

Italo-German Seminar - 23 e 24 May 2007

«The Dualistic System In Germany and Italy»

Francesco Bordiga

The individual members of supervisory board responsibility

1. The responsibility of the individual members of the supervisory board («consiglio di sorveglianza») is strictly connected both to the board specific attributions and to the distribution of roles among its members. **First the board's duties should be decided and** then consider the (eventual) internal segmentation of the duties, knowing that they are both influenced by: *a*) the statutory variants which concern the concrete confirmation of the dualistic system the code to determine private autonomy, *b*) the constitution of committees foreseen by the “soft law”.

2. In first instance, the supervisory board have the fundamental control function following the mould of the board of statutory auditors («collegio sindacale»): competences of surveillance upon the legality of company administration (as in art. 2403, comma 1°, c.c., the art. 2409-*terdecies*, comma 1°, lett. *c*, c.c.). The regulating formula used in reference to the board of statutory auditors (art. 2407, comma 2°, c.c.: «the auditors must carry out their obligations professionally and diligently as the appointment requires ... They are jointly responsible, with the components of the management board, for the actions or omissions of these when the loss would not have occurred had they supervised in conformity with the obligations of their appointment) follows that dictated with reference to the supervisory board (art. 2409-*terdecies*, comma 3°, c.c.: «the members of the supervisory board must carry out their obligations with the diligence and the nature that the assignment requires. They are jointly responsible with the members of the management board for the actions or omissions of these when the loss would not have occurred if they had surveilled in compliance with the obligations of their appointment): the missing reference on the subject of professionalism does not have precise regulatory meaning. The gap has to be filled on the basis of general principles of obligations (art. 1176, comma 2°, c.c.).

3.1. Therefore the principles concerning the traditional board of statutory auditors, have to be recalled in order to define the duties and responsibilities of the members of the supervisory board.

Drawing from the traditional approach, the obligations can be distinguished between obligations with specific content, where the legislator must indicate the conduct required, and obligations towards the general control over the *legality* of administration (or, in other terms the obligation to observe the law and the statutory provisions on behalf of the administrators).

The first (specific control obligations) does not present particular problems and are appropriate (within compatibility) for the members of the supervisory board. Even though they are not explicitly recalled by art. 2409-*terdecies* c.c. they can be applied in light of the general deferment of art. 223-*septies*, disp. att., c.c. to the discipline of the board of statutory auditors.

The second (general control obligations) declinates itself into a huge number of necessary controls that are defined in light of the standard of diligence, which also limits the extension of the services due. Regarding the reference point of view, the degree of diligence requested to the members of the supervisory board is based on the model of the average agent: in this case, the shrewd business men, or even better of the shrewd controller (i.e., «die Sorgfalt eines ordentlichen und gewissenhaften Geschäftsleiters»: § 93 and 116 AktG).

3.2. The responsibility of the controlling body can be distinguished as exclusive responsibility or as concurrent-derived responsibility.

The first occurs when non-execution on behalf of the counsellors is posed in respect to a direct loss: the same conduct by the controller causes detriment to the company, its shareholders or to third parties (in this case, false proof can induce incorrect investment or disinvestments by the company; violation of business secrets; but involves all cases when the non-execution by a supervisor regards not only the supervisory duties but involves the further attributions assigned to the board: this form of responsibility, marginal in the case of the supervisory board, could take on significant weight in comparison to the surveillance counsellors expecting *real managerial duties* where these are similar to the Italian dualistic system).

In the second form of responsibility the non-execution of supervisory duties upon the director's actions is combined with a damaging act carried out by the administrators, that the supervisor has omitted to reveal and to avoid. In this case the constituent element for responsibility are: 1) acts of "mala gestio" by the administrators; 2) omitted vigilance or of reaction on behalf of the supervisory board; 3) damage; 4) causality link between the damage and supervision defects.

This is valid for the member of supervisory board: once a violation of surveillance obligations has been proven and the completion of facts or omission by the administrators that the controls should have revealed, one presumes the causality connection from the lack of supervision of the members of the board and the damage caused by the directors (in other words one presumes that the member of supervisory board could have avoided the damage deriving from the administrators conduct).

3.3. As is sustained for the auditors – drawing from the laws in terms of responsibility: art. 1294 and 2055 c.c. which fix the general principle of joint obligation between joint debtors – the rule of the jointly nature of the obligation which derives from the non-execution chargeable to more counsellors or to the entire board, is also valid for the members of supervisory board. Without a provision similar to the one dictated with reference to the board of directors (2392, comma 1°, c.c.), the eventual segmentation of duties within the board cannot constitute the suspension of the solidarity rules while validating them as a guide for the redistribution of internal responsibility.

3.4. Finally, also the discipline concerning the corporate actions stated with reference to the statutory board of auditors must be extended to the board of supervisors. That implies the possible exercise of the direct action (of the corporation) against the members of the supervisory board, the derivative suite (action of minority shareholders) and the action by the creditors.

4. Recapping the rules governing the responsibility of the members of the supervisory board, “inherited” by the board of statutory auditors, it is necessary, at this point, to shed some light on the peculiar responsibilities of the supervisory board in the Italian “dualistic system”: the supervisory board is completely new for the Italian system and different from that of the traditional board of statutory auditors.

The “originality” of the supervisory board consist in the fact that the traditional competences of the board of statutory auditors are united to some attributions which in the traditional model are attributed to the general assembly. The attributions transferred from the assembly to the supervisory board in the dualistic system are: the appointment and the revocation of the directors (recte: management board); decisions upon the administrators fee; to take legal action against the administrators; approve the balance sheet.

These attributions determine, “de facto”, the transfer of the fiduciary duty that binds the management board from the general assembly to the supervisory board.

The supervisory board's program must : a) grant (*de facto*) the surveillance board the power to control on the merits of the administration; b) increase the power to address the surveillance council on the management of the society [in this view the governmental Report on the reform of company law which qualifies the supervisory board as «mixed management and control body», § 16].

The remark has (possible) consequence on the point of responsibility:

- i) *more rigour in determining derived responsibility*, in consideration of: the greater possibility of weighing upon the administrators activities (it is enough to think about the faculty of repeal); the recognition (perhaps still only theoretically and experimentally), of a liability in the form of “culpa in eligendo”, in the choice of the members of the management board who turned out to be detrimental to the corporation.
- ii) *An extension of direct responsibility* due to external incidence of the new attributions (for example: the approval of a balance sheet which damages the society or alternatively due to incongruous determination of the administrators fees).
- iii) The possibility, at least theoretical, of the direct responsibility of the surveillance counsellors for having determined the acts of illegitimate operations on behalf of the administrators (in this sense, v. BGH, NJW, 1980, 1629 in matter of «*schädigende Einflussnahme auf den Vorstand zum Nachteil der Gesellschaft*»).

5. Conformation of the role of responsibility is characterised by a few “statutory” variables. Two of them deserve to be mentioned.

The concerns the possibility to attribute, at statutory level, typical management competencies such as the competence to «deliberate on the order of both the industrial and financial strategic operations of the society which the management council had arranged» (art. 2409, comma 1°, lett. f-bis, c.c.). Such attributions can only bring responsibility (in competition with the administrators) to the surveillance counsellors for managerial resolutions (illegitimate) taken, on the basis of the last part of the letter f-bis of art. 2409-*terdecies*, c.c. (: «stop in every case the [management board's] responsibility for the computed acts) only when finalised at not detracting responsibility from the administrators for the choices deliberated by the supervisory board, leaving their responsibility intact.

On second instance, the possibility to form committees with specific roles within the supervisory board weights upon the responsibility of the individual counsellors. The hypothesis can occur when the management

board is entirely made up of executive administrators. The Italian Code of Corporate Governance accepts that the system of internal control (and in particular, that noted by the committee for internal control) is rooted in the surveillance board. Surveillance counsellors that are members of the committee of internal control, in light of the special functions they perform in relation to their participation in the committee itself, should face a wider form of responsibility derived from lack of pointing out and hiding the facts from the administrators.

Francesco Bordiga