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INDEPENDENT AUTHORITIES IN FINANCIAL MARKETS: PROPOSALS FOR REFORM

1. Origin and Development of the Independent Authorities in Italy

The proliferation of Independent Administrative Authorities in the past decade calls for an overall reflection upon their role and their position within the administrative system. A rethinking of the role of such Authorities, within a broader system, is also necessary to address growing criticism on the excessive and often scarcely coherent recourse to such bodies, which have undoubtedly certain exogenous elements in the context of the Italian traditional system of the state authorities, as commented in the course of the present paper.

The various phases in the development of the Independent Authorities may be summarised as follows.

Consob[1] and ISVAP[2] have been the first Italian Independent Authorities in Italy. They were established on the model of common law countries' governmental agencies. This model was considered to better address the need for public supervision of private activities in the context of rapidly expanding markets which were at the time also subject to an unprecedented integration at both a domestic and international level. These two authorities have been originally set up respectively as a part of the Treasury and of the Ministry of Industry and only later acquired the status of Independent Authorities[3].

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[1] Law no 216/1974

[2] Law no. 576/1982

[3] Consob with Law no. 281/1985 and ISVAP gradually through various provisions, the last of which being Legislative Decree no. 373/1998

In 1990, the Press Authority (*Garante per l'Editoria*[4]) and the Antitrust Authority (*Autorità Garante della Concorrenza e del Mercato*[5]) were established in the context of harmonising European legislation.

The 90s have seen a proliferation of these bodies. Within a limited time frame the following authorities were established: *Commissione di garanzia sullo sciopero nei servizi pubblici essenziali* (Authority regulating strikes in the essential public services) by Law no. 149/1990, *Autorità per l'informatica nella Pubblica amministrazione* (Authority regulating IT in the Public Administration) by Legislative Decree no. 39/1993, *Commissione di vigilanza su fondi pensione* (Pension Funds Authority) by Legislative Decree no. 124/1993, *Autorità per la vigilanza sui lavori pubblici* (Public Works Authority) by Law no. 109/1994, *Autorità per i servizi di pubblica utilità* (Public Utility Services Authority) by Law no. 481/1995, *Garante per la Protezione dei dati personali* (Personal Data Protection Authority) by Law no. 675/1996 and *Autorità per le garanzie nelle communicazioni* (Communications Authority) by Law no. 249/1997 to which the functions of the Garante per l'Editoria were transferred.

Various economic and political reasons led to the introduction of the Authorities within the Italian administrative system. Economic integration, rapid development of the markets, abolition of monopolies, growing competition, the impact of economic activities on public collective interests together with the approval of sectoral EU policies and legislation, led to the introduction of new forms of control of the economy which ensured the necessary equidistance between public bodies and market operators.

Essential public services were the sector most affected by this process due to the gradual decline of the economic model of direct management of essential public services by the State and generally to the end of direct State intervention in the economy. In the new competitive context, the need for a type of regulation which was, as far as possible, neutral and independent of the interests involved was felt. In other words, the State was no longer a player of the economic game but was now a umpire.

One further element determining to the multiplication of such new institutional entities was the growing scepticism as to the ability of the traditional public administrations to carry out tasks requiring specific technical expertise.

The variety of reasons for the establishment of the different Independent Authorities in the course of time is reflected also by differences in their respective roles. It is therefore difficult to identify a single model of Authority. Nonetheless, this is possible - on the basis of the laws providing for the establishment of each Authority and of the functions attributed to the Authority therein - to classify them into categories. On the basis of this exercise, an assessment as to whether each category is consistent with the traditional structure of State Authorities can be made.

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[4] Law no. 223/1990, subsequently *Garante per la Radiodiffusione e l'Editoria* (Press and Broadcasting Authority)

[5] Law no. 287/1990

2. The concept of Independence

When starting a summary of independent administrative authorities, it is perhaps useful to warn that this definition will be used to more with the intention of following the widely known *nomen iuris*, than of defining the legal nature.

On the other hand, the definition "independent administrative authority" brings to mind legal concepts which, upon careful analysis, seem to be contradictory.

This is an indication of the difficulty of placing such bodies in the traditional administrative system.

Initially, legal academics defined them as "independent administrative bodies with a high level of impartiality" or as "*super partes* bodies", and only later was the expression "independent administrative authorities" used.

Such name however refers to a reality which is not homogeneous due to the variety of entities, objectives, setting-up times, powers and intervention sectors and which arises from the policy that the legislator intended to pursue through their institution.

Although the term "authority" brings to mind a different aspect of public authorities (which implies that they no longer function through the traditional bodies, but through different bodies such as the Authorities) in relation to the needs which have recently come to light in our society, it fails to qualify the new bodies from a subjective point of view or with regard to the action they take. Therefore, one may deduce that the term does not have a precisely defined legal value and could be used by the legislator as a synonym of public body.

As for the term "administrative", we should emphasise that a body may be described in this manner, with regard to its activity, when it is connected to the public administration and therefore has an administrative function which is aimed at the effective protection of public interests (which may be even be protected through the issue of authoritative acts). Thus, with this traditional definition in mind, the term "administrative" would appear to clarify the concept expressed by the term "authority" further, by specifying that the latter acts through administrative decisions.

However, the authoritative power which is attributed to many authorities is normally exercised both in the administrative field and in the private field, and also in the regulatory and jurisdictional field.

Considering this variety, these bodies' activities do not appear to fall within the scope of administrative activity.

Even the qualification "independent" does not appear to be self evident.

Independence may in fact be defined as a special position whereby an entity has been exempted by law from complying with the rules in force within the organisation in which the principle of subordination and hierarchy applies.

But by accepting this meaning of independence, a contradiction with the term "administrative" arises. In fact, a body may be defined as "administrative" if it is subject to the rules of the public administration and to the principle of hierarchy which also implies powers of direction and control. Consequently, a body which is defined as "administrative" is unlikely to be defined as independent at the same time.

The concept of independence brings to mind first and foremost the position of the Judiciary which according to the Constitution is subject exclusively to the Law.

Since the independence of such bodies, as an expression of their neutrality, is their fundamental characteristic, they cannot be of an administrative nature.

Considering the difficulties of finding the correct term for these bodies, it is necessary to analyse the various (connected) reasons underlying the introduction of the independent authorities to our system.

In the first place, the model of independent authority is the result of a transposition of the common law model to our legal system. However, since the administrative structure of the common law countries is completely different from the Italian administrative structure, considerable difficulties have arisen in placing these bodies in the administrative system.

First of all, as a result of the creation of these of the independent authorities, traditionally administrative functions have been assigned to bodies which are extraneous to the Executive.

This may in part be justified by the Constitutional provisions (articles 97 and 98) which are based on the principle of the separation of administration from politics.

The tendency to separate politics from administration emerged at the time of the unification of Italy and was supported by those who saw the potential dangers of political interference in the administration. Besides, the administrative organisations are only indirectly guaranteed by the Constitution, since the public administration falls within the scope of Government due to the provision that ministers are politically responsible for the acts carried out by their Ministry.

The Independent Authorities "guarantee (compliance with) the rules" and are in a different position with respect to the public administration in the traditional meaning of the term. They generally have a regulatory function rather than a propulsive and executive role. They are in substance "arbitrators" and have an essentially tutorial role which is aimed at the reconciliation of all the interests involved in each matter.

These authorities were set up with the intention of ensuring the right balance in sensitive sectors which provide services to the public that are inherent to fundamental, and thus unrestrainable, rights. In fact the interests involved are of such importance that they need preventive, continual and constant protection and have to be subject to permanent supervision. Sometimes the interests in question are protected by the Constitution (such as for example the protection of savings in any form whatsoever, article 47 Cost.,which gave rise to Consob or the freedom of speech, article 21 Cost., which brought about the institution of the Communications Authority).

The change in meaning of the very notion of "*interesse pubblico*" is also of great importance. It no longer appears to be something imposed by a rule, but something which was constructed in light of the common law concept of "public interest", which indicates the objective meaning of public interest as referred to the State as a community and not as an entity as well as its neutrality.

This means that Authorities are bodies which do not pursue their own interests, but rather constitutionally recognised interests which are held by citizens. They occupy a special place within our legal system and are first and foremost independent bodies due to the need for neutrality and for separation from the traditional administrative organisations.

We can conclude that the characteristic which all the Authorities have in common is that of independence which distinguishes them from the traditional concept of administrative body provided by the constitution through the characterisitic of impartiality.

However, the characteristic of independence is not always present and sometimes it is only partially present.

Some Authorities are not completely separated from the Executive nor do they have the same degree of neutrality with regard to the interests involved which is typical of a judge, who is only subject to the law and is only required to apply the consequences provided by law. It would therefore appear that these Authorities fall under Administrative Law, since they weigh up the interests involved with a view to maximising the public interest. The problems pertaining to the broadening of the scope of Administrative Law and to the unavoidable entry into the Constitutional system are only relevant to the Authorities which, unlike the others, are of an independent and neutral nature.

3. Are the Independent Authorities really Independent?

If one analyses the features and functions of the Authorities in Italy, it appears that only some of them are entrusted with the protection and regulation of rights and interests enshrined in the Constitution, in addition to the features that are common, albeit to differing degrees, of any independent authorities (autonomy and independence, separate organisation and accounts). Indeed, such commons features are considered as a pre-requisite of the necessary impartiality and neutrality of their activities.

Some Authorities are entrusted with the supervision of economic sectors interested by a variety of interests (which are not actually fully fledged rights) that need to be balanced in order to attain the public objectives they pursue and the protection of constitutionally recognised rights or interests. In this case the Authorities make use of authoritative, discretionary powers and, above all, they are granted rule making powers which contribute to define the legal framework governing the relevant economic sector. These bodies are defined as "***Supervisory Authorities*"**. They are kept formally separate from the State organisation and from the public administration,

in the strictest meaning of the term, in order to guarantee an impartial weighting of the interests involved, free from political influence. Additionally, the complexity of the market sectors subject to supervision also requires a high level of technical and legal/economic expertise, which further justifies the recourse to Independent Authorities.

Consob, **Isvap** and to a certain extent even the **Commissione di vigilanza sui fondi pensione** all fall under this category.

In other cases, however, Independent Authorities were set up to deal with individuals' interests and claims which may be defined as fully fledged constitutional rights and which, as such, acquire per se a collective dimension. These Authorities are not called to mediate between potentially conflicting needs through the exercise of discretionary powers, as the relevant interests are contemplated by the Constitution and cannot be subordinated to different interests. Their function is to guarantee constitutional rights and their independence is therefore essential. The corollary of this duty is that they are devoid of any regulatory powers: essentially they have a duty to investigate, monitor the sector and verify compliance with the law. Even when they issue administrative decisions, they must act within the limits set forth by the law and must only apply the latter. Hence they are defined as "Guarantee Authorities", as they show similarities to the judicial authorities, ruling upon disputes between individuals, but differ from the latter because of the collective relevance of the protected rights.

Autorità garante della concorrenza e del mercato, **Garante per la protezione dei dati personali**, **Commissione di garanzia per l'attuazione dello sciopero nei servizi pubblici essenziali** and **Autorità per le garanzie nelle comunicazioni** all fall into this category.

Finally, other Authorities carry out mainly regulatory functions (*Autorità per l'energia e il gas*, *Autorità per la vigilanza sui lavori pubblici*) and others carry out tasks of coordination, direction and supervision in technical sectors (Aipa), it is indeed dubious whether the latter may actually be defined as Authorities.

By contrast with "Independent" the types of Authorities referred to above may be defined as "semi-independent" bodies because they operate in matters and sectors which are influenced by political directives. They are therefore substantially administrative bodies whose role is justified by the fact that the sector which is subject to their supervision requires them to assess the conduct of public and private entities in relation to current legislation. These bodies may otherwise be defined as technical and impartial bodies forming part of the State.

4. A comparison with other EU countries

A comparison of the Regulatory bodies established in other jurisdictions may provide useful indications for the identification of the criteria for the reorganisation of the Independent Authorities in Italy.

4.1 Authorities Supervising Financial Markets.

In the EU we have (at least) four different models of supervision in the financial markets.

We have an *Institutional Model*, with separate Regulators for each category of financial operators, a *Model based on objectives*, where there are various Authorities with specific purposes, a *Model based on activities and functions*, in which different Regulators supervise different activities, regardless of the legal status of the controlled entities, and a *Centralised Model*, which entails a single Regulator for all sectors of the financial market.

The Italian legislator adopted the second model (*Model based on objectives*), even if in a sort of "spurious" form, dividing the supervision within (mainly) three Regulators: Consob, ISVAP and the Bank of Italy.

We shall examine all these models later in this paper.

4.2 The Antitrust Authority

From a comparative analysis of antitrust rules in force in other European countries, it appears that the approach followed with regard to the system for the protection of competition currently in force in Italy diverges for two aspects.

The Italian legislator chose a system centred on a single body - *Autorità Garante della concorrenza e del mercato* – which was specifically created to implement the EU antitrust rules within the domestic market. It is structurally and functionally independent from the Executive and has autonomous powers of decision, which are in some cases balanced by the contribution of compulsory opinions by other bodies (such as Isvap for mergers between insurance companies). Moreover, it should be noted that the Bank of Italy is in charge of the implementation of the EU antitrust rules in the banking sector.

The model prevailing in other European countries is based on the implementation of the EU antitrust rules by various institutional bodies, and the entire system generally is under the authority of the Government, which is usually recognised as being responsible for competition protection policies and as having a leading decision-making rôle in many of the sectors which come under antitrust law.

Moreover, the different institutional relationship between antitrust authorities and the Government in other European countries corresponds to the fiduciary relationship established as a consequence designation by the Government.

The Italian legislator, on the other hand, has opted for the American system of bipartisan appointment whereby the Authority is appointed by Parliament – with the aim of ensuring that it is fully independent of the Government from the moment in which it is set up.

4.3 Insurance Company Authority

Current rules in the main European legal systems reveal a variety of regulatory models for the supervision of insurance companies.

(a) One solution, which has been implemented in Italy, France and in Germany entrusts the supervision in the insurance sector to an autonomous entity.

(i) In France pursuant to l. n. 89 – 1014, of 31 December 1989, the *Commission de Contrôle des Assurances* has the task of supervising on the insurance sector, especially as far as documentary supervision (accounts, by-laws etc.) and inspections. The Commission has five effective members and six suplementary members, who are appointed for five years. The Chairman is appointed by the Ministry for Finance and Finance.

(ii) In Germany, the insurance supervisory authority (*Bundesaufsichtamt für das Versicherungswesen)* has a general power of supervision over the entire sector. Its members are appointed by the Ministry for Finance, with the exception of the Chairman, who is appointed by the Federal President, upon proposal by the Federal Government.

(iii) In Italy, the regulation and supervision of insurance companie is entrusted to ISVAP with regard to the financial and accounting management and the management of the assets and liabilities of the companies, and to the supervision (Law no. 576 of 12 August 1982 and susequent amendments and supplements). Moreover, the Ministry for Industry is responsible for the revocation of the authorization to carry on insurance activities and for the commencement of the compulsory administrative liquidation procedure, both of which are ordered by ministerial decree.

(b) An alternative solution has been adopted in Great Britain, which is based on the unification of the supervisory powers in the various sectors of the financial market under one independent authority. The Financial Services and Markets Act of 2000 gave the Financial Services Authority the exclusive competence in all sectors of the financial market, including the insurance sector, and over all the entities which operate on this market, with regard to all the supervisory objectives.

(c) Finally, in Spain the supervision of all aspects of the insurance sector has been entrusted to a special directorate (Directorate General of Insurance Companies) of the Ministry for Economy (Royal Decree no. 755 of 1991).

4.4 Electricity and Gas Authority

In the sectors which have been liberalised by the European Union it is common to find Authorities which are totally independent of the market players (see articles 22, Directive 96/92/EC and Directive 98/30/CE).

The European Commission recently issued a draft proposal aimed at amending these Directives, according to which the national Authorities should ensure that national tariffs are fixed and applied in conformity with EU principles.

Since these Authorities are entrusted with the delicate task of regulating and supervising the *transition* from situations of legal monopoly to situations of effective competition, it is necessary to guarantee their independence especially from the Executive.

Nonetheless, the Authorities in other European countries (CRE in France, OFGEM and GEMA in the United Kingdom, CNE in Spain) do not seem to be independent of the Executive.

4.5 Personal Data Protection Commission.

The important task of implementation of the constitutional principles on which Directive no. 95/46/1996 was based and which was expressly conferred on the *Garante per la Protezione dei dati personali* by Law no. 675/1996, was consacrated as a supranational principle in the Charter of Fundamental Rights of the European Union, which was proclaimed at the European Council meeting on 7 December 2000.

From the point of view of Italian public law, article 30, paragraph 2 of Law no. 675/1996, by providing that the Commission operates with ”full autonomy and with independence of judgement and assessment”, has placed the new body among the so-called independent administrative authorities, and in particular among the guarantee authorities.

In the Commission’s case, the characteristics of independence, impartiality and neutrality are particularly enhanced. In fact, not only is this body appointed directly and entirely by parliament (which strengthens the impartiality and autonomy of the appointment), its independence is also guaranteed by the European Directive (article 28) and other international instruments (Europol, Schengen, computerised customs system, Eurodac) which oblige Italy to ensure that authorities such as the Commission enjoy full independence, strengthened by the provision of effective powers of intervention in their particular fields.

The democratic legitimation of the body and its members also arises from the criteria with which the members are appointed. In fact, they are chosen from people who can guarantee their independence and who are well-known experts in the fields of law or information technology, so as to ensure that both qualifications are present within the body. The provision which regulates the incompatibility of the appointment as member of the Commission (with a duration of four years and renewable once only) with any other professional or advisory activity, with the function of director or public or private employee and with any elected position (article 30, paragraph 4) further enriches the framework.

As a result of the fact that it has its own powers and is independent of the public administration in the traditional meaning of the term, the Commission is a body which

ensures the compliance with rights pertaining to an individual's personality with respect to the various activities of data processing. Through a variety of functions of direction, supervision and, where necessary, prohibiting and disciplinary powers, the Commission aims to promote a more correct relationship between public and private entities which process personal information and the interested parties, who in the past were not always aware of the risks arising from the management of data bases and files.

4.6 Communications Authority

Similar authorities to our *Autorità per le garanzie nelle comunicazioni* are to be found in the other systems. They however *do not* have that the characteristic of autonomy which implies independence from the Government and the inadmissibility of directives and/or coordinating functions by the Executive, nor do they have the power to extend their functions beyond the guaranteeing and regulatory functions which characterise the Italian Authority.

This reasoning also applies to OFTEL (United Kingdom), which is a government agency, to ART (France), which carries on many of its functions in collaboration with the competent Ministry, to Reg. TP (Germany), which operates as an agency of the Federal Ministry for the Economy and Technology and to the CMT (Spain), which perhaps may not even be described as independent.

5. Perspectives of reform

In the course of 2001, the Government appointed a Commission of experts with the task of outlining the main features of a possible reform of the so called Independent Authorities.

On December 2002, the Commission submitted a final report based on the following guidelines:

a) it is necessary to operate a distinction between truly independent administrative Authorities (i.e., those enjoying a full organisational and decision-making autonomy, with respect both to the Government and to the market operators of the relevant business sector) and Authorities that are not fully independent from the Government, which have been granted only limited rule-making powers and the power to set tariffs (e.g., Authority for gas and electricity);

b) only truly independent Authorities shall be treated as "Independent Authorities", whereas not fully independent Authorities shall be considered as forming part of the Public Administration (and therefore should be, more correctly, qualified as "Agencies of the Public Administration");

c) so narrowed the scope of the definition of Independent Authorities, it appears necessary to adopt uniform criteria for the appointment of the representative bodies

which shall favour their committee structure (a Commission that appoints a president among its members) and bipartisan appointments (e.g., either by the Parliament with qualified majorities or by the Presidents of the Chamber of Deputies and Senate);

d) the need for a uniform legal *status* of the personnel employed by all Independent Authorities;

e) the need for a uniform appeal procedure against the decisions of all Independent Authorities (different courts are entitled to adjudicate on appeals against Independent Authorities' decisions at present).

6. The independent Authorities in Financial Markets

6.1 Four different models

As we have seen, four model of supervision over financial markets can be identified within the EU.

(a) The so-called Institutional Approach, in accordance to which a separate Regulator supervises each category of financial operators or rather each market. On the basis of this model, there are three supervisory bodies, each responsible for the activities of the various market players: banks, financial intermediaries and collective investment schemes, insurance companies, i.e. each of the three sectors into which the financial market is divided (banking, securities and insurance sectors).

(b) Another model is based on regulatory objectives which entrusts various authorities with supervision of financial market operators. Each authority has a specific purpose, regardless of nature of the supervised entities and of business the sector to which they belong. In this case separate bodies are entrusted with supervision on (i) the stability of the market and of each intermediary, (ii) fairness and transparent behaviour of market players and (iii) competition in the market as a whole and among the intermediaries.

(c) A model based on activities and functions concerns the distinction between the different types of intermediation carried on by the financial intermediaries and on the corresponding division of supervisory powers among the various bodies, each of which supervises a particular activity, regardless of the legal status of the controlled entity.

(d) Finally, the so-called centralised model entails a single supervisory body, which has authority over all sectors of the financial market and over all the entities operating within it, with regard to all the above mentioned objectives (stability, transparency and competition).

With the recent limited exception some countries (specially UK) which adopted the so-called centralised model, most EU countries have adopted mixed systems, with more than one type of supervision.

Indeed, the centralised model adopted in the UK (followed in 2002 also by Austria and the Netherlands, and in 2003 by Ireland; similar solutions have been proposed in France and Germany) appears, among the various models described above, preferable in that it is the best suited to the recent "multi-sectoral" approach of financial intermediaries and to the progressive integration of the markets. This trend makes it increasingly difficult to operate a clear distinction among traditional sectors of the financial market, especially as far as so-called financial conglomerates are concerned. It may sometimes be difficult to establish whether a particular entity is a bank or a non banking intermediary, or if a group belongs prevalently to one financial sector or another.

Nonetheless, unifying the supervisory bodies may not prove to be an easy task in the short/medium term and could be difficult to carry out in any case, since on the one hand it could result in the dilution of relevant and longstanding experience, while on the other there could be professional shortages and organisational difficulties which may not be easy to overcome.

In Italy, the current, albeit spurious model based on objectives, seems to be the most suitable to meet supervisory objectives.

6.2 A single European Regulator?

A proposal to establish a central European security regulator is recurrently taken into account in relation to the consolidation of the Single European Market for Financial Services.

A specific provision of the new European Constitution should provide the legal basis for the establishment of a European Regulator for financial services. However, the case for the establishment of the European regulator, at least in the short term, is not free from criticism[6]. Many consider that the European regulator may not be the best option to attain an even and coherent regulation within the European countries and deem that a more gradual and flexible approach should be preferred, also in line with the trend to de-centralise monitoring powers that is gaining momentum in other field of EU legislation.

The role assigned to CESR by the Stockholm Council, in accordance with the indications set forth in the Lamfalussy report, support the second approach. CESR is called to interpret EU legislation and to monitor implementation of the same by member States; it shall therefore provide national regulators with coherent indications, establish common principles and supervise their reception both in the regulations themselves and in the market practice. It is felt that a joint effort by the national regulatory authorities would achieve the result of removing any obstacles that the fragmentation of supervisory rules and practices currently pose to the European integration. This would result in a desirable – although frequently undesired –

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[6] See the annual speech of Mr. Spaventa (Chairman of Consob), Milan May 6, 2003. pag. 7 f. of the text distributed to the attendees.

interference in the autonomy of national regulators that should accept, abandoning any nationalism or protectionism – the constraints that derive from their participation to the Single Market for financial services.

The directives already approved and those that will be shortly approved will entail substantial reform of domestic legislation. In particular, the new market abuse directive will require various amendments to the Testo Unico della Finanza including the reform of Consob's power of initiation of legal proceedings and of its investigation and disciplinary powers.