Two-tier system in Italian Banks: Future Governance or Temporary Trend ?

The Italian Corporate Law Reform of 2003 gives corporations the opportunity to choose among three systems of governance:

a) a so called traditional system with a Board of Directors (*Consiglio d'Amministrazione*) and a Board of Auditors (*Collegio sindacale*);

b) a one-tier system with a Board of Directors made of executives and non executives who perform the monitoring tasks inside the Board itself *(Comitato per il controllo sulla gestione*);

c) c) a two-tier system with a Board of Directors (*Consiglio di Gestione*) and a Supervisory Board (*Consiglio di Sorveglianza*).

The peculiarity of the latter consists in the fact that shareholders do not directly appoint directors. They instead appoint the members of the Supervisory Board who will then appoint the directors. The system clearly finds inspiration in the German solution with the exception of *Mitbestimmung* (mandatory presence of workers in the Supervisory Board) which has not been incorporated by the Italian legislator.

Scholars define the two-tier system as the governance structure which better accomplishes the dissociation between ownership and control since shareholders do not want to be involved in the running of the corporation which is entirely delegated to the managers *via* the supervisors.

This may be true when it comes to family owned corporations, but less true for listed corporations controlled by majority shareholders (which is usually the case in Italy) who indirectly nominate the directors. Hence the definition of the two-tier system as an "insincere diaframma".

At the dawn of 2004, commentators noted the failure of alternative governance systems since everyone seemed to stick to the old but reassuring traditional system.

However recent mergers between banks have redesigned the importance of two-tier system.

Intesa Sanpaolo, the product of a merger between Banca Intesa and Sanpaolo Torino, has adopted in its bylaws the division of powers between the Board of Directors and the Supervisory Board.

UBI Banca, the result of a merger between Gruppo BPU and Gruppo Banca Lombarda e Piemontese, has chosen the two-tier system and so will Banca Popolare Italiana and Banco Popolare di Verona e Novara, soon to merge.

But why are banks suddenly so in love with the two-tier ?

According to some sarcastic commentators, two tier system is the only way to grant extra seats on both Boards hence the definition "a seat moltiplicator".

As a matter of fact Intesa Sanpaolo has 11 directors and 19 auditors, total 30. UBI Banca displays 10 directors and 21 auditors, total 31.

Among economists it is widely accepted that efficient Boards are the ones that reduce rather than increase the number of its members. Plus, particularly in the context of banks, it is preferable to have a Board of Directors with only executives to speed up the decision making process, just like in the German *Vorstand*.

Other major weakness attributed to two-tier system is the exclusion of minority shareholders from the Board of Directors.

The new Italian legislation on listed corporations assures the presence of at least one minority appointed director, both for the traditional and one-tier system, not for the two-tier.

This means that if you choose the latter, you don't have to deal with minorities who can only appoint a man on the Supervisory Board (and not even the Chairman of the Supervisory Board, which is the case of traditional and one-tier systems).

Further critique is that unlike the traditional system in which auditors may only be removed with a just cause and the approval of the court, two-tier system allows shareholders to remove members of the Supervisory Board without a just cause which makes the Supervisory Board highly dependent on shareholders' will.

Those favourable to two tier system point out that it creates a perfect division of functions between both Boards, it gives more representation to different type of managers and shareholders, it improves the coordination among groups of shareholders.

On one specific issue admirers and dissenters of two tier system do not have a clear position yet: the so called "high management".

Article 2409-*terdecies* of the Italian Civil Code enumerates the specific powers attributed to the Supervisory Board: a) appointment and removal of the directors and the decision over their remuneration, b) approval of the balance sheets, c) derivative suit against the directors and so on.

But it also adds a key provision (*f-bis*) which states that the bylaws might "allow the Supervisory Board to deliberate on strategic operations and industrial/financial plans thought out by the Board of Directors, for which the latter continue being fully liable".

Such a provision makes the Supervisory Board a potential hybrid, since it borrows directorial functions.

Following questions have emerged:

a) Is the deliberation of the Supervisory Board on issues covered by art. 2409-terdecies f-bis) a real approval, an authorization or a non binding opinion ?,

Kommentar: non mi sembrano esatti

Kommentar: è proprio vero?

b) May the Supervisory Board have a voice on operations and plans or it does only hold a power of denial without the possibility of giving instructions to the Board of directors ?

Some commentators try to differentiate effective management operated by the directors from high management which could be defined as the setting of strategic goals .

The banks we have previously mentioned have all incorporated the *f-bis* clause in their bylaws. For all check article 25.1 of Intesa Sanpaolo's bylaws : "*The Supervisory Board, under proposal of the Board of directors, deliberates on the strategies of the Corporation and the Group; it approves the industrial and financial plans and budgets of the Corporation determined by the directors who remain fully liable…The Supervisory Board might point out the identification criteria of strategic operations which it needs to authorize*".

Some investment bankers in Germany have warned us from overrating the role played by the *Aufsichtsrat* which in most cases simply ratifies the decisions taken by the *Vorstand.*

Plus banking law in Italy strongly forbids the contamination between management and supervisoring.

Kommentar: sarebbe da siscutere

We will see what results the interaction between the two Boards will produce.

Carlos D'Ercole