the exercise of the full range of related activities within the fold of "granting of loans". The expression used for this purpose ("in any form") leaves no room for doubt as to the scope of the comprehensive regulatory provisions under consideration. The link between registration and authorization to carry out the above as stipulated in Article 107 – identifying a regime of "reserve" in line with the guidance prior to the enactment of Legislative

Decree no. 141 of 2010[87] – which was pivotal in restoring powers to Bank of Italy of control over intermediaries.

More on general, and later referred to as the Institute for the Supervision on Insurance Companies (Ivass), consisting of Decree Law no. 95 of 6 July 2012 converted into Law no. 135 of 7 August 2012, as the institute which performs control functions already assigned to Isvap, integrated into the structure of the Bank of Italy (as shown by the referring of its President and Executive Board to the General Manager and the Directory of the Bank of Italy, although completed with the inclusion of two directors).[88] Although the reasons for the foundation of reform in literature emphasized “the need for ethical standards and a greater control of the control”,[89] the fact is that the transformation of Isvap into Ivass, in taking a significant step in establishing a closer link between the banking and insurance supervision, resulted in an obvious enhancement of the role played by the Bank of Italy in the Italian financial supervision system.

Finally, it is hardly necessary to mention the possibility – which the press criticized widely[90] – that the “reform of the Public Administration” given by the Italian government in 2014, incardinated a measure (announced by President Renzi) on the abolition of Covip (Supervisory Authority of supplementary pension provision, which was established in 1993 by Legislative Decree no. 124 of 21 April 1993), while their functions transferred to the Bank of Italy.

Regardless of the assessments in relation to the policy rationale of such a measure – the contents of which are, moreover, proposed by the applicant time by time[91] – it is clear how this is situated in disciplinary orientation in the process (mentioned previously) to amend the “model” of organizational supervision of the financial sector; process most likely inspired by the desire to want to restore the weight of the Bank of Italy within the overall balance of the authoritative apparatus place at the top of public control of markets.

What the implications of this institutional option will be, as it will be reflected in future in the definition of the Italian financial system (avoiding a transformation into the hybrid structure) is difficult to hypothesize at present. What can certainly be said is that such an orientation (as far as can be justified in terms of cost-effectiveness of means of intervention) marks a turning point in the course of evolution of Italian special setting… a reversal in the long journey that (for reasons equally justified) had led to the assertion of “subjective pluralism” doctrine in determining the framework of financial control authorities.

Notes

1. This Law was preceded by an Agreement on 18 January 1893 when the Banca Nazionale del Regno, the Banca Nazionale Toscana and the Banca Toscana di Credito decided to "merge their assets they bring to the new single bank, which will call Bank of Italy".
2. Contemporary with this merger was the liquidation of the Banca Romana (entrusted by law to the new Institution), hence the obvious connection of the complex regulatory solution to the banking crisis which arose in Italy in the early 1890s.
3. On this aspect of Italian economic history see Cafagna (1969) "La formazione di una 'base industriale' fra il 1896 e il 1914", in caracciolo (ed.) *La formazione dell'Italia industriale* (Bari: Laterza), p. 137 ss. More general see R. Romeo (1961) *Breve storia della grande industria in Italia* (Bologna: Il Mulino); R. Romeo, *La rivoluzione industriale dell'età giolittiana*, in *La formazione dell'Italia industriale*, cit., p. 115 ss. For an analysis of the causes of delay in the process of industrialization of Italy than the other countries in the West, see P. Saraceno (1976) *La radici della crisi economica* (Rome: Svimez), p. 2.
4. See De Mattia (ed.) (1967) *I bilanci degli istituti di emissione italiani 1845–1936* Vol. I, t. II, tav. 5, p. 441 ss. which contains the data relating to the banknotes circulation in 1861–1936.
5. See Hilferding (1961) *Il capitale finanziario* (Milan: Feltrinelli), which addressed, among the first, the analysis on the impact of financial accumulation on the composition of the markets, so opening the way deepening of rules that can protect savings and to ensure the formation, hence the need to introduce appropriate forms of control on banking.
6. See Rathenau (1976) *L'economia nuova* (Torino: Einaudi) in which he stated that the economic development of a country cannot be left solely to private initiative, and where appropriate rationalization of production must be set alongside public and private forms of entrepreneurship.
7. See on this point F. Capriglione (1976) *Intervento pubblico e ordinamento del credito* (Padova: CEDAM) at Chapter II, p. 21, where it is emphasized that in the thirties the provision of public funding performed a function instrumental to the "reorganization of the economic sectors in which the State became the owner of a significant equity", so not surprisingly you record "a process of progressive publicizing the management of the companies whose majority was the creation of IRI".
8. This is in line with the dominant liberal conception in which the objective of monetary stabilization is identified with an aim of general interest to be pursued as a priority.
9. Relevant is the setting of the "cash management account" – introduced by Art. 114 t.u. 1910 to allow the Treasury to meet cash needs – to curb the possibility of overflow from the account, subject to the determination of the timing and means by which to implement his reinstatement where overruns have to occur.
10. For an assessment of the impact of this legislation on the institutional position of the Bank of Italy is well to recall the words of B. Stringher (1926) *Un quarto di secolo alla Banca d'Italia, 1901–1925* (Rome: Banca d'Italia), p. 11,

who stressed that institution eventually "free from constraints" could reach "a new era".

11. See G. Carli (1967) *Preface* to De Mattia (ed.) *bilanci degli istituti di emissione italiani dal 1845 al 1936* (Rome: Banca d'Italia).
12. We refer to r.d.l. 5 May 1926, no. 812, that gave issuing powers only to Bank of Italy and to rr.dd.ll. no. 1511 of 7 September 1926, and no. 1830 of 6 November 1926, to protect savings, converted in Law nos 1107 and 1108 of 23 June 1927, that brought the first systematic regulation of credit into being.
13. See M.S. Giannini (1953) *Aspetti giuridici della liquidità bancaria*, in AA.VV, *Atti del primo convegno internazionale del credito*, IV, Roma.
14. Cfr. E. Galanti (2008) *La storia dell'ordinamento bancario e finanziario italiano fra crisi e riforme*, in E. Galanti (ed.) *Diritto delle banche e degli intermediari finanziari* (Padova: CEDAM), p. 56.
15. For an interpretation of this 1947 Law see Vignocchi (1968) *Il servizio del credito nell'ordinamento pubblicistico italiano* (Milan: Giuffrè), p. 118, note no. 19, p. 119; F. Merusi (1972) "Per uno studio sui poteri della banca centrale nel governo della moneta", *Riv. trim. dir. pubbl.*, p. 1442; Vitale (1972) "Il modello organizzativo dell'ordinamento del credito", *Riv. trim. dir. pubbl.*, p. 1413.
16. See A. Fazio (1979) "La politica monetaria in Italia dal 1947 al 1978", *Moneta e credito*, p. 269.
17. See F. Capriglione (1978) *Intervento pubblico e ordinamento del credito* (Milan: Giuffrè), p. 56 ss.
18. See M. Porzio (1990) "Autonomia ed eteronomia nella gestione dell'impresa bancaria", *Dir. banc. merc. fin.*, p. 3.
19. See F. Capriglione (2010) "Evoluzione della disciplina di settore", in F. Capriglione (ed.) *L'ordinamento finanziario italiano* (Padova: CEDAM), t. I, p. 24.
20. See Finocchiaro and Contessa (1994) *La Banca d'Italia e i problemi del governo della moneta* (Rome: Bank of Italy), p. 40.
21. See among others Ferraris, *La classificazione delle persone morali di diritto pubblico*, *Riv. dir. pubbl.*, 1919, I, p. 433 ss; Manzini, *Trattato di diritto penale*, V, Torino, 1935, p. 62. For case-law see Cass. Sez. Un., 26 March 1925, *Foro it.*, 1925, I, c. 837 ss; Cass. Sez. Un., 6 April 1929, *Giur. It.*, 1929, I, c. 822 ss.
22. Cfr. Messineo (1954) *Operazioni di banca e di borsa* (Milan: Giuffrè); Folco (1959) *Il sistema del diritto della banca* (Milan: Giuffrè).
23. See Ferri Gius., *Banca d'Italia*, in *Enc. dir.*, Vol. V, p. 5.
24. See Catapano (1999) *Assetti partecipativi della Banca d'Italia*, in Capriglione and Catapano (eds) AA.VV., *Scritti in memoria di Pietro De Vecchis* (Roma: Banca d'Italia), t. I, p. 196.
25. See F. Capriglione (2006) *Crisi di sistema e innovazione normativa: prime riflessioni sulla nuova legge sul risparmio (l. n. 262 del 2005) Banca, borsa, tit. cred.*, p. 154.
26. For a definition of democratic principles see N. Bobbio (1984) *Il futuro della democrazia* (Torino: Einaudi) and (1995) *Stato, Governo, società. Frammenti di un dizionario politico* (Torino: Einaudi), studies in which we distinguish between a procedural conception of democracy and a substantive conception (or values) to which you can connect forms of active citizenship.

27. See V. Mezzacapo (1993) *L'indipendenza della Banca d'Italia* in Bassi and Merusi (eds) *Mercati e amministrazioni indipendenti* (Milan: Giuffrè), p. 50.
28. See V. Mezzacapo, cited, p. 51.
29. See C.A. Ciampi (1981) *Funzioni della banca centrale nell'economia di oggi* (Roma: Banca d'Italia).
30. Relevant is Article 4 Consolidated Law on Banking: see F. Capriglione (2012) *Commento sub art. 4 tub*, in *Commentario al testo unico delle leggi in materia bancaria e creditizia* (Padova: CEDAM), t. I, p. 27.
31. See *Un aggiornamento del valore delle quote di capitale della Banca d'Italia* on www.bancaditalia.it.
32. In these statutory provisions was specified, in fact, the ability to make annual allocations to the "ordinary and extraordinary reserves" for amounts up to 40 per cent of the net profits for the year, subject to the payment of dividends (for a total of up to 10 per cent of capital) and additional amounts (not exceeding 4 per cent of reserves).
33. See *Decreto Bankitalia, Ue chiede chiarimenti. "Aumento capitale possibile aiuto di Stato"* on www.ilfattoquotidiano.it, 28 February 2014.
34. See F. Capriglione (2014) *La rivalutazione del capitale della Banca d'Italia. Problemi e prospettive* in *La rivalutazione del capitale della Banca d'Italia* (Padova: CEDAM), p. 18.
35. The ECB has been limited to attract the attention of the Ministry regarding compliance with the consultation procedure "and to recommend an *agere* prudent and compliant" with the principles and objectives of the ESCB at the time of execution of the capital increase; see ECB Legal Opinion 27 December 2013. Pursuant to Art. 3, para. 4 of Decision 98/415/EC, the process for approval of amendments to the Statute of the Bank of Italy should have been suspended pending the request for consultation.
36. See M. Pellegrini (2014) *L'aumento di capitale della Banca d'Italia nella prospettiva europea* in *La rivalutazione del capitale della Banca d'Italia*, cited, p. 61.
37. See M. Sepe (2014) *Riforma della governance della Banca d'Italia e autonomia nell' esercizio delle sue funzioni istituzionali: nihil sub sole novi*? in *La rivalutazione del capitale della Banca d'Italia*, cited, p. 81.
38. See, among others, Puccini (1978) *L'autonomia della Banca d'Italia* (Milan: Giuffrè); Garella (1980) *Attualità e prospettive del rapporto Parlamento-Banca d'Italia. Il coordinamento parlamentare* in *Dem. dir.*, p. 801 ss; Mezzacapo *L'indipendenza della Banca d'Italia*, cited, p. 68; F. Capriglione *Banca d'Italia*, in *Enc. dir.*, p. 244.
39. See F. Merusi (1982) *La posizione costituzionale della banca centrale* in *Credito e moneta*, p. 57 ss.
40. See F. D'Onofrio (1979) *Banca d'Italia e costituzione economica: la prospettiva della crisi dello Stato nazionale*, in *Banca borsa*, I, p. 443.
41. See, among others, Puccini, cited, p. 44; Mezzacapo, cited, p. 53.
42. See F. Capriglione (1994) *L'ordinamento finanziario verso la neutralità* (Padova: CEDAM), p. 212; in a manner consistent with G. Montedoro (1994) *Il principio di separatezza tra politica ed amministrazione nel paradigma dei rapporti fra Governo e Banca d'Italia Mondo bancario*, no. 4, p. 26.
43. See F. Capriglione *Crisi di sistema e innovazione normativa: prime riflessioni sulla nuova legge sul risparmio (l. n. 262 del 2005)*, cited, p. 150.

44. See D. Siclari (2007) *Costituzione e autorità di vigilanza bancaria* (Padova: CEDAM), p. 271.
45. See *supra* para. 3.
46. See ECB Legal Opinion 27 December 2013.
47. See among others T. Padoa Schioppa (1988) *The European Monetary System: A Long-term View in AA.VV., The European Monetary System* (Cambridge: Cambridge University Press); R. Masera (1990) *L'evoluzione del sistema monetario europeo (aspetti tecno-economici)* in *Dal sistema monetario europeo al sistema europeo delle banche centrali* (Roma: Banca d'Italia), p. 38 ss; Tamborini (1997) *Dal Rapporto Delors al Trattato di Maastricht e oltre. Cos'hanno da dire gli economisti?* in *Economia politica*, no. 3, p. 361; M. Pellegrini (2003) *Banca Centrale Nazionale e Unione Monetaria Europea* (Bari: Cacucci), p. 156.
48. See F. Capriglione (2013) *Mercato regole e democrazia* (Torino: UTET), p. 40.
49. See among others P. Ciocca (1991) *Banca finanza mercato* (Torino: UTET), p. 171; F. Capriglione (1999) *Moneta* (voce), in *Enc. dir.* (Agg. III) (Milan: Giuffrè), p. 747.
50. See F. Merusi (1997) *Governo della moneta e indipendenza della Banca Centrale nella Federazione monetaria dell'Europa*, in *Studi e note di economia*, p. 7.
51. See Papadia and Santini (1998) *La Banca centrale europea* (Bologna: Il Mulino), p. 28.
52. See G. Guarino (1997) *Verso l'Europa ovvero la fine della politica* (Milan), where, with the clarity that characterizes the thinking of the A., stressing the importance of the role ascribed to the technique in defining the conditions capable of supporting factors and pooling structures in the European context.
53. See Marzona and Caldirola (1997) *Politica economica e monetaria* in Chiti and Greco (eds) *Trattato di diritto amministrativo europeo* (Milan: Giuffrè), t. 1, p. 901.
54. See F. Capriglione (1999) *Moneta*, in *Enc. dir.*, Agg. III (Milan: Giuffrè), p. 758.
55. See Roepke (1954) *Economic Order and International Law*, in *Recueil des Cours de l'Academie de droit international de la Haye* II, p. 204 ss.
56. See Picone (1982) *Diritto internazionale dell'economia e costituzione economica dell'ordinamento internazionale*, in *Diritto internazionale dell'economia* (Milan: Giuffrè), p. 38.
57. See M.S. Giannini *Sovranità*, in *Enc. dir.* (Milan: Giuffrè), Vol. XLIII, p. 224.
58. See G. Della Cananea (2006) *Sovranità e globalizzazione*, in *Parolechiave*, no. 35, p. 97, para. 2.
59. See A. Carrino (2005) *Oltre l'Occidente. Critica della Costituzione europea* (Bari: Cacucci), p. 174.
60. Among these is the management of its foreign exchange reserves, in addition to a share of those of the ECB on its behalf.
61. See in this way M. Pellegrini (2012) "L'architettura di vertice dell'ordinamento finanziario europeo: funzioni e limiti della supervisione", *Riv. trim. dir. ec.*, I, p. 54.
62. See among others E. Ferran (2011) *Understanding the New Institutional Architecture of Eu Financial Market Supervision*, in *Legal Studies Research*. Paper Series, University of Cambridge, Faculty of Law, no. 20/2011, p. 34; A.M. Tarantola (2011) *La vigilanza europea: assetti, implicazioni, problemi aperti*, Lectio at Master in Diritto Amministrativo e Scienza dell'Amministrazione,

University Roma Tre, 8 aprile 2011, in www.bancaditalia.it, p. 16; F. Guarracino (2012) *Supervisione bancaria europea* (*Sistema delle fonti e modelli teorici*) (Padova: CEDAM); F. Capriglione (2012) *Globalizzazione, crisi finanziaria e mercati: una realtà su cui riflettere*, in *Concorrenza e mercato*, p. 867; V. Troiano (2012) TROIANO, *Interactions Between EU and National Authorities in the New Structure of EU Financial System Supervision*, in *Law and Economics Yearly Review*, no. 1, p. 104.

63. The "Lamfalussy process", previously in force, provided for the establishment of committees of the third level, consisting of representatives of the national supervisory authorities: the Committee of European Banking Supervisors (CEBS), the Committee of European Supervisory Authorities Insurance and occupational Pensions Supervisors (CEIOPS) and the Committee of European securities Regulators (CESR). These committees have the task of contributing to the consistent and convergent with EU directives, so as to ensure more effective cooperation between national supervisory authorities.
64. See Micossi, Carmassi and Pierce (2011) *On the tasks of the European Stability Mechanism*, in *CEPS Policy Brief*, no. 235.
65. See F. Capriglione (2011) *Le amministrazioni di controllo del mercato finanziario. La particolare posizione della Banca d'Italia*, in *Riv. trim. dir. ec.*, I, p. 1, 11. This approach seemed comforted by the directions of the Law no. 262 of 2005 which, although adopted in a logic of emergency, would have allowed (Art. 19, para. 7) policy to intervene significantly in the process of appointment of the Governor (v. para. 3 above). In addition, the provision of law to establish a "Commission on Questions of the protection of investors' reporting directly to the President of the Council of Ministers (Art. 30, para. 3) that left no doubt with regard to the risk of the Bank of Italy to lose their autonomy".
66. See among others G. Montedoro (2009) *Economia della crisi, trasformazione dello Stato, governo dei giudici*, in *Riv. trim. dir. ec.* I, p. 66; ID. *Mercati democrazia e potere costituente: categorie giuridiche e necessità storica del cambiamento*, in *Aperta contrada* 3 August 2012; F. Guarracino *Supervisione bancaria europea* (*Sistema delle fonti e modelli teorici*), cited; Grasso *Crisi dei mercati e sovranità dello Stato: qualche elemento di discussione*, in *Aperta Contrada* 16 July 2012.
67. See Decree-Law 6 December 2011, no. 201 "*Disposizioni urgenti per la crescita, l'equità e il consolidamento dei conti pubblici*" (so called salva Italia), converted by Law 22 December 2011, no. 214; Decree-Law 24 January 2012, no. 1 "*Disposizioni urgenti per la concorrenza, lo sviluppo delle infrastrutture e la competitività*" (so called cresciItalia), converted by Law 24 March 2012, no. 27; Decree-Law 9 February 2012, no. 5 "*Disposizioni urgenti per la semplificazione e lo sviluppo*" (so called Semplificazioni), converted by Law 4 April 2012, no. 35. In such a complex device, as I have emphasized elsewhere, there is an anxiety that is an obstacle to the implementation of the demands of civil society and, therefore, the creation of favourable conditions for the affirmation of lines proposals for a desired change (able to reconcile and balance the above instances with state law), see F. Capriglione (2012) *Globalizzazione, crisi finanziaria e mercati: una realtà su cui riflettere*, in *Concorrenza e mercato*, p. 867.
68. Symptomatic of this is the speech given by President Barroso during a working session of the Summit of the Council of June 2012 in which it was expressed: "We have agreed a convincing vision for a strengthened economic

and monetary union, and this is a point I would like to highlight particularly, following the report presented to the European Council on the genuine EMU…This banking union will be designed in a way that fully respects the integrity of the single market. At the same time, we recognize that there are member states that will not want to participate in some areas that are predominantly linked to membership of the euro, now or in the future. Everyone here has agreed that a stable euro is in the interest of the whole European Union. Over the summer, the Commission will put together the legislative proposals to make this a reality".

69. See Sarcinelli (2013) *L'unione bancaria europea e la stabilizzazione dell'Eurozona*, in *Moneta e credito*, p. 7.
70. See Pisani and J. Ferry. *The Known Unknowns and Unknown Unknowns of EMU*, *Bruegel Policy Contribution*, no. 18, on www.bruegel.org/publications/publication-detail/publication/756.
71. See R. Masera, *Moneta europea credito nazionale*, in *La Repubblica*, 17 June 2013.
72. See among others Wymeersch (2012) *The European Banking Union. A First Analysis*, Universiteit Gent, *Financial Law Institute*, WP, 2012–07, p. 1; F. Capriglione (2013) *L'unione bancaria europea* (Torino: UTET), Chapters IV and V; M. Sarcinelli (2012) *L'unione bancaria europea*, in *Banca Impresa Società*, no. 3, p. 333. For some significant reflections made in the past by the doctrine with regard to the role played by the ECB in the Union see T. Padoa Schioppa (2004) *L'euro e la sua banca centrale. L'unione dopo l'Unione* (Bologna: Il Mulino).
73. See Wymeersch *The European Banking Union. A first Analysis*, cited, p. 20; F. Guarracino (2012) *Dal meccanismo di vigilanza unico (ssm) ai sistemi centralizzati di risoluzione delle crisi e di garanzia dei depositi: la progressiva europeizzazione del settore bancario*, in *Riv. trim. dir. ec.*, I, p. 207, which points out that "the recent draft reform of banking supervision in the euro zone, as proposed by the Commission last September, also plans to intervene in the governance of the EBA in order, among other things, to ensure their decision-making capabilities".
74. See M. Perassi, *Brevi conclusioni* in Roma Conference 16 September 2013, *Dal testo unico bancario all'Unione bancaria: tecniche normative e allocazione di poteri*, p. 180.
75. See F. Capriglione *Mercato regole democrazia*, cited, p. 67.
76. See F. Guarracino *Dal meccanismo di vigilanza unico (ssm) ai sistemi centralizzati di risoluzione delle crisi e di garanzia dei depositi: la progressiva europeizzazione del settore bancario*, cited, p. 208.
77. See *Relation to the "Proposal for a Regulation of the European Parliament and of the Council"* COM (2012) 511, para. no. 1.
78. See I Visco *Intervento alla 88° Giornata mondiale del risparmio*, Rome, 31 October 2012, p. 12.
79. See D. Masciandaro *Gli sprechi ci sono, ma Bankitalia resta un istituto di eccellenza*, *ilFattoquotidiano* 17 September 2012 on www.ilfattoquotidiano.it/2012/09/17.
80. See UIF Report on its annual activity in 2013, 9 July 2014, where, for the first time since 2008 the Unit was established at the Bank of Italy, was prepared

extensive and detailed analysis of the contribution of the new organization in the fight against money laundering.

81. See Scarselli (2007) *Commento all'art.29*, in Nigro and Santoro (eds) *La tutela del risparmio. Commentario della legge 28 dicembre 2005, n. 262 e del d.lgs. 29 dicembre 2006, n. 303* (Torino: UTET); Soldati (2009) *L'arbitrato bancario finanziario della Banca d'Italia (ABF)*, in *Contratti*, 2009, 8–9, p. 853 ss; Quadri (2010) *L'Arbitro Bancario Finanziario nel quadro dei sistemi di risoluzione stragiudiziale delle controversie*, in *Nuova giur. civ. comm.*, p. 318; Auletta (2011) *Arbitro bancario finanziario e "sistemi di risoluzione stragiudiziale delle controversie"*, in *Società* I, p. 88; Bergamini (2011) *I nuovi strumenti stragiudiziali di soluzione delle controversie in materia bancaria e finanziaria*, in Gabrielli and Lener (eds) *I contratti del mercato finanziario*, in *Tratt. contratti Rescigno-Gabrielli*, II ed. (Torino: UTET), p. 451.
82. See ord. 21 July 2011, no. 218, in *Riv. trim. dir. pubbl.*, 2011, II, p. 117 ss, commented by A. Antonucci *ABF e accesso al giudizio di legittimità costituzionale*.
83. See among others Capriglione and Miglionico (2012) *The Italian Banking and Financial Arbitror between iurisdictio and Strengthening of the Supervisory Function*, in *European Business Law Review*, p. 333; M. Pellegrini *Commento sub art. 128 bis tub*, in *Commentario al testo unico delle leggi in materia bancaria e creditizia*, cit., tomo IV, p. 2032 ss.
84. See De Carolis (2011) *L'Arbitro bancario finanziario come strumento di tutela della trasparenza* (Rome: Bank of Italy) *Quaderni di Ricerca Giuridica della Consulenza Legale*, no. 70.
85. See M. Perassi (2011) *Il ruolo dell'ABF nell'ordinamento bancario*, in *Analisi giuridica dell'economia*, no. 1, p. 144.
86. See among others M. Pellegrini (2010) *La svolta disciplinare degli intermediari finanziari non bancari. Da un riscontro di regolarità alla "supervisione"*, in *Scritti in onore di Francesco Capriglione* (Padova: CEDAM), I, p. 294; V. Lemma (2011) *La riforma degli intermediari non bancari nella prospettiva di Basilea III*, in *Rivista elettronica di diritto, economia, management*, no. 1, p. 186; F. Capriglione *Commento sub art. 106 tub*, in *Commentario al testo unico delle leggi in materia bancaria e creditizia*, cited, t. IV, p. 1379.
87. See V. Troiano (2010) *I soggetti operanti nel settore finanziario* in *L'ordinamento finanziario italiano*, cited, t. II, p. 591.
88. On this point, see Article 13, para. 11, Decree-Law no. 95 of 2012, which precisely establishes the unique union at the summit between the two institutions.
89. See E. Galanti (2014) *L'Ivass, la vigilanza sulle assicurazioni e sulle banche*, in *Riv. trim. dir. ec.*, I, p. 38.
90. See Linguella *Risoppressa la Covip* in *Previdenza complementare* 5 May 2014 on www.previdenzacomplementare.finanza.com/2014/05/05,: "the delete operation is part of the fury destruens that, under the guise of saving and the elimination of waste, narrows the space of representation and democracy (see Senate and Provinces)....(while)...in the case of Covip, since there is neither waste nor savings, there is only one decision to further centralization of power".

91. A first organic attempt in this direction took place already in the parliamentary proceedings relating to the bill government on the "protection of savings" (see Parliamentary Act no. 4705) and a first draft of Decree-Law no. 95 of 2012, proposed by the Government Monti, in which it foresaw the closure of Covip.

8
Commissione Nazionale per le Società e la Borsa (Consob)

Mirella Pellegrini and Vittorio Mirra

8.1 Introduction

The Consob was introduced into the Italian legal system during the redefinition of the national financial market, in the context of the European economic integration.

Even before the origin of the Consob, under the Banking Law of 1936 the Italian legislation was characterized by the limited attention devoted to the securities market; the legal provisions were designed in order to institute control over the banking activities, which required the authorization of the Inspectorate for Credit and Savings (*Ispettorato per il credito e il risparmio*) on every issue of shares, bonds and securities if performed by means of companies under the supervision of the above-mentioned public entity. This authorization was compulsory for companies that intended to join a syndication issuance procedure for the placement of shares, bonds, etc. (Arts 2 and 45 of the Banking Law of 1936).

It is clear that the legislator, limiting its intervention to the above-mentioned two provisions, was not worried about the implementation of the national financial structure (not at that point in possession of modern operational tools[1]) but it intended to complete the control powers of the Inspectorate in order to ensure protection for the market for any action carried out by the banks (in this case, the issue and the placement of securities).[2]

The validation of a legislative production for regulating the securities market and, more generally, for affirming a neutral financial system (in which the supervisory powers must be independent of political influence, instead being designed to ensure objective conditions of development, in compliance with the new market reality[3]) became effective

only with the transposition of the European Directives on the banking system (no. 77/780 and no. 89/646).

In particular, overcoming the logic of a unique authority for the supervision of the financial sector (i.e., the Bank of Italy, thus identified by the 1926 and 1936 Banking laws[4]), the Italian regulator begins to look favourably at the creation of special administrations in charge of the supervision on specific areas of the financial sector.

In this regard, immediately after the institution of the Consob in Italy, several administrations arose, provided with powers of control on particular sectors of the financial system: at the beginning of the 1980s, Law no. 576/1982 introduced the Vigilance Authority for the Insurance Sector (Isvap, now Ivass) while immediately after, Law no. 287/1990 created the Antitrust Authority (AGCM).

The structure of the financial system, through the presence of independent administrations (see *infra* para. 8.4), enables the supervisory authorities to recognize requests from the market, activating the variegated forms of regulation under their competence.

This process is based on the belief that the actions set out by such authorities must be considered particularly suitable for a proper regulation of the sector, which is characterized by particularly complex operational forms and, therefore, highly technical features.

Thus, in the last decades of the twentieth century, the Italian legislator realized an authoritative framework for the supervision on the intermediaries and the markets, qualified by the independence of the administrations in charge of such powers.

Of course, the above-mentioned scenario requires time and certain circumstances to occur in order to move from an original model of "supervision by subjects" (of banks, markets or insurance companies) to a new model based on the functions performed; and this shift would be reached only after the crisis of the system, that interested the Bank of Italy at the beginning of this millennium.[5] The crisis caused the adoption of the law on public savings (Law no. 262/2005, as well as Legislative Decree no. 303/2006) which, in innovative terms, specified the tasks and the role of the supervisory authorities for the financial market.

8.2 Consob and the affirmation of a market system

The Consob was founded in 1974, in the context of a reform of the company law aimed to safeguard minority shareholders and small savers by putting listed companies under specific supervision.[6]

From that date onwards, the Italian financial system has moved from a sort of "closed", that is not interactive, economy, to an "open" one; this process has been carried out at both domestic (thus respecting the pluralism of issuers and the diversification of products) and international levels, implementing the relationships between companies operating in different countries with exchanges of cross-border financial products and therefore with activities performed beyond the national boundaries.

Academia has analysed the various phases of the Consob's evolution; this Authority, initially quite dependent upon the Ministry of Treasury, in 1985 – with Law no. 281 – reached its own free-standing configuration, autonomous with respect to political power.[7] The progressive expansion of its functions and, as better described below, the change in its organization and in its area of autonomy,[8] reflect a pattern aimed at complete regulation of the financial sector; in such a scenario, the Consob has the relevant role of ensuring the orderly functioning of the market.

In order to fully understand how the Consob can be located among the other supervisory authorities for the financial sector (in particular, the Bank of Italy) – and, therefore, within the independent administrations[9] – we need to focus on the exercise of public vigilance on the subjects operating in the financial system.

Thus, we will focus on the legislative provisions that concern the main goals of the controls and the adequate allocation of the competences among the various authorities supervising the financial market.

Initially, Law no. 1/1991[10] distributed the supervisory functions on the securities market according to a logic of "supervision by subjects";[11] consequently, the Consob – even though it, together with the Bank of Italy, held the highest position within the financial system – had limited powers of intervention (extended, exceptionally, to the controls on banks pursuant to Art. 16 of Law no. 1/1991).

Then, the affirmation of "supervision by functions",[12] not completely outlined, attributed to the Consob the control on the *transparency* as well as the chance to legitimately extend its interventions on banking – but in general on all financial – intermediaries operating in the market; this system was implemented with the Italian Banking Consolidated Law ("TUB"): the Legislative Decree no. 385/1993.

Only at the beginning of the twenty-first century, a system rationalizing the public control on the financial sector was implemented, with Law no. 262/2005, then amended by Legislative Decree no. 303/2006 (so called Law on public savings, which provided for some instruments

to fix the market failures arising from the crisis – Cirio, Parmalat – and mitigate the investors' lack of confidence).

The Consob, according to the evolution of the Italian economic legislation, renovated its structure, progressively widening its autonomy as well as its powers of intervention. In particular, the Italian Financial Consolidated Law (Legislative Decree no. 58/1998; TUF) clearly defines its competences, outlining its institutional role; thus, the Italian TUF clearly attributed a primary role to the Consob in the supervision of the financial system operators: after some initial provisions (Arts 1–4, which harmonize the interventions of the Consob and the actions of other vigilance authorities with the European legislation), it established the allocation of the Consob's assignments among the various entities subject to TUF's provisions and thus among intermediaries, markets and issuers.[13]

The powers of intervention granted to the Consob are justified by the aim to accord with the principles of transparency, establishing proper rules of conduct and disclosure obligations in order to correct the asymmetries that usually characterize financial transactions; the final goal is therefore to ensure investor protection, the healthy functioning of the market and respect for the corporate rules.

Moreover, the institutional innovations arising from the Law on public savings represent the highest legislative legitimization of the functions of the Authority, which was supposed to have reached a position comparable to that of the Bank of Italy in the diarchy of the Italian financial legal system.

The Consob's structural reorganization – and the change of its operational framework – reflected both the duties to be discharged according to the law (starting from Law no. 262/2005) and the legislator's intention to reduce the autonomy of the Bank of Italy (whose governing board is politically appointed in such a way as to restrict the independence of the Central Bank[14]) delimiting its powers of action within well-defined boundaries.

To sum up, the above-mentioned legal framework helps in understanding the new redefined role of the Consob that has new and complex duties better fitting a global financial economic context, which encourages an increasing opening to the market.

A further step towards the innovation and the expansion of the Consob's functions was implemented with the MiFID Directive (Directive 2004/39/EC) that completed and specified its position as supervisory authority of a modern financial market.

Decree no. 164/2007 for the transposition of that Directive confirms this scenario, introducing a regulation (aiming to safeguard the market and

protect investors) focused on the Consob's powers of intervention. From that emerges the clear belief that a mutual relationship between correct conduct and efficient functioning of the market does exist: behavioural correctness is *condicio sine qua non* for the consumers' trust in the market dynamics and indirectly for the smooth running of the market itself.[15]

The wording of Art. 5 of the Italian TUF is not coincidental (it derives from Decree no. 164/2007): following the logical order used until this point, it includes, among the duties attributed to the Consob, "the safeguarding of faith in the financial system", as a crucial condition for its growth.[16]

8.3 Consob: perspectives on its role within the new EU institutional framework

The financial crisis that occurred in the first decade of the twenty-first century involving some countries with developed enterprises (Argentina, Parmalat, Cirio, etc.) threw up problems with no easy solution that influenced the institutional orders of the Italian supervisory authorities at various levels. Among those problems, the adequacy of the organizations and the powers of the administrations are particularly significant; this holds true especially for the Consob which, in following the process of European integration, has new tasks to perform and must consequently take on increased responsibility.

An imbalance in the relationship between national and transnational regulators emerges – now more than ever before – with inevitable repercussions on the possibility of ensuring appropriate harmonization of controls in a context of market integration.

The financial and sovereign debts crisis that started in 2007 highlighted further gaps in the supervisory model then in force in Europe (under which Member States themselves were entitled to supervise the intermediaries operating in that sector[17]).

Therefore, the system of controls on the financial markets existing in each EU country suffered this circumstance, showing the inadequacy of the answers offered by a legislation that proved to be fragmented and inconsistent.

Similarly, the mechanisms of cooperation and coordination realized among the different national authorities were unable to apply either a uniform version of the European law or an effective exercise of the supervisory functions.

Hence the need at European level to reform the EU financial system's architectural scheme of control. In order to reach this goal, the elaboration

of an innovative structure of the financial system was initially assigned to a professional group chaired by Jacques de Larosière.

On the basis of the data elaborated by this group, starting from 1 January 2011, three new European supervisory authorities became operative, within the banking sector (EBA), the securities and the financial markets (ESMA) and the insurance and pension funds (EIOPA).[18]

In addition to these authorities, a further EU body (the European Systemic Risk Board, CERS or ESRB,) was tasked with macroprudential supervision, in order to operate in strong connection with the European Central Bank (whose President is also the chief of the CERS).

The authorities and the above-mentioned body, together with the national supervisory authorities, form the European System of Financial Supervision (ESFS).[19]

These three authorities use specific powers and tools oriented to the protection of consumers and financial activities. Those tools, including specifications, integrations, clarifications and further developments, are aimed at reducing uncertainty and the discretionary powers of the European law, in order to reach a uniform regulatory policy. The attribution of such prerogatives to these Authorities is based on the identification of entities provided with high technical competences.

The specification of such competences at European level has generated problems of evaluation (*rectius*: analysis) with regard to the relationship between the European Authorities and the national ones that at a domestic level have functions that are the same as those of EBA, ESMA and EIOPA.

In this respect, it is worth noting that the above-mentioned European Authorities are enabled to issue provisions that directly affect the financial intermediaries located in the Member States. Additionally, it is important to understand that said forms of regulatory standardization represent a kind of regulation with a level higher than that of the domestic ones, and they will consequently prevail in the case of different disciplinary approaches.[20]

This organizational scheme appears unfit to achieve a balanced supervision of the market (if it is analysed from all its various viewpoints, with reference to the regulatory powers or to the concrete actions towards the financial players).

This issue was considered by the resolution of the European Council dated 14 December 2012, which endorsed the project of constitution of the Single Supervisory Mechanism (SSM); this project was introduced to the euro zone by the European Commission in September 2012. The European Banking Union (EBU) was thus created, and the power to

supervise the banks with size able to influence the stability of the financial system was allocated to the European Central Bank (ECB).

It is quite clear that the main objective was to start an action of supervision that could optimally harmonize operational procedures (improving coordination and cooperation among Member States) and, more generally, to guarantee the balance of the financial markets and the economic systems shocked by the crisis.[21]

ESFS and EBU will surely deeply interact with the activities of the national Authorities (even if in different ways), limiting their potentialities.

In fact, the UBE and the SSM involve the banks with registered offices in the Member States (and only those of systemic importance, that receive "public financial assistance"), which are under the prudential supervision of ECB (and are therefore no longer under the control of the national Central Banks).

It must also be taken into consideration that the potential extension of the UBE to countries not included in the euro zone does not seem to have received positive feedback from those countries themselves.

Such a disciplinary innovation represents a dystonia for the agencies supervising the Italian financial market. More specifically, on the one hand the Bank of Italy, in the light of the above-mentioned institutional changes, appears destined to narrow down its functions (or at least to maintain limited powers on the small/medium-size banks); on the other, the Consob does not seem to have suffered the same downsizing, since it is not within the SSM (which concerns only the banking sector).

Moreover, the interventions of the ECB in the general context of the banking union, having an impact on market reality (even though only indirectly), will also influence some profiles of the typical controls of the Consob. But at this stage, it is merely a hypothesis to be tested.

From a different point of view, it should be considered that in the near future, when the disciplinary measures will be entirely *en force* and the ESMA will have an active role in the identification and definition of the main supervision guidelines, the Consob too should comply with the inputs of such European authority, becoming substantially subject to it; in such an event, the Consob's supremacy over the domestic securities market might be considered as fully accomplished.

Therefore, while the Bank of Italy – with its huge structure – was forced to redefine its functions extending its *agere* beyond the traditional competences (think, e.g., of the Banking Ombudsman (ABF), and the incorporation of the former Italian Exchange Office and the Isvap, now denominated Ivass), the Consob's case is different: even though it

has the traditional role of substantial *ex post* verification of the potential weaknesses of the financial intermediaries, it should now seek new areas of intervention, with the purpose of preserving its efficiency as well as its primary role in the market – this, relating to both the definition of the corporate governance schemes of the entities under its control and the methods of trading financial products.

More particularly, it is deemed necessary to underline that, unlike the national central banks of the euro zone, induced by the Treaty of Maastricht to start processes of convergence (*rectius*: conformity) that are not only economic but also legal, the European supervisory authorities have not yet started this process. The forms of harmonization before and after the creation of the ESMA have merely limited and defined the activities of the intermediaries and the markets, and they have had a very limited (i.e., indirect) impact on the powers and on the organizational structure of the national vigilance authorities.

Consequently, the standardization function authoritatively performed by ESMA is required for the elimination of the existing asymmetries among national authorities: it could be a factor of aggregation among the forms of supervision in the EU with positive effects for a concentration of controls more consistent with the mature European financial market.[22]

On the basis of this evaluation, the route to follow in order to reach an optimal configuration of the European market of the financial services is still a long and wearisome one.

It is still unclear if the Consob will be able – considering its small size and the inadequate strategy of governance currently carried out – to face a change implying the assignment of new functions by the European legislator.[23]

8.4 Consob: an independent administrative authority

The Commissione Nazionale per le Società e la Borsa (Consob) is the Italian authority in charge of supervising and regulating the financial market.

This Authority's duties cover a range of tasks aimed at the protection of public investment. The vigilance activities carried out by the Consob could be concurrent with those performed by the Bank of Italy, though their respective functions differ in the goals they set out to attain.[24]

The model used for financial market supervision promotes and requires the cooperation and coordination of various national authorities:[25] the Bank of Italy, the Consob and Antitrust[26] (responsible for stability, transparency and fairness, and competition respectively).

The Consob can be listed among the independent administrative authorities (*autorità amministrative indipendenti*): this status, although not explicitly classified by law, is characterized by common features pooling these public bodies[27] (e.g., expertise and autonomy). The number of this particular type of public entity in Italy has been increasing since the 1990s, when the State began asserting itself as regulator (rather than as manager, until then its main role[28]), inspired by the British model of independent regulatory authority.

In Italy, these independent Authorities have emerged lacking an organic scheme, due to external pressures and economic difficulties. The heterogeneous nature of the provisions regulating these entities[29] and their powers, render it impossible for them to be classified under a unique category.[30]

As a rule, these Authorities differ in the type of functions they carry out (regulation, supervision and rights protection, or quasi-judicial activities), and their areas of intervention. In addition to their main duties, the independent administrative authorities have to perform auxiliary ones; and they are duty bound to perform tasks demonstrating their accountability, such as annual reporting to Parliament on the activities they have undertaken in the strategic sectors entrusted to them.

Compared to the ordinary public administration, specific traits characterize these Authorities: first of all their independence,[31] which releases them from any subordination normally tying ordinary governmental administrative bodies to the State; thus interrupting, in fact, the ratio of responsibility which binds Government to Parliament. They are therefore completely independent from the political powers. However, said independence is mostly theoretical, owing to the political derivation of the Authorities' members, who are appointed by the political parties (by means of Parliament or the Government[32]). According to some,[33] this independence should also be granted to Parliament.[34] Finally, these Authorities denote an extreme level of competence and professionalism, so preventing regulatory capture.[35] In light of this, they could be classified as Scientific Government Authorities, considering the quality of the opinions they express, which do not appear to be based on the criteria of common administrative discretion, but rather by exercising a power ascribable to the paradigm of technical discretion.[36]

The independent administrative authorities, therefore, perform public duties in order to protect general interests in key sectors, with a neutral position with regard to the public and private interests involved; and their internal decision-making processes are based on experience and technical neutrality, independent of the political powers.

The transparency of the decision-making processes is provided as a counterbalance to the natural absence of the Authorities' political responsibility, and it is ensured by the stakeholders' participation in the regulatory process.[37]

The transfer of powers from the central government to the independent Authorities, which has been deemed a "Copernican revolution", followed the affirmation of the principle of the full protection of the market's interest. Individuals and companies have acquired a prominent position in protecting businesses from State interference, rendering necessary the establishment of the mentioned Authorities as a functional warranty.[38]

The powers granted to the Consob within the financial sector have been justified not only with respect to the Italian Constitution, based on several principles such as the protection of savings (Art. 47 of the Italian Constitution), the transparency and fairness of information (Art. 21), the equal treatment of investors (Art. 3) and the good performance of the public administration (Art. 97); but also with reference to some European principles (consumer protection, freedom of competition, freedom of establishment and free movement of capital).[39]

8.5 Cooperation with other Authorities and professional secrecy

Financial regulation in Italy has been frequently amended, and rarely introduced in a coordinated way. This has resulted in a structure providing various vigilance procedures that are difficult to classify; the competences are distributed among different supervisory authorities: the regulation is, in fact, characterized by a mixed approach.[40]

The overall consistency and functionality of the Authorities' actions are also guaranteed by collaboration with each other in the formulation of proposals, the expression of opinions and agreements, and the exchange of information.

The exchange of information is a fundamental instrument of said cooperation; it is necessary to the execution of the supervisory activities according to their different purposes, while mutually respecting each Authority's independence in the pursuit of its institutional role.[41]

Specifically, the cooperation between the Consob and other Authorities occurs at different levels.

As to the relationship with the governmental authority and particularly with the Ministry of Economy, the Consob offers its technical opinion on the regulatory provisions implemented by the Ministry (e.g.,

the requirements for respectability and professionalism in a company's top managers), and it is often consulted on technical issues concerning the legislation to be adopted. (Nevertheless, the political responsibility for the adoption of any legislation in the financial field lies exclusively with the mentioned Ministry.)

The Law on public savings (Law no. 262/2005) properly establishes different types of coordination among supervisory authorities, maintaining their independence from governmental interference. Therefore, and in light of the above-mentioned mixed approach, the Consob exchanges information with the Bank of Italy, the Commission for monitoring pension funds (Covip), the Insurance Supervisory Authority (Ivass) and the Antitrust Authority (AGCM), in order to facilitate and coordinate their respective monitoring activities, and execute common arrangements or joint regulations, if necessary.[42]

The Consob also maintains collaborative relationships with associations representing specific categories (e.g., consumers' associations), taking into account their observations and assessments in the performance of their institutional duties.

The Consob also collaborates with other Italian public administrations by exchanging information and generally aiding in their respective functions, though within the limits of professional secrecy required by their mutual relations, which cannot be in opposition with the Bank of Italy, Covip and Ivass.[43]

The exchange of information with the authorities and committees of the European System of Financial Supervision (ESFS) is also ensured; in the cases and ways established by the applicable European legislation, they fulfil the disclosure obligations with regard to other authorities and institutions indicated by the law.

On a European level, the Consob can execute cooperation agreements with the competent authorities of the European Union Member States and with the European Securities and Markets Authority (ESMA), which may provide for a mutual delegation of supervisory duties. The Consob participates in the CESR (Committee of European Securities Regulators), established in June 2001 by the European Commission for the purpose of examining matters of common interest to all EU Member States and other states of the Common European Area.[44]

As to international bodies, the Consob is a member of IOSCO (International Organization of Securities Commissions[45]), which currently encompasses the supervisory authorities of financial markets in over 100 countries, as well as of ESMA (whose members are the Supervisory Authorities of the European Union Member States); and

participates in activities carried out by other international organizations with regard to financial services, such as the Organisation for Economic Co-operation and Development (OECD),[46] the World Trade Organization (WTO)[47] and the International Forum of Independent Audit Regulators (IFIAR).[48]

8.6 Consob's supervision on the financial markets and its main duties

Banking, securities and insurance segments are becoming increasingly integrated in terms of markets, intermediaries and financial instruments. The boundaries that once clearly separated these activities are now less distinct in most developed financial systems, because of the intense technological, geographical and functional assimilation process that these three sectors are undergoing, and also because the intermediaries are becoming less specialized. In light of this, the Consob's supervisory powers have gradually expanded in their scope, encompassing not just the stock markets, but also issuers, public collection of savings, undertakings for collective investment and intermediaries.[49]

The Consob and the Bank of Italy, according to their respective competences, carry out vigilance activities with the following objectives:

a) safeguarding trust in the financial system;
b) protecting investors;
c) maintaining the stability and proper operation of the financial system;
d) keeping the financial system competitive;
e) ensuring compliance with financial law.

In pursuit of these objectives, the Bank of Italy is responsible for risk containment, asset stability, and the proper and prudent management of intermediaries, while the Consob is responsible for transparency and fairness of conduct (Art. 5 of the Italian Consolidated Financial Law – TUF).

In essence, the Consob's task is to protect investors and ensure the effectiveness, transparency and development of the stock markets, by means of a wide range of powers.

These powers can be summarized – referring to each area of vigilance covered – in terms of the kind of activities performed: regulatory, informative, and inspection. All of the above are complemented by the power to sanction the entities supervised.[50]

Firstly, the supervision on financial markets is performed by assigning powers to adopt regulatory measures[51] or rulings, with either general or individual effectiveness.[52] The law on public savings (no. 262/2005) further increased said powers, in order to face the problems generated by the corporate scandals of that time (e.g., the Parmalat scandal[53]), during which significant regulatory interventions – defining governance rules for listed companies, the regulation of accounting controls and the provision on financial products and investor protection – were implemented.

As a general rule, the Authority's actions must be duly motivated,[54] and cause the minimum amount possible of negative impact on supervised entities;[55] this means that the Consob's action is allowed – as a tool to protect the constitutional value of savings – insofar as it grants a balanced market development through the safeguarding of freedom.[56]

In performing its supervisory functions, the Consob is bound by several principles[57] aimed at ensuring the proportionality of its action, which – added to the discretionary powers granted to the Authority – outlines a framework able to provide an adequate and sufficiently flexible technical response, within the legislative frame, to the problems the market faces during its operation.[58]

The Consob's administrative powers are imperative and enforceable; its actions are, therefore, subject to the jurisdiction of the administrative courts (whereas the competent judge for claims against sanctions issued by the Consob, is the Court of Appeal, that is, the civil courts).

The range of the Consob's regulatory powers is broad; it covers investment services and activities,[59] authorizing their execution if a proper corporate and organizational structure is ensured and also certain economical requirements,[60] regulating the behaviours to be adhered to by the intermediaries,[61] the disclosure of the "regulated information"[62] necessary to keep markets and investors duly informed, the management, conduct and data concerning the intermediaries and the main relevant facts having an impact on the evaluation for investment purposes.

The Consob also has specific powers of action when mandatory rules set out by the law are breached. Specifically, if Italian investment companies (as well as non-EU investment companies and banks, asset management companies, fixed capital investment companies (SICAFs), non-EU Alternative Undertaking for Collective Investment Managers (AIFMs) authorized in Italy or banks authorized to provide investment services and activities having their registered office in Italy) violate the rules provided by TUF, the Consob, to the extent of its duties, may order them to cease such irregularities; furthermore, it may prohibit them

from engaging in new transactions, and may also impose any other limitation relative to each type of transaction involving single services or activities.[63]

Particularly with regard to the regulated markets, the Consob ensures that market rules are compliant with European law, and sufficient to ensure the transparency of the market, the orderly conduct of trading, and the protection of investors; the Consob may also require stock exchange companies (*società di gestione del mercato*) to amend market rules in order to eliminate any problem it may find. With its supervisory powers over stock exchange companies and individual segments of regulated markets, the Consob, is in a position to greatly affect the autonomy of the entities acting on these markets. The Consob authorizes the operations of regulated markets; it can forbid the implementation of admission decisions, the exclusion of financial instruments and market participants, or revoke such decisions; it governs market insolvency of parties admitted for trading on regulated markets and in multilateral trading systems; it can revoke the above-mentioned authorization, and it can also replace the action of the stock exchange companies.[64]

Listed companies are also subject to the Consob's regulatory powers[65] (e.g., notification of the participation of the major shareholders,[66] reporting obligations on all the transactions executed on markets; examination of accounting documents and the opportunity to challenge the certified financial statements, verifying transactions with related parties;[67] corporate governance; company information[68]); and additional regulation defines multilateral trading facilities,[69] systematic internalizers,[70] regulated market management companies,[71] and online portals for innovative start-ups.[72]

With regard to ensuring complete and correct information throughout the financial markets, the Consob must approve a prospectus[73] and all of the documentation for takeover bids and IPOs; this task allows investors to make informed investment decisions.[74] The Consob authorizes the publication of a prospectus after verifying that it is complete, and that its content is consistent. Additional monitoring is provided during and at the end of the offering proceeding,[75] in order to ensure compliance with the applicable law and regulation, as well as fairness and transparency while the transactions are being executed.

The Consob could be found liable for spreading incomplete information, as it could be found liable for negligence while performing its supervisory authority, even if it has been rarely declared so by the Courts.[76]

Furthermore, within its regulatory powers, the Consob may also spontaneously issue communications formally expressing its opinion

on the scope of individual regulatory obligations, or on the applicability of further legal provisions; by doing so it concurs in clarifying the matter in question with additional elements identifying the proper rule of conduct to be adopted,[77] in order to comply with the applicable regulation.[78] These kinds of acts have an indirect conditioning strength on the supervised entities; therefore they can be challenged before the administrative court.[79]

As previously mentioned, some decisions have a more direct impact on the subjects involved in the financial markets: decisions on the authorization of the exercise of a restricted activity, the monitoring of same, amendments to some resolutions and, of course, the powers to sanction violations of the obligations set forth by the law, as well as by Consob regulations.[80]

Among their powers, the Consob's supervisory authorities can also require authorized intermediaries to communicate data and information, and transmit documents, periodicals, spot reports and records (informative vigilance).[81]

The intervention of the Authority could be even more severe; the Consob may, in fact, with regard to authorized intermediaries:

a) convene the directors, members of the panel of auditors, and managers;
b) order the convening of the governing bodies, and set the agenda for the meeting;
c) proceed directly to convene the governing bodies, when the competent bodies have not complied with an order issued by the Authority.

Furthermore, the Consob and the judicial authorities regularly collaborate, exchanging information and documentation regarding crimes potentially committed.[82] The Consob may report the facts to the civil courts in the event of a well-founded suspicion that the panel of auditors, the supervisory board, or the management board, while performing their supervisory duties, have engaged in serious irregularities; as well as in the event of a well-founded suspicion that a company is providing investment services or activities, or collective asset management services without being authorized.[83]

Finally, the Consob may carry out inspections of authorized intermediaries, require that they exhibit documents, and adopt any measure deemed necessary, in compliance with the provisions of European law.[84]

8.7 Investor education

Over the past years, and through multiple interventions, financial law and regulation has outlined a strategic plan aimed at emphasizing the investor's position regarding information requirements. This activity is designed to improve the relationship of trust between investors and the Authorities (so-called bonding[85]), and to ensure that they progressively become more aware in the way they make investment decisions. The Italian legislator has often underestimated this aspect, but it has been considered and valued by the Consob.[86]

Investor education represents an active administration tool with which the Consob, while promoting a widened and deepened knowledge on issues of public and social interest, safeguards the general interest of public savings.[87]

The purpose of investor education is, as has been pointed out, to increase the public's financial knowledge.

There are two main tools to achieve this goal. On the one hand, it is important to promptly provide investors with easy access to complete, accurate and useful information; on the other, it is necessary to implement the availability of such information with educational initiatives, so that investors can comprehend its key elements, and, more generally, benefit from the protection mechanisms allowing them to freely make conscious investment choices and avoid excessively risky, abusive, or even fraudulent investments. In brief, the objective of investor education is to strengthen the individual investor's self-protection capabilities.

Thus, investor education completes and is complementary to the traditional tools with which the Consob carries out its supervisory activities, and with them it jointly contributes to the goal of protecting public savings.

The Consob, through its website, provides useful information on investments and financial products, in order to raise the general level of financial knowledge and render the process of making investment decisions easier.[88] An example is the very recent case on equity crowdfunding.[89] The Consob is the first national financial supervisory authority to have adopted a specific regulation on equity crowdfunding, outlining appropriate rules for investing in innovative start-ups through online portals; concurrently it drafted a very detailed investor education document (available on the Consob website[90]), entitled "Important things to know before investing in innovative start-ups through an online portal". This document provides, step by step, all the information necessary to fully understand the phenomenon of crowdfunding, the legislation in

force, and the rules applied to online capital offers, including the risks associated with investing online.

8.8 Sanctioning powers

The sanctioning powers granted to the Consob must be viewed as the final step in a complex and manifold vigilance procedure. The efficiency of a regulation is strictly related to the proper implementation and enforcement of the rules set. There is, therefore, a functional link between the Consob's regulatory activities and its sanctioning powers, because the latter must be considered as the executive phase of the above-mentioned activities.

The sanctioning proceeding has been recently amended by the Consob;[91] it implements the provisions set out by TUF and is completed by the general legislation on administrative procedures (Law no. 241/90) and on decriminalization (Law no. 689/81).

The basic principles on which all of the provisions regulating the sanctioning proceeding are founded can be summarized in: full knowledge of the investigation records, necessary formalization of the activities carried out and the distinction between preparatory and decision-making functions with regard to the imposition of the sanction.[92]

The trends indicating how to achieve improvements in efficiency both on a national and European level show that the administration's effectiveness and timeliness, and procedural simplification and celerity, are principles also applicable to the sanctioning proceeding. The new structure of the sanctioning proceeding aims at ensuring that the Consob's power to sanction is executed promptly, thus also ensuring certainty in legal relations.[93]

The organizational model of such procedure is no longer comprised of the "two phases" in force until March 2014,[94] assigning the investigation phase entirely to the Administrative Sanctions Office[95] (*Ufficio Sanzioni Amministrative*[96]), and so reducing the time to complete the administrative proceedings from 360 to 180 days (starting from 30 days after the date on which the letter contesting the violation[97] is notified to its alleged author(s)).

In full compliance with the need to simplify the relationship with the Consob, all communications and notifications pertinent to the sanctioning procedure are made through PEC (certified email account), thus attaining the complete dematerialization of the process.

The interested parties may exercise the right to defence granted them by several means: file a defensive brief and documentation; request to be

personally audited;[98] request postponement to file the documentation; request access to the documentation.

The technical contents of many claims, the difficulties often arising during the investigations, and also the objective of attaining a better rebuttal to the arguments presented by the alleged violator(s), has strengthened cooperation among the different Consob offices, in order to share the diverse competences of each, and thus justify and motivate the claim. The Administrative Sanctions Office may in such a case ask for a specific technical report to any of the vigilance Offices on the arguments presented by the parties, and on any other matter deemed worthy of investigation.[99]

At the end of the preparatory phase[100] the Administrative Sanctions Office submits to the Commission – within 15 days prior to the proceeding's expiration term – a report with reasoned proposals on the existence of the alleged infringements, and with either a proposal for the quantification of the relevant sanction to be charged, or about the dismissal of the proceeding.

The Commission is charged with the decision-making functions, adopting either a formal decision to sanction (possibly modifying the quantification proposal made by the Administrative Sanctions Office), or one to dismiss the proceeding, which will be notified to the interested party(ies).

The decisions imposing sanctions are published on the Bank of Italy's website and on the Consob Bulletin (available in electronic format on its website).[101]

The constitutional right of defence is further ensured by the right to file an opposition – against the sanction(s) inflicted – before the Court of Appeal having jurisdiction where the company or entity found responsible of breaching a financial regulation is located (if these criteria do not apply, the place in which the breach was committed is the one to consider).[102]

Finally, the effectiveness of the sanctions adopted by the Consob is also ensured by the provision stating the joint liability of the companies when a violation of the law and regulations is committed by their employees or representatives.[103]

Some of the administrative sanctions are rather relevant in their amounting and are also particularly afflictive, especially when further accessory sanctions are added, such as the confiscation of the product or profit gained by the illicit action, and the temporary disqualification from having an administrative, managerial or supervisory position in listed companies. This complicates the relationship with the criminal

sanctions set out by the applicable law on behaviours concerning the financial system.

All the recent European Directives demand that the administrative penalties and the other administrative measures shall be "effective, proportionate and dissuasive";[104] on the other hand, States may provide for and impose criminal penalties.

It must be emphasized that the co-existence of criminal and administrative penalties (the "double penalty"), even though allowed by European law, can however create difficulties for the entire sanctioning system, especially in light of recent judgments by the European Court for human rights.

The latter has adopted a functional approach with regard to the nature of the sanction: it does not consider the formal penalties' classification assigned by the State, but the severity of the penalty to which the individuals concerned were *a priori* liable[105] in terms of financial consequences for the applicant and the compromising of his/her integrity (e.g., in case of issuance of accessory sanctions).[106] For this reason a formal administrative penalty can be considered as criminal in nature (e.g., market manipulation – Grande Stevens and Others v. Italy); and if the proceedings before the Consob and the criminal courts concerned the same conduct by the same parties on the same date, it implies that the new set of proceedings concerned a second "offence" originating in identical facts to those which had been the subject-matter of the first; in such a case the "*ne bis in idem* principle" should avoid the second sanction being applied.[107]

It is true that the Consob's sanctioning proceeding has been – by now – considered compliant with a citizen's primary right, but probably, in the interest of the system's consistency, different solutions should be evaluated in terms of the type of offence committed (i.e., formal individuation of conduct to which a sanction is associated) in order to avoid the applicability in the future of the "*ne bis in idem* principle", which could hinder the Consob's or the criminal court's activities, having in essence a negative effect on legal certainty.

8.9 Conclusions

Consob activity therefore remains essential for public control of the Italian financial market, ensuring disclosure of complete and accurate information to the investing public by listed companies, transparency and correct behaviour by financial market participants, and accuracy of the facts represented in the prospectuses related to offerings of

transferable securities to the investing public, compliance with regulations. Also still essential in the performance of its activities are: cooperation with public authorities (the Ministry of the Economy and Finance, the Bank of Italy, the Insurance Industry Regulatory Authority – Ivass, the Pension Fund Regulatory Authority – Covip), with market bodies, with the judicial authorities, and with trade associations.

Given the subject matter of the Consob's work as a supervisory and regulatory Authority, the evolution of its regulation and control forms are affected by increasingly supranational standards. As a result, the Consob is a member of, and participates to the work of, the European Securities and Markets Authority (ESMA), and it also participates in the activities of the Financial Stability Board, within which it is represented by its President.

Ultimately, the continuing challenge for the Consob is to find a balance between public interest, protecting investors, and the free development of the autonomy of financial intermediaries, so as not to interfere in the constantly accelerating processes of financial innovation in the market.

Notes

1. Mirella Pellegrini wrote paras 1, 2, 3 and 9; Vittorio Mirra wrote paras 4, 5, 6, 7 and 8. The opinions expressed in this article are Vittorio Mirra's own and do not reflect the views of the Consob.V Pontolillo, *Commento* sub *art. 45 r.l.d. n. 375, 1936*, in Vv. Aa., *Codice commentato della banca* (1990), Milan, Giuffrè ed., I, 535.
2. In this context is relevant Law no. 428 of 3 May 1955 (Provisions for the issuance of shares and corporate bonds) which requires ministerial authorization, having consulted the Interministerial Committee for Credit and Savings (*Comitato Interministeriale per il Credito e il Risparmio* – CICR), for an increase in paid-in capital and bond emissions exceeding the amount of Lit 500,000,000 (€258,230).
3. F Capriglione, *L'ordinamento finanziario verso la neutralità* (1994), Cedam Padova ed., Chapter 4.
4. Royal Law decree (regio decreto legge) 6 November 1926, no. 1830, and Royal Law decree 12 March 1936, no. 375.
5. We refer to the well-known case of "betrayed consumers" ("*risparmio tradito*") originated by the leaks from Cirio and Parmalat, which pointed out the deep deficiencies in the Consob control system.
6. F Capriglione, *L'ordinamento finanziario verso la neutralità* (no. 3 above).
7. B Libonati, *La "quarta" Consob*, in *Riv. soc.* (1985), 433; G Minervini, *La Consob* (1989), Liguori Napoli ed., 14.After Law no. 49/1977 (that made the secondary market official), Law no. 77/1983 was issued. Such a law is very relevant for the extension of Consob's control over all the public offerings of shares, bonds or securities, establishing the obligation to communicate in advance the transactions carried out and the publication of an informative prospectus.

8. Law no. 281/1985 removed the interference of the governmental authority in the performance of Consob's duties, granting full autonomy within the limits set forth by the law (Art. 1). Some links with the political authority still remain (transmission of relevant information and documentation to the Ministry of Economy, that can transmit its observations to the Consob; furthermore, the proceeding for the appointment of the members of the Consob is effected by the governmental authority, but only to ensure a suitable form of political accountability (i.e., democracy) for the individuation of the bodies politically responsible in the performance of the functions assigned to the Consob.
9. G Montedoro, *Mercato e potere amministrativo* (2010), Editoriale Scientifica Napoli, 319.
10. F Capriglione, *Note introduttive alla disciplina delle s.i.m. e dell'organizzazione dei mercati finanziari*, in *Quaderni di ricerca giuridica della Consulenza legale della Banca d'Italia* (1991), Rome, no. 25.According to Law no. 1/1991, the Consob's competences have been further increased, having granted to this Authority a primary role in the regulatory process.
11. Vigilance by subjects, characterized a public intervention linked to the typologies of financial operators.
12. Vigilance by functions, which assigns to the supervisory authorities competences according to the objective of actions set forth by the law: stability, transparency and competition, assigned to the Bank of Italy, the Consob and Antitrust, respectively.
13. S Providenti, *Art.91 tuf.*, in *Il testo unico dei mercati finanziari. Società quotate, intermediari, mercati, OPA, insider trading* (1998), Milan, 32.
14. F Capriglione, *Crisi di sistema ed innovazione normativa: prime riflessioni sulla nuova legge sul risparmio (Legge n.262 del 2005)*, in *Banca borsa tit. cred.* (2006), I, 126.
15. M Pellegrini, *Le controversie in materia bancaria e finanziaria* (2007), Cedam Padova ed., Chapter 5.
16. The positive relationship established among the fairness of the intermediaries' behaviour and the efficiency of the markets in which they operate is broadly recognized by academia; see H Varian, *Intermediate Microeconomic* (2005), Boston, W. W. Norton & Company.
17. It implied the failure, at European level, of the process of legislative harmonization in the banking, financial and insurance fields, in light of the persisting fragmentation of the applicable disciplinary and supervision regimes, while considering also the wide gap between the general principles fixed by European law and the potential implementation at domestic level of such principles.
18. These Authorities are entities of the Union with autonomous legal status.
19. V Troiano, *The New Institutional Structure of EBA*, in *Law and Economics Yearly Review* (2013), 2, I, 163; E Ferran, *Understanding the New Institutional Architecture of EU Financial Market Supervision*, in *Legal Studies Research* (2011), Paper Series, University of Cambridge, Faculty of Law, available at www.ssrn.com.
20. M Pellegrini, *L'architettura di vertice dell'ordinamento finanziario europeo: funzioni e limiti della supervisione*, in *Riv. trim. dir. econ.* (2012), I, 57.
21. F Capriglione, *L'Unione bancaria europea* (2013), Utet Torino ed.

22. This is not to diminish the importance of the European entities, nor to suggest attempts aimed to revalue the (residual) competences of the national authorities. The participation of each country and its own supervisory authority must surely become an essential moment of the transnational structure, but the perspective of a new European organizational model of the financial system has to be connected to the above-mentioned formula, that can unite different realities and, therefore, achieve the unitary intent to realize the common interest in a global context.
23. See MiFID II Directive (Directive 2014/65/EU), EMIR Regulation (Regulation 2012/648/EU), AIFMD Directive (Directive 2011/61/EU).
24. In the exercise of supervisory functions, the Bank of Italy and the Consob shall observe the following principles: (a) valuation of the decision-making autonomy of authorized persons; (b) proportionality, intended as a criterion for the exercise of power suited to achieving the purpose, with the minimum sacrifice of the addressees' interests; (c) recognition of the international character of the financial market and safeguarding of the competitive position of Italian industry; and (d) facilitation of innovation and competition.
25. The Italian Consolidated Financial Law (Legislative Decree no. 58 of 28 February 1998; TUF) and the Italian Consolidated Banking Law (Legislative Decree no. 385 of 1 September 1993; TUB) establish cooperation between the Authorities in the main principles of the legislation (Arts 4 and 7, respectively).
26. In addition to these, the Insurance Supervisory Authority (Ivass) and the Commission for Monitoring Pension Funds (Covip) are responsible for the insurance and pension sectors respectively.
27. On this matter, see M Clarich, *Autorità indipendenti* (1995), Bologna Il Mulino ed.; A Pajno and M D'Alberti, *Arbitri dei mercati. Le autorità indipendenti e l'economia* (2010), Bologna Il Mulino ed.; F Merusi and M. Passaro, *Le Autorità indipendenti* (2011), Bologna Il Mulino ed.
28. A La Spina and G Majone, *Lo Stato regolatore* (2000), Bologna Il Mulino ed.
29. G Amato, *Autorità semi-indipendenti e autorità di garanzia*, in *Riv. trim. dir. pubbl*. (1997), 645.
30. F Benvenuti, *Disegno dell'Amministrazione italiana – Linee positive e prospettive* (1996), Padova Cedam ed., 226.
31. The independence of the Commission's members is granted by several provisions ensuring the neutrality of the decisions taken during their office. They cannot perform any other professional activity nor carry out any public function; they cannot be removed by individual action, but solely for reasons of incompatibility as set forth by the law.The Consob's independence is confirmed by its financial authority and by the power – granted by the law – to define its own internal rules. The Consob personnel have their own roll, the employment procedure is managed directly by the Authority, and the financial treatment is linked to that of the Bank of Italy, save for specific organizational needs. *Amplius* in M De Benedetto, *Indipendenza e risorse delle autorità indipendenti*, available at www.astrid-online.it.
32. With specific respect to the Consob, the Commission is composed of five members appointed by a Decree of the President of the Republic, on the proposal of the Prime Minister, reached by resolution of the Council of Ministers, with mandatory advice from the parliamentary commissions

(see Art. 22, para. 13, of Law Decree no. 90 of 24 June 2014, converted into Law no. 144 of 11 August 2014). The governance of the authority and the imbalance between the powers granted to the Chairman and those of the Commissioners are analysed by L Enriques, *La governance delle autorità di vigilanza dei mercati finanziari*, in *Giur. Comm.* (2013), 6, I, 1153.

33. F Merusi and M Passaro, *Le Autorità indipendenti* (no. 28 above); *contra* V Cerulli Irelli, *Aspetti costituzionali e giuridici delle Autorità*, in *L'indipendenza delle Autorità* (2002), Bologna Il Mulino ed., 54.
34. The delegation provided by the legislator could be compared more easily to a trust than an agency: the settler/Parliament would delegate a "property rights policy" to the trustee/independent Authority, which would maintain the long-term interest (the specific mission), but could legitimately make short-term choices that differ from those required by the delegator; see A La Spina and G Majone (no. 29 above), 218.
35. M Carpenter, *Preventing Regulatory Capture: Special Interest Influence and How to Limit it* (2013), Cambridge University Press.
36. This kind of discretionary power is still judged by the administrative courts, though applying scientific and technical rules in accordance with the parameters of the best science and experience.
37. The peer review on the regulation adopted by the Authorities is ensured by the consultation procedure and by the system of notice and comment. This sort of reinforced democracy counterbalances the lack of a direct link with the representative political network. More pervasively M Clarich, *Manuale di diritto amministrativo* (2013), Bologna Il Mulino ed., 343.
38. G Guarino, *Le autorità garanti nel sistema giuridico*, in Aa.Vv., *Autorità indipendenti e principi costituzionali* (1999), Padova Cedam ed.; F Merusi and M Passaro, *Le leggi del mercato* (2002), Bologna Il Mulino ed., 64; F.A. Grassini, *I perché dell'indipendenza*, in V Cerulli Irelli, *L'indipendenza della autorità* (2001), Bologna Il Mulino ed., 6.
39. F Capriglione and G Montedoro, *Società e borsa (Consob)* (2002), in *Enc. Dir.*, Agg. VI, Milano Giuffrè ed., 1037.
40. This is an approach compliant with the new European configuration, with specific regard to the proposal formulated to create a new configuration to supervise the domestic financial market, by assigning different objectives or "finalities" to different authorities (see also C Goodhart and D Schoenmaker, "Institutional Separation between Supervisory and Monetary Agencies", in *Giornale degli Economisti e Annali di Economia* (1992), nos 9–12; RC Merton and Z Bodie, "A Conceptual Framework for Analyzing the Financial Environment", in D Crane et al., *The Global Financial System, A Functional Perspective* (1995), Harvard Business School Press, Cambridge; and LJ White, *Technological Change, Financial Innovation, and Financial Regulation: The Challenges for Public Policy* (1997), Wharton Financial Institutions Center, University of Pennsylvania, 33.
41. C Rabitti Bedogni, *Le nuove funzioni e i nuovi poteri di vigilanza della Consob*, available at www.astrid-online.it.
42. For example, the Regulation on the organization and intermediary procedures providing investment services or collective investment management services (adopted by Bank of Italy and the Consob on 29 October 2007 and subsequently amended by the joint deeds of the Bank of Italy and the Consob of 9 May 2012, 25 July 2012 and 19 January 2015).

43. TUF also mentions information exchanges, and enlists the collaboration of the *Guardia di Finanza* (the Italian Financial Police) for the performance of investigations and enquiries instrumental to the accomplishment of the institutional duties. Finally, there is a privileged channel of communication with the judicial authority, to which the Commission is required to report the facts established in the course of business, if they are relevant as a result of their criminal nature.
44. CESR's members have signed a Multilateral Memorandum of Understanding for the exchange of mutual information and administrative cooperation with the Authority.
45. The International Organization of Securities Commissions (IOSCO), established in 1983, is the acknowledged international body bringing together the world's securities regulators, and is recognized as the global authority setting the standard for the securities sector. IOSCO develops, implements, and promotes adherence to internationally recognized standards for securities regulation, and is working intensively with the G20 and the Financial Stability Board (FSB) on the global regulatory reform agenda.
46. The Organisation for Economic Co-operation and Development (OECD) promotes policies to improve the economic and social well-being of people around the world. Among the goals to be achieved by the organization there are: restoring confidence in markets, and the institutions and companies making them function; improving the regulation, and generally a more effective governance at all levels of political and business life.
47. The World Trade Organization (WTO) is the only global international organization dealing with the rules of trade between nations. The main goal of the organization is helping producers of goods and services, importers, and exporters conduct their businesses.
48. IFIAR focuses on the following activities: (i) sharing knowledge on the audit market environment and practical experience of independent audit regulatory activity, particularly regarding inspections of auditors and audit firms (ii) promoting collaboration and consistency in regulatory activity and (iii) providing a platform for dialogue with other international organizations that have an interest in audit quality.
49. *Amplius* in F Capriglione and G Montedoro, *Società e borsa (Consob)* (2002), in *Enc. Dir.*, Agg. VI, Milano Giuffrè ed., 1028.
50. These tools allow the identification and rectification of potential breaches of the rules set to prevent abuse, and the punishment of violators (e.g., rigorous powers are granted to the Consob by the legislation – at European level as well – on market abuse).
51. F Galgano and F Roversi Monaco, *Le nuove regole del mercato finanziario* (2009), Padova Cedam ed.
52. The regulations and measures with a general application adopted by the Bank of Italy and the Consob are published in the *Official Gazette of the Italian Republic*. Other important measures concerning persons subject to supervision are published by the Bank of Italy and the Consob on their respective web sites (Art. 3, para. 3, TUF).
53. On this matter, *ex multis*, V Sangiovanni, *Valori mobiliari la responsabilita' dell'intermediario nel caso parmalat e la recentissima legge per la tutela del risparmio*, in *Soc.* (2006), 5, 605.

54. See Art. 23 of Law no. 262/2005.
55. In order to reduce the administrative burdens faced by supervised subjects (Art. 6 of Legislative Decree no. 70 of 13 May 2011, converted by Law no. 106 of 12 July 2011), the Consob has mapped out the disclosure obligations set forth by financial regulation. Mapping these obligations has revealed a complex legislative/regulatory framework, deriving from an establishment of sources that have layered over time, with non-standard methods. Therefore, some types of interventions shall be implemented so to reduce the burden on supervised subjects, and increase the benefits for the market (the areas of intervention are available at http://www.consob.it/main/consob/oneri_amministrativi/index.html).
56. D Siclari, *Gold plating e nuovi principi di vigilanza regolamentare sui mercati finanziari*, available at www.amministrazioneincammino.it.
57. Art. 6 TUF expressly mentions the: (a) valuation of the decision-making autonomy of authorized persons; (b) proportionality, as a criterion to exercise the power best suited to achieve the purpose, while procuring minimum sacrifice to the addressees' interests; (c) recognition of the international character of the financial market, and safeguarding of the competitive position of the Italian industry; (d) facilitating innovation and competition.
58. M Clarich, *Le autorità amministrative indipendenti tra regole, discrezionalità e controllo giudiziario*, in *Foro amm. TAR*, 2002, 3865.
59. These activities are limited by law to investment firms, EU and non-EU investment companies, asset management companies, banks authorized by the Bank of Italy, EU and non-EU banks and foreign stockbrokers.
60. According to Art. 18 TUF, the provisions on investment services and activities to the public on a professional basis are reserved for investment companies and banks. Asset management companies may professionally manage public portfolios and carry out investment consultancy services. A regulated stock exchange company may be authorized to manage multilateral trading systems. Italian investment companies (SIM) may provide non-core services and other financial activities, as well as related and instrumental activities, to the public on a professional basis. For the authorization of online portals for the collection of capital for innovative start-ups (equity crowdfunding) see Art. 50-*quinquies* TUF. For the authorization of regulated markets see Art. 63 TUF.
61. In providing investment and non-core services and activities, authorized intermediaries must: (a) act diligently, fairly and transparently in the interests of customers and the integrity of the market; (b) acquire the necessary information from customers and operate so that they are always adequately informed; (c) use publicity and promotional communications which are correct, clear and not misleading; and (d) have resources and procedures, including internal control mechanisms, suitable for ensuring the efficient provision of services and activities (Art. 21 TUF).
62. See Art. 113-*ter* and following TUF. The issuers of securities make the regulated information public, ensuring access which is rapid, non-discriminatory and reasonably suitable for guaranteeing the effective divulgation throughout the entire European Union.
63. See Art. 51 TUF.
64. In case of necessity and urgency, the Consob adopts the measures required for the mentioned purposes (Art. 74 TUF).

65. The Consob verifies that listed companies comply with the reporting obligations relating to the market, and inflicts sanctions when such obligations are breached. Furthermore, the Consob, in the event of a well-founded suspicion that the board of auditors, the supervisory board or the management control committee, while performing their supervisory duties, has committed serious irregularities, may report the facts to the courts, pursuant to Art. 2409 of the Italian Civil Code.
66. See Art. 120 TUF.
67. Consob Regulation no. 17221 of 12 March 2010 – Provisions relating to transactions with related parties (as amended by Resolution no. 17389 of 23 June 2010).
68. See Part IV, Title 3 TUF.
69. The Consob identifies the minimum operating requirements for multilateral trading systems, including the obligations of their managers, and it can request the suspension or exclusion of a financial instrument from trading on multilateral trading systems.
70. The Consob may request that systematic internalizers exclude or suspend from trading financial instruments admitted to trading on regulated markets.
71. The Consob authorizes these companies by filing them in a register, if they have specific requirements. It also approves the regulation of each regulated market, and it can admit and identify market practices, behaviours that are repeated over time and are reasonably expected in one or more financial markets.
72. The collection of funds supporting newly established innovative businesses can be carried out through on-line portals managed by regulated intermediaries such as banks or investment firms, or by approved entities listed in a special Register (see regulation on equity crowdfunding adopted by Consob by resolution no. 18592 of 26 June 2013, available at www.consob.it).
73. The verification of the accuracy of the prospectus includes the consistency and clarity of the information contained therein, for its approval (Art. 94-*bis* TUF).
74. The prospectus shall contain the information that, depending on the characteristics of the financial products and the issuer, is necessary for investors to make an informed assessment of the issuer's assets and liabilities, profits and losses, financial position and prospects, and of the financial products and related rights. The prospectus also contains a securities note which briefly gives key information, in non-technical jargon. The format and content of the securities note, together with the prospectus, gives adequate information on the fundamental features of the financial products in order to aid the investors in deciding whether or not to invest in such products (Art. 94 TUF).
75. The Consob may suspend the public offering in the event of a well-found suspicion of violation of legal provisions and it may prohibit the public offering if the mentioned violations are confirmed (Art. 99 TUF). As to the takeover bids, the Consob may, *inter alia*, reduce or increase the purchase price and establish the exemptions from the mandatory bid obligations (see Title II of the Regulation implementing Legislative Decree no. 58 of 24 February 1998, concerning the regulation on issuers).

76. Supreme Court of Cassation, rul. no. 4587 of 25 February, 2009; Joined Chambers of Court of Cassation, rul. no. 7339 of 12 March, 1998. If there is evidence that the Consob omitted to exercise its supervisory power, and the existence of a causal link between the unlawful conduct and the harm suffered by the investors is verified, the Consob could be required to pay damages pursuant to Art. 2043 of the Italian Civil Code. See F Capriglione, *Poteri della A.G. in presenza di azioni per Danni nei confronti della Consob*, in *Mondo banc.* (2001), 3, 60; G Montedoro, *Questioni giurisdizionali in materia di atti illeciti delle autorità di vigilanza sui mercati. Rassegna di giurisprudenza*, in *Nuova giur. civ. comm.* (2002), 33.
77. It must also be mentioned that the activity of moral suasion towards the intermediaries, which is highly relevant with regard to the conduct of all the supervised entities, should be implemented according to the indication of the Authority. On the matter, see Cera, *La Consob* (1986), Milano Giuffrè, 95; Visentini, *La legalità nell'organizzazione dell'economia* (1995), Milano Giuffrè; Annunziata, *Interpretare o legiferare? Le comunicazioni persuasive delle Autorità di controllo sui mercati finanziari*, in *Riv. Soc.* (1995), 908.
78. V Cerulli Irelli, *Lineamenti di diritto amministrativo* (2010), Torino Giappichelli (ed.) On the effectiveness of the Consob's communications, V Porro, *L'efficacia giuridica delle "comunicazioni" delle autorità di controllo rivolte ai soggetti vigilati*, in *Giornale dir. amm.* (2000), 594.
79. TAR Lazio, 18 May 2001, no. 4191, in *Foro it.* (2001), III, 437.
80. For example, with regard to the regulated markets, the Consob authorizes their operation: it also has several powers versus the management company (e.g., to revoke a suspension decision for financial instruments and trading operators, and to request the stock exchange company to suspend financial instruments or intermediaries from trading).
81. The Consob may, in relation to any person who might be acquainted with the facts: (a) require information, data or documents in any form whatsoever, establishing the time limits for receipt thereof; (b) require existing telephone records, establishing the time limits for receipt thereof; (c) conduct personal hearings; (d) seize property (…); (e) carry out inspections; (…) (see Art. 187-*octies* TUF).
82. See Art. 187-*decies* TUF.
83. See Art. 166 TUF.
84. For the collaboration with the Authorities of other EU countries, please refer to Art. 10 TUF.
85. *Amplius* in M Tonello, *Corporate Governance e tutela del risparmio*, in F Galgano, *Trattato di diritto commerciale* (2006), 175.
86. More specifically, recently, various initiatives concerning investor education have been taken and implemented by the Consob together with consumer associations (e.g., the definition of the Investors' Charter, a point of reference for small investors in terms of financial education, and relations with intermediaries and with supervisory authorities).
87. An additional tool for ensuring a protection to the investors and to encourage a fair relationship between clients and intermediaries is the Conciliation and Arbitration Chamber managed by the Consob. For a thorough analysis see M Pellegrini, … part IV, Chapter 5, para. D.
88. The Consob website provides information on the risks linked with the various types of investment, detailed information on certain particularly complex

products (covered warrants, reverse convertibles, derivative products, etc.), and multimedia presentations to find out more about complex financial products, etc.

89. On the matter, ESMA – Securities and Markets Stakeholder Group, *Position Paper on Crowdfunding of 10 April 2014*, available at www.esma.europa.eu; L Collins and Y Pierrakis, *The Venture Crowd – Crowdfunding Equity Investment into Business* (2012), available at www.nesta.org.uk; A Agrawal, C Catalini and A Goldfarb, *Some Simple Economics of Crowdfunding* (2013), NBER Working Paper no. 19133, available at www.nber.org; L Hornuf and A Schwienbacher, *Which Securities Regulation Promotes Crowdinvesting?* (2014), available at www.ssrn.com; U Piattelli, *Il crowdfunding in Italia* (2013), Giappichelli Torino ed.; V Mirra, *Equity crowdfunding: la guida pratica* (2014), available at www.filodiritto.com; M Pinto, *L'equity based crowdfunding in Italia al di fuori delle fattispecie regolate dal "Decreto Crescita"*, in *Soc*. (2013), 7, 818; V Santoro and E Tonelli, *Equity crowdfunding ed imprenditorialità creativa*, available at www.dirittobancario.it.
90. http://www.consob.it/main/trasversale/risparmiatori/investor/crowdfunding/index.html
91. Consob Resolution no. 18750 dated 19 December 2013 (amended by Resolution no. 18774 dated 29 January 2014).
92. Art. 195 TUF establishes that "the proceedings shall afford all parties the opportunity to state their case and have access to the investigation file. Transcripts shall be taken of the proceedings. Investigatory and adjudicatory functions shall be separate".
93. For more specific details, refer to the Regulatory Impact Assessment report annexed to the consultation document of 5 August 2013, available at www.consob.it.
94. These two phases were autonomously managed by the Vigilance Office competent for the matter and by the Administrative Sanctions Office.
95. However, the activities and verification taking place before the formal letter contesting the violation ("pre-inquiry" phase) is sent, are still be managed by the Vigilance Office(s) competent for the matter.
96. The centralization of the investigation upon the Administrative Sanctions Office is aimed at achieving greater consistency and uniformity in the assessment of the facts on which the proceedings are based, thereby enabling an even more effective implementation of the principle of equal treatment of the parties.
97. The contents of this letter have been improved with more detailed and complete elements. Specifically, the notification letter of the charges includes: (a) a reference to the vigilance activities effected, to any inspection made and to the documentation acquired; (b) a description of the alleged violation; (c) an indication of the provisions of the relevant rules violated and the sanctions set forth by the latter; (d) an indication of the organizational unit responsible for the procedure; (e) an indication of the organizational unit where vision can be taken and copy extracted of the documents as well as the methods of submission of the application; (f) an indication of the terms for the submission of defensive briefs and documents, and for asking a personal audition within 30 days; (g) an indication of the certified mail address (PEC) to which the communications pertaining to the sanctions proceeding must

be sent; and (h) the invitation to communicate any certified mail address (PEC) to which the person concerned wishes to receive communications and notifications relating to the sanctions proceeding (see Art. 4 of the regulation on Consob sanctioning proceeding).

98. At the hearing, the employee(s) of the Vigilance Office who participated in the allegations of the violation contested (i.e., at the pre-inquiry phase), may participate, at the request of the Administrative Sanctions Office. The minutes of the hearing are signed by the parties (see Art. 5 of the regulation on Consob sanctioning proceeding).
99. Even in such an event, the discussions with the stakeholders are, however, ensured by the transmission to them of that report and the opportunity afforded to the persons mentioned by submitting their observations in reply within 30 days. In order not to affect the activities of the Administrative Sanctions Office and to ensure a reasonable period for making the necessary assessments, a suspension of the enforcement proceedings period has been established for the time necessary to acquire the technical report and for a maximum period of 30 days (see Art. 6 of the regulation on Consob sanctioning proceeding).
100. The Administrative Sanctions Office may order joint proceedings in cases where the alleged infringement has been committed by several persons cooperating with each other, or if the nature of the alleged violations is appropriate for a joint evaluation of the individual positions of the interested person(s). In case of proceedings against several parties, the Administrative Sanctions Office may order the separation of the positions of interested parties if it is deemed necessary to ensure the proper and appropriate exercise of the investigative activities (see Art. 7 of the regulation on Consob sanctioning proceeding).
101. Taking into account the nature of the offences and the interests involved, the Bank of Italy or the Consob may establish further methods of publicizing the measure, charging the related expenses to the offender or excluding publication of the measure where such publication may provoke serious risks to the financial markets or cause disproportionate damage to the parties.
102. Opposition does not suspend enforcement of the provision. If serious grounds occur, the court of appeal may order suspension with a reasoned decree (see Art. 195, para. 5, TUF).
103. Companies and entities with which offenders are connected shall be jointly liable with them for payment of the sanction and publicity expenses (see Art. 195, para. 9, TUF). This provision is going to be deleted given the upcoming implementation of Directive 2013/36/EU.
104. Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC; Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU; Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse.

105. In such a sense, European Court for Human Rights, Grande Stevens and Others v. Italy – 18640/10, 18647/10, 18663/10 et al., Judgment 4 March 2014.
106. In case of market manipulation, the penalty "could go up to 5,000,000 Euro, and in certain circumstances this ordinary maximum amount could be tripled or fixed at ten times the proceeds or profit obtained through the unlawful conduct. The imposition of the above-mentioned pecuniary administrative penalties entailed the temporary loss of their honour for the representatives of the companies involved, and, if the companies were listed on the stock exchange, their representatives could be temporarily forbidden from administering, managing or supervising listed companies for periods ranging from two months to three years. Consob could also forbid listed companies, management companies and auditing companies from engaging the services of the perpetrator, for a maximum duration of three years, and could request the professional bodies to suspend, on a temporary basis, the individual's right to carry out his or her professional activity. Lastly, the imposition of pecuniary administrative penalties entailed confiscation of the proceeds or profit of the unlawful conduct and the assets through which they had been obtained" (European Court for Human Rights, Grande Stevens and Others v. Italy, cit.).
107. A State could only impose a double penalty (fiscal and criminal) with regard to the same facts if the first penalty was not criminal in nature (European Court for Human Rights, Åklagaren v. Hans Åkerberg Fransson, Case C-617/10 of 26 February 2013).

9

Istituto per la Vigilanza sulle Assicurazioni (Ivass)

Enrico Galanti and Patrizia Rosatone

9.1 Introduction

Under Italian law, the Istituto per la Vigilanza sulle Assicurazioni (Ivass) is the supervisory Authority over the insurance sector and carries out its supervisory functions by exercising powers of an enabling, prescriptive, investigative, protective and repressive nature.

Ivass supervises undertakings that carry out insurance or reinsurance activities on Italian territory, such as insurance groups and financial conglomerates, which include insurance and reinsurance undertakings, subjects, entities and organizations which, in any way, perform functions partly included in the operational cycle of insurance or reinsurance undertakings (limited to insurance and reinsurance profiles), as well as insurance and reinsurance intermediaries and any other insurance market participant.

In compliance with the principles of independence necessary for the impartial exercise of the functions of supervision over the insurance sector, Ivass, which replaced the former Isvap (regulated by Law no. 576 of 12 August 1982 and subsequent modifications) was established by Decree-Law no. 95 of 6 July 2012 (converted into Law no. 135 of 7 August 2012). The objectives of Ivass's supervisory activities are the sound and prudent management of undertakings, transparency and fairness in the behaviour of supervised entities, as well as promoting an appropriate degree of consumer protection.

9.2 The origin. Law no. 576 of 12 August 1982, and the allocation of powers with the Department of Industry

Before Law no. 576 of 12 August 1982, the supervision of the insurance market was up to the executive and it was carried on by a specialized

Department of Industry office called General Directorate of Private Insurance Undertakings and Insurance Undertakings of Public Interest.

Within the Directorate there was an Inspecting Office and the Consulting Commission for Private Insurance. The most important measures – such as authorization to carry on insurance business, and the winding up and withdrawal of authorization – were adopted upon the obligatory advice of this Commission, which had two sections, one for life insurance and another for non-life insurance. The Commission also gave mandatory advice on regulatory schemes and – at the Department's request – on bills about insurance matters.

This supervisory system was consistent with the legislation on insurance and reinsurance business applied during that period. In fact, all the laws about insurance activities were collected in a single law adopted in Presidential Decree no. 449 of 13 February 1959, the Single Text on exercise of private insurance[1] that used to be the basic text on insurance activities until the transposition in the national legislation of the European directives which introduced common rules for the European insurance market.

The transposition of European regulation in Italian legislation began in the 1970s with Law no. 295/1978[2] on non-life insurance and continued in the 1980s with Law no. 742/1986[3] on life insurance; both laws introduced the right of establishment recognized by the Rome Treaty in the Italian legal system.

In the Single Text and in the laws mentioned above, the Department of Industry was always identified as the public entity that exercises supervisory powers, even though in the case of Law no. 742/1986 Isvap had just been established. Public supervision over the insurance market had, since the start, been based on the assumption that insurance – which has the nature of a business activity and is not a public service – was also an instrument to achieve public and social interests. As a matter of fact, insurance undertakings, by covering risks, sell security and support to the development of industrial and commercial activities.[4] It is therefore necessary to establish some form of control on this relevant sector and to protect the interests of those who sign an insurance contract.[5] The protection of policyholders could be realized through supervision over insurance undertakings – based on authorization to carry on the business of insurance, granted only if certain conditions and requirements were met – and on the compliance of the insurance activity with the insurance laws and regulations.

It also had to be considered that insurance undertakings collected a huge amount of money – the rates paid by the policyholders – and so it

was necessary to control how this money was funded in order to guarantee the solvency of the insurance undertakings and its capacity to pay a compensation if and when the risk covered happened.[6]

It is clear that the instruments and goals of supervision over insurance and over banks are similar.

The supervisory functions of the Department of Industry were exercised on INA – (National Institute of insurance),[7] on insurance and reinsurance undertakings and on any other entity that was authorized to exercise insurance and reinsurance business and also on undertakings or entities carrying on insurance business without authorization.

In order to improve a technical and specialized approach to the insurance supervision, Law no. 576/1982 established Isvap as the Supervisory Authority for Private Insurance Undertakings and Insurance Undertakings of Public Interest. The law conferred on the Institute, which had a public body status, the functions of supervision provided for the Testo Unico and the other laws and regulations on insurance.

Although the law did not specify the reasons for the supervision, an analysis of Isvap's activities clearly showed that the supervision was aimed to guarantee the undertakings' financial stability and solvency. For this purpose, Isvap exercised control over technical, financial an assets/liability management of the insurance undertakings, examined and verified undertakings balances and ensured the observance of the laws by all insurance operators.

Compared to the supervision as regulated by the Testo Unico no. 449/1959 there was something new because the financial stability was not the only purpose of Isvap's supervision.

In the first organization of Isvap established by the law itself, was created a structure, called *Complaints section*, entrusted to examine complaints of policyholders and of those entitled to insurance benefits. This attention to the claims gave to supervision activity a new point of view more focused on the consumer protection and on the fulfilment of contractual obligations taken on by the insurance undertakings. Furthermore *Complaints section* could advice Isvap President on serious and continuous non-fulfilments of contracts and propose – if necessary – the adoption of sanctions against the insurance undertakings.[8]

The consumer protection fostered through this important activity – which was enhanced in the following years – was achieved in an indirect way. Isvap has never had the power to compel the insurance undertaking or the other insurance operators to do something as, for example, to pay the compensation or to reply to the consumer. If the insurance operator was not compliant with the law, Isvap could only impose sanctions.

Isvap intervened in the claim to guarantee the correctness of operators' activity – because this is the scope of the supervisory functions – but could not settle a private conflict because this activity in Italian law was reserved for judicial power.

Law no. 576/1982 still reserved an important role for the Department of Industry, which set the directives in the insurance sector and arranged the annual reports on status of insurance policy.

The relationship between the Department of Industry and Isvap was marked out by the supremacy of the first, because Isvap was under its supervision and the Department issued directives on the exercise of Isvap's supervisory powers. Furthermore the most relevant measures against the insurance operators – including authorization to carry on insurance or reinsurance business, the authorization's or the registration's withdrawal, mergers of companies, sanctions for infringements of the law and appointment of commissioner for the administration of the undertakings – were also adopted by Department decree, upon Isvap's proposal. The Department also should provide for safeguards, reorganization and winding up of insurance undertakings. Isvap performed just a preparatory activity for the measures adopted by the *Department*, supplying it with the information and other elements of analysis acquired exercising supervisory activity.

Because of the role of the Department, scholars at the time said that Isvap could not be qualified as an independent authority[9] – as the Bank of Italy and the Consob (the National Commission for Listed Companies and the Stock Exchange) were for banking and financial markets – and that it could be considered a governmental entity exercising state functions in a more efficient and prompt way (instrumental body).

From this point of view Isvap was only a technical support entity, pursuing interests and purposes of another subject, the Department of Industry, that could control Isvap's achievement of supervisory purpose.[10]

Other scholars, having regard the legal status under public law and the organizational and financial autonomy of Isvap, said that the Institute was not really submitted to the *Department of Industry* and so it could be qualified as an auxiliary agency of the *Department* itself.[11]

From this point of view, the directives of the Department did not reduce Isvap independence because they aimed only to direct and maintain Isvap supervisory activity into the administrative orientation in insurance field fixed by Department itself and into the insurance policy lines set by CIPE (Interdepartmental Committee for Economic Planning).

Also when Isvap gave advices or proposals its autonomy and independence of evaluation was saved because the Department could only disagree with Isvap's position and in the case of Isvap advice on authorizations if the Department did not agree it could decide only after having obtained the advice of the Council of State.

It also had to be considered that under Law no. 576/1982 Isvap had specific tasks exercised in total autonomy.

In fact Isvap acquired information and data – by asking other public bodies – to improve its knowledge of the insurance market also regarding European and international areas.

Isvap could even request information, elements and data related to the undertakings and to the other entities under its supervision, and could convene the legal representative, the general director and the president of the audit college of the insurance undertakings.

The information acquired was useful in Isvap's control over the rates for the terms of life insurance contracts[12] and in general for exercising its functions, because it provided appraisal elements on the soundness of the companies. Furthermore the information acquired could support the proposals to the Department – through Isvap's Board and President – to adopt and modify laws and regulatory acts on insurance matters.

The Institute received the obligatory communication and some documents, as memoranda of the partner's meetings, proposals and audits of the Audit College of the insurance undertakings.

In order to ascertain a company's structure, Isvap could ask for information on share purchase by subject or groups involved in deficit management or in companies threatened with the compulsory winding up.

Finally, Isvap was the only entity competent to adopt all the acts necessary in the procedure of a compulsory winding up.

Beyond the specific tasks clearly conferred onto Isvap, other scholars emphasized some features of independence of the new public entity provided by the law.

First of all, Isvap was not under Department control because it had general supervisory functions whereas the Department could adopt only some measures – specified in insurance law – against the insurance operators.

In the exercise of its own supervisory functions Isvap was totally independent, and its decisions were not under the control of the Department. This is the reason why only the Board deliberations on balance and on the Statute were subject to Department approval.

Isvap was also totally independent when it adopted any acts concerning compulsory winding-up proceedings and when it conducted preliminary activity for the measures adopted by the Minister, such as mergers of companies and restoration plans or short-term finance schemes.

Furthermore, the Institute had financial autonomy because it was totally financed by annual contributions paid by the insurance and reinsurance undertakings by means of their contribution for supervision on insurance and reinsurance business. This contribution, established by decree of the Department of Industry, did not exceed one-thousandth of the premiums earned for each financial year.

As well as other independent public entities, the balance and the financial management of Isvap are under control of the Audit Court.

Finally, Isvap had organizational autonomy and could define its internal structure with regard to the needs related to the best exercise of supervisory functions. For this purpose the Board adopted the Statute and the general rules on its organization, operations and personnel. The Board also had independent management of expenses.

This uncertainty was caused by the law itself, which had combined features of independence and submission to the executive power, and will be overcome only by future reforms in insurance supervisory activity enhancing Isvap's role and status.

9.3 The reform rationale; the establishment of a new authority

In the 1980s, the crisis in the insurance sector became more evident because in the previous 20 years – from 1964 to the first months of 1982 – 19 insurance undertakings were threatened with compulsory winding up.[13] Public opinion was worried and discouraged by the situation in the insurance market and it became necessary to intervene in order to restore consumer and operator confidence.

This serious situation could not be solved by the reorganization of the General Directorate and other solutions, based on the entrustment of supervisory functions to the Bank of Italy or to the INA, were rejected. The best choice was to create a new model of supervision by founding a new public body that would be more efficient, more prompt and more able to intervene in the management of insurance undertakings in order to forestall the necessity of extreme measures such as the winding up of the company.

Isvap's foundation was probably inspired by the Independent Regulatory Commission established in the USA and by the positive

experience of other European countries – Great Britain and France – where independent public entities had just been established for carrying on supervisory activities in specific economic sectors which required more technical competence and knowledge.[14]

The transposition into Italian legislation of the first insurance directives – which established duties of collaboration between the European supervisory authorities – pointed out the need to establish a new supervisory system managed by a public entity independent of political power.[15]

On the other hand, there were national experiences in similar sectors, such as banking and the financial markets, in which the supervisory functions were exercised by independent public entities such as the Bank of Italy and the Consob.

The diffusion of insurance into each sector of life with the related market development highlighted the need to improve the protection of policyholders through an enhanced supervision body with high technical competence and specific powers.

After 1969 when motor vehicle liability insurance (third party liability) became compulsory, many undertakings entered the market, and it became necessary to verify that requirements and conditions to carry on insurance business were met not only in the early phases of authorization but also during the course of business.

Also to be considered was the diffusion of the life products, combining insurance and financial aspects, for saving money and investment purposes. For these products it was necessary to enforce control on insurance operators, establishing a kind of supervision more akin to supervision on financial products. The supervision on life products solicited more attention on financial stability and particularly on the investments of the insurance undertakings.

It was also underlined that a really efficient supervisory system needed to be managed by an entity with high professional competence and experience in insurance matters.[16] The new supervisor would therefore have to exercise its powers control over insurance operators with the goal of creating the conditions for both the stability and the responsible and correct development of the insurance market.

For the same reasons, Law no. 287 of 10 October 1990 that established the Italian Competition Authority gave Isvap an important role in the rights of free enterprise and competition protection in the national insurance market. In fact, in operations involving insurance companies where there were agreements, abuses of power and concentrations eliminating or restricting competition in the national market, the

Competition Authority could adopt the necessary measures after taking Isvap's opinion into account. A request for the opinion was obligatory, but the opinion expressed was not binding; the Competition Authority had to request Isvap's advice but it could adopt a measure without Isvap's opinion if this was not issued within the term of 30 days, or indeed a measure opposed to the opinion itself.

The above-mentioned rule was in line with the allocation of competence between Isvap and the Competition Authority, which was the only entity empowered to ascertain whether there was an infringement of the competition law and if so to evaluate it. From this point of view, the purpose of Isvap's opinion was to give all the information and data useful for the exercise of the Competition Authority's powers. In fact in the proceedings of Competition Authority regarding the insurance market there is a coordination of public interests to ensure that there is no predominance of fair competition over the stability of insurance market.[17]

Law no. 287/1990, recognizing Isvap instead of the Department of Industry as the supervisory body, confirmed the key role of the Institute in supervisory activity in the insurance market and its position independent of the Department, which did not take part in the proceedings on the releasing of the opinion.

At the time other independent authorities had a stronger position in the field of competition. In fact, the law for operations involving banks, and broadcasting and publishing undertakings empowered the Bank of Italy and the Agcom (the Communications Regulatory Authority) respectively to adopt measures to protect competition.[18]

9.4 Isvap internal organization according to Law no. 576/1982

Under Law no. 576/1982 within Isvap were the President, the Board of Directors and the Board of Auditors.

The President was appointed by a President of Republic's decree, upon the Council of Ministers' resolution based on a proposal by the Department of Industry.

The President represented Isvap; he was President of the Board of Directors, and General Director of the Institute.[19] As General Director and President of the Board, the Isvap President had the power to manage all the decisions adopted by the Institute and also to contribute to the adoption of all the Department measures because he was also a member of the Consulting Commission for Private Insurance. For these reasons

he had to be chosen from people of impeccable morals and complete independence, and particularly expert in the technical and administrative disciplines relating to insurance activity.

Some scholars criticized the rules on the President's appointment, saying that he was totally under political control, not only because he was chosen by the Department of Industry but especially because he could be removed and suspended by the Department itself. From this point of view, the rules on the President's appointment confirmed the non-independent nature of Isvap.[20]

The Board of Directors was appointed by a decree of the President of the Council of Ministers, in agreement with the Secretary of Industry.

It must be stated that among the functions of the Board are the competence to reject Isvap's advice relating to the demand of authorization to exercise the insurance business and to propose the application of measures against the insurance undertakings, including any compulsory winding up. The final measures, as mentioned above, were adopted by the Department of Industry. The Board also proposed modifying laws, regulations and general administrative acts concerning insurance activity.

Regarding the internal organization of Isvap, the Board had powers to adopt the Statute and the general rules regarding the organization, to hire and promote personnel and to approve Isvap's budget and final balance. The balance and the financial management of Isvap are under the control of the Audit Court.

The Board of Auditors was appointed by a decree of the President of the Council of Ministers, in agreement with the Department of Industry. The President of the Board was a professor nominated by the Department of Justice, and the other two members were civil servants, one nominated by the Treasury and the other by the Department of Industry. The Board of Auditors exercised internal administrative and accounting control over Isvap administrative acts, and supervised its compliance with laws and regulations.

As to the first internal organization, among the offices for ordinary administrative activity of Isvap, Law no. 576/1982 established the offices and services designed to support the supervisory activities of the Institute.

The first of these was an Inspectorate, to which were transferred the functions and powers originally exercised by the General Directorate of private insurance undertakings and undertakings of public interest. In fact, it was necessary to combine the off-site activities – on documents, reports and data sent by undertakings periodically or at the Institute's

request – with the on-site inspections. On-site inspections were aimed at acquiring information, data and documents directly in the offices of the insurance operators and verifying both the documents and information given by the insurance operators and the actual compliance with insurance laws and regulations by the insurance operators themselves.

The above-mentioned Claims section was established as a part of the Inspectorate.

In order to improve its knowledge of the insurance market at national and international level, the first Isvap included an office specializing in study, programming and research, and another office for data processing.

9.5 The increase of Isvap duties by Law no. 20/1991

Law no. 20 of 9 January 1991 introduced relevant changes to Law no. 576/1982.

Supervision and crises measures were enhanced and reshaped.

In the case of a serious non-compliance with the implementing measures issued by supervisory authorities, the appointment of a commissioner for the fulfilment of individual acts was introduced.[21] The commissioner was appointed by a decree of the Department of Industry, on its own initiative or by proposal from Isvap.

An extraordinary administration similar to that of the banking law was also introduced in case of serious irregularities in administration, serious violations of the rules of law, administrative provisions or articles of association, or a serious and lasting non-compliance with the relevant implementing measures adopted by supervision authorities.[22] The measure was issued by the Department of Industry, on its own initiative or by proposal from Isvap. Isvap also appointed the extraordinary bodies and ruled the procedure: a key role which fostered its position.

The increasing role of Isvap was evident in other changes introduced by Law no. 20/1991 aimed at involving the Institute in "high administration" activities on insurance matters.

The Department directives in the insurance field were to be adopted taking into account Isvap's proposal, and the Department's annual report on the insurance political situation had to be based on information and data provided by the Institute. The composition of the Consulting Commission was changed through the addition of three more Isvap managers.

An important innovation of Law no. 20/1991 was the introduction of rules on the acquisition of control by or in insurance or reinsurance

undertakings, which gave Isvap huge powers to supervise their compliance and to adopt enforcement measures.

The law also foresaw that the Italian insurance undertakings had to draw up a consolidated account and to communicate it to Isvap. The Institute could request the companies and entities controlled by the insurance undertakings to communicate data, news and information, and it could also carry out inspections of them even if they were not under its supervision.

9.6 The d.P.R. no. 385/1994 (the "Cassese Decree"): Isvap as a fully-fledged independent authority

If Law no. 20/1991 contributed to the development of the independence and autonomy of Isvap, the President of Republic's Decree no. 385/1994 was generally considered as a turning point in Isvap activity, particularly as far as the relationship with the Department of Industry is concerned.[23]

Even though Isvap still remained under Department supervision, the decree abolished the power of the Department itself to give directives to Isvap and to fix the administrative orientation in insurance field.

In a general clause, the Decree transferred to Isvap all control and supervisory activities formerly exercised by the Department, clearly stating that these activities were to be exercised in complete autonomy and in respect only of its own legal system as established by Law no. 576/1982.

The decree also specified that Isvap should: authorize the undertakings to carry on their insurance business; adopt the sanctions imposed in the case of a violation of duty of communication by trust companies, stockbrokers and anyone who had acquired shares of insurance undertakings; appoint the commissioner for the fulfilment of individual acts; approve the conditions of the merger and the statute of the new entity created by the merger.

In line with the transfer to Isvap of the complete supervisory activities, the decree abolished the Consulting Commission for Private Insurance.

As far as the authorization to carry on insurance business is concerned, the choice to transfer this power was consistent with the idea that granting the authorization did not involve a political assessment of the Department[24] but only a technical evaluation typical of an independent authority. This idea emerged in European law, particularly in the early directives (Directive CEE nos 239 and 240 of 24 July 1973, for non-life insurance, and Directive CEE no. 267 of 5 March 1979, for life

insurance) where it was established that the assessment of the authorization request could not regard the economic needs of the insurance market but only the fulfilment of the conditions provided by the law. This does not mean that authorization is merely an automatic validation process, because its granting involves an assessment of the supervisory authority on the adequateness of the undertaking financial and organizational structure to respect the interests of the insurance market and of the community in general.[25]

In fact, all the requirements aim for financial stability and solvency of the insurance undertakings (capital and financial adequacy) and the capacity of the holders of participation and persons charged with the administration, the management and the control functions to guarantee sound and prudent management.

Conditions for the pursuit of an insurance business – such as the establishment of sufficient technical provisions, including mathematical ones, covered by assets belonging to the undertaking and the possess of a solvency margin for the whole business carried on in Italy and abroad – were also introduced.

Notwithstanding the general clause on transferring powers to Isvap, the Department held the competence to withdraw authorization, to approve restoration plans or short-term finance schemes, to dissolve administration bodies, to order compulsory winding up, and, after hearing Isvap, to determine the supervision contribution. The Department also managed the registrars of intermediaries (agents and brokers) and of loss adjusters.

Immediately after the enactment of the Cassese decree, the process of transposition of the third directives on insurance matters was also completed. Two Legislative Decrees – nos 174 and 175 of 17 March 1995, on life insurance and non-life insurance respectively – were issued.

This transposition introduced the single authorization principle into the Italian legal system: an undertaking allowed to carry on insurance business in one Member State can carry on this activity in the other Member States as well, in freedom of service or right of establishment. To begin the activity in another Member State it was only necessary to contact the authority of the Member State which released the authorization. The activity carried out in another Member State in right of establishment or freedom of service was supervised by the authority that released the authorization (the home country control principle). The correct application of these principles calls for enhanced cooperation between the authorities, especially in the cases of law infringement. But in any case, the supervisory authority of the home Member State could

exercise its inspecting powers and also apply sanctions on a business carried out in another Member State.

As a consequence of the new rules, Isvap also extended its supervisory powers on the insurance activity exercised by the Italian undertakings in freedom of service or right of establishment in the other Member States.

As far as the restoration plans or short-term finance schemes are concerned, the decrees establish that they are proposed by Isvap (when the solvency margin is insufficient or falls below the guarantee fund) which also supervises their execution, while the power to approve them and to fix the term for their execution remains with the Department. If the plans are not fully implemented Isvap can: adopt a prohibition on commencing new business; appoint a commissioner for the fulfilment of individual acts; in serious cases propose authorization withdrawal to the Department.

The decrees were criticized because they established an allocation of powers which was not fully consistent with the new nature of Isvap. As a matter of fact, the approval of plans, for instance, involves the exercise of discretionary and highly technical assessment which would be more suitable to Isvap than to the Department.[26]

9.7 The further increase of Isvap's powers by Legislative Decree no. 373/1998

Another important step toward Isvap's evolution was made by Legislative Decree no. 373 of 13 October 1998, which rationalized the rules relating to the Institute.

During the discussion about the bill it became evident[27] that the bill was suitable for strengthening the powers and functions of Isvap as a supervisory authority, transforming the Institute into an independent authority, as the other supervisory entity operating in the European market.

For that reason the law abolished the Department's supervision of Isvap and transferred to it the most recent Department functions in the field.[28] The transfer specifically concerned the management of the intermediaries (agents and brokers) and of loss-adjusters and registrars, and the concomitant power to impose disciplinary sanctions on them.[29]

In line with the transfer of all the supervisory activities to Isvap, the decree abolished the role of CIPE in setting the insurance policy lines which were now set directly by the Government. Isvap became the Parliament and Government reference entity to propose solutions

and changes, and to signal facts relevant to regulation and supervisory activity. The law also emphasized that Isvap operated as supervisory authority in full autonomy and exclusively in accordance with its organization, and introduced a general rule which recognized Isvap's power to adopt any measure necessary to protect the insurance undertakings and the policyholders.[30]

The decree introduced Isvap's power to issue general rules binding on the insurance undertakings which were considered the first expression of Isvap's normative function.[31] The regulatory power is the maximum expression of supervisory activity and it is usually conferred on the supervisory authority according to the idea that the efficient regulator is the one that knows the market and has the technical competence to rule it.

In fact, Legislative Decrees nos 174 and 175 of 17 March 1995 (on the implementation of European directives on life insurance and no-life insurance respectively) and no. 173 of 26 May 1997 (on the consolidated balance of insurance undertakings) conferred onto Isvap the power to adopt general orders in specific matters that were substantially regulation acts.

The first example of measures adopted by Isvap to protect policyholders was Circular no. 249 of 19 June 1995, which required the insurance undertakings to provide written information explaining the features and the terms of the life insurance contract available to the public.

As far as Isvap's internal organization was concerned, the law abolished the Audit College and – with regard to the organizational autonomy of the Institute – repealed all the articles of Law no. 576/1982 relating to the first internal organization.

The cooperation between Isvap and the other supervisory authorities was reorganized by Legislative Decree no. 343/1999, on the enforcement of prudential supervision. The decree provided that the Italian independent authorities which operated in the financial market (the Bank of Italy, the Consob, Isvap and Antitrust), had to cooperate with one another and could not refuse to give each other information on the ground of confidentiality.

Isvap also cooperated with other European supervisory authorities and with the administrative and judicial authority of the other Member States in the case of winding up and bankruptcy proceedings. The collaboration between Isvap and authorities of a third State was regulated by cooperation agreements respecting the principles of reciprocity and confidentiality.

The increasing connections between banks and insurance undertakings – often in the same conglomerate – and the diffusion of insurance products with financial features brought improvements in collaboration between those authorities in full compliance with their autonomy and competences.

Considering the contiguity of insurance supervision over banking and financial market supervision, complying with the Italian Constitution that imposes the protection of savings (Art. 47), in the same period during the bill's discussion of Legislative Decree no. 300 of 30 July 1999 (Reform of governmental organization) it was proposed that Isvap's referent at political level should be changed from the Department of Industry to the Department of Economy and Finance. But the change, although logical, was never realized.[32]

Regarding its relationship with the other European supervisory authority, the law also established duties of collaboration through the exchange of information, with the aim of facilitating the exercise of their respective functions. In fact the creation of a constant information flow among the authorities at both national and European levels was the starting point for the achievement of effective cooperation not only in the insurance sector but also throughout the entire financial market.

The law also changed the rule on the supervision contribution, stating that it was established by 31 July by decree of the Department of Economy and Finance (the former Treasury), instead of the Department of Industry, to ensure financial cover for the Institute's administrative costs. The law also established that with regard to the financial autonomy of Isvap, the part of the supervision contribution not used by Isvap had to be given to Isvap itself and utilized for fixing the contribution in the next period.[33]

At that time the Department still held the competence to the issue and withdraw authorization, and to impose extraordinary administration and compulsory winding up.

Considering the nature and the effects of the measures reserved to the Department, it could be said that the executive power was involved in the most relevant measures regarding the life of an insurance undertaking, such as the suspension of ordinary activity of the company – as in the case of restoration plans and a short-term finance scheme – or the interruption of insurance activities, such as withdrawal of authorization and compulsory winding up.

It was illogical that these measures – provided for the cases when the insurance undertaking could not guarantee the sound and prudent management of the insurance business – were adopted by the Department

and not by Isvap. The latter – as the supervisory authority on technical, financial and assets/liability management of the insurance undertakings – could better verify compliance with provisions, as these related to the solvency margin and the guarantee fund, which required technical valuation.

9.8 The Code of Private Insurance (Legislative Decree no. 209/2005). The law on the reform of saving (Law no. 262/2005). Isvap as supervisory authority. The residual powers of the Department of Industry

With the Delegation Law no. 229 of 29 July 2003[34] the Italian Government was empowered to issue a legislative decree in order to reorganize the laws on insurance activity.

The aim was simplification, reducing the number of rules and codifying those remaining in order to remove inconsistencies and improve the quality of legislation. The result would be a single text, the Code of Private Insurance, an organic collection of the law rulings in the insurance sector similar to the Consumer Code and the Digital Administration Code adopted by the Government itself, empowered by the same law.

By simplifying the rules, the codification gave more legal certainty to the insurance operators making compliance easier.

As pointed out by the Council of State in its advice on the draft of the legislative decree,[35] the empowerment was not limited to merely collecting the existing rules, but was wide enough to introduce new ones.[36] So when Law no. 229/2003 fixed the general purposes to be achieved by the legislative decree, if the previous rules were unable to achieve those purposes, specific new provisions could be introduced.

Among the purposes fixed by the law were: to adapt Italian legislation to the European laws and international agreements; to protect the insurance consumer, specifying transparency in contract terms and the information on contracts, also covering fairness in the advertising of insurance products; to realize effective competition between insurance undertakings; to guarantee the correctness of financial and assets/liability of insurance managing when they also belong to an insurance group; to reorganize the sanctions system and the allocation of powers between Isvap and the Minister of Production's activities in proceedings started as a result of an insurance crisis.

Notwithstanding the wide scope of the delegation law, the Minister of Production Activities (now Minister of the Economic Development) and the Minister for EU Policies[37] chose to collect the existing rules on

insurance business, including mediation, without comprehending the rules on contracts, which remained in the Civil Code, and the regulation on Isvap, which stayed in Law no. 576/1982, only partially repealed and emended. Therefore when Legislative Decree no. 209 of 7 September 2005 was issued, introducing the Code of Private Insurance, the new rules established were only those strictly necessary.

In particular, regarding insurance contracts, the Code only included a few specific rules on the transparency of terms, conduct and mandatory information, very similar to the rules applied in banking and in the financial sector. These rules, with regard to the protection of consumers, tried to re-establish an equilibrium in favour of the consumer, as the weak party in the insurance contract. For the same purpose the provisions on compulsory insurance against civil liability in respect of the use of motor vehicles and ships were reworded to guarantee the disclosure of premiums and contract terms, especially on websites.

The decree also introduced new provisions for transposing European directives into Italian legislation, such as the directive on mediation business.[38] It had been issued to remove the differences between national laws which hindered the creation of the European insurance Single Market. The idea was that only an effective regulation of the intermediaries' activities could maintain the stability of the insurance market and promote fairness of competition. In particular, after the definition of the insurance mediation, the Code established that intermediaries taking up mediation activity had to be authorized after proving they had the appropriate knowledge and ability, and a good reputation. The Code also introduced some rules to be respected when the intermediaries proposed and sold insurance contracts.

In order to simplify the rules applied in the case of violations of the law, the Code reorganized the sanctions system.

The penal sanctions, as in the financial and banking sector, were introduced in respect of serious infringement of public interests, such as the carrying out of insurance business or mediation and loss-adjuster activity without authorization.

Aiming to simplify the application of the administrative pecuniary sanctions, and complying with Legislative Decree no. 231/2001 on the penal responsibility of companies, the Code introduced the principle of the responsibility of the undertakings, except in the cases of violation of specific duties and obligations by natural persons expressly identified; this meant the sanctions were mostly applied to companies.

The competence to apply administrative pecuniary sanctions, in the Code still conferred on the Department of Production Secretary, by Law

no. 262 of 28 December 2005 (the Reform of Savings), was transferred to Isvap's President. The innovation in Law no. 262/2005 was more consistent with the sanction systems usually established for the other authorities in the financial and banking sectors, where sanctions were applied respectively by the Consob and the Bank of Italy, and also with the disciplinary sanction system introduced by the Code itself for insurance intermediaries and loss adjusters, where sanctions were applied by Isvap's President on the proposal of the Disciplinary Guarantee Committee.[39]

According to Law no. 262/2005 and with the regulatory power conferred by the Code, Isvap, like the Bank of Italy and the Consob, for banking and the financial market respectively, issued a regulation[40] introducing the rules of the procedure to apply administrative pecuniary sanctions. This regulation had to take into account the principles settled by the law itself, like the observance of the adversarial nature of proceedings and the separation between the fact-finding and the deciding functions.

We have already stated that as far as Isvap is concerned, the Code did not include the provisions of Law no. 576/1982, which was only partially repealed and changed by the Code itself, going on to regulate only the structure and the basic organization of the insurance authority (internal bodies, competences and rules of appointment of the bodies).[41]

The supervisory functions were regulated in the Code but Art. 4 of Law no. 576/1982 – changed by the Code itself (Art. 351, para. 1) – established in general that Isvap must respect European law and the insurance policy lines fixed by Government,[42] that its budget and financial statements were subject to the State Audit Court, and finally that each year it had to present a report on its activity to Parliament.

On the other hand, the insurance supervisory activity of Isvap is regulated by the Code, specifying first of all the purpose of supervision: "the sound and prudent management of insurance and reinsurance undertakings and transparency and fairness in the behaviour of undertakings, intermediaries and the other insurance market participants with regard to stability, efficiency, competitiveness and the smooth operation of the insurance system, to the protection of policyholders and of those entitled to insurance benefits as well as to consumer information and protection" (Art. 3).

This article – complying with the legality principle – identifies the final goals of insurance supervision, as "the sound and prudent management of insurance and reinsurance undertakings and fairness in the behaviour of undertakings, intermediaries and the other insurance

market participants", and the interim goals, as "stability, efficiency, competitiveness and the smooth operation of the insurance system, to the protection of policyholders and of those entitled to insurance benefits as well as to consumer information and protection", through which the final goals could be achieved.[43]

It is interesting to notice that the Code considers the stability and efficiency of the insurance system to be closely connected to competitiveness, confirming that there is no efficiency and stability without competition and that it is necessary to introduce rules in order to realize an effective competitiveness among insurance operators. It also means that competition is a public value because it promotes innovation and social vitality inasmuch as the protection of competitiveness is a constitutional value (Art. 117).[44]

Art. 3 of the Code is going to be changed to implement Solvency II Directive whose Art. 27 foresees "the protection of policy holders and beneficiaries" as "the main objective of supervision". The new Art. 3 as in the draft legislative decree approved by the Government the 10th of February 2015 now states that "Main objective of supervision is the protection of policy holders and beneficiaries". In the new version of the norm "the sound and prudent management of insurance and reinsurance undertakings and transparency and fairness in the behaviour of undertakings towards the customer" is an instrument to pursue this goal while "the stability of the system and the financial markets" is a secondary objective.

In order to achieve these purposes, the Code confirms the role of Isvap as the supervisory authority of the insurance sector, specifying that it could exercise "its powers of an enabling, prescriptive, investigative, protective and repressive nature, as set forth in the provisions of this code" (Art. 5, para. 1).

In particular, this article introduces the most relevant innovation, which concludes Isvap's evolution into a fully-fledged independent authority,[45] conferring on the Institute the general power to adopt any regulation necessary to achieve the purpose of the supervision and, in particular, the sound and prudent management of insurance undertakings and the transparency and fairness in the behaviour of supervised entities (Art. 5, para. 2).[46]

The delegation law did not specify that the Code could introduce Isvap's regulatory power because the law referred only to governmental regulations but, as mentioned above, in the previous laws Isvap, as supervisory insurance authority, could only issue general acts as orders or circulars.[47]

This legal framework was consistent with the role of the insurance supervisor as a subject applying legal rules while at the same time regulating and controlling the insurance market. The rules have to be set to take into account the market needs as they emerge from supervisory experience and praxis and also with regard to the evolution and changes in the insurance business.[48]

Under this scheme, the law made the basic choices whereas the supervisory authority, with its highly technical, prompt and efficient approach, granted the adoption of implementing measures which introduced detailed rules to fit the changing features of the insurance market.[49]

This legal framework is also consistent with the constitutional system because the regulatory power was an expression of the general principles of the Italian Constitution, especially the principles of good administration and impartiality (Art. 97), the freedom of economic enterprise (Art. 41), the principle of equality and the protection of savings (Art. 47). EU legal principles, such as the protection of consumers and competition, and the freedom of establishment and circulation, were also respected.[50]

There is also compliance with the principle of legality, because the power to issue regulatory acts was established by law and could operate only in the matters and within the limits established by the law itself, respecting both the general principles fixed by the administrative laws and the specific principles and limits fixed by the insurance laws, in particular the purposes of the supervisory activity.[51] Of course, there is no possibility of conferring regulatory powers in matters that can be regulated only by the law, and the same applies at the European level.[52]

Isvap's general regulatory power is based on the Code's provision upon which Isvap "by regulations implementing the provisions of this code, adopt[s] general rules" in the matters specified in the Code itself (Art. 191, para. 1) covering all insurance supervisory activities.[53]

Apart from these general provisions, the Code included many of single norms entrusting Isvap with the power to adopt regulations on specific issues.

The regulatory acts can be divided into two broad categories. On one hand, those on Institute proceedings introducing rules on the exercise of Isvap's powers and, on the other, acts introducing mandatory rules of conduct for insurance operators.[54]

As for the nature of the normative powers, there was a distinction between independent regulations, for which the law specified only the purpose to be achieved, and other regulations implementing and completing the general rules fixed by the law.[55]

Isvap's regulations were issued by the President and were published in the Italian Official Journal and in Isvap's Bulletin, and were also available on Isvap's website (Code, Art. 9, paras 2 and 5).

Some months after the Insurance Code enactment (7 September 2005) Art. 23 of the Reform of Saving Act (Law no. 262 of 28 December 2005), established similar basic principles for the exercise of secondary legislation powers by all the authorities active in the financial sectors. According to Art. 23.4 of Law no. 262/2005, the procedure for the adoption of Ivass regulations is now set out by Regulation no. 3 of 5 November 2013 in order to guarantee the effectiveness, efficiency, transparency and simplification of the procedure itself, having regard to the proportionality principle.

Isvap's regulations had to take into account the proportionality principle, achieving the purpose of supervision with less sacrifice by and impact on insurance operators, with regard to the need for competitiveness and innovation development in the pursuit of business by the supervised entities (Art. 191, para. 2, Code) – as expressly established by the Code's provision – and also with regard to the nature, activity and size of the supervised entities themselves. They must also be compliant with the principles and options introduced by the previous provisions implementing Community regulations (Art. 354, para. 2, Code).

The Institute could request the Council of State for advice relating to each regulation. This option would preferably be exercised for the regulations that are most relevant or for those on procedures and organization.[56]

The Code also established that Isvap regulations could be issued only after a public consultation. This mandatory consultation enables the acquisition of all the information, data and elements useful for the adoption of the new regulation. Through the consultation the supervisor can effectively balance public and private interests and achieve its institutional goals with less sacrifice of the interests and needs of the insurance operators (the proportionality principle).[57]

The adequacy and proportionality of the regulations for the evolution of the insurance market and for the interests of money savers and investors was also guaranteed, as established by Law no. 262/2005, by a mandatory revision, at least every three years, of all the regulations adopted by the Institute (Art. 23, para. 3). For the revision of the regulation – at least for the more important acts or for those applied with more uncertainty of interpretation – Isvap can request the supervised entities to provide data and valuations of the effects of the regulation on their activity (Art. 9, para. 2, Ivass Regulation no. 3/2013).

The consultation and the analysis of the impact of regulation – complying with the proportionality principle – have to be based on economical and efficient criterion (Ivass Regulation no. 3/2013 – first recital).

In the public consultation, the draft of the new regulation – together with a preliminary analysis of the impact of the regulation – is published on the Institute's website for a short period, in order to hear the voice of the insurance operators (Art. 6, para. 2, Ivass Regulation no. 3/2013).

Regulation no. 3/2013 also specifies that if the new provisions do implement European or national law, the regulation's choices can be explained by referring to the orientations and works managed at international, European and national level (Art. 4, para. 2).

The preliminary analysis of the regulation's impact is based on: an examination of previous market or regulatory failures; an assessment of the options, the choice of whether not to regulate the matter or the sector included; a cost–benefit analysis of the different options.

The Institute assesses the comments and issues the final text of the new regulation. This is published, together with a report showing: the most important rules introduced; all the observations received and the reasons why they were or were not accepted; a final impact analysis.

Law no. 262/2005 confirms that for each act introducing general rules – except those regarding the internal organization and activity of the Institute without any impact on the insurance market – Isvap has to explain its regulatory choices, highlighting underlying principles and the purposes and public interests involved.

The Code while entrusting Isvap with the power to adopt regulations on insurance matters, holds some competence of the Minister of Production activities saying that related measures have to be enacted in the framework of "within the sphere of insurance policy lines set by Government" (Art. 4).[58] The reference to the governmental policy lines makes the point that the Minister's regulatory functions should involve general interests strictly connected with the political responsibility of the Government rather than any technical supervisory activity.[59]

The wording of the Code about the Minister's powers seems clearly linked to a programmatic wish to draw a general division of power between political and technical authority. However, an analysis of the Code single provisions and the supervision practice tells a somewhat different story. As a matter of fact, on the one hand, Government never issued a formal act to set insurance policy lines (such as directives). On the other, the Minister's residual powers – in line with what also happens in the banking and financial sectors – seem to be linked more to the field

of sensible right of the individuals (both natural and juridical persons) than to general policymaking powers.

The Minister also issued, on Isvap's proposal, regulation on the good reputation and the professional qualifications of the actuary appointed by the undertakings authorized to carry on life insurance and compulsory insurance against civil liability in respect of the use of motor vehicles and ships; in this last case the Minister's decree also established the functions of the actuary.[60]

After hearing Isvap's opinion, the Minister also adopted the regulation on the good reputation and independence requirements of significant owners (holders of participations) and key functionaries (persons charged with administration, management and control functions at insurance and reinsurance undertakings) as well as their professional requirements.[61] These requirements also apply to the liquidators of the ordinary winding up of the insurance undertakings.

Under the Code, the Minister of Production also holds the power to adopt certain measures against insurance undertakings, upon Isvap's proposal, such as the withdrawal of authorization to pursue business and the extraordinary administration of the insurance undertakings.

These residual powers of the Minister on specific important issues are not in disagreement with the role of Isvap as supervisory authority on the insurance market and its nature of independent authority. This was confirmed immediately after the Code by Law no. 262/2005, which mentioned the Institute as one of the three authorities, together with Bank of Italy and the Consob, that supervised the financial sector (in the broad sense).[62]

As a consequence of a supervisory system based on three authorities, the law establishes duties of collaboration and coordination,[63] especially in matters where a joint action is necessary in order to protect the consumer or to guarantee the stability, efficiency and fairness of the financial markets (Art. 20). The globalization of the financial markets, and the diffusion of company groups operating in each of the three sectors (financial conglomerates) called for an improvement in the supervisory action in order to prevent crises and their spillover effects.

9.9 The last reform: from Isvap to Ivass. The original project based on the merger of Isvap and Covip and the creation of Ivarp

The final reform of the insurance supervision authority was introduced with Decree-Law no. 95 of 6 July 2012 (converted into Law no. 135 of 7 August 2012).

In a former edition of the draft decree-law, both Isvap and Covip (the Supervisory Commission for Pension Funds) were closed down, and Ivarp – the Institute for the Supervision of Insurance and Pension Funds – was created, taking on all their tasks, competences and powers.

This reform aimed to ensure the full integration of supervision activities in financial, insurance and social security savings, also creating a closer relationship with the banking supervision in order to enforce supervision on all financial markets and reduce the costs of the supervisory activities.

This broader project (encompassing pension funds as well) was probably inspired by the European supervision system in which Regulation no. 1094/2010[64] founded Eiopa, the European Insurance and Occupational Pensions Authority.

This broader project was not carried out for the opposition of the trade unions, represented in the Covip governance bodies, to the cancellation of the agency, and when the decree-law was converted, by Law no. 135 of 7 August 2012, the reform applied only to Isvap, creating Ivass, the Institute for the Supervision of Insurance.[65]

As far as its other aspects were concerned (in particular relating to the new governance body) the draft bill remained essentially the same and was finally approved.

9.10 Ivass governance

The aim of ensuring “the full integration of supervision over insurance sector ... through a closer relationship with the banking supervision” set by Art. 13.1 of the Decree was pursued, above all, with a unique “union at the summit” which characterizes the governance of new body.

In effect, it stated that the President – the Chair of the Board of Directors and its legal representative – is the Director General of the Bank of Italy.[66] On the other hand, the Directorate of the Bank of Italy (BOI), “enlarged” by the two members of the Board of Directors, is Ivass’ supreme collegial body (the Joint Directorate).[67]

It is therefore impossible to understand Ivass’ governance without having a look at that of the Bank of Italy. This latter has substantially changed as a result of Law no. 262/2005 whose Art. 19, para. 6 introduced “collegiality”, stating that: “The authority to adopt measures with external consequence which fall within the Governor’s capacity and which refers to the measure adopted on his behalf is transferred to the Directorate”.[68] It was a dramatic change which grafted collegiality in a structure whose monocratic nature, typical of many central banks, dated back to 1899.[69]

This change, among others,[70] came as a result of the crisis of summer 2005, when two hostile takeover attempts by foreign (European) banks toward Italian banks casted a shadow on the former Governor's ability to keep the supervised subjects at arm's length and maintain an impartial attitude during the last part of his tenure.[71]

It is also interesting to notice that behind the reform which transformed Isvap into Ivass, changing the governance body, there were similar reasons which led to similar solutions. This awareness led to the 2012 reform of the insurance supervision authority which has also the aim of reviewing spending, generated by the strain that the financial crisis put onto the public budget. So political will, improving effectiveness and efficacy of the insurance supervision led to the adoption of Art. 13 of the D.L. no. 95/2012, which is significantly entitled "Urgent provisions on public expenditure revision without variance of the services level and measures on strengthening the banking capital".

The "union at the summit" also involved a unique kind of "dual representation". On the one hand it was stated that "The President: shall represent Ivass vis-à-vis third parties in all acts and contracts and in legal actions";[72] on the other, it is clearly shown that the Joint Directorate "which is a body of Ivass, shall be responsible only for the functions attributed to Ivass"[73] and "shall be responsible for setting guidelines and the strategic direction of Ivass, and shall have the power to take the acts of external importance relating to the performance of the institutional functions in matters of insurance supervision".[74]

One can therefore summarize the broad attribution of the Board of Directors (which is chaired by the President) and the Joint Directorate, saying that the first is responsible for the internal management and the organization and the second, with its higher rank, for the supervision of the insurance industry. This latter materializes not only in supervision measures (authorizations, restrictions, bans and sanctions) but also in all the acts of "external importance" related to the supervision. Among them the Statute, in particular, states, "issuing of opinions, clearances and agreements and making of proposals within proceedings in the jurisdiction of other Authorities or public administrations".[75] The supervision measures or acts that are decided by the Joint Directorate are therefore usually signed by the Governor, who chairs it.[76]

The long list of functions of the Board of Directors (12 items), set out by Art. 5 of the Statute, always pertains to the "overall administration", mostly the management of human and financial resources (above all: fees from supervised entity). One can notice that the Board of Directors has residual competence about the administration and can be

summoned to decide upon any issues that the Joint Directorate deems necessary to submit.[77]

The division of labour between the two colleges is similar to that between the BOI Superior Council and the Directorate, but there may be more differences than similarities. Inside Ivass, which is not of corporate form, members are not shareholders, and there is a wider integration between the two organizations. As previously mentioned, the two members of the Board of Directors are also members of the Joint Directorate. And, because they must be "chosen among persons of unquestioned integrity, independence and professional expertise in insurance matters", we can say that they bring their experience in the insurance field to the Joint Directorate, playing a double role – the day-to-day running of the structure (as Board members) and cooperation to achieve the supervision goals (as Joint Directorate members). Because the Board does not have a shareholder structure, for this organization there is no ban on dealing with matters of supervision such as that which characterizes the BOI Superior Council. Instead, the Joint Directorate can delegate power to adopt measures, in the Supervision field as well, to the President, the Board of Directors, any of its members, the body executives or specific committees.[78]

A key role of connection between the two organizations is assured by the President who has to "promote and coordinate the activities of the Board of Directors and chair its meeting" and to "inform the Joint Directorate about the most important facts regarding the administration of Ivass".[79] This is an important provision which in day-to-day practice gives elasticity to the management covering the grey areas of borderline matters[80] or of organizational decisions which can have an impact on supervision.

In case of necessity and in an urgent situation, the President can adopt a measure which falls into the scope of the Joint Directorate. The President can be substituted by the senior member of the Board of Directors available in terms of appointment. "Such measures shall be ratified by the Joint Directorate at the first possible meeting". This is a relevant provision which gives flexibility to its supervisory function, taking into account the collegial nature of the Joint Directorate, which meets at least once per month.[81] Urgency as to be intended as the need to adopt one act within its terms or to be effective and it depends on contingency and on planning of Joint Directorate meetings. The collegial body acknowledges the urgency by ratifying the act.

The framework of Ivass governance is integrated by the power of the Joint Directorate to "grant mandates to the President, individual

Directors, managers of Ivass or to the Committees, Commissions or Colleges".[82] Mandates can also be granted (both by the Joint Directorate and by the Board of Directors) to the Secretary-General. A position which the Statute foresees "may be appointed" by the Joint Directorate "with tasks regarding the ordinary administration of Ivass and co-ordination of operational areas".[83] This position has been established and is very important in the day-to-day running of the body because he or she has a managing and coordination role similar to that of the former Isvap Deputy Director General.

9.11 Ivass internal organization. The budget and hiring constraints

According to Art. 13.34 of the Decree: "Within 120 days from the take-over of the functions of Isvap, the Board of Directors of Ivass shall draft a reorganization plan taking into account the principles established by the Statute in line with para. 25 of this article. At any rate the plan shall realize savings compared to the total cost of running Isvap".

The reorganization plan was implemented in 2013 and it led to a new organizational chart, broadly similar to that of the Bank of Italy, which streamlined the internal structure. The previous chart showed: two directors with coordination tasks: one operational, reporting to the Deputy Director General and the other legal, reporting directly to the President, which managed two departments (Sanctions and Compulsory Administrative Winding up) and one section (Legal affairs); seven departments, reporting to the Deputy Director General; three offices (smaller structures): Internal Auditing, President Staff and External Relations, reporting directly to the President. The new organizational chart abolished the directors and has nine departments, reporting to the Secretary General (who reports to the Board of Directors and the Joint Directorate) and three Offices which report directly to the Board of Directors: Internal Auditing, Secretariat to the President and the Board of Directors and Legal Services.[84] The largest and most complex Departments (Prudential Supervision, Supervisory Regulation and Policies, Consumer Protection, Research and Data Management and Management of Resources) are structured in divisions.

In order to foster the enhanced coordination between banking and insurance supervision which inspired the reform, the reorganization plan led to the allocation of the responsibility of some of these position to BOI personnel.[85]

The reorganization plan was implemented in the 2013 financial cycle which, as a matter of fact, realized savings vis à vis the 2012 financial

cycle. The quoted provision of Art. 13.34 of the Decree ("At any rate the plan shall realize savings compared to the total cost of running Isvap") can, however, be interpreted in two different ways. In a wider sense it could mean that the reorganization plan must produce a perpetual reduction in costs in relation to Isvap costs, even beyond the realization of the plan itself. In a stricter sense the reduction of costs can be referred just to the realization of the reorganization plan and must not imperatively concern the financial cycles following 2013. In our opinion this latter interpretation is preferable, for the following reasons: (a) the provision literally refers the savings to just the reorganization plan; (b) a reorganization plan will usually result in extra costs, due to the need to carry on additional activities while continuing to run the usual business; (c) trying to make the reduction in costs perpetual will be inconsistent with the "organizational, financial and accounting autonomy" granted to the body by Art. 13.3 of the Decree and could in the long run seriously affect its ability to achieve its institutional goals; (d) the other, broader, interpretation would lead to a unique provision in the landscaping of the public bodies, and this seems a somewhat irrational conclusion.

Another tight constraint on Ivass activity comes in the last part of Art. 13.32 of the Decree, which states that: "Ivass staff shall be determined within a number equal to the transferred permanent staff members which were in the services of Isvap". The provision, which has been operative since the enforcement of the new Statute, sets the total number of employees at 355, a figure which is lower than the 400 on the former Isvap roll: a challenge for the new body in achieving its institutional goals.

Taking into consideration the fact that Ivass was also subject to the general provisions of laws that in recent years limited the hiring capacity of the public administrations, setting \age caps on their turnover,[86] one might wonder if this new and stricter limit on staff hiring could override those general limits. In our opinion, this interpretation is logical and consistent with the above-mentioned principle of the "organizational, financial and accounting autonomy" granted to the body by Art. 13.3 of the Decree.

To complete the information on this subject, a bill to lift all those constraints and to give Ivass a wider leeway has been presented to the Senate [87]. On the other hand, draft legislative implementing the Solvency II Directive decree approved by the Government the 10th of February 2015 slightly changes Art. 5 of the Code to clarify that Ivass has to respect the principles of general provisions on costs control, "within its autonomy".

9.12 Speculations on the way ahead

Even though we do have no crystal ball, we can venture some speculation about insurance supervision in Italy in the near future.

It can be observed that the "union at the summit" between Ivass and the Bank of Italy that we described can be perceived as a first step in a longer process which could lead to a merger.

This outcome could make sense, bringing banking and insurance supervision under the same roof. Even though at European level the enabling clause on which the Single supervisory mechanism in the banking sector is under construction (Art. 127, para. 6 of the Treaty on EU functioning), does not entrust the European central bank with insurance supervision, this remains a viable solution at national level even though the entrustment of direct responsibility in insurance matters to central banks it is not encouraged by the EU. So, there are no clear signals in this direction and in our opinion it is fairly unlikely that we will see this solution in the near future. As a matter of fact the European prevailing mood, the fears about the strain that the merger will surely put on the organization of the Bank of Italy and the high cost that this operation will involve for its balance sheet in the short term seem to prevail over the consideration of possible economies of scale in the long run.[88]

As we have already observed, a minor change in the landscape of the Italian insurance supervision could come through the merging of the minor authority of the pension funds (Covip) with Ivass or the Bank of Italy. The 2012 project blocked by the Trade Unions opposition seemed to have come back onto the political agenda in spring 2014,[89] in a different version, in the framework of a wider reform of the whole public administration – but it was dropped again.

Anyway, even though Ivass could be perceived to be blocked and at a crossroads, the process is not as static as it might at first glance appear. The Institute and the Bank of Italy are deeply engaged in the realization of a tighter coordination between banking and insurance supervision, a challenging goal which entails constant work in the background which is already changing the schemes and mindset of performing insurance supervision.

9.13 The Italian system: a comparison

The 2007–2008 financial crisis which started in the United States and then spilled over into Europe becoming the sovereign debt crisis in

some EU States (the PIGS) highlighted inconsistencies and delays in the European project itself. The European financial system (whose assets were hugely invested in public debt bonds) was under stress. This led some EU Member States into introducing relevant changes in their supervisory systems in order to improve financial firms' resilience to exogenous shocks and the spillover effects within the financial sectors.

In recent years, Italy and, as described above, the United Kingdom and France introduced changes in their supervisory insurance system. The reforms were based on a new supervisory approach considering the insurance market not as a closed sector but as a part of the entire financial insurance market.

This movement towards reform did not follow a common and coordinated approach, and each State dealt with the problem in different ways even though common trends can be traced. The shortcomings that emerged during the financial crisis in every sector of the supervision systems called for reform at EU level as well, where three new authorities were established: the EBA (European Banking Authority), the Eiopa (European Insurance and Occupational Funds Authority)[90] and the ESMA (European Securities and Markets Authority).[91]

It will be useful to recall the main features of the insurance supervision systems in the major EU countries after the last reform, in order to briefly compare them with the Italian system.

9.13.1 United Kingdom

In the United Kingdom, the previous reform of the financial service regulation of the 1997 (following the BCCI collapse) led to the establishment in 2001 of the FSA (Financial Services Authority), an independent non-governmental body with statutory powers given by the Financial Services and Markets Act 2000 (FSMA).

FSA was set up as a company limited by guarantee, totally funded by the firms it supervised. Its sole member was the Chancellor of the Exchequer. The FSMA gave the FSA four statutory objectives: market confidence, financial stability, consumer protection and reduction of financial crime.

The FSA supervised all the subjects operating in the financial market: banks, insurers and financial advisers – and from 2004 and 2005, respectively, the mortgage business and general insurance intermediaries.

By 2010, the financial crisis had prompted another reform of the supervisory system in order to protect and improve the UK's economy, and to ensure the integrity, fairness and competitiveness of the financial services market. The reform was based on the abolition of the FSA

and on the splitting of its functions between the Bank of England and two other new agencies, the Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA).

In December 2012 the Financial Services Act (FS Act)[92] gave the Bank of England responsibility for financial stability, bringing macro- and micro-prudential regulation together, and it created the Financial Policy Committee (FPC) as a new regulatory structure within the Bank of England itself. The FPC's objectives are to remove or to reduce systemic risks, protecting and improving the quality of the UK financial system. It has also the secondary objective of supporting the economic policy of the Government. The FPC can give directives to regulators, the PRA and the FCA.

The FS Act also created a new Prudential Regulation Authority (PRA), to carry out the prudential supervision and regulation of financial firms, including banks, investment banks, building societies and insurance companies. The PRA protects stability of the financial markets through supervision and regulation. It is a subsidiary of the Bank of England, and it works alongside the FCA in order to achieve its specific statutory objectives: the protection of the policyholders and the safety and soundness of the subjects supervised. The Government – accepting the recommendation of the Parliamentary Commission on Banking Standards – proposed introducing competition as a secondary objective for the PRA. It means that to carry out its functions the PRA must promote the competition of the supervised firms and also that it must review its prudential system, introducing changes that could achieve not only the general statutory objectives of PRA but also the competition.

PRA also protects the policyholders from insurance undertakings' failures, ensuring that the insurers will be able to pay compensation whenever the risk covered should happen.

The PRA works alongside the Financial Conduct Authority (FCA), the other regulatory structure of the supervisory system created by the FS Act. The FCA is an independent institution, not part of the Bank of England, governed by a Board appointed by the Treasury and funded from the fees paid by the firms carrying out the activities regulated by the FCA itself.[93]

The FS Act gave the FCA the responsibility of promoting effective competition, and entrusted it with the conduct regulation of all financial services firms. In particular, the FCA's strategic objective is to ensure that the relevant markets do function. This final objective is achieved through three operational objectives: to secure an appropriate degree of protection for consumers; to protect and enhance the integrity of

the UK financial system and to promote effective competition in the interests of consumers.[94] The FCA is also the prudential supervisor of the firms not supervised by the PRA.

The regulation of conduct, respecting the principle of proportionality, is based on the size and the nature of firms, and it consists in regular assessments on the conduct of firms. The FCA also carries out project works on specific sectors of the market and products that are putting or may put the consumers at risk. The FCA is also competent to deal with unfair terms in standard consumer contracts.

Regarding the protection of policyholders, if the PRA ensures the continuity of cover on the risks they are ensured against, the FCA ensures that the consumers will be fairly treated by the insurers.

9.13.2 France

The ACPR – Autorité de contrôle prudentiel et de résolution – is the French supervisor of banking and insurance activities. It was created in January 2010[95] as ACP – Autorité de contrôle prudentiel – and was converted into the ACPR by the law on separation and regulation of banking activities.[96]

The financial crisis highlighted the need of a new supervisory authority with a global view on all the financial markets. The new authority was created by merging the authorities competent to release authorizations for[97] and to control[98] the banking and insurance sectors.

The ACPR is an independent[99] authority, funded by the fees levied on supervised entities,[100] which works by applying the principles of competence, efficiency and promptness. It has a close connection with the Bank of France, which is the employer of its staff. The ACPR's own budget is annexed to that of the Bank of France, and can be exceptionally accrued by Bank of France supplementary endowments.

The objectives of the ACPR are to guarantee the stability of the financial market, to protect the consumers, clients' bank and policyholders, and to improve the role of France in the international and European scene. It has also powers to avoid and manage financial crisis.

The ACPR also verifies the compliance of banks and insurance undertakings, with consumer protection rules. This mission is carried out by an ACPR-specific structure, the Direction du contrôle des pratiques commerciales, which works very closely with the AMF – Autorité des marchés financiers – the French financial markets regulator, because of the relationships between insurance, banking and financial products.

In order to realize its objectives the ACPR has powers to control and to adopt administrative measures and sanctions.

The ACPR's principal body is the College, which makes plenary decisions on general matters relating to supervision and financial stability, and also on the general directives on ACPR's operation, and makes decisions restricted to certain of its members on specific matters related to a single sector of activity.

The President of the ACPR College is the Governor of the Bank of France, and among its members is also the President of the AMF and of the ANC – Autorité des normes comptables.

Sanctions are issued by the Commission des sanctions, which is independent of the College.

Also in the ACPR is the General Secretary, appointed by the Ministry of Economy at the proposal of the ACPR President, competent to the manage departments.

9.13.3 Germany

The German insurance supervisor is the Federal Financial Authority – BaFin.

This entity was established in 2002, by the Financial Services and Integration Act, in order to create a single integrated financial regulator, merging three supervisory agencies: the Federal Banking Supervisory Office, the Federal Supervisory Office for Securities Trading and the Federal Insurance Supervisory Office.

The BaFin is an institute ruled by public law with full legal capacity, funded only by the fees and contributions paid by the entities supervised. It is under the legal and technical supervision of the Federal Ministry of Finance, which is politically responsible for the BaFin's activities.

The Bafin's objectives are to guarantee the effectiveness, stability and integrity of the financial markets. It supervises banks, insurance undertakings, financial services institutions, pension funds, domestic investments funds and asset management companies. As a solvency supervisor, the BaFin ensures that credit institutions, insurance undertakings and financial services providers will be able to satisfy savers and policyholders. As a market supervisor, the BaFin ensures its fairness and the transparency.

The BaFin also has the important role of protecting investors, answering their questions, enquiries and complaints, and influencing companies to correct errors or explaining the legal situation to the complainants.

Regarding its supervisory activity on the insurance market the legal basis is the Insurance Supervision Act.[101] In particular, BaFin verifies that insurance business is carried on only by authorized insurance undertakings managed by directors with the necessary professional qualifications

and reliability. BaFin is also competent to verify whether insurance conduct is fit and proper, and compliant with the statutory and supervisory provisions, especially those on the safety and profitability of the investments. According to the German Federal system, insurers working only in a local area are subject to local supervisory authorities at State level.

9.13.4 Spain

The General Directorate on Insurance and Pension Funds (*Direcciòn Generales de Seguros y Fondo de Pensiones* – DGSFP) is the Spanish insurance supervisory authority.

It is an administrative agency of the Secretaría de Estado de Economía y Apoyo a la Empresa, which is a part of the Ministry of Economy and Competition (*Ministerio de Economía y Competitividad*).[102]

The DGSFP issues authorizations to carry out insurance[103] and mediation activities,[104] and to manage pension funds.[105] It supervises the activities carried on by the authorized entities and protects consumers, policyholders, beneficiaries, injured third parties and participants of the pension funds, managing and solving the consumers' claims.

Within the DGSFP sits the Junta Consultiva de Seguros y Fondos Pensiones, an advisory body of the Ministry of Economy, which gives its opinion on decisions regarding insurance, mediation and pension funds on no mandatory request, studies matters submitted for its attention, and gives general recommendations. Its President is the General Director of the DGSFP.

9.13.5 National features and common trends

Even though the shape of the different national supervision systems is obviously specific to each country and not harmonized, it is clear that the 2008 crisis fostered a slight rapprochement following some common trends.

One of these trends is certainly the growing involvement (in various forms) of the banking supervisor (often the central bank) and insurance supervision (France, Germany, Italy, and United Kingdom), and the reduction of the number of authorities or the introduction of better coordination.

Another trend, although less widespread, is the bringing of prudential supervision on soundness and transparency controls on market conduct under the same roof. This seems to be a paramount approach in France and Germany. In Italy, however, this is true just of insurance and banking (where the two different kind of supervision are both up to

Bank of Italy and Ivass), while for financial firms the two competences are divided (the Bank of Italy for soundness and the Consob, the Italian SEC, for transparency and market conduct). In the United Kingdom, on the other hand, those two attributions are handled by two different bodies.

9.14 The European financial supervisory system and the Eiopa

The European System of Financial Supervision (ESFS) has created three new authorities, with the aim of guaranteeing the stability and the effectiveness of the financial market: the European Banking Authority – EBA,[106] the European Securities and Markets Authority – ESMA[107] and the European Insurance and Occupational Pensions Funds Authority – Eiopa.[108]

These authorities are independent of the European Parliament, the Council of the European Union and the European Commission, and they have the objectives of ensuring the integrity, transparency, efficiency and the correct functioning of the banking, securities and insurance and occupational pensions sectors, as well as the protection of financial consumers, investors and policyholders.

The ESFS also includes the European Systemic Risk Board (ESRB) and the Joint Committee of the European Supervisory Authorities – and, in the Member States, the National Supervisory Authorities.

The reform of the European supervisory system, as mentioned above, moved from the awareness that many shortcomings in supervision contributed to the financial crisis of 2007 and 2008.[109] In order to prevent other financial crises, it was deemed necessary to enforce the supervisory activity, promoting in particular the convergence of supervisory practices, establishing a single set of harmonized prudential rules and increasing the coordination of the supervisory activities between the National and European Authorities.

Inside the ESFS, the close and regular cooperation between the European financial authorities is guaranteed mostly through the Joint Committee of EBA, ESMA and Eiopa, which has the competence to ensure cross-sectorial consistency especially as regards financial conglomerates, accounting and auditing, micro-prudential analysis of cross-sectorial developments, risks and vulnerabilities in financial stability, retail investments products, anti-money laundering measures, and finally exchanging information with the ESBR and developing the relationship between the ESBR and the European Supervisory Authorities. The

Joint Committee is also competent to settle cross-sectorial disagreements between National Authorities or between them and the European authorities.

The Board of Appeal is another joint body of the European Supervisory Authorities that provides legal advice on the Authority's exercise of power. In fact, any natural or legal person and also the competent Authorities can appeal to the Board against the individual decisions issued by the Eiopa in the cases established in Regulation no. 1094/2010.[110] The decisions of the Board of Appeal can be challenged before the European Union Court of Justice, which is also directly competent to uphold or overturn the decisions taken by the Eiopa.

National Supervisory Authorities maintain their powers on national markets, but the Regulation establishes many powers of Eiopa through which it can achieve its tasks. These powers with respect to the procedure and the conditions established by the Regulation itself can be exercised directly towards the National Authorities and the financial institutions, and the related decisions prevail over any other previous decision made by the competent authorities.

This legal framework is consistent with the purposes of Eiopa's foundation, summarized in the slogan "from regulation to supervision", which indicates that Eiopa also intends to become the supervisor of the European insurance market in the near future. This move does not mean the complete dispossession of national Authorities' powers and functions; it merely shows that the Eiopa can impose its powers when the National Authorities are not compliant with Union law or do not take the necessary actions to resolve those situations which can have negative impact on the integrity, efficiency, transparency and orderly functioning of the financial markets.

In particular, Eiopa can address an individual decision if it is necessary "to maintain or restore neutral conditions of competition in the market or ensure the orderly functioning and integrity of the financial system" when a financial institution[111] does not satisfy the requirements established in the legislative acts, mentioned in Art. 1(2) of the Regulation,[112] directly applicable to the financial institution itself, and the competent National Authority is not compliant with Union law, as requested in the formal opinion issued by the Commission.[113]

The Eiopa can also make an individual decision in an emergency if it is necessary "to restore the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union" when a financial institution does not comply with its obligation under the legislative acts, mentioned in Art. 1(2) of the

Regulation, directly applicable to the financial institution itself, and the competent National Authority is not compliant with Union law and with the decision of the Eiopa requesting that the competent authority itself take the necessary action to address adverse development which can have a bad impact on the orderly functioning and integrity of financial markets or the stability of the whole or part of the financial system in the Union.[114]

Finally, the Eiopa can adopt an individual decision addressed to a financial institution requesting the necessary action to be compliant with its obligations under Union law when the competent authority does not comply with the binding decision of the Eiopa on disagreement between competent authorities of different Member States.[115]

As for the National Authorities, the coordination with Eiopa is basically based on the exchange of information. In particular, Eiopa can request the National Authorities for information – on a recurring basis if necessary – to exercise its duties and, where the information is not available or not available in timely fashion, upon a duly justified and reasoned request, to the Minister of Finance, to other supervisory authorities, to the national Central Bank or to the statistical office of the Member State concerned and also to the relevant financial institutions.

Eiopa submits the regulatory technical standards drafts to the EU Commission endorsement – aiming to ensure consistent harmonization in areas specified by the legislative acts, mentioned in Art. 1(2) of the Regulation, and respecting the limits established by the legislative acts themselves – or implementing technical standards drafts in areas specified by the same legislative acts to determine the condition of application of the legislative acts themselves.

These technical drafts do not involve strategic decisions or policy choices. They can be the object – before their submission to the Commission – of an impact study on potential costs and benefits and of an open public consultation. As regards the public consultation, the Eiopa can request the opinion of the Insurance and Reinsurance Stakeholder Group and the Occupational Pensions Stakeholder Group.

These stakeholder groups, creating specifically to facilitate consultation with stakeholders in areas of relevant interest for the Authority, also give opinions on the guidelines and recommendations issued by the Eiopa and addressed to the National Authorities or to the financial institutions in order to establish consistent, effective and efficiency supervisory practises and to ensure common, consistent and uniform application of Union law.

Inside the Colleges of Supervisors, established by the Solvency II directive as an instrument of supervision of insurance and reinsurance undertakings groups, the Eiopa also has a relevant role.[116] Eiopa can participate in the Colleges' activities, including joint on-site inspections, with the aim of simplifying the functioning of the Colleges themselves and promoting the efficient exchange of information between the National Authorities. The aim is to prevent regulatory arbitration and to guarantee the consistent application of the Union law in the entire European insurance market. In the College, the Eiopa also has the role of mediator and exercises its power to legally adopt binding mediation to settle disputes between the Authorities and members of the College. Eiopa can also adopt individual decisions toward a financial institution requiring it to take action to comply with its obligations under Union law.[117]

As for financial crisis prevention, Regulation no. 1094/2010 establishes a close cooperation, based on the exchange of information, between the Eiopa and the ESRB necessary to the ESBR itself to achieve its purposes. In fact, the ESBR can adopt warnings – if a systemic risk is estimated as important – and recommendations to take appropriate actions to limit the identified risk, addressed to the Eiopa or to a National Authority, upon which the Eiopa itself has to ensure proper follow-up.

Exercising its supervisory powers, Eiopa has to consider the systemic risk, that is, the "risk of disruption in the financial system with the potential to have serious negative consequences for the internal market and the real economy".[118] In order to improve the capacity to identify the systemic risk, Eiopa, in consultation with the ESBR, sets criteria for its identification and measurement and cooperates with the ESBR in this field to establish a common approach.

In order to guarantee full autonomy and independence, Eiopa has an autonomous budget with revenues mainly from obligatory contributions from national supervisory authorities and from the General Budget of the European Union.

9.15 Conclusions

In this chapter we have outlined a legal history of the Italian insurance supervision authority from its birth in the 1982 as Isvap – as a technical arm of the Department of Industry– to the 1994 reform which gave to it the status of a truly independent authority; and since then, the 2013 reform which established Ivass, creating a common governance with the

Bank of Italy and bringing banking and insurance supervision under the same roof.

The analysis describes the powers of the insurance supervision authority, recalls the project of reform to merge it with the pension funds authority, and gives an insight into the original Ivass governance with its institutional link with the Bank of Italy.

In the final paragraphs, the Italian system is compared with those of the other big European countries, and the national authority is placed in the framework of the European financial supervisory system.

Notes

The views expressed in this work are those of the authors and are not attributable to either Ivass or the Bank of Italy. Enrico Galanti wrote paras 9–11 and 12.5 and is responsible for the first draft and the editing of the chapter; Patrizia Rosatone wrote paras 1–8, 12 (except 12.5) and 13.

1. The Single Text collected the laws issued on insurance matters until its implementation, and was based essentially on the R.D.L. no. 966 of 29 April 1923 which introduced public control on insurance business to guarantee the sound and prudent management of insurance undertakings, to ensure the solvency of the insurance undertakings and to protect the policyholders. The R.D.L. had also abolished the monopoly (not in fact completely achieved) on life insurance of INA – (National Institute of Insurance) an economic public entity established by Law no. 305 of 4 April 1912.
2. Directive no. 73/239, completed by Directive no. 73/240.
3. Directive no. 79/267.
4. Report on the bill (which became Law no. 576/1982) of the Chamber of Deputies – XII Permanent Commission (Industry and commerce – handicrafts – foreign commerce).
5. This is the opinion of Dino Marchetti, *Natura e funzioni dell'Isvap,* published on *Quaderno CIRSA n. 15*, who report the same opinion expressed by Ascarelli and of Merusi and Passaro.
6. This is the opinion of Nicola Monfreda*, Istituto per la vigilanza sulle assicurazioni Private e di interesse collettivo – Isvap*.
7. On INA, see note no. 1.
8. The importance of this activity was underlined by the Report on the bill (which became Law no. 576/1982) of the Chamber of Deputies – XII Permanent Commission (Industry and commerce – handicrafts – foreign commerce) and was appreciated by Angelo Jannuzzi, *I poteri dell'Isvap*, in *Assicurazioni*, 1991.
9. On the legal nature of Isvap see Giorgio Sangiorgio, *Istituto per la vigilanza sulle assicurazioni private e di interesse collettivo (Isvap)*, 1995.On the different opinions upon the level of autonomy of Isvap, see also Gustavo Minervini, *Le istituzioni per la tutela del pubblico risparmio. L'Isvap*, in *Giur. Comm.*, 1985.
10. Giuseppe Leonardo Carriero, *Il controllo sull'attività assicurativa: Istituzioni, obiettivi e strumenti*, in *Federalismi.it* no. 24/2008; Roberto Caranta, *La nuova*

Isvap, in *Responsabilità civile e previdenza*, 1998. See also the Report on the bill (which became Law no. 576/1982) of the Chamber of Deputies – XII Permanent Commission (Industry and commerce – handicrafts – foreign commerce).

11. Angelo Jannuzzi, mentioned above; Sabino Cassese, *Gli organi dell'Isvap*, in *Giur. Commerciale*, 1984.
12. Under the Single Text, rates and contracts terms were approved by the Department of Industry. The approval of the rates and contracts terms was abolished with the transposition in the Italian Law of the third directives on life and non-life insurance by Legislative Decrees nos 174 and 175 of 17 March 1995. The approval of the rates for compulsory motor vehicle liability insurance by CIP (Interdepartmental Prices Committee) was abolished by Law no. 537/1993.
13. Report on the bill (which became Law no. 576/1982) of the Chamber of Deputies – XII Permanent Commission (Industry and commerce – handicrafts – foreign commerce).
14. Discussion on the draft of Law no. 576/1982 of 27 July 1982. See also Fabio Merusi and Michele Passaro, *Autorità indipendenti*.
15. Enrico Bottiglieri, sub Artt. 1–6, in *Commento alla legge 12 agosto 1982, n. 576 e d.P.R. 4 marzo 1983, n. 315*, in *Nuove leggi civ.*, 1987.
16. Marino Bin*, Autorità indipendenti? Il caso dell'Isvap*, expressed the opinion that where there is independence, there must be also the high and qualified competence of the managers in the sector regulated by the independent authority.
17. This principle was expressed in the judgement of the Administrative Regional Trial of Lazio, Rome, 1 August 1995, no. 1474.
18. Desiderio, *L'ottica dell'Isvap*, in *Assicurazione e prodotti finanziari – Tipologia-Distribuzione – Vigilanza*, 1990, criticized the different position of Isvap in Antitrust law respect to the other supervisory authority. The exceptions were abolished for the Agcom (Authority for Guarantee on Communications) with Law no. 249 of 31 July 1997 – which introduced the mandatory but not binding advice of the Agcom – and for Bank of Italy with Law no. 262/2005, Legislative Decree no. 303 of 29 December 2006 and Legislative Decree no. 21 of 27 January 2010.
19. Cassese, mentioned above, expressed the opinion that the law wanted to establish a new governance system different from that established in the Consob where joint decisions were not prompt or efficient enough. The same opinion was reported by Bottiglieri and Gustavo Minervini, mentioned above.
20. Bin, mentioned above.
21. Now in Art. 229 of the *Insurance Code* (IC).
22. Now in Art. 232 of IC.
23. For Caranta, mentioned above, Isvap before Cassese's decree was only a semi-independent authority which did not exercise discretionary powers typical of administrative functions considering the public and the private interests.
24. This opinion was already expressed by Jannuzzi, mentioned above, after issuing Law no. 20/1991 with regard to authorization to carry on insurance business and to merger of insurance undertakings.

25. A contrary opinion was expressed by Caranta, mentioned above. He thinks that in the release of authorization there is not a valuation of public and private interests involved.
26. In the opinion of Bin, mentioned above, this is a macroscopic incongruity of the decrees.
27. See the discussion on the bill Consulting Parliamentary Commission, 15–16 September 1998 and 30 June 1999.
28. For Ferrari after Legislative Decree no. 373/1998 Isvap was totally independent of the Department of Industry and other public entities, in *Nuovi profili di diritto delle assicurazioni – Il fatto assicurativo* – Giuffrè – 2003.
29. For this purpose Isvap, with Order no. 1338 of 11 November 1999, founded the Guarantee College, an entity competent to evaluating disciplinary violations committed by agents, brokers and loss adjusters, and to propose the application of a disciplinary sanction to Isvap's President.
30. Desiderio, mentioned above, welcomed the change but criticized the abolition of rates and terms of contract approval because it was a useful tool to achieve effective policyholder protection. The approval of rates and terms ended with the transposition of the third directives in insurance matters, although some powers still remain for life insurance contracts (the undertaking had to inform Isvap of the essential elements of technical bases for calculating premiums and rates), and for compulsory motor vehicle cover (the undertaking had to inform Isvap of the general and special terms of contracts).
31. The existence of Isvap's power to adopt general rules implementing law (even if not formally qualified as regulatory acts) before the Code of private insurance (issued by Legislative Decree no. 209 of 7 September 2005) which conferred to the Institute the power to adopt regulations, was confirmed by the decisions of Administrative Regional Court, Roma, I Section, no. 4207 of 17 March 2010 and no. 12276 of 19 May 2010, respectively on an order and on a Circular. The same opinion was expressed by Riva, *Commento agli artt. 188–191*, in *A.A.V.V., Commentario al Codice delle assicurazioni*, a cura di M. Bin, Padova, 2006, and Morbidelli, *I regolamenti dell'Isvap*, in *A.A.V.V., Il nuovo Codice delle assicurazioni – Commento sistematico, a cura di Sandro Amorosino e Luigi Desiderio*, Milano, 2006. See also Tarchi, Capriglione.
32. The change was welcomed by Luigi Desiderio, mentioned above.
33. Now the contribution for supervision is established by 30 May, by decree of the Department of Economy and Finance – after hearing Isvap – so as to ensure financial cover for the costs of supervising over undertakings, at maximum two per thousand of the premium earned for each financial year, excluding taxes and levies (Art. 335 Code of private insurance).
34. Art. 4, para. 1, Law no. 229 of 29 July 2003 on urgent measures to codify, reorganize and improve the quality of the regulatory framework – simplifying law for 2001.
35. See Council of State, Consulting Section on Normative Acts, Advice no. 11603 of 14 February 2005.
36. Tarchi, comment on Art. 191 in *Il Codice delle assicurazioni private – Commentario al d.lgs. 7 settembre 2005, n. 209*, volume II, Tomo secondo (Arts 161–209), diretto da Francesco Capriglione.

37. The draft was proposed by the Ministers of Production Activities and Community Policies, in agreement with the Minister for Public Administration, the Minister of Economy and Finance and the Minister of Justice.
38. The Code transposed the directive 2002/92/CE on insurance mediation into Italian legislation.
39. See note no. 29. After the Code, the rules of the procedure before the Disciplinary Guarantee Committee were established by Isvap Regulation no. 6 of 20 October 2006, repealed by Ivass Regulation no. 2 of 8 October 2013.
40. Isvap Regulation no. 1 of 15 March 2006, repealed by the Ivass Regulation no. 1 of 8 October 2013.
41. RIVA, *Commento agli artt. 3–10*, in *A.A.V.V., Commentario al Codice delle assicurazioni*, edited by M. Bin, Padova 2006, said that, if the rules on appointment were the same as the first version of Law no. 576/1982, held over the doubts about the independence of an authority where the internal bodies were appointed by the Government. But it could also be considered that other rules of appointment for other authority, like the Consob, had the same strict connection with the Government.
42. For RIVA, *Commento agli artt. 3–10,* mentioned above, the reform of insurance supervision could abolish the role of the Government achieving true independence for the insurance authority.
43. This is the opinion of Carriero, mentioned above.
44. See on this point Carriero, mentioned above. From this point of view, also, the provisions on consumer protection, through the introduction of duties of information, establish rules of the market which promote competition between insurance operators granting the reliability of the operators itself.
45. RIVA, *Commento agli artt. 3–10*, mentioned above, said that Isvap became independent but pointed out that Code did not change the rules on the appointment of Isvap's internal bodies and so doubts continued about the Institute's independence from Government. For Tarchi, mentioned above, the importance of this innovation is connected specially with the enforcement of independence and powers of Isvap.
46. The Council of State's advice imposed the qualification of Isvap prescribing acts as regulatory acts. Morbidelli, mentioned above, said that the introduction of a general regulatory power was expression of the capacity of innovation of the Code.
47. On this point, see Morbidelli, and Tarchi, both mentioned above.
48. See the decision of the Regional Administrative Court, Lazio, Roma, I Section, no. 5522/2007. This opinion is also expressed by Riva, *Commento agli artt. 3–10,* mentioned above, who expresses his worries about possible risks as to empty the law and rules overlapping.
49. Scalise, Comment on Art. 9 – in *Il Codice delle assicurazioni private – Commentario al d.lgs. 7 settembre 2005, n. 209*, edited by Capriglione, Cedam, Padova, 2007, highlighted that this scheme is compliant with the Lamfalussy procedure adopted by the European Union for the financial single market and extended to the insurance sector with Directive no. 2005/1/CE. He also remembered that this solution was just applied to the banking and financial sectors (Art. c4 Legislative Decree no. 385/1993 and Art. 3 Legislative Decree no. 58/1998).

50. See Riva, *Commento agli artt. 188–191*, mentioned above, and also Scalise, mentioned above.
51. See the Council of State's advice and Riva, *Commento agli artt. 3–10*, mentioned above, and Scalise, mentioned above, on the compliance of the regulatory powers of Isvap with the legality principle.
52. About the compliance of regulatory powers with the Constitution and with the law see Morbidelli, mentioned above.
53. Art 191 (Regulations) – 1. In the exercise of its supervisory functions over the technical, financial, assets/liabilities management of insurance and reinsurance undertakings and on transparency and fairness of behaviours by insurance and reinsurance undertakings and intermediaries, Isvap shall, by regulations implementing the provisions of this code, adopt general rules relating to:

    a) the fairness of advertising, the rules on the way undertakings and intermediaries shall introduce themselves and behave in relation to the supply of insurance products, taking account of the different needs for policyholders protection;
    b) information requirements before the conclusion of the contract and during its term, including the requirements relating to the promotion and placement of insurance products, by means of distance communication;
    c) check on the adequacy of risk management processes, including effective administrative and accounting procedures and suitable internal control mechanisms of insurance and reinsurance undertakings;
    d) financial adequacy, including the establishment of technical provisions, the representation and valuation of assets, the composition and calculation of the solvency margin of insurance and reinsurance undertakings;
    e) the setting up and management of assets devoted to a specific business, under the terms envisaged in the civil code, of segregate assets and internal funds of undertakings pursuing life business, including the limits and restrictions on investments and the principles and layouts to be adopted in the assessment of the property in which assets are invested;
    f) the layout of accounts, the chart of accounts, the forms and arrangements for making a confrontation between the accounting system and the chart of accounts, the layout and content of the statement relating to the solvency margin and of the other supervisory models derived from financial statements and consolidated accounts of insurance and reinsurance undertakings;
    g) the indication of the entities not subject to compulsory consolidation which are required to draw up consolidated accounts for the sole purpose of supervision;
    h) supplementary supervision over insurance and reinsurance undertakings, including the verification of the intra-group transactions and the calculation of the adjusted solvency of insurance undertakings and companies controlling insurance undertakings;
    i) the procedures relating to the issuing of the measures envisaged for the taking-up of insurance business, compliance with operating conditions,

acquisition of holdings, shareholdings, extraordinary operations, safeguards, reorganization and winding up measures of insurance and reinsurance undertakings.

54. About this classification see, Amorosino, *La regulation dei mercati e delle imprese nel Codice delle assicurazioni*, in *A.A.V.V., Il nuovo Codice delle assicurazioni – Commento sistematico*, edited by Sandro Amorosino e Luigi Desiderio, Milano, 2006.
55. On the nature of the regulations see Morbidelli, mentioned above.
56. This is the opinion of Amorosino, mentioned above.
57. About the proportionality of the regulation, Tarchi, mentioned above, highlighted that the administrative courts recognized proportionality as a general principle which limited the administrative activity (see also the decision of the Council of State, V Section, no. 2087 of 14 April 2006). On the features of the public consultation see the decision of the Regional Administrative Court, Lazio, I Section, no. 33031/2010.
58. According to Amorosino, mentioned above, there is a coexistence of public powers in the insurance sector of a governmental body and a technical independent authority. He is also critical about the choice of identifying the Minister of Production and not the Minister of Finance as governmental referent as in the other financial market.
59. This opinion was expressed by Giuseppe Leonardo Carriero, mentioned above, and by Scalise, mentioned above.
60. Decree by the Minister of Economic Development no. 99 of 28 April 2008.
61. Regulation of the Ministry of Economic Development no. 220 of 11 November 2011.
62. In the report on the bill, the creation of a single supervisory authority for financial services market was expressly considered a premature choice.
63. Through information, data and documents exchange on the one hand and memorandums of understanding and coordination committees on the other.
64. Regulation (EU) no. 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision no. 716/2009/EC and repealing Commission Decision 2009/79/EC.
65. The project of merging the Covip (this time directly with the Bank of Italy) seemed to resurface in the framework of the 2014 public administration reform bill, but was abandoned once more.
66. It is noteworthy that for this capacity (President of Ivass) the Director General of the Bank of Italy does not earn any additional compensation. This can be inferred from Art. 13, para. 11 of the Decree, which does not foresee any emolument for this position while para. 14 has a provision for the two members of the Board of Directors.
67. See: for the President Art. 13, paras 11 and 12 of the Decree and Art. 3 of the Statute; for the joint Directorate Art.13, paras 17 and 18 of the Decree and Art. 7 of the Statute.
68. The paragraph also states that the Directorate resolutions are taken by majority. In a draw, the Governor has the casting vote.
69. On the monocratic nature of the Bank of Italy governance before 2005, see E. Galanti, in *Storia della legislazione bancaria finanziaria e assicurativa Dall'Unità*

d'Italia al 2011 by E. Galanti, R. D'Ambrosio and A. V. Guccione, (2012), Venezia Marsilio ed., 51 s and 72 s.

70. Like the end of the life tenure of the Governor by Art. 19, para. 7 of l. no. 262/2005, which provides for a six-year tenure for the Governor and the other members of the Directorate, this is renewable once. The new Statute of the Bank of Italy was endorsed with D.P.R. 12 December 2006. See M. O. Perassi, *Banca d'Italia e contesto internazionale. Prime riflessioni sul nuovo statuto*, in *Banca impr. soc.*, 2007, p. 11, as well as O. Capolino, *Le autorità*, in E. Galanti (ed.), E. Galanti, *Diritto delle banche e degli intermediari finanziari* (2008), Padova Cedam ed., 205 ss.
71. Law no. 262 (Norms on safeguard of saving and financial markets regulation) was enacted on 28 December 2005. On those events see E. Galanti, *Storia …*, 197 s.
72. Stat. Art. 3.2.
73. This provision stresses the fact that we are looking at two different organs of two different bodies, although their composition overlaps to some degree.
74. Stat. Arts 7.2 and 8.1.
75. Stat. Art. 8b. The other competences of the Joint Directorate, provided by Art. 8, are: the approval of the annual report to Parliament; Statute changing; the constitution of Committees, Commissions or Colleges; the secondment of BOI employees; the appointment of delegates to the EIOPA.
76. Stat. Art. 9. In case of absence or impediment, the Governor is substituted by the President, and this latter by the senior member of the Joint Directorate in terms of appointment.
77. Stat. Arts 5 letters n and o.
78. Art. 13.18 of Decree and Stat. Art. 8.3.
79. Stat. Arts 3 letters b and c.
80. Consider, for instance, the general provision of law about transparency, which compels the organization to disclose data.
81. See Stat. Art. 9, paras 5 and 1.
82. Stat. Art. 8.3, which also states the criteria of delegation, information about decision taken by delegates and resolutions which cannot be delegated. A similar provision of the Statute provides for mandates that can be granted by the Board of Directors (Art. 3.3).
83. Stat. Art. 8.2.
84. This has now tasks, similar to those of the Bank of Italy Legal Department, of legal defence and advice, while the Sanctions and Compulsory Winding Up departments became autonomous.
85. The position covered with personnel from BOI are the Secretary General and the heads of the following Units: Management of Resources, Inspectorate and Legal Affairs.
86. See Art. 3.102 of Law no. 244/2007, as lately amended by Art. 14.1, letter a of d.l. no. 95/2012 converted into Law no. 135/2012 which, for the year 2015 limits expenditure on staff hire to a maximum of 40 per cent of that related to the staff who had left the previous year (the year before the quota was 20 per cent).
87. Ddl Senate no. 1120-*quinques Provisions on Ivass* functioning.
88. It has to be considered that in recent years the Bank of Italy has already absorbed the merger of the Italian Financial Intelligence Unit (UIC,

2007–2008) and has undergone a substantial change in its territorial network (about one third of its branches closed).

89. At the time of writing, in early May 2014, the Italian Government announced a project of Public administration reform which includes the merger of Covip into the Bank of Italy.
90. The EIOPA assumes all tasks and powers of the Committee of European Insurance and Occupational Pensions Supervisors.
91. The ESMA assumes all tasks and powers of the Committee of European Securities Regulators.
92. The reform came into force on 1 April 2013.
93. On the FCA's powers to raise fees, see para. 23 of Part 3 of Schedule 12A of the FSMA.
94. From FCA, http://www.fca.org.uk/news/fca-to-investigate-competition-in-investment-and-corporate-banking-services-following-review-of-wholesale-markets.
95. Ordinance no. 2010–76 fixed objectives, organization and composition of the ACPR.
96. Law no. 2013–672 of 26 July 2013.
97. CEA (Comité des entreprises d'assurance) and CECEI (Comité des établissements de crédit et des entreprises d'investissement).
98. *Commission bancaire* and ACAM (*Autorité de contrôle des assurances et des mutuelles*).
99. The objectives are fixed by the Art. L. 612–1 of the Code monétaire et financier.
100. Art. L. 612–20 of the Code monétaire et financier.
101. Versicherungsaufsichtsgesetz – VAG.
102. Royal Decree no. 245/2012 of 10 February 2012, which fixed the general structure and organization of the Minister.
103. Royal Legislative Decree no. 6 of 29 October 2004 – Law on arrangement and supervision on private insurance.
104. Law no. 17 of 27 July 2006 on private insurance and reinsurance mediation.
105. Royal Legislative Decree no. 1 of 29 November 2002.
106. Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision no. 716/2009/EC and repealing Commission Decision 2009/78/EC.
107. Regulation (EU) no. 1095/2010 of the European Parliament and of the Council of 24 November 2010, establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision no. 716/2009/EC, and repealing Commission Decision 2009/77/EC.
108. Regulation (EU) no. 1094/2010 of the European Parliament and of the Council of 24 November 2010, establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision no. 716/2009/EC and repealing Commission Decision 2009/79/EC.
109. The reform was initiated by the European Commission, following the recommendations of a Committee of Wise Men chaired by Mr de Larosière, and supported by the European Council and Parliament.

110. Arts 17, 18 and 19 of the Regulation no. 1094/2010.
111. Art. 4, para. 1, point 1, of Regulation no. 1094/2010 "(1) 'financial institutions' means undertakings, entities and natural and legal persons subject to any of the legislative acts referred to in Art. 1(2). With regard to Directive 2005/60/EC, 'financial institutions' means only insurance undertakings and insurance intermediaries as defined in that Directive".
112. Art. 1, para. 2 of Regulation no. 1094/2010: "2. The Authority shall act within the powers conferred by this Regulation and within the scope of Directive 2009/138/EC with the exception of Title IV thereof, of Directives 2002/92/EC, 2003/41/EC, 2002/87/EC, 64/225/EEC, 73/239/EEC, 73/240/EEC, 76/580/EEC, 78/473/EEC, 84/641/EEC, 87/344/EEC, 88/357/EEC, 92/49/EEC, 98/78/EC, 2001/17/EC, 2002/83/EC, 2005/68/EC and, to the extent that those acts apply to insurance undertakings, reinsurance undertakings, institutions for occupational retirement provision and insurance intermediaries, within the relevant parts of Directives 2005/60/EC and 2002/65/EC, including all directives, regulations, and decisions based on those acts, and of any further legally binding Union act which confers tasks on the Authority".
113. Art. 17 "Breach of European law" of Regulation no. 1094/2010.
114. Art. 18 "Action in emergency situations" of Regulation no. 1094/2010.
115. Art. 19 "Settlement of disagreements between competent authorities in cross border situations" of Regulation no. 1094/2010.
116. The College of Supervisors is established by Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II). The definition is introduced by Art. 212, para. 1, letter e: "'college of supervisors' means a permanent but flexible structure for cooperation and coordination among the supervisory authorities of the Member States concerned".
117. Art. 21, para. 4 of Regulation no. 1094/2010.
118. Recital 14 of Regulation no. 1094/2010.

10
Commissione di Vigilanza sui fondi Pensione (Covip)

Raffaele Capuano

10.1 Introduction: interaction between mandatory and supplementary pension schemes

Mandatory and supplementary pension systems are quintessentially complementary: one cannot exist without the other, and development of supplementary pension schemes cannot be separated from knowledge of the basic system.[1]

The stated mission of Covip (Commissione di Vigilanza sui Fondi Pensione) as per Italy's legislation establishes that in carrying out its institutional tasks the Authority is in charge both of prudential supervision of occupational pension plans and protection of its members and beneficiaries' rights (i.e., consumer protection).[2] In particular, Covip's main duty is to provide guidelines aimed at protecting transparency of contractual conditions among all supplementary pension forms and at monitoring the related terms and conditions in order to safeguard members' mindful affiliation.

10.2 Covip's role and tasks

In such a context Covip's role is of primary importance.[3]

Since Covip was established, legislation provided it with highly specific regulation and supervision functions. Legislative Decree no. 252/2005 clearly established Covip's role as the sole authority in charge of supervising Italy's private pension system "aiming to safe and transparent management of Pension Funds and appropriate functioning of the complementary pension system".

After several years of activity, the Authority's role is now widely acknowledged by operators, in light of its valuable competence and know-how relating to complex issues in the relevant sector.

Furthermore, Covip's supervisory and control functions are aimed at soundly supporting Italy's pension funds, and its functions also encompass remarkable – at times even drastic – corrective and censoring actions aiming to protect affiliates and effectively addressing risks endangering their interests. As such, verification of the functionality of Italy's pension system – while aimed at protecting the stability and cost-effectiveness of the numerous institutions involved – cannot be separated from the pursuit of optimal fulfilment of affiliates' interests. Once again, combined with the need to build up a new welfare state, Covip's sensitivity turns out to be crucial to fulfil individuals' pension needs.

What qualifies Covip's actions is the belief that the ultimate goal of the pension system, along with its own controlling role, lies in attaining a satisfactory model of the "welfare state". In this context, Covip's role proves undeniably valuable to complementary pension systems, thanks to its remarkable expertise and wide-ranging competencies encompassing control over transparency, and checks on operators' fairness and stability, as well as favouring the interaction among relevant actors within the labour market, and pursuing welfare state objectives.

Covip was established within the reform of Italy's mandatory and complementary pension systems aimed at correct and transparent administration and management of complementary pension funds. Since its inception, Covip's role and functions have been decisive, it being entrusted with secondary legislation tasks and the implementation of primary legislation, as well as issuance of authorizations on pension funds activities and approval of guidelines adopted by supervised bodies. Covip is, furthermore, in charge of monitoring such funds from a regulatory and managerial perspective, both via desk analysis as well as through proper inspections.

Through an array of ad hoc regulatory measures introduced between the late1990s and early 2000, Covip's activities and tasks gradually developed, resulting in wider operational independence, consistent with the enhanced awareness of the importance of retirement savings to safeguard old age income by integrating mandatory pension benefits and compensating their future reduction within basic pensions. (Italy's Constitutional Court highlights the operational link between the two pension pillars, both cited in Art. 38(2) of the Constitution.)

Legislative Decree no. 252/2005 clearly establishes Covip's role as the sole authority in charge of supervising Italy's private pension system "aiming to safe and transparent management of Pension Funds and appropriate functioning of the complementary pensions system". The stated mission as per legislation establishes that Covip, in carrying out

its institutional tasks, is in charge both of prudential supervision of occupational pension plans and protection of its members and beneficiaries' rights (i.e., consumer protection). In particular, Covip's main duty is to provide guidelines aimed at protecting transparency of contractual conditions among all supplementary retirement forms and monitoring the related terms and conditions in order to safeguard members mindful affiliation.

Covip has been consolidated as the only sectoral Authority in charge of supervising all forms of complementary pensions – so as to put an end to old fragmentation and promote transparency – also acknowledged by social parties and representatives of banks associations, as well as financial and insurance mediators. Such supervisory role relies on a homogeneous and comprehensive system.

The political aim of complementary pension funds also lies in balancing all social and financial parties' views, including with regard to (declared or tacit) accreditation of pension benefits (*TFR – Trattamento di Fine Rapporto*).

Covip's fundamental role within the wide range of authorities monitoring the financial system is widely acknowledged by Italy's "*Legge sul Risparmio*" (Savings Law no. 262), issued on 28 December 2005. In particular, para. IV of the mentioned Law underlines the independence of the activities carried out by relevant authorities (Covip included) and at the same time confirms Covip's own exclusive competence (already established by Legislative Decree no. 252/2005) on transparency and accuracy of all forms of complementary pension funds. Over the years, Covip has effectively carried out its institutional functions, thus contributing to significantly developing Italy's pension funds sector while maintaining respect for funds competences management.

Covip supported pension funds during the start-up of their initiatives, creating a clear and fully responsive structure and sustaining interaction between social parties and workers' associations in the sector, as well as adopting supervisory provisions (including through fines) in order to correct and penalize behaviours that prove inconsistent with the needs of funds affiliates.

10.3 Covip's activities

Covip's activities can be summarized as follows. Regulatory activities, by means of a wide array of implementing regulations and supervisory procedures, as well as secondary legislation. Such measures, gradually implemented over the years, involved the subjects monitored, at all

levels. The main aspects are: definition of schemes of by-laws, regulations, terms and conditions of pension funds; procedures to be implemented for pension fund activities, approval of by-laws and changes to regulations, acknowledgement of legal personality, merging and transfers, and cross-border activities; regulations on the placement of supplementary pension funds and related affiliation; instructions on pension funds advertisements; drafting instructions for projects providing approximate calculations of pension benefits; procedures for periodic information to affiliates; procedures for pension funds claims; procedures for the budget compiling of pension funds; instructions for investment policies implemented by pension funds.

The above procedures are some of the regulatory initiatives implemented by Covip, following experience of public processes and consultations with public authorities, which allowed a specific structure for complementary pensions to be outlined – which was also appreciated by other countries.

With regard to monitoring and supervisory supervision on pension fund actions, based on primary and secondary legislation and the above regulatory actions, Covip has developed accurate supervision on Occupational Pension Funds, Open Pension Funds, personal insurance schemes (PIPs) and pre-existing pension funds, through: accurate analysis of the documentation that all pension funds must convey to Covip (i.e., by-laws, regulations, budgets, information sent to affiliates, investment policy schemes, agreements for the management of financial resources); and accurate analysis of the recommendations that pension funds must transmit on a monthly, quarterly and annual basis. In this regard, Covip defined a complex pension fund reporting system that allows for clear monitoring of the evolution of pension fund management activities (i.e., mainly costs, profits and risks); accurate analysis of the claims transmitted to Covip by affiliates or other representatives; inspection activities of complementary pension funds under Covip's supervision (on an annual basis) taking into account the analysis of the documentation provided, as well as specific problems that require urgent actions and solutions.

As a result of the above monitoring activities, Covip performs corrective activities with specific instructions defined on a case-by-case basis and consistent with the characteristics and relevance of the problems and irregularities identified.

The array of actions can be summarized as follows: notices setting out supervisory provisions – that is, standard means by which pension funds are informed of the irregularities identified and receive indications of

the corrective measures to be undertaken, also establishing the related deadlines; funds are raised by Covip for particularly complex situations in order to identify corrective strategies; financial sanctions – if a pension fund violates Covip laws or regulations, the Authority shall enforce financial sanctions and impose fines to the subject responsible for the fund. Sanctions shall be implemented after a complex procedure enabling the subjects concerned to put forward rebuttal and requests for hearings; naming a Commissioner for compulsory liquidation – whereby irregularities do not allow for ordinary proceedings, pension funds shall be dismissed temporarily or permanently, via Ministry of Labour Decree, upon Covip's proposal; reporting to the Public Prosecutor Office, whereby violations may constitute criminal offences.

Over the years, Covip has capitalised on all of the above tools by following rational criteria and a "sense of balance" in order to implement measures commensurate with the irregularities identified and their negative effects on affiliates. Furthermore, Covip has recently been entrusted with the supervision of privatized funds investments (first pillar of retirement institutions for professional workers). Italy's Decree-Law no. 98/2011, setting out urgent directives on financial stabilisation, widens Covip's monitoring powers and entrusts it with supervision of financial resources, investments and capitalization of social security schemes under private law (per Decree no. 509/1994 on privatized funds or associations, and Decree no. 103/1996 on private funds or associations) – that is, these social security schemes under private law manage the compulsory basic social security relating to the main professional categories in Italy (doctors, journalists, lawyers, notaries, pharmacists and so forth).

Covip has been in charge of supervising financial resources investment and the capitalization of such social security schemes since Decree no. 98/2011 came into force, which sets up a further monitoring tool which, in the current ruling context, backs the pre-existing supervisory system (mainly written) entrusted to Italy's Ministry of Labour and Social Policies, Ministry of Economy and Finance, other relevant Ministries, Court of Auditors, and Parliament. In addition, Covip carries out its supervisory functions through inspections within each specific social security scheme, requiring production of any records and documents deemed necessary. Over the past few years, Covip has frequently been subject to numerous attempts to incorporate its functions within other Authorities.

10.4 Conclusions

Covip has played a valuable informative role relating to complementary pension funds both in the field of finance education and in terms of the promotion of communication.

Its awareness-raising activity is of key importance, as the creation and development of a proper supplementary pension system is based upon the expression of the free choice of individuals, who can make decisions consciously only if adequately informed and educated as to the actual meaning and implications of their choices.[4]

Therefore, it is of primary relevance that information on complementary pension schemes should be adequately disseminated among workers of all and any professional categories (public, private and independent), and particularly among young people.[5]

The decreasing levels of first-pillar coverage require that an increasingly large number of individuals adhere to pension funds so as to secure satisfactory pension benefits.[6] Legislation repeatedly reveals an awareness that welfare systems (in general) and pension systems (in particular) cannot be exclusively based on the provision of pension benefits by the State and/or by State-funded bodies and institutions; rather, they should rely on individuals' resources to be managed through market instruments.[7]

In this context, control and supervision performed by a thoroughly competent and highly skilled public body – such as Covip – is an essential component of the overall design of the new welfare system.

Notes

1. See M. Persiani (2009) *La previdenza complementare* (Padova: CEDAM); M. Cinelli (2010) *La previdenza complementare* (Milan: Giuffrè); F. Vallacqua (2012) *La previdenza complementare per i lavoratori pubblici e privati* (Milan: EGEA).
2. About the Italian pension funds system, see E. Fornero (1999) *L'economia dei fondi pensione: potenzialità e limiti della previdenza privata in Italia* (Bologna: Il Mulino); G. Amato and M. Marè (2001) *Le pensioni. Il pilastro mancante* (Bologna: Il Mulino); M. Messori (ed.) (2006), *La previdenza complementare in Italia* (Bologna: Il Mulino); R. Cesari (2007) *Tfr e fondi pensione* (Bologna: Il Mulino).
3. See, among others, G. Romagnoli (2010) "Profili di vigilanza e dei controlli sui prodotti di previdenza complementare" in P. Corrias and G. Racugno (eds) *Previdenza complementare ed imprese di assicurazione* (Milan: Giuffrè).
4. On system reforms, see D. Franco (2002) "Italy: A Never-ending Pension Reform" in M. Feldstein and H. Siebert (eds) *Coping with the Pension Crisis: Where Does Europe Stand?* (Chicago: Chicago University Press); D. Franco and

M. Marè (2002) "Le pensioni: l'economia e la politica delle riforme", *Rivista di Politica Economica* Vol. 92, 7–8, p. 197; R. Cesari, G. Grande and F. Panetta (2007) *La previdenza complementare in Italia: caratteristiche, sviluppo e opportunità per i lavoratori* Questioni di economia e finanza (Rome: Bank of Italy), no. 8.
5. A. Rosolia and R. Torrini (2007) *The Generation Gap: Relative Earnings of Young and Old Workers in Italy*, Temi di discussione (Rome: Bank of Italy), no. 639.
6. See T. Boeri, L. Bovenberg, B. Coeuré and A. Roberts (2006) "Dealing with the New Giants: Rethinking the Role of Pension funds", *Geneva Reports on the World Economy*, no. 8, ICMBCEPR (Oxford: Oxford University Press).
7. In this regard, see I. Visco (2008) "Retirement Saving and the Payout Phase: How to Get There and How to Get the Most Out of It" in *The Impact of the Payout Phase on Financial Markets* Colloquium, Paris, 12 November 2008.

11
Financial Intelligence Unit (FIU)

Italo Borrello

11.1 Introduction: principles and rules for preventing money laundering and terrorism financing

Under Italian law, the FIU was established at the Bank of Italy on 1 January 2008 pursuant to Legislative Decree no. 231 of 2007, issued as implementation of Directive 2005/60/EC (the Third Anti-Money-Laundering Directive), in order to prevent and combat money laundering and terrorist financing.

Money laundering is a crime by means of which the proceeds of a criminal activity are introduced into the legal economic system – through financial intermediaries or other qualified subjects[1] – with a view to disguising or concealing their illegal origin. It is not only a crime; it is a phenomenon that harms the economy, and alters the rules and conditions of competition in markets. It is a threat to the efficiency and the stability of the financial system, and to confidence in it.

The most important and complex forms of money laundering tend to exceed the national boundaries, affecting different jurisdictions. Financial innovation, increasing globalization and market integration all offer significant opportunities to criminals: the material placement of the proceeds of crimes, the fulfilment of operations in order to separate funds from their illegal origins and the final integration in the legal economy can be managed quickly, in different locations, concealing the identities involved.[2]

Taking into account these specific characteristics, the international anti-money laundering strategies have in the last two decades seen a marked trend towards the strengthening and expansion of the rules, controls and subjects involved.[3]

The initiatives in this field have developed two different approaches: the first, on the basis of prosecution, with a widespread awareness about the need for the qualification of money laundering as a crime and the gradual adoption of an "all crimes" approach in the identification of the predicate offences; the second, on the prevention side, with financial and administrative tools focused on the detection of suspicious conduct and the protection of the integrity of the economy and the financial markets from any infiltration or contamination.[4]

At international level, the Financial Action Task Force (FATF), a specialized agency set up at the OECD, is recognized as the main source of international rules and principles on the prevention and fight against money laundering and terrorism financing. The FATF Recommendations, developed over the past two decades,[5] are the terms of reference for other international agencies and for the rules issued at European and national levels.[6]

The FATF Recommendations contain measures aimed at strengthening the comprehensive guarantees and further protecting the integrity of the financial system, providing national governments with effective tools to combat financial crime.

These measures are based on specific obligations for the subjects (financial institutions, professionals and other operators) exposed to the risk of involvement in money laundering;[7] they require the obliged subjects to comply with duties of customer due diligence and record keeping, according to the effective risk and intended to grant the transparency of the beneficial ownership of each transaction. If any suspicion of money laundering or terrorism financing arises from a transaction or from a client profile, the obliged subjects are required to promptly send a report to the national Financial Intelligence Unit (FIU), a specialized central agency created in every country, charged with the financial analysis of the suspicious transactions reported and the dissemination of the resulting intelligence to the law enforcement agencies.[8]

According to the FATF Recommendations a financial intelligence unit (FIU) "serves as a national centre for the receipt and analysis of suspicious transaction reports and other information relevant to money laundering, associated predicate offences and terrorist financing, and for the dissemination of the results of that analysis".

The measures set up at FATF level are replicated in the European Union regulation, where three Directives have been issued in recent decades in order to create a harmonized regulatory environment among the Member States.

According to the developments of the international principles, the Third AML Directive (no. 2005/60/EC), currently (early 2015) in force, marked a change from the previous (no. 91/308/EEC and no. 2001/97/EC): it was largely inspired by the risk-based approach, and it emphasized and strengthened the principles and procedures that must govern the relationships between the obliged entities and their customers.

According to the Third AML Directive, in order to effectively combat money laundering and terrorism financing, each obliged entity has to comply with duties of customer due diligence and record keeping, based on the risk arising from clients or transactions. Furthermore, each Member State "shall establish a FIU as a central national unit responsible for receiving (and to the extent permitted, requesting), analysing and disseminating to the competent authorities, disclosures of information which concern potential money laundering or potential terrorist financing. As a national, technical agency, the FIU must be given the degree of autonomy necessary to fulfil its responsibilities while being accountable for the results it achieves. It must be provided with adequate resources and must have access, directly or indirectly, on a timely basis, to the financial, administrative and law enforcement information that it requires in order to perform its tasks".[9]

In 2013, following the last revision of the FATF Recommendations, the European Commission launched a review of the European principles on the basis of an external study on the implementation of the Third Directive (the Deloitte Study)[10] and an intensive consultation with interested parties (private enterprises, civil society organizations, representatives of regulators and supervisors, etc.).

In light of the feedback received during the consultation process, the Commission issued a Proposal for a fourth Directive,[11] which will arise as a new reference for the evolution of the anti-money laundering rules in the Member States.[12]

The text of the Proposal has been definitively consolidated in January 2015, after the agreement reached in the "trilogues" between the European Institutions. It does mark significant points of progress on important aspects of the anti-money laundering regulation, such as the inclusion of tax crimes among the predicate offences and a more precise definition of the risk-based approach and its characteristics, also providing for the establishment of a supranational and national risk assessment exercise. In line with the FATF Recommendations, the text of the new Proposal establishes detailed measures for the transparency of institutions and companies, and confirms the central role of the FIUs in the fight against money laundering and terrorism financing.[13]

11.2 The FIUs: basic characteristics

FIUs meet the need to centralize information about transactions suspected of being related to money laundering or terrorism financing, in order to avoid dispersion and fragmentation and make more effective the investigation and the possible subsequent prosecution of any financial offence.[14]

11.2.1 Functions

The core functions of an FIU call for objectivity in decision making, the timely processing of incoming information, and strict protection of confidential data.

FIUs serve as central agencies for the receipt of disclosures filed by reporting entities. At a minimum, this information should include suspicious transaction reports. The national legislation could require other information such as cash transaction reports, wire transfer reports and other threshold-based declarations/disclosures.

The financial analysis performed by the FIUs add value to the information received. The analysis may focus either on each single disclosure received or on appropriate selected information, depending on the type and volume of the disclosures received, and on the expected use after dissemination.[15]

FIUs conduct both operational and strategic analysis. The first is aimed to identify specific targets (e.g., persons, assets, criminal networks and associations), to follow the trail of particular activities or transactions, and to determine links between those targets and possible proceeds of money laundering, predicate offences or terrorist financing.[16] Strategic analysis is focused on trends and patterns related to money laundering and terrorist financing; this information is then also used by the FIUs or other state entities in order to determine threats and vulnerabilities related to money laundering and terrorist financing (strategic analysis may also help to establish policies and goals for the FIUs).

In order to properly undertake their analysis, FIUs should be able to obtain additional information from reporting entities, and should have access on a timely basis to the financial, administrative and law enforcement information that they require.

The results of these analysis are disseminated, spontaneously or upon request, to relevant competent authorities (i.e., to the national law enforcement bodies), through dedicated, secure and protected channels, for further investigation and possible prosecutions.

Finally, FIUs exchange information each other on a reciprocity basis, through securely protected channels. To this end, each national FIU should have an adequate legal basis for providing complete factual and, as appropriate, legal information, including the description of the case being analysed and the potential link to the country of its counterpart. Upon request and whenever possible, FIUs should provide feedback to their foreign counterparts on the use of the information provided, as well as on the outcome of the analysis conducted, based on the information provided.

11.2.2 Independence and autonomy

To ensure that the above-mentioned requirements are met on an ongoing basis, FIUs need to be given enough operational autonomy to allow them to carry out their assigned tasks without undue interference.[17] According to the international standards, an FIU should be operationally independent and autonomous, meaning that the FIU should have the authority and capacity to carry out its functions freely, including the autonomous decision to analyse, request and/or disseminate specific information. In all cases, this means that the FIU has the independent right to forward or disseminate information to competent authorities.

Characteristics of operational and managerial autonomy are required by the international standards in defence of the independence of FIUs, the effectiveness of their action, the specialty of the functions related to the financial analysis, and the heterogeneity of the information available in performing the analysis, that may be of a financial, administrative or investigative type.

It is worth noting that the autonomy and the independence of an FIU must be accompanied by adequate guarantees of accountability for the way in which the FIU carries out its mission.[18]

A number of factors enter into the definition of the autonomy and accountability of the FIUs. One is the placement of the FIU in the national administration. The law may also protect the independence of the FIU by defining the manner in which its head is appointed and replaced. Specific reporting arrangements may be set out. These factors are often intertwined, and affect the degree of autonomy and accountability of an FIU. In addition to these legal factors, other factors may affect the autonomy of the FIU, such as the local conditions related to the relations between the political power and the administration, and the actual budgetary resources provided.

11.2.3 Types of FIUs

Different types of FIUs have been established worldwide over the years. Taking into account the general purpose of combating money laundering, countries have generally given the national FIUs the three core functions that are part of the accepted definition of an FIU: reception, analysis and dissemination.[19] The administrative arrangements by which these functions are carried out, however, vary considerably from country to country.

In some countries, the function of the FIU as an additional tool for law enforcement organizations in combating money laundering and associated crimes was emphasized, and this led to the establishment of the FIU in an investigative or prosecutorial agency. Other countries emphasized the need for a filter between the financial institutions and the police, and consequently their FIUs were established outside these agencies.

The wide variety of arrangements for FIUs may be summarized under four general headings: the administrative-type FIU, the law enforcement-type FIU, the judicial- or prosecutorial-type FIU, and the mixed or hybrid FIU. Such classification is not exhaustive, and other ways of classifying FIUs are possible.[20]

Administrative-type FIUs are usually part of the structure, or under the supervision, of an administration or an agency other than the law enforcement or judicial authorities. Such an FIU can constitute a separate agency, within the organization of a ministry or administration but autonomous and independent. The objective of such an arrangement is to establish a filter between the financial sector (and, more generally, entities and professionals subject to reporting obligations) and the law enforcement authorities in charge of financial crime investigations and prosecutions.[21] The location of such FIUs varies: the most frequent arrangements are to establish the FIU in the ministry of finance, the central bank or a regulatory agency.

In some countries, the emphasis on the law enforcement aspects of the FIU led to the creation of the FIU as part of a law enforcement agency. Under this arrangement the FIU acts as a body with appropriate power of law enforcement, and acting in close cooperation with other law enforcement units, such as a financial crimes unit, it benefits from their expertise and sources of information. In return, information received by the FIU can be accessed more easily by law enforcement agencies and can be used in any investigation.

Judicial or prosecutorial-type FIUs are established within the judicial branch of the state, most frequently under the prosecutor's jurisdiction,

allowing public prosecutors to direct and supervise criminal investigations. Disclosures of suspicious financial activity are usually received by the prosecutor's office, which may open an investigation if suspicion is confirmed by the first analysis carried out under its supervision. The judiciary's powers (e.g., seizing funds, freezing accounts, conducting interrogations, detaining suspects and conducting searches) can then be brought into force without delay. Judicial and prosecutorial FIUs can work well in countries where banking secrecy laws are so strong that a direct link with the judicial or prosecutorial authorities is needed to ensure the cooperation of financial institutions. The principal advantage of this type of arrangement is that the information disclosed is passed from the financial sector directly to the judiciary.

There is another category of FIUs that contains different combinations of the arrangements described previously. This hybrid type of arrangement is an attempt to gain the advantages of all the elements put together. Some FIUs combine the features of administrative-type and law enforcement-type FIUs, while others combine the powers of the customs office with those of the police.

Independent of each national arrangement, the international standards assign a key role to international cooperation between FIUs, in order to exchange information about suspicious transactions: FIUs must be able to cooperate regardless of their nature or the existence of international treaties or intergovernmental relations. Such approach is based on the autonomy and independence of the Units, their high technical skills and the specialty of their functions.[22]

11.3 The Financial Intelligence Unit for Italy (UIF)

11.3.1 Organization and functions: a general overview

Legislative Decree no. 231 of 26 November 2007, transposing the Third anti-Money Laundering Directive into Italy, established the Financial Intelligence Unit for Italy (UIF) within the Bank of Italy. The UIF, operational since 1 January 2008, was defined by the same Decree as "the national structure charged with receiving information from persons obliged to provide it on suspected money laundering or terrorist financing, requesting it from same, analysing it and transmitting it to the competent authorities".

With the establishment of the UIF at the Bank of Italy, the legislator confirmed the choice made in 1997 for an FIU of administrative nature,[23] in continuity with the FIU functions assigned to the former

Ufficio Italiano dei Cambi, which was abolished pursuant to Art. 62 of the same Legislative Decree, no. 231/2007.[24]

Therefore the anti-money laundering Italian framework is based on a clear distinction between financial analysis and investigation: the UIF is the authority competent to receive STRs, analyse them and disseminate the results of its financial analysis to the law enforcement authorities entitled to carry out further investigations (Special Foreign Exchange Unit of the Finance Police and the Bureau of Anti-Mafia Investigation).

Pursuant to Art. 6, para. 2 of Legislative Decree no. 231/2007, the UIF performs its functions in complete autonomy and independence. Such characteristics can benefit from the considerable independence and autonomy of the Bank of Italy, according to the rules of the European System of Central Banks and those governing the national and European banking supervision.

Legislative Decree no. 231/2007, while entrusting the UIF with powers, tasks and responsibility consistent with said principles of autonomy and independence, has assigned a unique legal subjectivity to the Unit. It has no legal personality, and its organization and functioning are provided for by a specific regulation issued by the Bank of Italy;[25] nevertheless, the UIF human, technical and financial resources are provided by the Bank of Italy, in accordance with internal regulations and principles of economical, proportional, efficient and effective management.

Aside from the structural and organizational aspects, the Decree intended to privilege a subjectivity strongly anchored to the core functions assigned to the UIF. That justifies the full autonomy and independence granted by law to the Unit as national centre for allocation, coordination and channelling of data and information that are of significant public interest.

Accountability is an important complement to the autonomy and independence of the UIF. Together with the other authorities which are part of the AML apparatus, the UIF supplies the Ministry of Economy each year with statistics and information on the activity performed during the previous year as part of its functions. The statistics shall cover at least the number of reports of suspicious transactions received and analysed. Such data allow the Ministry to present Parliament with a report containing an assessment of the action taken to prevent money laundering and terrorist financing and proposals to make it more effective, by the end of May each year.

Furthermore, the Director of the UIF transmits to Parliament, via the Ministry of the Economy, an annual Report describing the activity performed during the previous year by the UIF, as part of the system

serving to prevent and combat money laundering and the financing of international terrorism. Legislative Decree no. 231/2007 provides for the annual report to be accompanied by a report prepared by the Bank of Italy on the financial and other resources made available to the Unit.

The budget of the UIF is an independent item in the context of the budget of the Bank of Italy. It is therefore approved by the Board of Director of the Bank. It is for one year, and it is defined on the basis of annually defined strategic goals.

Its location at the Bank of Italy has enabled it to draw on skilled human resources. As regards personnel recruitment, the UIF can benefit from the selective competitions held by the Bank of Italy, which are also focused on expert knowledge of the economic and financial issues.[26]

The Director of the UIF is entrusted with the autonomous responsibility for the management of the Unit. He is appointed by the Directorate of the Bank of Italy, on the basis of a proposal from the Governor of the Bank, from among persons with suitable integrity, experience and knowledge of the financial system.[27] The Director is responsible for the working of the structure, manages and controls the activity of the Unit, and participates in national and international bodies engaged in AML/CFT activities.[28]

An advisory role at the UIF is assigned to the Committee of Experts, composed of four members appointed in compliance with a decree issued by the Ministry of Economy after consulting the Governor of the Bank of Italy. The Committee is entitled to provide general and abstract criteria for shelving suspicious transaction reports and to set out general principles on the negotiation of Memoranda of Understanding. The Director can submit any other issue to the Committee for examination. Finally, the Committee is entitled to draw up an opinion on the activity of the UIF, which is an integral part of the UIF's annual Report sent to the MEF for the further transmission to Parliament. The Committee is convened at least half a year and serves for a term of three years, which may be renewed for another three.

Pursuant to Art. 6, para. 6 of Legislative Decree no. 231/2007, the UIF performs the following activities:

a) analyses financial flows with the aim of detecting and preventing money laundering and terrorist financing;
b) receives suspicious transaction reports and conduct financial analyses thereon;

c) acquires additional data and information furthering the performance of its institutional functions from entities obliged to report suspicious transactions;
d) receives the communications of aggregated data in order to perform its strategic analysis;
e) has access to archives and databases, whether or not these are publicly available.

Furthermore, availing itself of the information gathered in the performance of its activities, the UIF: conducts analyses and studies individual anomalies traceable to possible cases of money laundering or terrorist financing on specific sectors of the economy deemed to be at risk, and on categories of payment instruments and specific local economic conditions; develops and disseminates models and patterns representing anomalous conduct on the economic and financial plane that may be signs of money laundering or terrorist financing; may suspend transactions suspected of involving money laundering or terrorist financing for up to five working days, including at the request of the law enforcement or the judicial authorities.

11.3.2 Receiving, analysing and disseminating suspicious transaction reports

Pursuant to Art. 6, para. 6, letter b of Legislative Decree no. 231/2007, the UIF exercises the key functions of receiving and analysing suspicious transaction reports (hereafter STRs) and of disseminating the results of its analysis to the competent authorities.

As regards the function of receiving, it is important to highlight that the obligation to report a suspicious transaction to the UIF arises when the obliged entity (financial intermediary, non-financial operator or professional) "knows, suspects or has reasonable grounds to suspect that money laundering or terrorist financing is being or has been carried out or attempted". The suspicion may arise from the characteristics, size or nature of the transaction, or from any other circumstance ascertained as a result of the functions carried out, also taking account of the economic capacity and the activity engaged in by the person in question, on the basis of information available to the reporting entity, acquired in the course of its work or following the acceptance of an assignment.[29]

It is worth noting that the reporting obligation also arises from a state of doubt, or inadequate security, about the actual existence of a case of money laundering. Indeed, the mere existence of "reasonable grounds

to suspect"[30] determines the existence of the reporting obligation for the operator.

Legislative Decree no. 231/2007 intended to delineate an independent definition of money laundering (Art. 2), not recalling the Italian penal code (Art. 648-*bis and -ter*). This choice was imposed by the EU Directive that fully defines an action that "if committed intentionally, constitutes money laundering", aiming to create a coherent system of prevention and combating money laundering at supranational level, common to all Member States.

The notion of money laundering provided for by Legislative Decree no. 231/2007 could be defined as "administrative": this definition is characterized by a greater flexibility in the identification of the behaviours and of the objective and subjective conditions required to enable the operators to report suspicious transactions. This results from a series of elements and, first of all, from the fact that the definition of money laundering also includes the activities of self-money laundering (operations aimed to conceal the illegal origin of the money, carried out by the same person who committed the predicate offence or participated in it), that have been not punishable independently of the predicate offence in the Penal Code, until the new law no. 186 of 15 December 2014. Such law, which entered into force in Italy since 1 January 2015, criminalizes self-laundering, stating that shall be punishable "any persons who, having committed or participated in committing an intentional crime, employs, replaces, moves, within economic, financial, business or speculative assets, the money or others profits deriving from the commission of such crimes(s), in a way such to concretely hinder the identification of their criminal origin" (new Art. 648-*ter*.1 of criminal code)[31].

The "administrative" definition of money laundering –also including self-money laundering since 2007 – has vastly expanded the range of suspicious transactions reportable to the UIF. As a result, since 2008 there has been a significant increase in suspicious transaction reports sent to the UIF: in 2013–2014 the number of reports amounted respectively to approximately 65,000 and 72,000 (in 2007 the STRs were about 12,500). Also notable are the total amounts reported: in 2013 about €84 billion.[32]

In cooperation with the other authorities involved in the domestic anti-money laundering system, the UIF has drafted and is currently implementing measures aimed at coping with the flow of reports. To this end, the Unit has carried out significant investments in professional and technological resources in recent years. In particular, it has undertaken a far-reaching revision of operational procedures, methods

and instruments, while the breadth and depth of analyses are correlated with the level of risk associated with each report. A contribution to the efficiency of the process is made by an Internet-based system developed in 2011 for collecting and handling STRs. This system, named RADAR, supports the entire cycle of acquisition, analysis and transmission of reports, to improve the quality of the reports, the financial analyses and the timeliness of the information flows.[33]

The new system for managing STRs has increased the amount of information available and reduced the need for additional reporting requirements, with positive effects on the overall efficiency levels. More structured information in STRs help the UIF to improve its capacity to select the reports, contributing to perform more complete evaluations and facilitating the identification of the most relevant cases.[34]

Pursuant to Art. 6, para. 7, letter c of Legislative Decree no. 231/2007, the UIF has the power, on condition that such action is not prejudicial to investigations under way, to suspend the transactions suspected of money laundering or terrorist financing, for up to five working days, on its own initiative, or at the request of the Special Foreign Exchange Unit of the Finance Police, the Bureau of Anti-Mafia Investigation or the Judicial Authority. This is a particularly incisive measure, which is taken in case of urgent necessity to block any transfer of funds suspected to be of illicit origin. It is usually adopted in close coordination with the Judicial Authority, in order to allow the appropriate precautionary measures (seizure, confiscation, etc.).

The UIF is entitled to perform the financial analysis using all its powers of collection of relevant information. It should be noted that financial analysis concerns not only the suspicious transaction reports but also unreported suspicious transactions of which the UIF becomes aware on the basis of information contained in its databases or sent by the law enforcement agencies, the supervisory authorities or the professional associations, other foreign FIUs.

Moreover, in order to perform its analysis functions, the UIF has access to a wide set of sources (it is important to mention, in this respect, the access of the UIF to the registry of accounts and deposits and the tax registry at the Revenue Agency). It is worth noting that the UIF has no access to law enforcement information for its domestic analytical purposes, but it can obtain this information when it comes to providing assistance to its foreign counterparts.[35]

The UIF examines any other fact that could be related to money laundering or terrorist financing. To this end, it: collects additional data from reporting parties, including via inspections; cooperates with foreign

FIUs; and, within Italy, exchanges information and cooperates with financial supervisory authorities, judicial authorities, law enforcement bodies and other competent authorities.[36]

The analysis of STRs by the UIF consists basically in investigating the financial aspects in order to understand the context underlying the report, to ascertain the origin and destination of the funds and to identify the possible aims of the transaction.

In line with the positions adopted at international level by the FATF, which provide for a selective approach in the treatment of STRs, the analytical process differs with the depth of financial investigation required, according to the risk of money laundering and the financing of terrorism inherent in the various transactions reported.

Financial analysis can proceed on several levels and is preceded by an enrichment phase consisting in the supplementation of the information originally notified by the reporting entities with additional information of help in assessing the transactions reported. Enrichment, triggered automatically by computerized procedures immediately after reports are received, concerns information in other databases owned by the UIF or available to it.[37]

If the analyst concludes that there is no risk of money laundering or terrorist financing, he proposes that reports be closed, considering it as unfounded. Although they have been closed, such reports are nonetheless transmitted to the investigative bodies with a standard technical report and may be re-examined later if new evidence should emerge making the hypothesis of money laundering plausible or if so requested by the investigative bodies.[38] The dismissal of such reports is notified to the reporting entities.

The investigation of the more complex transactions is carried out as part of a broader financial analysis whose direction and depth vary from case to case in accordance with the risk associated with the suspect transactions under examination. During investigations, analysts may use multiple information sources and the broad powers of initiative provided by law; in particular, they may acquire data and information from reporting entities and all the persons required to make reports and use information obtained from institutional entities and foreign financial intelligence units.

The overall analysis of suspicious transaction reports, in the light of their recurrence in a systematic view, allows the UIF to outline types of behaviour characterized by a potential link with criminal conduct. In recent years, UIF has paid attention to trust and the vehicles frequently used to shield beneficial ownership and prevent a proper reconstruction

of the cash flows. Similar purposes have emerged in the underwriting of life insurance policies to high financial content issued by foreign companies. In parallel with the intensification of the economic crisis, a greater spread of usury (as evidenced by reports of suspicious transactions that doubled in 2013 over the previous year) has been observed. Important phenomena of international tax evasion, computer fraud based on identity theft, abnormal use of payment cards (not consistent with the true purpose of these instruments and the economic profile of the owners), cases of potential offences against public interest or attributable to politically exposed persons, inappropriate use of public funds, failures to apply the rules on the traceability of financial flows in the field of public procurement, embezzlement of funds attributable to political parties, and situations of bribery or corruption were detected.[39]

Apart from the cases of reports closed as unfounded, the UIF transmit the STRs, including a technical report containing the information on the transactions provoking the suspicion of money laundering or terrorist financing, without delay, including on the basis of Memoranda of Understanding, to the Special Foreign Exchange Unit of the Finance Police and to the Bureau of Anti-Mafia Investigation, which will inform the National Anti-Mafia Prosecutor, whenever the case submitted relates to organized crime.[40]

11.3.3 Improving reporting awareness and ability

The growing number of reports also expanded the volume of data available to the UIF, increased their information value, and had a positive effect on the Unit's cooperation with other national and foreign authorities. The trend also points to intermediaries' growing awareness of the importance of carefully examining customers and their transactions as a first line of defence against criminal infiltration and contamination.[41]

The quality of reports is of fundamental importance if they are to make an effective contribution to combating money laundering. Common sense and an ability to discern and weigh anomalous factors in transactions must guide the activity of reporting entities.

Reports must derive from a reasonable suspicion, have passed through a fine filter and have sprung from a real desire to cooperate rather than from fear of incurring the sanctions established by law. The spirit of the AML Italian legislation excludes the possibility of so-called active cooperation being restricted to activating automatic observation mechanisms, which would reduce the assessment of the risk inherent in each transaction to a mere bureaucratic formality.

To that end, the UIF has the power of issuing instructions regarding the data and information that reports must contain. As previously mentioned, the general revision of the report form has made it possible for STRs to be more complete and uniform, enriching the suspicious facts reported with essential information and adequate reasons.

Furthermore, the UIF pursues – with an intense awareness-raising activity – the objectives of facilitating the identification of behaviours that can be connected to money laundering or terrorist financing and increasing the diagnostic skills of the reporting entities.

This objective has been carried out through the development of anomaly indicators and patterns and models of anomalous behaviour.

According to Art. 41, para. 2, of Legislative Decree no. 231/2007, the UIF is in charge of proposing and periodically updating the anomaly indicators to assist the obliged entities in detecting STRs.

The indicators are formally issued by the Ministry of Justice, for the professionals (in consultation with the self-regulatory bodies), the Bank of Italy for the financial intermediaries and the Ministry of Internal Affairs for non-financial business and operators.[42]

The indicators of anomalies are not an exhaustive list of elements that makes reference to the subjective profiles and the objective aspects to facilitate the assessment of reporting entities. As clearly stated, the absence of indicators is not sufficient to rule out the transaction being suspicious.

Since its establishment, the UIF has elaborated and proposed anomaly indicators for almost the entire range of reporting entities. The following measures have provided each category with specific indicators related to money laundering and to terrorist financing:

a) Decree of the Ministry of Justice of 16 April 2010 establishing anomaly indicators for the purpose of facilitating some categories of professionals and auditors in identifying suspicious transactions;
b) Bank of Italy measure of 24 August 2010 establishing anomaly indicators for intermediaries;
c) Decree of the Ministry of Internal Affairs of 17 February 2011 establishing anomaly indicators for the purpose of facilitating some categories of non-financial operators in identifying suspicious transactions; updated on 27 April 2012, thus extending the indicators to gaming operators with a physical network;
d) Bank of Italy measure of 30 January 2013 establishing anomaly indicators for auditors and auditing companies charged with reviewing the accounts of bodies of public interest.

The above-mentioned provisions have a uniform structure, with provisions of a general nature and an annex containing specific indicators, tailored to the characteristics of each category of reporting entities.[43]

Pursuant to Art. 6, para. 7, letter b of Legislative Decree no. 231/2007, the UIF also disseminates models and patterns of anomalous conduct from an economic and financial perspective that may be indicative of money laundering and terrorism financing. These are complementary instruments designed, like the indicators, to assist the reporting entities to identify suspicious transactions to be reported.

The models differ from the indicators in that they are intended to draw operators' attention to specific sectors of operation or courses of conduct that may involve anomalies possibly arising from criminal phenomena.[44] The models make reference to subjective and objective anomalies that can be related to specific predicate crimes, abuse of payment instruments, or fraud or other typologies identified in specific sectors.

From September 2009 onwards, the Unit has sent out, through specific public announcements, a series of communications issuing models and patterns related to the following matters: Firms in difficulty and usury (24 September 2009); Dedicated accounts (13 October 2009); Internet fraud (9 November 2009); Risk of carousel VAT frauds (5 February 2010); Operations connected with the abuse of public financing (8 July 2010); Leasing fraud (17 January 2011); Usury (9 August 2011); Factoring fraud (16 March 2012); International tax fraud and invoicing fraud (23 April 2012); Anomalous conduct relating to the gaming industry, one addressed to banks, the other to the gaming industry (11 April 2013); Anomalous use of trust (2 December 2013); Anomalous use of payment cards for cash withdrawals (18 February 2014).[45]

It is worth noting that neither the anomaly indicators nor the models and patterns are binding. However, they help to build objective and subjective profiles that assist the operators to identify suspicious transactions and consequently choosing those to report. There is no inevitable link between one of the cases described in the forms or the indicators occurring and the triggering of the obligation to submit a report, which arises only after the operator has made a careful assessment.

11.3.4 Strategic analysis

Legislative Decree no. 231/2007 calls the UIF to perform not only the tasks aimed to analyse single suspicious transactions and identify potential criminal activities but also strategic analysis functions targeted to identify phenomena, trends, and potential weaknesses in the system.

Strategic analysis allows the Unit to define priorities and strategies. The sharing of its results with other authorities and operators encourages the strengthening of the overall anti-money laundering system.

From the viewpoint of strategic analysis, UIF analyses financial; conducts analyses and studies on: individual anomalies related to possible cases of money laundering or terrorist financing; specific sectors of the economy deemed to be at risk; categories of payment instruments; and specific regions or areas. It also carries out analyses to reveal if there is any money-laundering or terrorist financing activity in any particular areas of the country.

As regards the data available to perform strategic analysis, under Legislative Decree no.231/2007 (Art. 6, para. 6, letter d), the UIF receives aggregate anonymous data regarding all transactions whose amount exceeds €15,000 from the main categories of reporting entities (banks, Poste Italiane, fiduciary and asset management companies, securities firms and insurers).[46] Moreover, Law no. 7/2000 establishes that every transaction in gold relating to investments or gold for industrial use worth €12,500 or more must be reported to the UIF. Transactions involving jewellery do not fall within the scope of the reporting obligation. The report need be filed by only one party to the transaction, preferably the seller.

Furthermore, for its studies and analyses the UIF has not only its internal databases but also access to a wide range of additional sources providing data of various kinds: economic, financial and socio-demographic variables to help identify physiological determinants of financial flows; data on crimes and investigations to help detect connections with illegal activities.[47]

In addition and in compliance with privacy obligations in general, the UIF also processes data from other competent authorities, such as: aggregated data on crime extracted from a database at the Ministry of Internal Affairs; macroeconomic indicators, from the National Institute for Statistics; and data on taxable income from the National Tax Authority.

Open source information from the internet greatly enriches the dataset that the UIF exploits for its analyses.

The techniques deployed for the strategic analysis can vary, depending on the complexity of the phenomena under investigation, the purpose of the analysis, and the nature of the data available and of related information. Simple descriptive statistics are used to produce synthetic reports to monitor patterns of relevant aggregates. More sophisticated quantitative methods (such as econometric models or data mining techniques) are implemented in order to process the information that may

be extracted from large amounts of data, by deploying sophisticated software and hardware tools.

Legislative Decree no. 231/2007 (Art. 9, para. 9) requires that the general results of the studies the UIF performs shall be provided to police forces, financial sector supervisory authorities, the Ministry of the Economy, the Ministry of Justice and the National Anti-Mafia Prosecutor. Moreover, the UIF gives the results of the analyses and studies carried out on specific anomalies indicative of money laundering or terrorist financing to the Bureau of Anti-Mafia Investigation and the Special Foreign Exchange Unit of the Finance Police.

In addition to that, the UIF strives to develop its analyses so that they also feed back to operational analysis, providing it with useful outcomes, which may vary from the risk-ranking of geographical areas or intermediaries (and the categories thereof) to the detection of single financial flows or transactions involving funds of illicit origin that may have not been reported as an STR.

As regards the operational implications of the UIF's strategic analyses, it is important to highlight that the results obtained are used to build indicators of the money laundering risk or anomaly schemes, model and patterns, to identify intermediaries to be subject to onsite inspections, and to detect unreported anomalous financial flows to be further analysed.

To make available the results of its strategic analysis, the UIF initiated the regular dissemination of statistical data on its activity and the publication of issues and studies.[48]

In 2013, attention was focused on the use of cash, in order to identify areas in which the use of such payment instrument presents anomalous profiles,[49] and on the determinants and anomalies of financial flows to offshore financial centres.[50]

The results of the strategic analysis carried out by the UIF contributed to the development of a methodology for national risk assessment, in accordance with the new FATF Recommendations, with the aim of achieving the identification, analysis and assessment of threats of money laundering and terrorist financing, identifying the most relevant ones and their implementation methods.[51]

11.3.5 Cooperation at national and international level

The Italian anti-money laundering legislation tends to create a network of relationships based on a systematic institutional coordination and the development of synergies between actions carried out by the authorities involved. In this perspective, Legislative Decree no. 231/2007 (Art.

9) provides the legal basis for a wide cooperation between the UIF and all the domestic authorities involved in the prevention and contrast of money laundering and terrorist financing. Arrangements in this field are useful to perform its institutional tasks.

With the aim of facilitating the activities connected with the investigation of suspicious transaction reports, the UIF regularly exchanges information with the law enforcement authorities; it also has the facility to conclude Memoranda of Understanding establishing the conditions and procedures for such bodies to exchange police data and information.

The UIF and the financial sector supervisory authorities exchange information, thus facilitating the development of the respective functions of supervision and monitoring. Moreover, financial sector supervisory authorities, interested administrative bodies and professional associations inform the UIF of possible cases of failure to make suspicious transaction reports and of every fact that could be connected with money laundering or terrorist financing observed in respect of the obliged subjects.

Information provided by supervisory or investigative authorities assists the UIF to target sectors and subjects at highest risk and most in need of improving compliance.

Relationships between the UIF and the Judicial Authority have been developed in two directions: first, the flow of suspicious transaction reports and the subsequent financial analysis conducted by the UIF is aimed at fostering the conduct of in-depth investigation by the law enforcement bodies and to facilitate the launch of the related judicial initiatives;[52] and second, prosecutors have increasingly frequently made enquiries for information about suspicious transaction reports, technical and financial analyses and information from other FIUs, which the prosecution can take advantage of for its own initiatives.[53]

Further opportunities for collaboration between the UIF and the Judicial Authority are expressly provided for by Legislative Decree no. 231/2007: in this perspective, according to Art. 9, para. 7, where the Judicial Authority has reason to believe that money has been laundered or that money, property or other proceeds of illegal origin have been used in transactions carried out at supervised intermediaries, it shall notify the competent supervisory authority and the UIF of the actions for which they are competent. The information communicated shall be covered by professional secrecy; and notification may be delayed when it could be prejudicial to the investigation. The supervisory authority and the UIF shall inform the Judicial Authority of the steps taken and the measures adopted.

The increasing use of various forms of cooperation has led to the development of relations also based on consultation between the FIU and prosecutors more involved in the fight against organized crime, corruption and tax evasion, with positive results in investigations and prosecutions. It is important to take into account that such intensive cooperation with the Judicial Authority is conducted in compliance with the distinction of roles between financial and investigative analysis as established by law.[54]

The UIF is also empowered to make arrangements independently with foreign counterparts. In particular, Art. 9, para. 3, of Legislative Decree no. 231/2007 states that "By way of derogation from the obligation of professional secrecy, the UIF may exchange information and cooperate with homologous authorities of other states that pursue the same purposes, subject to reciprocity also as regards confidentiality of information, and may conclude memoranda of understanding to this end".

UIF provides cooperation related to money laundering, associated predicate offences and terrorist financing to foreign counterparts not only in the framework of the mentioned Art 9, para. 3, but also based on the provisions in Council Decision 2000/642/JHA,[55] according to which "Member States shall ensure that FIUs exchange, spontaneously or on request and either in accordance with this Decision or in accordance with existing or future memoranda of understanding, any available information that may be relevant to the processing or analysis of information or to investigation by the FIU regarding financial transactions related to money laundering and the natural or legal persons involved" (Art. 1, para. 2).

The range of information that UIF is able to provide to its foreign counterparts is as broad as the range available for its domestic analytical purposes.[56] UIF's capacity to cooperate includes both spontaneous and upon request exchanges and, based on Art 9, para. 3, is subject to reciprocity principles.[57]

According to international standards, each FIU must grant its prior consent to its information being further used or disseminated by the foreign counterparts to which it is forwarded. The legal basis for this is provided by the above-mentioned Council Decision 2000/642/JHA, also establishing that "an FIU may refuse to divulge information which could lead to impairment of a criminal investigation being conducted in the requested Member State or, in exceptional circumstances, where divulgation of the information would be clearly disproportionate to the legitimate interests of a natural or legal person or the Member State concerned or would otherwise not be in accordance with fundamental

principles of national law" (Art. 5, para. 3). The Council Decision also maintains that any refusal to grant consent should be appropriately explained.

UIF exchanges information through the dedicated channels used by FIUs globally for their cooperation (namely, the Egmont Secure Web and the regional FIU.NET network). UIF uses only these channels, as they ensure security and confidentiality and allow each counterparty to be identified univocally and clearly. Access to and use of these channels and gateways for international cooperation are strictly limited and regulated, and appropriately secured by internal rules of procedure.[58]

UIF can co-operate freely with its foreign counterparts, without any need for bilateral or multilateral agreements. At the same time, UIF can negotiate and sign directly (i.e., with no need for third party authorizations) Memoranda of Understanding with any foreign counterparts that need them in order to co-operate.[59]

Based on the same legal basis as that which allows it to share information internationally, UIF provides feedback to the foreign counterparts on the use and usefulness of the information received. This is particularly the case where such information is forwarded to law enforcement agencies and prosecutors (based on prior consent) and then used either in the context of ongoing investigations or as a means to target, prepare and file international rogatory letters.

11.3.6 Controls and inspections

The UIF exercises its competences by activating controls and extensive powers to request data and documents. The concomitant inspections constitute a particularly incisive tool.

UIF inspection activity is directed on the one hand towards financial analysis of reported suspicious transactions and the hypotheses of omitted reporting it elicits from third party authorities (Art. 47, para. 1, letter a of Legislative Decree no. 231/2007, defined as "targeted inspection"), and on the other towards general inspections (Art. 53, para. 4 of Legislative Decree no. 231/2007) aimed at verifying the adequacy of reporting procedures and the fulfilment of active cooperation. For this last purpose, the FIU may request the collaboration of the Special Foreign Exchange Unit of the Finance Police.

The targeted inspections are mainly aimed at acquiring on-site details on the flows of funds referring to specific transactions. Such inspections permit flexibility of intervention and speedy gathering of relevant information, namely in cooperation with the investigative and judicial Authority. In addition, they are increasingly carried out as part of

the Unit's cooperation with the authorities involved in preventing and combating money laundering, particularly with the judicial and investigative authorities.

The UIF inspection activity can be addressed to the entire range of reporting entities, and it is performed by the UIF through on-site and off-site controls.

During inspections carried on by the UIF under Art. 47, para.1a, and under Art. 53, para. 4, operational and procedural dysfunctions detected are reported to the Bank of Italy as the supervisory authority regarding the intermediary's compliance with the anti-money laundering legislation (in particular, the rules on organization, customer due diligence, compliance with data recording and the retention requirement). The information that the Unit acquired through its inspections is transmitted, where deemed relevant, to the Bank of Italy in its capacity as supervisory authority.

In 2013 the UIF intensified its efforts in the inspection activity, starting an ongoing conversion of strategies that involve the use of inspections as a tool not only for verifying compliance to fulfil the reporting obligations but also for deepening investigations into segments and phenomena at particular risk. Inspections were accordingly oriented toward critical areas such as asset management, banking online, abnormal use of payment cards, and transactions in shares of foreign companies in exchange with Italian banks and financial intermediaries.

11.3.7 Secrecy and confidentiality

Legislative Decree no. 231/2007 contains rules concerning the protection of confidentiality of information managed by the UIF and of the reporting entities.

Art. 9, para. 1 provides that all the information in the possession of the UIF is covered by professional secrecy, including vis à vis the public administration, apart from the cases of communication expressly provided for by the same Legislative Decree.

Moreover, Art. 45, para. 4 states that the flows of information on suspicious transaction reports between the UIF, the Finance Police, the Directorate of Anti-Mafia Investigations, the supervisory authorities and the professional associations shall be sent electronically, in such a way as to ensure their confidentiality and security. According to the same Art. 45, para. 5, the law enforcement agencies adopt, on the basis of Memoranda of Understanding, and having consulted the Financial Security Committee, adequate measures to ensure the maximum protection of the identity of the reporting entities.[60]

Pursuant to Art. 46, para. 1, "whosoever may in any case be aware of a report's having been made shall be prohibited from passing on this information except in the cases envisaged by this decree". The violation of the said obligation is sanctioned with a criminal sanction, provided for in Art. 55, para. 8.

It is worth noting that since its inception the UIF has developed various initiatives for the modernization of IT in handling, storage and use of related information, in order to increase the standards of security and confidentiality of the data handled. All exchanges of information with other FIUs is realized through the protected Egmont Secure Web and FIUNET, whose access is granted to a limited number of authorized persons.

Specific rules govern the STRs transmitted by legal professionals. They can send STRs directly to the UIF or to their professional association (specifically named by a decree of the Ministry of the Economy, in agreement with the Ministry of Justice). The same associations, after receiving a STR from one of their members, must transmit it – without delay – to the UIF, without naming the source. In order to comply with this rule, UIF has signed specific Memoranda of Understanding with the national associations of notaries and labour consultants (named with specific Ministerial Decrees),[61] establishing the implementing measures for the transmission of STRs from professionals to the UIF, and protecting the identity of the reporting individuals.

11.4 Other functions assigned to the UIF

The tasks of the UIF also extend to preventing and combating terrorist financing as a combined effect of the provisions of Legislative Decrees 109/2007 and 231/2007, with particular regard to the reception and examination of suspicious transaction reports. Among these tasks, Regulation (EC) no. 423/2007, as amended by Regulation (EC) no. 1110/2008, includes combating the financing of the proliferation of weapons of mass destruction.[62]

In 2010, Regulation (EC) no. 961/2010 repealed the two earlier regulations and introduced measures restricting financial transactions alongside the obligations to send reports and to impose freezes. As part of the activity to combat the financing of terrorism and proliferation, the UIF's financial analysis also concerns reports of suspected financing of terrorism and plans for the proliferation of weapons of mass destruction. The Unit's tasks include compiling notifications of freezes and disseminating, on its website and by other means, the lists of persons designated by the competent international authorities.

With the aim of preventing and combating money laundering, the regulations governing the gold market make it obligatory to declare operations amounting to €12,500 or more relating to investments in gold and transactions in gold material mainly for industrial use, and transmit the same declarations to the UIF (or give it to a bank for transmission to the UIF).[63]

Finally, in order to combat the financing of Internet-based child pornography, Art. 19 of Law 38/2006 provides for the issue of a regulation defining the procedures for the confidential transmission of information between the UIF, the National Centre established at the Ministry of the Internal Affairs and the financial system. In this field, the UIF is assigned to receive information from banks, post offices and financial intermediaries providing payment services, on relationships and transactions ascribable to persons involved in marketing child pornography, and to transmit the information acquired to the Centre at the Ministry of the Internal Affairs.[64]

11.5 The effectiveness of the UIF's activity: some conclusive remarks

The characteristic trait of the UIF's activity is receiving, analysing and disseminating STRs and other relevant information in order to prevent possible money laundering, terrorist financing and other related predicate offences. The system based on STRs is one of the cornerstones of the Italian discipline of the prevention of money laundering.

Is such a system effective? Does it work efficiently? In order to answer this question we must take into account the above-mentioned clear distinction between the preventive approach, aimed at protecting the integrity of the financial markets, and the repressive one, focused on the prosecution of crimes related to money laundering. From the point of view of prevention, the evaluation of the effectiveness of the anti-money laundering system cannot be based on the number of convictions for the offence of money laundering, but must take into account the size and the proportion of reports significant for the purposes of preventing the integrity of the financial system and identifying and prosecuting serious criminal cases.

The value of such a system is shown by the contribution that STRs – and the financial analysis performed at the UIF – provide for the investigations and prosecutions aimed at identifying and prosecuting not only episodes of money laundering but also other serious crimes identified as predicate offences. In recent years, numerous STRs transmitted by

the Unit to the law enforcement agencies have been deemed worthy of investigation findings. This was confirmed by the 2012 annual Report of the Ministry of Economy to Parliament, according to which nearly half of the suspicious transaction reports taken into account as relevant for in-depth investigations and criminal proceedings, aimed at the repression not only of money laundering but also of various predicate offences.[65]

The efficiency and effectiveness of the anti-money laundering system also relies on the well-used network of institutional relationships based on coordination between the authorities involved, the development of synergies between the actions carried out by each one, and the convergence of the objectives pursued. Established relationships between the UIF and the other national authorities involved in anti-money laundering legislation aim at checking fulfilment of the obligations imposed by the rules and allow the sharing of methodologies useful in the monitoring and evaluating of specific risk situations.

Furthermore, international cooperation – developed through the extensive worldwide network of FIUs – is crucial to address the global dimension of money laundering and to identify transnational flows of funds of illicit nature. The network of the FIUs has proved effective not only for the deepening of investigation into suspicious transactions, but also, in the course of investigations and prosecutions, allowing judicial authorities to capture useful information, to formulate appropriate international requests for data and information, and in some cases to obtain temporary blocks of funds as a function of the subsequent request for seizure.

Notes

1. These subjects may be involved in laundering activities, not only when ignoring the origin of the assets but also, sometimes, playing an active role in the realization of illicit purposes. On the international strategies on combating money laundering and terrorist financing, see E. Aninat, D. Hardy and B.R. Johnston, *Combating Money Laundering and the Financing of Terrorism, Finance and Development*, Vol. 39, no. 3, September 2002, pp. 44–47; J. Broome, *Anti-money Laundering – International Practice and Policies*, Thomson, Sweet & Maxwell Asia, 2005; see also A. Veng Mei Leong, "Chasing dirty money: domestic and international measures against money laundering", *Journal of Financial Crime*, Vol. 10, No. 2, 2007, pp. 140–156; M. Pieth and S. Eymann, *Combating the Financing of Terrorism: Is It Working?*, Verlag Peter Lang, May 2009. As regards the Italian literature, see S. Giacomelli and G. Rodano, *Denaro sporco. Economie criminali, politiche di contrasto e ruolo dell'informazione*, Roma, Donzelli, 2001; M. Condemi, *Uso illecito del sistema finanziario a scopo di*

riciclaggio ed effetti monetari dell'attività criminale, in Aa.Vv., *Scritti in memoria di Pietro De Vecchis*, Bank of Italy, Rome, 1999, p. 227 e ss. See also G. Rey, *Analisi economica ed evidenza empirica dell'attività illegale in Italia*, in V. Zamagni (ed.), *Mercati illegali e mafie. L'economia del crimine organizzato*, Bologna, Il Mulino, 1993, p. 15 e ss.

2. Reference is made to the three stages into which the international literature articulates the conduct aimed at the laundering of criminal proceeds: the placement of the proceeds of crime, for example, in financial intermediaries or institutions; layering, consisting in carrying out operations aimed to separate the funds from their illicit origin (often diverting funds to foreign countries); and the final integration of funds into the circuits of the legal economy. See E. Cappa and L.D. Cerqua, *Il riciclaggio del denaro. Il fenomeno, il reato, le norme di contrasto*, Milano, Giuffrè, 2012; D. Masciandaro, *Banche e riciclaggio*, Milano, Giuffrè, 1994; S. Faiella, *Il riciclaggio e il crimine organizzato transnazionale*, Milano, Giuffrè, 2009.
3. As regards the development of the international rules, see M. Condemi and F. De Pasquale (eds), *Lineamenti della disciplina internazionale di prevenzione e contrasto del riciclaggio e del finanziamento del terrorismo*, Bank of Italy, Legal Researches, Rome, 2008.
4. If the efforts in the fight against money laundering and terrorist financing are to be successful, traditional law enforcement methods need to be supported by contributions from the financial institutions that hold critical information on transactions that may hide criminal schemes. The access of the anti-money laundering authorities to this information, normally covered by confidentiality regimes, is essential to trace criminal money channels, through financial analysis, and enable subsequent possible investigations and prosecutions. See J. Hart, "Criminal infiltration of financial institutions: a penetration test case study", *Journal of Money Laundering Control*, Vol. 13, No. 1, 2010, pp. 55–65; B.R. Johnston and I. Carrington, "Protecting the financial system from abuse – challenges to banks in implementing AML/CFT Standards", *Journal of Money Laundering Control*, Vol. 9, No. 1, 2006, pp. 48–61; W. Hetzer, "Money Laundering and Financial Markets", *European Journal of Crime, Criminal Law and Criminal Justice*, Vol. 11, 2003, pp. 264–277.
5. The FATF Recommendations have been substantially revised over the years, most recently in February 2012. The New Recommendations are available at www.fatf-gafi.org.
6. The FATF Recommendations, like most of the rules, guidelines, recommendations and other instruments used in international financial relations, are generally referred to as "soft law": they derive their strength by virtue of the spontaneous transposition into domestic regulations or through mechanisms of peer pressure or market discipline. The FATF provides a decisive contribution to the rapprochement of the regulations and the homogeneity of anti-money laundering national rules and cooperation between the authorities of different countries. The FATF also plays a crucial role in the evaluation of the alignment of the countries to the Recommendations, in order to identify strategic deficiencies and to encourage national legislators to take appropriate countermeasures to mitigate the risks and to intensify the necessary international pressure.

7. The risk-based approach is the core of the FATF Recommendations. It applies to both countries and individual operators: the impact of national measures and of the obligations for the individuals can be calibrated according to the risks of money laundering and the financing of terrorism.
8. With reference to the financial intermediaries, the anti-money laundering obligations are integrated within the prudential supervision: stability-oriented controls and prudential measures also aim to preserve the integrity of the financial system and the reliability and correctness of customer relationships. Both prudential and anti-money laundering obligations presuppose adequate organizational, procedural and technological safeguards. The costs faced by operators in fulfilling the anti-money laundering obligations are justified in the advantages arising from the protection against the risks (operational and reputational) related to the involvement in illegal behaviours. Legal professionals and other non-financial operators are involved in the anti-money laundering obligations because their activities are frequently required by criminals to complete illicit transactions or laundering schemes. Access to specialized legal skills and services is sometimes necessary in order to assist the laundering of the proceeds of crime and the funding of terrorism, employing methods such as the misuse of client accounts, purchase of real estate, creation or management of trusts and companies, etc. See FATF, *Money Laundering and Terrorist Financing Vulnerabilities of Legal Professionals*, http://www.fatf-gafi.org/topics/methodsandtrends/documents. As regards the anti-money laundering requirements for professionals, see, i.a., He Ping, "Lawyers, notaries, accountants and money laundering", *Journal of Money Laundering Control*, Vol. 9, No. 1, 2006, pp. 62–70.
9. See, in the Italian literature, L. Salazar, *Riciclaggio dei capitali: Direttiva comunitaria e legislazione italiana*, in *Foro It.*, 1991, IV, col. 273 ss; A. De Guttry, *Commento alla Direttiva 91/308/CEE del Consiglio delle Comunità Europee del 10 giugno 1991 relativa alla prevenzione dell'uso del sistema finanziario a scopo di riciclaggio dei proventi di attività illecite*, in A. De Guttry and F. Pagani (eds), *La cooperazione tra gli Stati in materia di confisca dei proventi di reato e lotta al riciclaggio*, Padova, 1995, p. 293 ss; E. U. Savona, *Luci e ombre di un esperimento regionale: la direttiva anti-riciclaggio dell'Unione Europea*, in C. G. Cortese and V. Santoro (eds), *Il riciclaggio del denaro nella legislazione civile e penale*, Milano, 1996, p. 86 ss. As regards the evolution of the European legal framework, see P. Costanzo, *La disciplina comunitaria: dalla Direttiva 91/308/CEE alla Direttiva 2001/97/CE*, in M. Condemi and F. De Pasquale (eds), *Profili internazionali…*, p. 59 ss. As regards the Third AML Directive, see E. Cassese and P. Costanzo, *La terza Direttiva comunitaria in materia di antiriciclaggio e antiterrorismo*, in *Giornale di diritto amministrativo*, 2006, no. 1, p. 5 ss.
10. *Final Study on the Application of the Anti-money Laundering Directive*, Deloitte, December 2010, http://ec.europa.eu/internal_market/company/docs/financial-crime/20110124_study_amld_en.pdf.
11. COM (2013) 45/3, *Proposal for a Directive of the European Parliament and of the Council on the Prevention of the Use of the Financial System for the Purpose of Money Laundering and Terrorist Financing*, Bruxelles, February 2013. Following the agreement reached in the European "trilogues", in January 2015 the draft Proposal was finalized and therefore still awaiting to be passed.

12. It is important to highlight the choice made by the text of a Fourth Directive for maintaining a minimum level of harmonization. This approach leaves room for possible misalignments between the rules of transposition issued at national level, allowing regulatory arbitrages and avoidance behaviours that could affect the overall effectiveness of the anti-money laundering system.
13. It is worth noting that the above-mentioned text of a Fourth Directive recognizes a European Platform of FIUs as a venue for development of guidelines for the application of the European rules, coordination of cooperation activities, and joint analyses of cases of mutual interest.
14. FIUs have now been in existence for over 20 years, and almost 140 more have been admitted into the Egmont Group, the international association of FIUs created in 1995 in order to develop cooperation and share best practices between FIUs. At the Egmont Group, the FIUs meet regularly to find ways to cooperate, especially with regard to information exchange, training, and the sharing of expertise. Countries must go through a formal procedure established by the Egmont Group in order to be recognized as meeting the Egmont definition of an FIU. The Egmont Group as a whole meets once a year. Since the Egmont Group is not a formal organization, it has no permanent secretariat; administrative functions are shared on a rotating basis. Aside from the Egmont support position, working groups and the newly established Egmont Committee are used to conduct common business.
15. International Monetary Fund, *Financial Intelligence Units: An Overview*, IMF Legal Dep., Washington, 2004.
16. In addition to the information that obliged entities report to the FIU (under the receipt function), the FIU should be able to obtain and use additional information from reporting entities as needed to perform its analysis. Furthermore the FIU should have access to the widest possible range of financial, administrative and law enforcement information. This should include information from open or public sources, as well as relevant information collected and/or maintained by, or on behalf of, other authorities.
17. International Monetary Fund, *Financial Intelligence Units…*, p. 23 ss.
18. The means by which FIUs are accountable for their actions and the person or body to which they are formally accountable will vary from country to country. Accountability mechanisms, however, need to ensure that the special powers entrusted to the FIU are not abused and that the public resources put at its disposal are used efficiently for the purposes intended.
19. FIUs, at a minimum, receive, analyse and disclose information on suspicious or unusual financial transactions provided by financial institutions or other operators to competent authorities. Although every FIU operates under different guidelines, most FIUs can exchange information with foreign counterpart FIUs. In addition, many FIUs can provide data and information to their counterparts, which can also be very helpful to investigators.
20. International Monetary Fund, *Financial Intelligence Units…*, p. 9 ss.
21. It is worth noting that financial institutions may not have clear evidence that a transaction they are facing involves criminal activity or that the customer involved is part of a criminal operation or organization. They would therefore be reluctant to disclose their suspicions to a law enforcement agency. In these cases an administrative type FIU will be able to substantiate the

suspicion and send the case to the authorities in charge of criminal investigations and prosecutions only if the suspicion is substantiated.

22. One of the main goals of the Egmont Group is to create a global network by promoting international cooperation among FIUs. The ongoing development and establishment of FIUs exemplify how countries around the world continue to intensify their efforts to focus on research, analysis, and information exchange in order to combat money laundering, terrorist financing and other financial crimes.
23. This model is particularly suited to enhance and distinguish the deepening financial reports with respect to the investigation. It emphasizes the delicate function assigned to the UIF, of connection and filter between private subjects that are under obligation to report, and the investigative and judicial authorities.
24. It is worth noting that the former Financial Intelligence Unit, Ufficio Italiano dei Cambi, was already defined (according to Legislative Decree no. 319 of 26 August 1998) as an "instrumental entity of the Central Bank". The UIC had been charged with anti-money laundering compliance responsibilities since 1991 but only in 1997 did it receive exclusive responsibility for receiving, analysing and disseminating STRs to its law enforcement counterparts. Furthermore, after the enactment of the Decision 2000/642/JHA, which was directly effective in the Member States, Law no. 388 of 29 December 2000 introduced a few regulations according to which the Ufficio Italiano dei Cambi was entrusted with the tasks of acting as the Italian Financial Intelligence Unit.
25. The Regulation issued by the Bank of Italy on 21 December 2007 confirms that "all the functions performed by the UIF, thus included the core functions of STRs financial analysis, are performed in full autonomy and independence".
26. The UIF is staffed with approximately 130 persons. The divisions entrusted with the financial analysis of the suspicious transactions reports have a staff of almost 70 analysts.
27. According to Art. 6, para. 3, of Legislative Decree no. 231/2007, the appointment shall last five years and may be renewed only once.
28. The Regulation issued by the Bank of Italy on 21 December 2007 details the requirements and competences of the Director, thus providing for the following tasks of: (a) issuing organizational regulations with external relevance; (b) convening and chairing the Committee of experts; (c) joining the competent national and international organization or appointing the competent UIF representatives; (d) directing the UIF personnel, promoting the specific training activities and providing the evaluative criteria; (e) delegating typologies of actions to the managers of the UIF. The Regulation provides for the following grounds of dismissal: "Directors may be removed from the position in the same way as laid down for the appointment if they no longer meet the conditions for the performance of their functions or are guilty of serious shortcomings". In the event of the absence or incapacity of the Director, his or her functions are performed by the Deputy Director appointed by the Governor.
29. Under the previous legislation (Art. 3, co. 1, d.l. 143/1991 converted into l. 197/1991), the reporting obligation was not anchored to a mere suspicion, but to the fact that the subject was "led to believe" the illicit origin of the

money or of the goods on the basis of certain characteristics. The evaluation of the operator, therefore, was related to the possible criminal origin of the money, goods or other property involved in the transaction that led the operator to believe that he was in the presence of a case of money laundering as defined in the Penal Code. In addition, the reporting obligation existed when awareness of the existence of a crime had become mature enough. The mere suspicion relating to the transaction was not, therefore, inherently likely to configure the activation of the reporting obligation.

30. This case is of Anglo-Saxon derivation, and was provided for in the United Kingdom legislature in 2002. In particular, pursuant to Art 329 (Failure to disclose: regulated sector) of the Proceeds of Crime Act 2000, the reporting obligation also exists where there are "reasonable grounds for knowing or suspecting", as well as the assumption of full knowledge or suspicion. This case appears to differentiate itself from suspicion or outright full knowledge, because it is based on factors and assumptions of an objective nature: it is the case in which the operator has objective evidence that the client could be involved in a case of money laundering.
31. The new article of criminal code also states that self-laundering is not punishable in cases where crime proceeds are destined exclusively for personal use or enjoyment.
32. Almost all of the reports received concerns suspicions of money laundering; numerically marginal remain the reports related to terrorist financing or programs of proliferation of weapons of mass destruction, also included in the system of prevention. Also the quality of the information reported to the UIF has shown a significant improvement in terms of completeness and clarity. The UIF provides support to operators for the development of appropriate capacities to diagnose and representation of suspicions.
33. In order to govern the new system, on May 2011 the FIU issued instructions on the data and information to be included in STRs. A new report format – the same for all reporting entities, and totally electronic – has been launched, increasing the amount of structured information available. Reporting entities are called upon to provide a more detailed and complete description of transactions, the parties involved and the relations/links between them. They are also required to set out their reasons for suspicion, in a separate descriptive section.
34. More ambitious objectives have been set for the future, through the implementation of a data warehouse, allowing more effective use of the information available. See UIF, *Annual Report for 2013*, Rome, July 2013.
35. This is a critical aspect, considering that the experience of recent years has shown how the value of the results and the performance of the analysis functions depend on the quality and the amount of information available. In this respect, it would be necessary to address the Italian legislation in order to provide for the possibility of the UIF's wide access to the law enforcement data (not only when such information serves in response to requests from foreign FIUs).
36. To this end, in the view of enriching the data available for its analysis functions, the UIF has signed Memoranda of Understanding with the Revenue Agency (on 16 June 2009, replaced by the updated Convention on 7 June 2012) establishing the conditions on the UIF access to the account and

deposit registry; the Customs and Monopoly Agency (13 December 2013), establishing the conditions of the access to cross-border declaration data. As regards the relationships with the supervisory authority, the UIF has signed Memoranda of Understanding with the Bank of Italy (2 April 2009, updated on 20 January 2011), the Ivass (16 March 2011) and the Consob (7 June 2013).

37. The above-mentioned future construction of a data warehouse will further enhance the automatic enrichment of reports and improve the exploitation of the information possessed not only by the FIU and the Bank of Italy but also by third parties.
38. It is important to highlight that according to the Art. 47 of Legislative Decree 231/2007, all the closed reports are kept on file for ten years, following procedures that allow consultation by the investigative bodies, on the basis of the Memoranda of Understanding. In 2013 the FIU closed… reports that it deemed to be unfounded from a financial standpoint on the basis of the information in its possession.
39. In recent months, the interest of the Unit has been also addressed to the possible use for illegal purposes of virtual coins (Bitcoin), in consideration of some STRs received on sales of such abnormal instruments and the initiatives that are being defined at the international level.
40. As regards a general overview of the UIF's activity, see G. Castaldi, *L'Unità di informazione finanziaria (UIF): funzioni e organizzazione*, Sassari, 17 April 2009; G. Castaldi, *L'Unità di informazione finanziaria (UIF) nel "sistema" italiano antiriciclaggio: l'attività svolta; i problemi aperti*, Napoli, 2 July 2009; G. Castaldi, *L'azione di prevenzione e contrasto del riciclaggio*, Commissione Parlamentare d'inchiesta sul fenomeno della mafia e sulle altre associazioni criminali anche straniere, Rome, 28 June 2011; C. Clemente, *L'Unità di Informazione Finanziaria per l'Italia nel sistema di prevenzione del riciclaggio*, Rome, 4 February 2014; C. Clemente, *L'Unità di Informazione Finanziaria per l'Italia nel sistema di contrasto alla criminalità economica e al riciclaggio*, 11 June 2014, Senato della Repubblica, Roma, Commissione d'inchiesta sul fenomeno delle mafie; C. Clemente, *Presentazione del Rapporto sull'attività svolta nel 2013*, Rome, 9 July 2014. All these documents are available in Italian at http://www.bancaditalia.it/UIF/interventi.
41. It is worth noting that almost 85 per cent of STRs come from banks and post offices that appear aware of the importance of the reporting system in the fight against money laundering. The number of reports submitted by professionals and non-financial operators remains small (in 2013, about 2,800 reports, amounting to just over 4 per cent of the total) and almost entirely attributable to notaries and gaming operators. Among the non-financial operators, for example, the offices of the Public Administration do not actually appear to be involved in the reporting system, depriving it of a potentially relevant contribution. UIF is currently working with other authorities in order to raise awareness of the above-mentioned categories of operators and identify the areas of public activity for which it is appropriate to provide anomaly indicators and instructions for reporting.
42. Before the anomaly indicators are issued, they are submitted to the Financial Security Committee, thus ensuring coordination with all the competent authorities.

43. Even if the Legislative Decree provides only for a formal consultation of self-regulatory bodies, it is worth nothing that before the proposal the UIF had informally consulted all the competent category associations, in order to properly tailor the indicators to the different activities performed.
44. The models are a product of the operational and strategic analysis, developed on the basis of the financial analysis of the STRs, of the typologies identified during inspections, and are issued directly by the UIF, but always benefiting from the cooperation of the supervisory authorities, the Finance Police, the competent association of categories, and the self-regulatory bodies.
45. The UIF also alerted reporting entities on areas of possible exposure to money laundering and terrorism financing with specific communications, in February 2010 and in February 2012, regarding the operations of repatriation or regularization under Art. 13-*bis* of Decree Law no. 78 of 1 July 2009 (referred to as the tax shield), and the anomalous use of payment cards for cash withdrawals, respectively. The second communication has been further developed by the issuing of the above-mentioned pattern of anomalous conduct.
46. Most of the data reported originates from banks and post offices (more than 96 per cent of the total number of aggregate records and of the total amounts transacted). Data are aggregated according to a set of classification criteria that have been increased since January 2012; the information reported currently includes the client's residence and economic sector, the intermediary's branch where the transaction took place, the type of the transaction, the total amount transacted and the corresponding cash component, plus the number of transactions aggregated in a single record.
47. In more detail and under a specific formal agreement, the Bank of Italy grants the UIF access to relevant databases, such as the database containing monthly reports by banks and other financial intermediaries required to provide detailed data on their activity, balance sheet and overall financial situation, and the register of cash transactions performed at Bank of Italy branches.
48. See, http://www.bancaditalia.it/UIF/pubblicazioni-uif/quaderni_analisi_studi.
49. Preliminary results indicate that the operations that are not explained by the fundamental economic, demographic and financial structure or the territory are with some exceptions concentrated in the regions of southern Italy that have the highest criminal infiltration index.
50. The results show that countries at risk attract a volume of financial flows higher by more than 30 per cent compared to what is justified by fundamental economics and socio-demographics. The analysis also allowed the UIF to define an indicator of anomaly for the classification of countries of destination of funds and Italian provinces of origin.
51. The reconnaissance of the areas most at risk and of the vulnerabilities in the national system of prevention, investigation and prosecution should lead to delineating the areas to which to steer future policy interventions to reduce vulnerabilities and increase the effectiveness of the system.
52. While analysing a STR, when the UIF becomes aware of sufficient evidence to identify a crime (other than money laundering or terrorist financing), it shall, pursuant to Art. 331 Code of Criminal Procedure, notify the Judicial Authority.

53. Furthermore, it's worth noting that the coordination with the Judicial Authority is essential in order to allow the UIF to suspend suspicious transactions, and to verify that, as expressly required by law, the suspension does not prejudice to any ongoing investigations and to ensure the consolidation of the effects of possible decision of seizure or confiscation.
54. The cooperation of the UIF with the Judicial Authority has progressively intensified: there were 216 requests received by the Judicial Authority in 2013, compared to 53 in 2008. This has given rise to an intense dialogue to provide the elements immediately available and those acquired through further investigation and contacts. Significant forms of cooperation were developed with the National Anti-Mafia Directorate and, through it, with certain district departments.
55. Council Decision of 17 October 2000 no. 2000/642/JHA ("Concerning arrangements for cooperation between financial intelligence units of the Member States in respect of exchanging information"), which is directly applicable without any need for transposition.
56. The cooperation that UIF can provide includes suspicions of money laundering and associated predicate offences, regardless of the type and nature. According to Art. 9, para. 3, of Legislative Decree no. 231/2007, any information can be exchanged including, in particular, "data and information concerning suspicious transactions". Upon this legal basis, UIF is able to provide to foreign FIUs all information available at the time of the request (e.g., STR material including banking and financial information, further information collected or intelligence developed through the analysis). It is worth noting that possible differences in the range of predicate offences between the countries involved may affect the exchanges, preventing the requested foreign FIU from providing information on specific offences (e.g., tax offences) and from consenting to its further use for intelligence or investigation by competent authorities in the requesting country.
57. Moreover, despite not having access to law enforcement information for its domestic analytical purposes, UIF can obtain this information when it comes to providing assistance to foreign counterparts. In fact, based on Art. 9, para. 3, for international cooperation purposes UIF "may also make use of specifically requested information in the possession of the Bureau of Antimafia Investigation and the Special Foreign Exchange Unit of the Finance Police". In accordance with this provision, when a foreign FIU requests law enforcement information on a particular case or subject, UIF approaches the mentioned authorities to obtain the police information respectively available which, as soon as received, is forwarded to the requesting foreign counterpart.
58. In 2013 the Unit adopted new work processes and new methods of dialogue with its foreign counterparts which, by making the full potential of dedicated computing platforms, increased the effectiveness of information exchange. In the European context, the FIU was among the first to activate the intersection of entire databases to identify occurrences of situations reported in different countries.
59. Art. 9, para. 3, explicitly empowers UIF to "conclude memoranda of understanding" with its foreign counterparts. MoUs are also envisaged by the Council Decision 2000/642/JHA (although this is not currently common

practice within the EU due to the particularly high level of integration and cooperation among European FIUs).

60. On 23 July 2010 the UIF signed a Memorandum of Understanding with the Special Foreign Exchange Unit of Finance Police and the Directorate of Anti-Mafia Investigations in order to ensure that the information is sent electronically, in such a way as to ensure that the report only reaches the people concerned and that the information sent is received intact and in its entirety.
61. See the two Decrees of the Ministry of the Economy, in agreement with the Ministry of the Justice, both issued on 27 February 2009.
62. As part of the fight against the proliferation of weapons of mass destruction, the United Nations adopted measures for preventing and combating the financing of proliferation programmes and placed a ban on assisting or financing persons involved in such activities. The European Union, implementing the resolutions adopted by the United Nations, has issued a series of measures including Regulation (EC) 267/2012, which establishes restrictive measures against Iran (freezing of funds and economic resources of individuals or entities associated with the development of sensitive activities in terms of proliferation). The FATF has developed guidelines for implementing the financial sanctions adopted by the United Nations. Specific measures have been introduced in the Recommendations to address the financing of the proliferation of weapons of mass destruction, in conformity with the UN Security Council resolutions.
63. As a rule, the declaration must be sent by the end of the month following that in which the transaction was carried out; in the case of physical cross-border transfer, the declaration must be made and sent before the transfer takes place. A copy of the declaration and of the document attesting its having been sent to the UIF must accompany the gold.
64. The UIF is also, together with the other competent units of the Bank of Italy, required to verify compliance with the relevant provisions in force by banks, electronic money institutions, post offices and financial intermediaries providing payment services, and to report violations to the Ministry for the Economy for the imposition of sanctions.
65. Indications on the overall effectiveness of the anti-money laundering system could also be drawn from the final results of the STRs, but such assessments are currently hindered by the lack of an adequate feedback to the UIF on the investigative and judicial processes resulting from the reports analysed and transmitted. See C. Clemente, *Presentazione del Rapporto sull'attività svolta dall'UIF nel 2013*, Rome, 6 July 2014.

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