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European and National Securities Laws and Regulations: New Challenges for the Consob
Lessons from the Case of the Italian Securities and Exchange Commission
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ABSTRACT

In the Italian legal system, the market abuse law (No. 62 of 2005) and the investor protection law (No. 262 of 2005) have produced a very relevant impact on the aims and objectives, powers and organization of the Consob, while its independence and governance have not been sufficiently improved.

In the first place, I point out the paradox of lack of precise rules concerning the governance of the Consob, just when it is charged with a pilot-role to guarantee a sound corporate governance of listed firms. In addition, I criticize the new Consob’s duty to check the truthfulness of publicly traded companies’ statements concerning their corporate governance features.

In the second place, I evaluate the forthcoming ‘judicial’ task of the Consob and its problematic compatibility with previous and more caratheristic tasks, with risks of vicious circles due to an interlacement of irreconciliable functions.

In the third place, I take into consideration the Law No. 62 of 2005 that have improperly changed the Consob in a “competitor” of public prosecutors and courts in the field of insider trading and market manipulation crimes. As a result, we can fear infringements of the ne bis in idem principle and conflicts of judgements, with uncertainties very harmful to the markets.

Finally, I conclude that in the hands of the Consob it has been concentrated an excessive number of duties and aims, not balanced by an adequate strengthening of its resources. The Italian experience highlights the need for financial markets’ supervisors (i) to be independent, (ii) to have proportionate resources, (iii) to tend toward clearly defined aims and (iv) to have the ability to concentrate on their core functions, without overlapping other institutions’ competencies.

It is, as a consequence, urgent to implement an institutional environment in which the private enforcement of investors’ and savers’ rights could be effective and not too costly. A new legislative decree could amend some of the criticized rules, so that my conclusion are provisional.
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Introduction

In this paper, I examine – following a comparative method and in the light of the European legal framework – some of the recent legislative innovations introduced in Italy by the market abuse law (Law No. 62 of 2005, art. 9) and the investor protection law (Law No. 262 of 2005). They have produced a very relevant impact on the institutional aims and objectives, powers and organization of the Consob, while its independence and governance have not been sufficiently improved.

In the first paragraph, I point out the paradox of the lack of precise rules concerning the governance of the Italian Independent Agencies, just when they (mainly, the Consob) are charged with a pilot-role to design a sound corporate governance of the Italian listed firms. In addition, I criticize the new Consob’s duty to check the truthfulness of publicly traded companies’ statements concerning their corporate governance features.

In the second paragraph, I assess the forthcoming ‘judicial’ task of the Consob and its problematic compatibility with previous and more caratheristic functions.

Finally, in the third paragraph, I take into consideration the Law No. 62 of 2005 (Market Abuse Law) that have improperly changed the Consob in a “competitor” of public prosecutors and judges in the field of insider trading and market manipulations crimes.

On the basis of an overall assessment of the new rules above mentioned – but being aware that is too early to express conclusive judgements – I conclude that in the hands of the Consob it has been concentrated an excessive number of duties and aims, too different from each other and not balanced by an adequate strengthening of its resources. As a result, it has been emphasized its dependence by the Government, and it is more difficult to define and implement a governance of the Italian financial markets Supervisor with an acceptable degree of efficiency and impartiality. Also, because of that number of different purposes not accompanied by an increment of resources, it’s problematic doing an objective assessment of its accountability.

The Italian experience could be a useful lesson for policy-makers, because it highlights crucial elements, such as the need for financial markets supervisors (i) to be independent, (ii) to have proportionate resources, (iii) to tend toward clearly defined aims and (iv) to have the ability to concentrate on their core functions, without overlapping other institutions’ competencies.

1. The governance of the Consob and the governance of Italian publicly traded companies.

During the first period of the XIV legislature just finished, there has been a number of draft bills with the declared purpose of deeply reforming the governance of the numerous Italian administrative independent agencies. The Parliament has not passed anyone of those bills, so that today we lack a uniform general law about the appointment criteria of their members, their tenure and incompatibilities, and so on.

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1 Available at http://www.camera.it/parlam/leggi/05062l.htm.
2 Available at http://www.camera.it/parlam/leggi/05262l.htm.
In the case of the Consob – the oldest of the Italian independent Agencies – the market abuse law (Law No. 62 of 2005, implementing the Directive 2003/6/EC) and the investor protection law (Law No. 262 del 2005) have introduced important and innovative rules, that have produced relevant consequences on its functions, powers and organization.

In this paragraph, I examine the rules of the Law n. 262/2005 that assign to the Consob a driving role both in fixing ex ante, with its regulations, and in supervising ex post, exercising its check powers, new measures with the aim to improve listed firms’ and listed financial intermediaries’ corporate governance.

It is not possible here to analyse carefully those rules one by one, so I just point out those provisions that let us to verify the guide-role of the Consob about corporate governance matters. We can, this way, be aware of the lack of balance between rules pertaining to the governance of the Supervisor and those ones concerning the governance of the supervised firms.

As regards to the regulatory powers, we have to remark the Consob shall implement principles concerning, for example, the election, by the minority shareholders, of one member of the board of auditors (new art. 148, 2nd paragraph, Legislative Decree No. 58 of 1998 - Consolidated Law on Financial Intermediation); the limits to the number of offices for components of boards of directors and board of auditors (new art. 148-bis, Legislative Decree No. 58 of 1998); criteria assuring independence of external auditors (new art. 159, 7th paragraph, Legislative Decree No. 58 of 1998); principles to be followed in the auditing practises (new art. 162, 2nd paragraph, Legislative Decree No. 58 of 1998).

They evidently are provisions that lay on the Consob the responsibility of deal with the most difficult problems that affect the corporate governance of any company, and that have been deeply discussed by researchers and scholars, international organizations (e.g. the OECD) and European Institutions as well. So, it will be interesting verify how Consob will interpret and partially anticipate the plan of new legislations and regulations contained, e.g., in the Communication of the European Commission of 21 May 2003 “Modernising Company Law and Enhancing Corporate Governance in the European Union – A Plan to Move Forward” and in other several European acts, as the Commission Recommendation of 15 February 2005 on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board, and so on.

Also in respect with the overseeing powers, the Consob activity will be, in the next future, much more important than in the past. See, e.g., the principle (new art. 149, 1st paragraph, lett. c-bis, Legislative Decree No. 58 of 1998), according to wich the board of auditors must oversee “the arrangements for implementing the corporate governance rules provided for in codes of conduct drawn up by management companies of regulated markets

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or by trade associations that the company, by means of public disclosures, declares it complies with”. Given that (art. 149, 3rd paragraph, Legislative Decree No. 58 of 1998) “The board of auditors shall notify Consob without delay of irregularities found in the performance of its oversight activity”, it is easy to foresee that the Consob is doomed to play a pilot-role in the process of evaluating to what extent the corporate governance of major Italian companies effective is.

This conclusion seems to be reinforced by the provisions of several articles of Legislative Decree No. 58 of 1998, as amended by the Law No. 262 of 2005, and first of all the new art. 124-ter. This article establishes that the “Consob, within the scope of its authority, shall establish the forms of publicity applicable to codes of conduct promoted by management companies of regulated markets or by trade associations of market participants, check the truthfulness of disclosures concerning compliance with the undertakings entered into by persons who have adopted such codes, and impose the corresponding sanctions for violations”.

The Investor Protection Law calls, then, for an intensive effort by the Consob on two different levels. Firstly, it shall enact general and abstract rules and, secondly, it shall oversee, in concrete terms, the conformity with corporate governance codes of companies’ practises and organizational patterns.

These two profiles should be kept distinct and they deserve different judgements.

The Salomonic decision to vest the Consob with the duty to write, over a few months, a number of rules aiming to relieve the most prominent problems affecting the governance of Italian companies, merits ex se a positive judgement, because of the urgent need of regulations able to prevent, at least partially and potentially, the financial and corporate scandals that have recently upset our markets.

Given the lack of precise legislative guidelines, the Consob may do a greatly discretionary work and its challenge will be the ability of codifying regulations in line with those of the most evoluted financial markets, with the international best practices and the listing standards of the most important stock exchanges, with twofold results that (i) our firms will be ready to be listed in those exchanges and (ii) the foreign investors (in addition to the Italian ones) could look to our companies with more trust.

On the other hand, – i.e. the check in concrete terms, company by company – the expectation that the Consob could be an all-seeing gatekeeper seems to be critizable a) partially, because it is utopian and b) partially, because it puts in place the preliminary conditions of an “administrativization” of the corporate governance. As a consequence, it could be less likely that management and control system designed by each firm, in accordance with its specific needs, could be one of its distinctive assets and characteristics.

a) It is utopian because the Consob does not seem to have resources proportionate to the variety of duties, day by day more complex, that it is charged with. Indeed, the Law No. 262 of 2005 itself (see art. 28) shows to be aware of this lack of resources when it declares it is (simply) possible for the Ministry of the Economy and Finance to raise the number of the Consob’s officers. But it is easy to foresee the risk that possibility will never turn into reality, because of the chronic troubles of public finance, especially after Consob officers’ number has been raised by 150 units by Law No. 62 of 2005 in order to be able to deal with new aims concerning insider trading and market manipulation conducts.

In the 2002, after Enron debacle, the U.S. Legislator had a different approach. The Congress reinforced immediately the SEC with new fundings necessary to information

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8 One year, according to the Law No. 80 of 2006.
technology needs and the recruitment of 200 qualified professionals (see Section 601 of the Sarbanes-Oxley Act of July 2002).

At the end of 2005 - two years later Parmalat collapse -, the Italian government did not follow that example.

For this reason, the Law No. 262 of 2005 does not take into due consideration the pertinent OECD recommendation: “Supervisory, regulatory and enforcement authorities should have the authority, integrity and resources to fulfil their duties in a professional and objective manner… As the number of public companies, corporate events and the volume of disclosures increase, the resources of supervisory, regulatory and enforcement authorities may come under strain. As a result, in order to follow developments, they will have a significant demand for fully qualified staff to provide effective oversight and investigative capacity which will need to be appropriately funded. The ability to attract staff on competitive terms will enhance the quality and independence of supervision and enforcement”

In addition, it is remarkable that for some years the Commission (i.e. the Board of Directors) has been having only four members\(^9\), while the Law No. 216 of 1974, that set up the Italian markets supervisor, requires the Government to appoint five members. The persistent sluggishness of the Government is a clear evidence of a structural dependence of the Consob from the politicians. The failed draft bills above mentioned should have corrected this mistake, but they did not so and, as a result, the Consob does not have enough independence. The Law No. 262 of 2005 has been a missed opportunity.

This becomes particularly evident if we consider that the same Law No. 262 has dealt with some of the most relevant problems affecting the independence, accountability and governance of the Bank of Italy\(^11\). The art. 19 of the Law No. 262 of 2005, indeed, has brought new rules concerning the appointment of the Governor and his tenure; has introduced the majoritarian principle; and has fixed a new division of powers between the Bank of Italy and the Antitrust Agency in banking sector.

In short, it has faced all the major deficiencies in the governance of Italian central bank, dramatically emerged in the case of recent hostile takeovers launched by foreign banks towards Banca Antonveneta\(^12\) and BNL.

It could be useful remind that the European Legislator shows to be aware of the impossibility for each regulator to check – at least day by day – all information provided by the issuers. Indeed, the Transparency Directive\(^13\), art. 24, par. 2, foresees that “Member States may allow their central competent authority to delegate tasks”\(^14\), on the implicit assumption that in some circumstances the overseeing by an other body (mainly, the exchanges) could be more effective and efficient. And this seems to be the case for the companies’ periodical statements concerning their corporate governance features.

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\(^9\) OECD, Principles of Corporate Governance, 2004, p. 31. See also OICV – IOSCO, Objectives and Principles of Securities Regulation, 2003, according to which “The regulator should have adequate powers, proper resources and the capacity to perform its functions and exercise its power”.

\(^10\) The 5th one has been appointed recently by the new Government chaired by R. Prodi.


\(^14\) This probably could be interpreted in the sense that, in the mind of European Legislator, the day to day check of information diffused by listed issuers is not a ‘core’ function of national independent authorities, because it is difficult to conceive a core function that can be delegated.
With respect to this matter, the Law No. 262 is surprising for its inability to take into consideration either the structural (appointment criteria and skills of the Commissioners) and occasional (vacancy of one Commissioner) weaknesses, innate in the governance of the Consob.

b) The options of the Law No. 262 are not only utopian because of the reasons above explained, but also controversial for the rationale they have.

Indeed, we can be afraid that risk of distortion – that I called earlier “administrativization” of corporate governance – actually occurs. According to the most influential economists (and to the business historians, as well), it is to be refused the idea that one (e.g. the Consob) can elaborate a model of corporate governance which fits any firm, and in any moment of its lifecycle. On the contrary, each firm should look for a dynamic balance, case by case and day by day, of its own ownership, strategy and governance.

One could admit the opportunity that Consob (see art. 124-ter Legislative Decree No. 58 of 1998) will “establish the forms of publicity applicable to codes of conduct”, because it is implicit in its general regulatory competency to enact general rules with the purpose to ensure transparency of the management and control system of listed firms.

Instead, it is fully questionable the idea that the Consob should “check the truthfulness of disclosures concerning compliance with the undertakings entered into by persons who have adopted such codes”.

Other provisions of the Legislative Decree No. 58 of 1998 (e.g., artt. 94, 2nd paragraph, and 102, 1st paragraph), that put down duties of disclosure on the companies, are generally interpreted in the sense that the Consob should check statements and documents published, so that they can show a complete and univocal description of corporations’ financial and economic condition, and not in the sense that the Consob (could and) should in any case guarantee the truthfulness of the entire publicly available information.

Many scholars have noticed the negative effects that a deep intrusion of the public supervisor in the firm’s organization could have. In this vein, one author has recommended to keep in mind that “Administrative supervision can only relate to whether a code has been identified and explanation given in case a provision is not followed but without entering into the substance of that explanation” [italics added].

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19 Eddy Wymeersch, Enforcement of Corporate Governance Code, Ecgi Law Working Paper N° 46/2005, June 2005, at http://ssrn.com/abstract=579364, p. 18. See also p. 21, where he adds that “A substantive review, this is whether the provisions have in fact been followed and whether the explanation for not complying is a credible one, is generally considered impossible, and creates unjustified expectations, while leading to a formalistic attitude”.

See also Ellis Ferran, The Role of Shareholder in Internal Corporate Governance: Enabling Shareholders to Make Better-Informed Decisions, “European Business Organization Law Review”, 4, 2003, pp. 505-506 (“On the one hand, securities regulators may not have the appropriate skills and experience... On the other hand, many national securities regulators are accustomed to supervising issuer disclosures in prospectuses and listing particulars...Extending their role to cover corporate governance disclosures would therefore be an incremental step, rather than a radical shift, into wholly unfamiliar territory”).
It is interesting also to look at the supervising ‘philosophy’ of one of the most influential financial markets’ supervisors, the FSA (U.K.) that in its “Principles of good regulation” has explained that “A firm’s senior management is responsible for its activities and for ensuring that its business complies with regulatory requirements. This principle is designed to guard against unnecessary intrusion by the regulator into firms’ business and requires us to hold senior management responsible for risk management and checks within firms” [italics added].

To comply literally with the principle we are examining (“check the truthfulness of disclosures concerning compliance with the undertakings entered into by persons who have adopted such codes”), instead, the Consob should go beyond the business judgement rule and discuss any management’s decision concerning the firm’s corporate governance.

Indeed, ‘check the truthfulness’ literally means to have an analytical knowledge of variables, such as, e.g., “the onerousness and complexity of each type of position, including in relation to the size of the company, the number and size of the firms included in the consolidation, and the extension and articulation of its organizational structure” (see art. 148-bis Legislative Decree No. 58 of 1998) and, on this basis, to “check the adequacy of organizational, managerial and accounting system and its real implementation” (see art. 2403 Civil Code regarding the board of auditors’ duties), moreover in relation to the provisions of the specific code of corporate governance adopted.

This way, the Consob’s checks should double - and lay upon - the activities of the firm’s offices (board of auditors - art. 2403 Civil Code and art. 149 Legislative Decree No. 58 of 1998 - and board of directors - art. 2381 Civil Code -).

This risk seems to be relevant also for the European Corporate Governance Forum, set up by the European Commission. In its ‘Statement on the “comply-or-explain principle” - issued on February 2006 - it indeed states that: “It [i.e. the Forum] therefore inclines to the view that regulatory authorities should limit their role to checking the existence of the statement, and to reacting to blatant misrepresentation of facts. They should not try and second-guess the judgement of the board(s) or the value of its/their explanations. This is a matter for the company’s shareholders”.

Otherwise, companies’ offices will loose their incentives to design and implement ‘firm specific’ (i.e. consistent with its strategy, ownership structure, competitive challenges and general market’s conditions, variables always evolving) governance patterns. They rather have an incentive to follow a formalistic perspective and to limit themselves to show that the firm’s organization is perfectly consistent, in the words, with the code. According to the comply or explain rule, indeed, it is much more comfortable to follow the ‘box ticking’ method.

And obviously the Consob itself cannot adapt the code to the characteristics of each firm.

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21 See the “Hampton Report” (Reducing administrative burdens: effective inspection and enforcement, 2005, available at http://www.hm-treasury.gov.uk/media/A63/EF/bud05hamptonv1.pdf): “The fundamental principle of risk assessment is that scarce resources should not be used to inspect or require data from businesses that are low-risk, either because the work they do is inherently safe, or because their systems for managing the regulatory risk are good” (p. 27).
Maybe the Law No. 262 of 2005 should have only extended the board of auditors’ duties, with the new art. 149, 1st paragraph, lett. c-bis, Legislative Decree No. 58 of 1998, so that it now must check “the arrangements for implementing the corporate governance rules provided for in codes of conduct” and eventually submit to the Consob any irregularity or deficiency found.

Moreover, it is necessary to underline that the parameter of the judgement will be in most cases the Corporate Governance Code\(^\text{23}\) for listed corporations, enacted by the Corporate Governance Committee of the Italian Stock Exchange.

This code, even in the latest edition of March 2006, does not fix analytical, precise and binding rules, but just guidelines to be adjusted according to each firm’s organization.

So, let us consider, as an experiment, the provision that describes the requirements of non-executive directors. Given that “The number, competence, authority and time availability of non-executive directors shall be such as to ensure that their judgement may have a significant impact on the taking of board’s decisions” (art. 2.P.3), could (and should) the Consob scrutinize, e.g., non-executive directors’ number and their competence? The same could be for (non-executive and) independent directors, who must be an adequate number (art. 3.P.1). Given the duty to guarantee the “truthfullness” of information provided by the company, could Consob abstain from giving its opinion about real adequacy of independent directors’ number? Should it verify the effective independence of each director?

Given rules such those above, is it possible to express a truthfullness / no truthfullness judgement?

If, for instance, the firm X has declared its governance is based on the Corporate Governance Code, and in particular that it has chosen A as an independent director, the Consob:

- (i) or recognizes it is true firm X has accomplished a corporate governance according to that Code model;
- (ii) or denies its consent, asserting, say, in its opinion A is not independent or just one independent director is not sufficient.

And what consequences if the Consob agreed the conclusion of a recent inquiry\(^\text{24}\), which considers effectively independent only four or five among the 284 directors declared as such by Italian listed companies?

Furthermore, a truthfulness check may easily results a merit check, far beyond the business judgement rule\(^\text{25}\).

If one prefers the interpretation here refused, then it is necessary a change of perspective by the authorities and a reform of their regulations.

So, for example, we should consider no more consistent with the new legislative context, provisions such those of "Supervising Provisions for the Banks of the Bank of Italy, Title IV, Chapter 11\(^\text{26}\) where, as to internal checks systems, there is the recommendation

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\(^{23}\) Available at www.borsaitaliana.it.


\(^{25}\) Cfr. ASSONIME, Le nuove disposizioni per la tutela del risparmio e la disciplina dei mercati finanziari, Circolare n. 12/2006, p. 49, which points out the risk of “trascendere la “veridicità” delle informazioni… avvicinandosi al merito della valutazione compiuta”.

\(^{26}\) Available at www.bancaditalia.it.
they shall be designed “according with the complexity and dimension of the activities” (p. 4) but, in any case, anyone can rely on “the autonomous responsibility of the firm’s management for the options they have done” (p. 5).

It is, obviously, hardly difficult for anyone to assess the truthfulness of a huge quantity of information like these ones exposed in a firm’s periodical disclosure to the market, and moreover there is the risk the Consob, alternatively:

a) in order to prevent its own responsibility based on charges of negligent or deficient use of its check powers, it could require each firm - from time to time - governance reforms, accordind to its own views, occasionally and / or strategically oriented. (Risk of a Consob that plays as a ‘planner’ of the corporate life and, finally, of the market, and risk of a race to the bottom instead to the top by the corporations in the field of corporate governance);

b) or it could continue its current policy, relying reasonably on information of control bodies (board of directors, board of auditors and auditing firm entered in the special Consob register), exercising, whenever it is necessary, its powers (such as the power of gathering information from members of governing bodies and general managers, of carrying out inspections, and so on).

The latter perspective is perhaps the best, because it lays the responsability of running and organizing firms on the bodies that have all the necessary information and are in the best position to monitor every risk, including the risk of (not) compliance with a proper code of governance. This regulatory approach could stimulate competition even as regard to the corporate governance and leave to the market the selection of more responsible companies.

It is for Consob extremely difficult to check the truthfulness of corporations’ statements about their compliance with the Code, also because it has not been involved with its gestation. The Code has been written by a enterily private Committee selected by Milan Stock Exchange, while for example the German Corporate Governance Code was adopted by the Government Commission appointed by Justice Minister.

We can therefore observe this ‘asymmetric’ situation.

In Germany, there is a public code whose enforcement pertains to private entities (namely, the companies’ executive and supervisory boards).


28 The responsibility of these bodies have been well investigated by COFFEE JR., JOHN C., "Understanding Enron: It’s About the Gatekeepers, Stupid" (July 30, 2002). Columbia Law & Economics Working Paper No. 207. Available at SSRN: http://ssrn.com/abstract=325240.


30 At http://www.corporate-governance-code.de/

31 Article 161 of the Stock Corporation Act (AktG): "The executive board and supervisory board of exchange-listed companies shall declare once a year that the recommendations of the “Government Commission on the German Corporate Governance Code” published by the Federal Ministry of Justice in the official section of the electronic Federal Gazette have been and are being complied with or which of the Code’s recommendations are not being applied. The declaration shall be made permanently accessible to stockholders.”
In Italy, there is a private code whose enforcement is duty of a public authority.

Now let have a look at the Anglo-Saxon world.

The UK solution seems to be linear. Indeed, the Combined Code forms part of the UKLA Listing Rules\(^{32}\) and its violation have the same consequence as the violation of the listing rules themselves\(^{33}\). In other words, the corporate governance codes have their natural room in the listing rules\(^{34}\) and their natural supervisor in the stock exchanges, as the Italian Stock Exchange seems recognize when it says “Borsa Italiana [i.e. Milan Stock Exchange] shall monitor the implementation of this Code by the issuers and the ongoing development of the regulatory framework” (Italian Corporate Governance Code above cited, Introduction principle, p. 11). It is here clear that in such a systems there are – because of the new art. 124-ter Legislative Decree No. 58 of 1998 above cited – the premises of an inefficient confusion of Consob’s and Stock Exchange’s roles. How attractive such a legal enviroment will be expecially for foreign companies willing to be listed in Italy?

Also in the USA, the duty of checking the corporate governance statements of listed corporations pertains to the New York Stock Exchange, according to Section 303A of the Corporate Governance Listing Standards\(^{35}\). The SEC has to approve these standards, but the New York Stock Exchange has the responsability (i) to check the compliance with them on the part of listed corporations and (ii) to sanction non-compliance cases with a public reprimend letter or suspending trading or delisting a non complying company.

Public supervisors’ duties should be concentrated not on vague and opinable rules, like those contained in corporate governance codes, but just on the essential companies’ statements related to their economic and financial situation, as stated e.g. in the Section 37n of the German Securities Trading Act\(^{36}\), according to which “the Supervisory Authority is responsible for auditing the annual financial statements and corresponding management report, or the consolidated financial statements and corresponding group management report, of companies whose securities within the meaning of section 2 (1) sentence 1 are admitted for trading in the official or regulated market (Geregelter Markt) of a stock exchange in Germany, to ensure that they comply with the legal requirements including the principles of proper accounting or other accounting standards permitted by law”.

Preferring a guidance role of the Consob in the corporate governance field, moreover, seems to be a radical refuse of the ‘philosophy’ underlying the recent general reform of Italian corporate law (Legislativ Decree No. 6 of 2003, which came into effect on January 1st, 2004), wich we can summarize with the following words of the Prof. Guido Rossi: “The reform shifted the existing balance between mandatory and enabling rule, considerably toward the latter: expanding freedom of contract in corporate law, the new regulation relies on the expectation that a market for rules will develop, in which the interaction among the different corporate stakeholders will automatically select the most efficient rules. The

\(^{32}\) Available at http://www.fsa.gov.uk.


\(^{36}\) Available, available also in English version, at http://www.bafin.de.
legislature has adopted, in other words, regulatory competition theories as a basis to reform the Italian corporate scenario”

In short, thinking of the Consob as of the ‘oracle’ of the companies for any aspect of their governance, means actually leaving the option for a pro-market law which Italian legal system, just two years ago, made.

This way, it is strongly frustrated the role of self-regulatory organizations, even if they “can taylor its standard to the specific needs of [their] members in a way no public agency can do”

In addition, there will be a crucial problem concerning the division of competencies between Consob and other authorities, namely the Bank of Italy, at least in financial intermediation sector.

Indeed, the Bank of Italy, on the basis of the general provisions of the Banking Law (Legislative Decree No. 385 of 1993) and of the Consolidated Law on Financial Intemediaion (Legislative Decree No. 58 of 1998) has got a competency that covers “the limitation of risk in its various forms, permissible shareholdings, administrative and accounting procedures and internal check mechanisms” (see art. 6 Legislative Decree No. 58 of 1998), i.e. the heart of any corporate governance system.

And, as a matter of fact, the Bank of Italy (see for instance its Regulation concerning the organization and the corporate governance of SIM and SGR, September 1, 2004) has the prerogative of approving “the new corporate governance of the intermediary” resulting by a corporate charter amendment. All intermediaries must then submit to the Bank of Italy their “plans” describing “analitically the organizational decisions” they will implement.

That regulation refers, more properly, to the “comprehensive” corporate governance model of the firm, and it is undoubtful that such expression covers any organizational profile.

Thus, once the Bank of Italy has approved “the new corporate governance of the [listed] intermediary”, could the Consob any more scrutinize the “truthfullness” of the pertinent information? The “truthfullness” of that information has been already checked by the Bank of Italy, and in consequence, the unique sensible check the Consob could still do, regards the completeness of that information and its consistency with previous statements of the firm’s managers.

The same it is true for the banks. The Regulation of CICR of 5th August 2004, enacts the Bank of Italy is responsible to ensure that the organizational system and the division of duties and powers of ‘banks’ and financial intermediaries’ bodies should be sufficient to permit the sound and prudent management of authorized intermediaries, in a context of transparent conducts. To this end, the Bank of Italy should check supervised banks have adopted a model of corporate governance that guarantees an efficient management and effective checks, and in particular it should scrutinize that model is consistent with firm’s ownership structure, its dimension, complexity and strategy, eventually in the light of its inclusion in a group of companies.

After the Bank of Italy have done all such overall checks, to what extent could the Consob judge those firms’ corporate governance yet?

Although the art. 5 of the Consolidated Law on Finance has charged the Bank of Italy and the Consob with two different purposes (so-called ‘twin peaks’, i.e., “The Bank of Italy shall have authority for matters regarding the limitation of risk and financial stability”, while “Consob shall have authority for matters regarding transparent and proper conduct”), in practise such two aspects tend very often to be confused and the Law No. 262 of 2005 does not contribute to track a clearer borderline, so that conflicts and superimpositions are likely to occur.

Italian legislator seems have forgot the following OECD recommendation: “The division of responsibilities among different authorities in a jurisdiction should be clearly articulated and ensure that the public interest is served... Effective enforcement also requires that the allocation of responsibilities for supervision, implementation and enforcement among different authorities is clearly defined so that the competencies of complementary bodies and agencies are respected and used most effectively.”

Moreover, it is relevant to remind here that Consob “shall exercise the powers conferred on [it] in harmony with the provisions of Community law, apply the regulations and decisions of the European Union and act on recommendations concerning matters governed by this decree” (Legislative Decree No. 58 of 1998, Article 2 “Relationship to Community law”).

Since European Institutions’ provisions about corporate governance issues are day by day more detailed, in accordance with the just reminded general principle regarding relationship to Community law, the Consob should in any case found its decisions primarily on such European rules, obviously even if they eventually are divergent from those laid down in the corporate governance code chosen by the supervised company.

The new Italian Investor Protection Law, therefore, has not adequately taken into account the fundamental duty of Member States’ administrative Agencies to base their action on the Community law, and this is a potential harm to the European integration process.

Such a limit of the Italian law become particularly evident if we recall the Consob is a member of the CESR (the Committee of European Securities Regulators), whose mission is inspired by the fundamental consideration that “investors will need to be sure that they receive equivalent levels of protection across Europe and market players will need to know what they can expect in terms of regulation and that there is a level playing field across Europe.”

2. The new ‘judicial’ role of the Consob.

The Investor Protection Law (art. 27) delegates to the Government the adoption of a legislative decree “to establish reconcilement and arbitration procedures in investment services”, and specifies procedures should take place “in a debate... before the Consob...”. It is clearly defined a new role for the Consob, we can label as ‘judicial’.

Certainly, the Constitution (art. 47) and the recent serious cracks (cases Cirio, Parmalat, Banca Polare di Lodi’s hostile takeover towards Banca Antonveneta, etc.) require a better protection of inventors and savers.

But, from a policy point of view, the opportunity of giving the Consob this new judicial role is not certain.

Any judge has to be absolutely impartial, external to both the parties and independent in any suit submitted to him.

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40 MERUSI F., Le leggi del mercato. Innovazione comunitaria e autarchia nazionale, Bologna, 2002, 97: “il potere normativo delle autorità amministrative indipendenti, come del resto ogni altro potere da queste esercitato, non è più un problema di diritto interno …, ma è … un problema di diritto comunitario”.
There are reasonable doubts that the Consob could not satisfy entirely these requirements, obviously not because the Commission members and officers have not enough competency, skills and ethical conscience, but because of some organizational and procedural weaknesses.

It is likely such ‘judicial’ function will come into collision with other objectives.

In other words, sometimes it could be hard for the Consob to be effectively impartial, because it has to run a number of various activities.

The Consob has implemented the provisions of the Legislative Decree No. 58 of 1998 with a detailed corpus of rules regarding investment services providers and, secondly, it has to supervise and fine the intermediaries. In the next future, it also will have to judge the suits between intermediaries and their clients.

This way, in the hands of a single authority, there have been cumulated functions deeply different from each other, and this interlacement does not seem to be consistent with an optimal institutional system, that should be characterysed by sufficient checks and balances.

Let us take into consideration abnormal situations like, e. g., the following ones.

Firstly, the Consob ascertains - say, at the end of its investigations - the intermediary A is not affected with deficiencies in its structures and procedures.

Secondly, a client brings a suit against the same intermediary A before the Consob, asking for recovery of damages suffered as a consequence of A’s negligence, and he is able to demonstrate the investment services provider has not procedures suitable, e.g., to properly define its own clients’ risk propension/adversion.

In such a case, the Consob could be in a puzzling situation. If it agrees with the plaintiff, as a matter of fact it will contradict itself. This is the reason why one may doubt the Consob could have a wrong incentive to reject the claim.

So, one may think this is a negative effect of an improper sum of too many irreconcilable functions.

In the situation described above, we can recognize the typical reasons why it is possible to object to the judge. The Consob, indeed, could be in the same status of that judge who has an own interest in the case (art. 51 n. 1 Italian Civil Procedure Code) or who had known and already judged the same case (art. 51 n. 4 Italian Civil Procedure Code).

Some distortions could also happen in the situation specular to that one examined above.

Let us suppose the Consob has done some inspections. It has found some law violations and fined the intermediary.

As soon the news spread, many client, under this pretext, could have an incentive to file a claim against that financial firm for economic losses they have suffered. As in the previous case, the Consob could be in trouble, because it is in a status like those described by the cited art. 51 of Civil Procedure Code and that justify an objection against the judge, due to his bias.

The risk of an inadequate degree of impartiality by the Consob is, moreover, much acute after socially alarming scandals like Cirio’s or Parmalat’s ones. In such cases, the

42 Those rules are collected mainly in the Intermediaries Regulation adopted with Regulation No. 11522 of 1st July 1998 (www.consob.it).


44 MALAGUTI V., ONADO M., Andava a piedi da Lodi a Lugano, cited supra at note 12.
pressure of savers’ and investors’ movements (together with the suggestion of the mass-media) could, at some extent, jeopardize the independece of judgement of the Consob, which in its quality of public body could feel held to act as the “consumers’ herald” and not as an impartial judge/arbitrator. Instead, it is crucial not only the effective but also the the perceived impartiality.

Coming back to the Law No. 262 of 2005, we have to look at art. 27, 1st paragraph, lett. b), where there is the provision that the next legislative decree (that will describe the arbitration procedure before the Consob) will have to keep in force the fines to be inflicted on intermediaries because of infringements of disclosure and fair conduct rules.

This means that if the Consob’s specialized ‘arbitration department’ has found those infringements, then it should submit its judgement to the, e.g., Intermediaries Division or Issuers Division that could inflict the proper fines on the same firm, for the same reason. It is easy to foresee that the Intermediaries Division or Issuers Division could be strongly influenced and could not run its activity without bias.

The Law No. 262 of 2005 risks to permit a confuse exercise of a variety of functions and this way it forgets the essential principle of the separation of powers: the Consob is at same time legislator, supervisor and judge.

For this reason, by its activities some vicious circles could arise, harmful for its governance and accountability.

Our legislator should have reminded the OECD principle according to which “Regulatory responsibilities should be vested with bodies that can pursue their functions without conflicts of interest and that are subject to judicial review”45.

Other European jurisdictions have probably been more responsive to such necessity of avoiding a concentration of numerous functions in the hands of their Supervisors, with the recalled risk of undermining their impartiality.

Spain, for example, has established three new “Comisionados”, i.e. the “Comisionado para la Defensa del Cliente de Servicios Bancarios”, the “Comisionado para la Defensa del Inversor” and the “Comisionado para la Defensa del Asegurado y del Participo en Planes de Pensiones”, separate from respectively the Banco de España, the Comisión Nacional del Mercado de Valores and the Dirección General de Seguros y Fondos de Pensiones. Each Comisionado has granted «caracteres de independencia y autonomía y a los que se dota de los medios profesionales y operativos necesarios para asegurar la eficacia en su actuación » (Real Decreto 303/2004, of February 20).

The Comisionados should submit to the pertinent Supervisor the infringements of relevant securities laws and regulations they have found46, but as they are separate and independent, the risk of conflict of interest and partiality is much less likely to raise.

The UK has appropriately avoided to transform the FSA in an Ombudsman, as well.

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46 Each Comisionado indeed should: “f) Remitir a los servicios de supervisión correspondientes aquellos expedientes en los que se aprecien indicios de incumplimiento o quebramiento de normas de transparencia y protección de la clientela con arreglo a lo establecido en el artículo 24.a) de la Ley 44/2002, de 22 de noviembre, de medidas para la reforma del sistema financiero” (art. 4 Orden 303/2004).

See also “Artículo 15. Conductas sancionables”, pursuant to which “Si la tramitación de los expedientes de quejas o reclamaciones revela datos que puedan constituir indicios de conductas sancionables, en particular, cuando se deduzca el quebrantamiento de normas de transparencia o protección a la clientela o se detecten indicios de conductas delictivas, o de infracciones tributarias, de consumo o competencia, o de otra naturaleza, el Comisionado para la defensa del cliente de servicios financieros pondrá los hechos en conocimiento del organismo de supervisión al que esté adscrito a los efectos oportunos”. 

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Indeed, the Financial Ombudsman Service has been set up to deal with individual disputes between consumers and financial firms, and it is independent from FSA. Naturally, notwithstanding “each of these bodies is operationally independent and has distinct functions, they will need to co-operate and communicate constructively with each other”\textsuperscript{47}. And even in this case, the Financial Ombudsman Service shall inform the FSA, where it sees indications of issues which may have regulatory implications. But their respective independence seems to be extremely important in order to prevent the “confusion or misunderstanding as to their respective roles”\textsuperscript{48} and the partiality of the former or of the latter.

In the field of consumer disputes resolution, we can also recall the provisions of acts that can, \textit{mutatis mutandis}, fit the Consob in its quality of arbitrator.

For instance, the \textit{European Code of Conduct for Mediators}, adopted with the assistance of the services of the European Commission, recommends to avoid “the mediator, or a member of his or her firm, having acted in any capacity other than mediator for one of the parties”.

And also the Commission Recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes (2001/310/EC) stresses the independence requisite, requiring inter alia responsible for the procedure has “no perceived or actual conflict of interest with either party”.

It is finally very significant the approach implicitly raising from art. 53 (“Extra-judicial mechanism for investors' complaints”) of the Directive 2004/39/EC of 21 April 2004 on markets in financial instruments (MiFID), according to wich “Member States shall encourage the setting-up of efficient and effective complaints and redress procedures for the out-of-court settlement of consumer disputes concerning the provision of investment and ancillary services provided by investment firms, using existing bodies where appropriate” [italics added]. The Directive seems, on principle, to give priority to the existing ADR bodies, in the light of well-tested assumptions summarized in the ‘Ockham's razor’ principle. If, then, entities [and - we can add - ‘functions’ as well] should not be multiplied beyond necessity, in the case at stake we cannot easily see any “necessity” to invent this new Consob’s task\textsuperscript{49}.

Again, we can conclude that the Law No. 262 of 2005 does not take into due consideration the principles elaborated at EU level.

We have, on the other hand, noticed that the Consob judicial power requires to be activate by the voluntary decisions of the parties, who can at any time bring the same suit before the ordinary judges. But if the aim was to deflate the ordinary civil procedures - in

\textsuperscript{47} See the “Memorandum of Understanding between The Financial Services Authority and the Financial Ombudsman Service”, Introduction, p. 1.

\textsuperscript{48} Ibidem, p. 3.

\textsuperscript{49} Maybe we can recall for the Consob the same warning principle formulated by the so-called ‘Sapir Report’ of July 2003 (\textsc{SAPIR A. (Ed.)}, \textit{An Agenda for a Growing Europe. The Sapir report}, New York: Oxford University Press, 2004), at p. 111, with reference to European institutions governance: “Lack of clarity in the core functions of the institutions is detrimental to both efficiency and legitimacy”. See also FSA, \textit{Supervising Financial Services in an Integrated European Single Market: A Discussion Paper}, January 2005, p. 39 (5.21): “Finally, trust is also more difficult to develop where supervisors have other, competing obligations and responsibilities: such potential conflicts need to be reviewed and removed if appropriate”.
Italy extremely slow and complex - then it should be necessary to give that competency to an independent body with a single, clearly limited, purpose.

The hurried decision to vest the Consob with this judicial duty puts the lights on the crisis of Italian civil judiciary and confirms the inability to reform it.

During the parliamentary iter of the law at stake, several deputies proposed to establish sections of the courts specialized in financial intermediation (on the model, e.g., of the Dutch Enterprise Chamber of the Court of Appeal in Amsterdam or the UK Financial Services and Markets Tribunal), but again this potentially very fruitful means was rejected, maybe also for implicit ideological and historical reasons.

The same unlucky destiny has hurt the proposal of introducing in the Italian system the class actions.

As a result, we may feel resigned to experiencing new financial and corporate scandals occurred in the absence of the ability for investors to prevent them, with the futile consolation of being able to crucify the Consob.

With respect to this issue, the Law No. 262 has been a great missed opportunity and has introduced some systematic contradictions.

Indeed, the same Law No. 262 (art. 29) gives competency to settle claims involving violations of banking operations and services transparency a ‘decisory body’, expression of the self-regulation of banks (a kind of ombudsman). It is not clear at all the reason why that Law has designed two different settlement and arbitration systems for issues that in daily bargaining are often so hardly distinguishable: investment services and banking operations/services, mainly in countries as Italy, where banks have the lion’s share of the former and of the latter. The problem is addressed by the cited Spanish Orden 303/2004, wich, in its art. 1.2, provides adequate criteria to remedy such overlapping of competencies.

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52 See, e.g., LENER R., Le “class action” scomparse, “Analisi giur. dell’econ.”, n. 1/2006, pp. 129 ss. At the beginning of XV legislature, however, several draft bills have been proposed (see, e.g., Progetto di legge S. 679 - “Disposizioni per l’ introduzione della “class action” and other bills cited by ASSONIME, L’azione collettiva per il risarcimento del danno: elementi di riflessione, Roma, 2006, available at www.assonime.it).


54 “Cuando una queja, reclamación o consulta corresponda, por razón de su contenido, al ámbito de competencia de dos o más comisionados, el expediente se tramitará por aquel que hubiera conocido primero de la reclamación, y si esta circunstancia no se puede determinar, por el que se decida en turno de reparto por acuerdo entre ellos en consideración a la cooperación que, con la finalidad de armonizar y mejorar las prácticas que utilizan en el ejercicio de sus funciones, establezcan para la prestación de la asistencia que pudieran recabarse en el eficaz ejercicio de sus competencias. En estos casos, el comisionado al que
The Law at stake seems have forget the existence of an Italian ombudsman, the “Ombudsman Bancario”, wich is a member of FIN.NET, the European network for settling cross-border financial disputes out of Court. Probably, it would be more productive for the Government to encourage initiatives such this one, because of the need to stimulate the full involvement and responsibility of consumers’ and firms’ associations, instead of charging just one public authority with the entire responsibility for these matters.

In order to implement efficient alternatives to the judicial proceedings it is indeed essential the cooperation among all parties concerned, and these parties could feel more protected by a system that grants the “equal representation to consumers and professionals”.

The Law No. 262 has chosen a more ‘dirigistic’ option with the twofold effect of:

- having a body (Consob) probably, in some cases, not fully impartial;
- not providing private parties involved and their associations with sufficient incentives.

Furthermore, the Law No. 262 surprisingly shows another contradiction. The art. 27, 1st paragraph, lett. a), requires the Government to take into account the principles of the Legislative Decree No. 5 of 2003 (proceedings regarding claims about corporate law an financial intermediation), issued coupled with Legislative Decree No. 6 of 2003 (general reform of corporation law).

The Legislative Decree No. 5 itself (artt. 38 ff.) permits conciliation and arbitration procedures, and gives the pertinent competency to “conciliation bodies” identified with public or private entities (e.g. the Chamber of National and International Arbitration of Milan founded by the Chamber of Commerce of Milan), while public supervisors, as the Consob or the Bank of Italy, are never mentioned.

To conclude, the Law No. 262 leaves and neglects both the paths traced by the Legislative Decree No. 6 of 2003 (see supra), as to the corporation law, and by the Legislative Decree No. 5 of 2003, as to the proceeding rules.

3. Insider trading and market manipulation. An efficient competition between the Consob and the Judiciary?

In this paragraph we will have a look at provisions of Legislative Decree No. 58 of 1998, as amended by Law No. 62 of 2005, regarding insider trading and market manipulation, according with the Directive 2003/6/EC.

The Law No. 62 of 2005 has enacted a system we may call ‘binary’, to some extent similar to the German one (Sections 38 and 39 of the Securities Trading Act, Gesetz über den Wertpapierhandel/ Wertpapierhandelsgesetz - WpHG).

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55 EC Commission Recommendation on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes (98/257/CE), Principle of Independence.

Indeed, it has introduced in the Legislative Decree No. 58 of 1998 new provisions (artt. 187-bis and 187-ter) which consider insider trading and market manipulation conducts as administrative violations in addition to the same criminal offences (artt. 184 and 185).

The Law No. 62 has literally followed the provision of the art. 14 of the Directive cited above: “Without prejudice to the right of Member States to impose criminal sanctions, Member States shall ensure, in conformity with their national law, that the appropriate administrative measures can be taken or administrative sanctions be imposed”. According to this provision, then, it was not binding to sum administrative and criminal sanctions to punish the same violations.

It is probably useful to remind that this provision has its roots in the consideration that “a full harmonisation of penal sanctions is not foreseen in the EC Treaty”\(^59\), so that the Directive 2003/6/EC has been written in those ambiguous terms.

As a consequence, Italian Courts and the Consob can start two proceedings (judicial the former, administrative the latter) that have the same subject.

We need to remark such two proceedings are autonomous so that “The administrative and appeal proceedings referred to in Article 187-septies may not be suspended on the grounds that criminal proceedings are pending covering the same facts or facts on which the definition of the case depends” (see art. 187- duodecies legislative Decree No. 58 of 1998).

This system could be detrimental for the cooperation among Supervisors of EC Member States, joined in the CESR, because pursuant the Directive 2003/6/EC (cf. art. 14, par. 2) “The competent authorities may refuse to act on a request for information where:

[...]

— judicial proceedings have already been initiated in respect of the same actions and against the same persons before the authorities of the Member State addressed, or

— where a final judgment has already been delivered in relation to such persons for the same actions in the Member State addressed”\(^60\).

This implies that, in transnational cases, the Consob’s cooperation with its counterparts could be deficient or, at least, delayed. In a more a more integrated European financial market, this obstacle could undermine the Consob’s ability to fully play its role in the perspective of the necessary “supervisory convergence” among national Regulators, that

58 Cf. Sections 38 and 39 of the Securities Trading Act, Gesetz über den Wertpapierhandel/ Wertpapierhandelsgesetz – WpHG.
60 See also art. 16, par. 4: “The competent authorities may refuse to act on a request for an investigation to be conducted as provided for in the first subparagraph, or on a request for its personnel to be accompanied by personnel of the competent authority of another Member State as provided for in the second subparagraph, where such an investigation might adversely affect the sovereignty, security or public policy of the State addressed, or where judicial proceedings have already been initiated in respect of the same actions and against the same persons before the authorities of the State addressed or where a final judgment has already been delivered in relation to such persons for the same actions in the State addressed. In such case, they shall notify the requesting competent authority accordingly, providing information, as detailed as possible, on those proceedings or judgment.”.
is one of the most important aims – in the financial services sector – of the Commission of European Communities\textsuperscript{61} and of the CESR too\textsuperscript{62}.

Although Consob and the judicial authorities shall cooperate with each other (see art. 187-decies), it is surely possible that their decisions will be divergent. Homogeneity of information doesn’t imply automatically homogeneity of judgement.

With regard to this issue, we should remind that every year Consob has submitted to the competent public prosecutor a number of cases\textsuperscript{63}, while in the law reports you can find only very few cases\textsuperscript{64}.

Furthermore, we should keep in mind that the Consob’s measures imposing sanctions may be appealed before the Court of Appeal. We may therefore view as many decisions as many bodies are involved in the same case.

This system seems to be too much complex and it does not guarantee neither the \textit{ne bis in idem} principle nor the law certainty.

\begin{itemize}
  \item Which impact on independence and accountability of Consob?
  \item To answer this question, we may consider some hypothetical facts as the following ones.
  \item Mr A is fined by Consob because of a violation of art. 187-bis of Legislative Decree No. 58 of 1998 (insider trading). With regard to the same conduct (remember that administrative and judicial proceedings are autonomous from each other), the public prosecutor, conversely, concludes Mr A is innocent and quits the case.
  \item Which effect may this contrast produce on market dynamics? There will be at least a big confusion, that evidently does not help “the protection of investors and the stability, competitiveness and proper functioning of the financial system” (see art. 5 Legislative Decree No. 58 of 1998).
  \item At the same time, it is necessary to talk about the consequence of radical different judgements of the Consob and a criminal court about the same case. Are the Consob officers responsible for a condemnation not confirmed by a Court?\textsuperscript{65}
  \item All these questions should have a negative answer, in particular if we put them on the table of the autonomy principle. But, it is becoming more and more common that Courts admit the compensation in favor of private citizens vis-à-vis the public administration, because of an abuse (or negligent use) of its powers. So, it is really reasonable to imagine Mr A (or the company he has been working for) claiming for compensation from the Consob, after a Court had cancelled an insider trading condemnation given by the Consob.
  \item At this point we reach an incredible number of judgements with a terrible confusion.
\end{itemize}

The difficulties affecting the cooperation between the Consob and the public prosecutors have already emerged in the past. In one case\textsuperscript{66}, e.g., the public prosecutor has

\begin{itemize}
  \item CESR, The Role of CESR at Level 3, cited above.
  \item Recently the Government passed a bill that limits the responsibility of officers to the extent their conducts are intentionally harmful or, at least, affected by gross negligence (cf. art. 4, bill of legislative decree implementing the art. 43 of Law No. 262 of 2005).
\end{itemize}
argued that the investigations conducted by the Consob and the disclosure given via its official bulletin were detrimental for the subsequent judicial enquiries – a clear testimony of their ‘collective action problem’, which could been exacerbate by the new reinforced autonomy granted to the Consob.

With the new binary system, finally, the Consob could become more and more willing to have always the same judgement of judicial authorities. It is even possible that the Consob will take decision only after consulting the public prosecutors. In this case, nothing different between current law in action.

In the 2004 Consob Annual Report (page 83), about this matter, the Commission wrote: “The decline in the number of reports to the judicial authorities on suspected cases of insider trading reflected both a more stringent selection of the market anomalies in light of which to open investigations and Consob’s determination to draw the attention of the judicial authorities only to cases where there was incontrovertible evidence of connections between the final customers who had ordered anomalous trades and the possible sources of inside information.”

There is a serious risk of an excess of prudence in the Consob’s work. This prudence is not entirely consistent with the right to punish also a mere insider trading attempt (see art. 187-bis, 6th paragraph, Legislative Decree No. 58 of 1998, “For the cases referred to in this article [i.e. insider trading], attempted violations shall be treated as completed violations”). Moreover, administrative violation is punishable even if not intentional (see art. 187-bis, 4th paragraph, Legislative Decree No. 58 of 1998). There are so just these two differences between an insider trading fact as an administrative violation and the same fact as criminal violation.

The rationale of these differences is the purpose to let the Consob eliminate as soon as possible any obstacle to the proper functioning of financial market, without need to demonstrate a complete irregular conduct nor it was intentional.

The “excess of prudence”, we referred to, will probably be opposite to this rationale and, ultimately, the new powers of Consob could not be, in practise, so effective.

But the previous one is not the only hypothesis we can formulate. By contrast, we can also imagine that the ‘competition’ between the Consob and the public prosecutors could lead toward the following worrying result.

The former and the latters could devote an excessive amount of resources and time to find market abuse cases, without paying the due attention to the rights of the market participants (a kind of “witch-hunt”), because, by doing so, they can increase their own visibility and legitimacy.

To understand the binary system, as in the case of the settlement procedures (see par. 3 above), we may remember the legislator’s lack of confidence in the judicial proceeding effectiveness, in the present case the criminal one.

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Almost no one is satisfied with these proceeding, but the sound solution is not to put in place a parallel administrative procedure, with a distorsive impact on an other authority vested with a different mission.

The Directive 2003/6/EC called for a simpler institutional system, as we may argue on the basis of the 36th ‘whereas’, that unmistakebly says: ”A variety of competent authorities in Member States, having different responsibilities, may create confusion among economic actors. A single competent authority should be designated in each Member State...”.

Maybe, a more linear model with two subsequent stages could be more efficient.
At first stage, Consob is the sole body wich punish insider trading and market manipulation conducts.
But its decisions are, at the second stage, always contestable before the court of appeal. There are both checks and balances, and not confusion between two authorities.68

We may now review the implication of Law No. 62 of 2005 on the Consob governance.

The administrative procedure shall be consistent with the necessity that “investigatory and adjudicatory functions ... be separate” (artt. 187-septies, 2nd paragraph, e 195, 2nd paragraph, Legislative Decree No. 58 of 1998).
Implementing this provision, Consob has enacted the Regulation n. 15086 (organizational and procedural rules to inflict sanctions) and the Regulation n. 15087 (criteria to exercize its supervisory powers), both dated 21 June 2005.

In a nutshell, investigatory function belongs to operational divisions (Intermediaries Division, Issuers Division, Markets Division), while the adjudicatory function belongs to the Commission (the ‘board’ with five members appointed by Government). It seems to be, apparently, a clear division of powers.

But, on the other hand, in those regulations there is probably a contradiction, because they require the authorization of the President (the chairman of the board) to exercise powers, such as to require listed issuers to provide information and documents; to carry out inspections; to require existing telephone records; to conduct personal hearings; to seize property that may be confiscated, and so on.

Those powers are all tipycal investigatory ones, but in spite of this, the President is charged with deciding if and when to put them into effect.
The principle of distinction between investigatory and adjudicatory functions, therefore, does not seem to be fully safe.69

The President (more exactly, the entire Commission, given that the chairman has to notice his colleagues when he had authorized inspections, personal hearings, and so on) is involved in the investigatory function and, therefore, it is possible to some extent a bias problem.

This contradiction (i.e. the incomplete distintion between investigatory and adjudicatory functions) has its old root in the Law No. 216 of 1974, that set up the Consob,

whose art. 1, 6th paragraph, roughly says: “The President oversees investigatory activities...”.

The Regulation No. 15087 mentioned-above is consistent with this old provision, while it is in contrast with the new principle about separation of investigatory and adjudicatory functions.

This means it is not sufficient to give more powers an authority, but it is also necessary to reform its governance, so that it will be able to put them into effect, without conflicts of interest and bias.

The weaknesses of the new provisions concerning the ‘binary’ system and the proceeding rules discussed above highlight the possible infringement of the fundamental principles of the Convention for the Protection of Human Rights and Fundamental Freedoms. This risk was perceived by the EC Commission when, in its proposal of 30.5.2001 about market abuse directive, it put the following warning “When determining the sanctions and organising a sanctioning procedure, Member States will have to comply with the principles of the Convention For The Protection Of Human Rights And Fundamental Freedoms” (cf. p. 12, Explanatory Memorandum, sub art. 14).

And that risk is not a theoretical one.

The French experience is very eloquent as regard to this aspect, because the Court of Appeal of Paris, in the 2001, in the case 

Kpmg Fiduciaire France c. Commission opérations bourse (the former French supervisor, replaced by the AMF) declared null and void a sanction for the incompatibility of the procedure (not distinction between the prosecutor and the body in charge with the final decision) with the art. 6 of the Convention cited above (“Right to a fair trial”, the modern version of the ancient principle of the due process of law laid down in a famous Statute by Henry III, and then passed into cap. 39 of the Magna Charta, becoming one the fundamental principles of the common law systems).

The innovative rationale of the Court of Appeal of Paris is the principle according to which “everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law” (cf. Art. 6 cited) not only when the sanction is a criminal one, but even when it is formally qualified as an administrative one.

In other words, anyone has the right to be judged by an independent and impartial judge even if this is not, formally speaking, a ‘judge’ but an independent administrative agency (in the case at stake, the French Cob and, in the next future, probably the Italian Consob) and even if it is its responsibility to punish someone not with a stricto sensu criminal penalty but just with an administrative one.

The French case should had make anyone aware of one necessary institutional precondition for an impartial exercise of punitive powers by an administrative body. The French legislator, indeed, has better designed the structure of the AMF (the new Autorité des marchés financiers), that consists of two bodies with different responsibility: the Board

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71 See also MIRATE S., L’applicabilità dell’art. 6, par. 1, CEDU al processo amministrativo secondo la giurisprudenza della Corte Europea dei Diritti dell’Uomo, “Rivista Italiana di Diritto Pubblico Comunitario”, n.1, 2004, pp. 119-145.

and the Enforcement Committee - a committee with exclusive powers to impose penalties and sanctions -. In the Italian system it seems absent a such clear division of powers.

It would maybe also be desirable foreseeing a remedy similar to that provided by Section 127 (4) of the U.K. Financial Services and Markets Act (FSMA) of 2000 that confers the right to refer the case to the Tribunal (the Financial Services and Markets Tribunal), whenever the FSA decides to sanction someone under the Section 123 of the FSMA.

4. Conclusions and perspectives

The recent laws on the market abuse and investor protection move, on paper, towards the right direction, that is the aim of improving the standard of market transparency and promoting a more proper conduct of intermediaries’ and listed companies’ management. The microeconomic improvement of firms’ corporate governance will hopefully score a macroeconomic success: the more effective protection of investors, and the stability and competitiveness of financial markets.

On the other hand, those laws do not seem – on the basis of an ex ante assessment – have made the sound political, institutional and procedural options.

They do not grant to Consob a sufficient degree of independence, because the Government did not give it enough human and financial resources. Therefore, in spite of all new its powers, it is not certain it will be able to act always effectively, timely and impartially.

The Consob’s duty of checking the truthfulness of disclosures concerning compliance with a code of conduct of any listed firm could be unfeasible and could lead towards a uniform model of corporate governance, ‘planned’ – by a centralized perspective – by an administrative authority 73.

Conditioned by this regulatory approach, firms have probably an incentive to comply with codes of conduct just formally, because it is much more costly to explain deviations from them and obtain the consent of Consob rather than declare to be in line. (Compliance with codes just as ‘box ticking’ option).

Furthermore, those codes are quite generic and do not give precise rules of conduct but just guidelines that need to be ‘interpreted’ by each firm in accordance with its specific characteristics.

Such a check of companies’ truthfulness statements on the part of Consob, strictly conceived and implemented, could lead Italian Supervisor far beyond the business judgement rule, denying the prerogatives of any firm’s management and control bodies.

In sum, the Italian legislator has designed a ‘paternalistic’ regime 74, without providing investors with the appropriate means to defend their rights before the ‘natural’ authorities: the judges. It is now even more urgent a general reform of civil and commercial proceedings and the implementation of useful devices, like some specialized sections in the

73 In addition to the authors cited above, see CAFAGGI F., La responsabilità dei regolatori privati. Tra mercati finanziari e servizi professionali, “Mercato Concorrenza Regole”, n. 1/2006, pp. 9-60.

tribunals and the class actions. In other words, it is necessary to implement an institutional environment, in which the private enforcement is effective and not too costly.\footnote{See BERGLÖF E., CLAESSENS S., \textit{Corporate Governance and Enforcement}, cited supra and, with reference to the initiatives promoted at EU level by the European Commission, LANNOO K., KHACHATURYAN A., \textit{Reform of Corporate Governance in the EU}, \textit{“European Business Organization Law Review”}, 5, 2004, pp. 37 ff.}

With regard to banks and other financial listed intermediaries, there could be a puzzling confusion of the Consob’s and Bank of Italy’s competencies.

Laying on Consob a role of arbitrator / mediator to settle claims concerning investment services, there is the premise of vicious circles due to a interlacement of substantially different functions and, as a consequence, severe bias problems could raise.

The inappropriate ‘competition’ between Consob and judicial authorities (first of all, public prosecutors) about insider trading and market manipulation cases does not seem to be efficient, because it produces a sort of prisoner’s dilemma: the former is hardly conditioned by the line of action of the latter and, conversely, the latter need the expertise and the information of the former.

There is not, then, a clear division of powers and competencies. Besides that, there are both the risk of infringement of the \textit{ne bis in idem} principle and of conflicts of judgements, with uncertainties very harmful to the markets.

With the right purpose of improving corporate governance, transparency, disclosure and, finally, protection of investors, the Laws at stake have concentrated in the hands of Consob a variety of powers and functions, while they have not deal with independence and governance deficiencies of this authority, and in the meantime the investors have been left without efficient means to protect themselves.

These conclusions, however, are provisional, especially with regard to the Consob’s duty to check the truthfulness of listed companies’ statements regarding the compliance of their corporate governance with a certain code.

The pertinent provision of art. 124-ter Legislative Decree No. 58 of 1998, added by Law No. 262/2005, is indeed very probably a still-born principle, since the bill of a new legislative decree implementing the art. 43 Law No. 262 seems oriented to abolish it.\footnote{The bill is now available, e.g., at www.assonime.it. See L. CARDIA, Chairman of the Consob, \textit{Audizione dinanzi la 6^ Commissione permanente del Senato (Finanze e Tesoro) - Indagine conoscitiva sulle questioni attinenti all’attuazione della legge 28 dicembre 2005, n. 262, recante “Disposizioni per la tutela del risparmio e la disciplina dei mercati finanziari”} of 27 September 2006, at www.consob.it.}

So, this paper really is - necessarily - a work in progress.