

Seminar on Comparative
Corporate Law:

The two-tier system in Italy and in Germany

The remuneration of the member of the
supervisory board

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I. Governing rules

- Article 223-*septies*, para. 1, accomplishment provisions of the Italian Civil Code (ICC): “If not otherwise provided for, the rules of the ICC which refers to [...] auditors are applicable, if consistent, also to the members [...] of the supervisory board [...]”.
- Article 2409-*quaterdecies*, para. 1, ICC provides for a direct reference to Article 2402 ICC; this latter states, within the framework of the board of auditors, under the heading “*Remuneration*”, that: “*The annual remuneration of the auditors, if not established in the by-laws, shall be determined by the shareholders’ meeting at the time of appointment thereof and shall have effect for the entire term of the office*”.

With respect to the issue examined herein, such rules are significant but not fully satisfactory in order to identify the remuneration rules to which the members of the supervisory board are entitled to.

II. The role of Article 2402 ICC

Article 2402 ICC sets forth three key rules:

- a) the onerousness of the statutory auditors' office;
- b) the predetermination of the relevant remuneration; and
- c) the invariability of the same.

The rationale of the abovementioned principles is, on the one hand, to guarantee the professionalism of the board of auditors and, on the other hand, the independence and the impartiality of the board of auditors in the exercise of their control functions in connection with the potential influences which the majority shareholders may exercise.

II. The role of Article 2402 ICC

- The same requirements pointed out for the board of auditors arise, reinforced, in respect of the supervisory board that is entrusted with the power to “*appoints and revokes the members of the management board and fixes their compensation*” (Article 2409-terdecies, para. 1, lett. a), ICC).

In conclusion:

- provided that the shareholders’ meeting, when resolving upon the determination of the remuneration to be granted to the members of the supervisory board, abides by the principles set forth under Article 2402 ICC, there are no particular concerns.
- The remuneration shall be fixed at the moment of the appointment, namely, at that stage the shareholders’ meeting shall predetermine an objective criteria for the determination thereof.

III. Criticalities

- *Quid iuris* in the event in which the shareholders' meeting does not resolve upon the remuneration and the by-laws do not contain any provision to such extent?
- Furthermore, *quid iuris* in the events in which the shareholders' meeting has duly established the remuneration to be granted to the supervisory board and, at a later stage, the shareholders' decide, amending the by-laws, to grant to the supervisory board new functions (for ex. the power to resolve upon strategic transactions and industrial and financial plans of the company drafted by the management board, Article 2409-*terdecies*, para. 1, lett f-*bis*, ICC)?

IV. Solutions & Criteria for the determination of the remuneration

- In the above mentioned events, it must be held that the members of the supervisory board are entitled to request the determination of the remuneration to the court.

- In relation to the criteria based on which any such authorities shall determine the relevant remuneration, it appears reasonable to hold that:
 - a) with respect to the remuneration connected to the carrying out of control duties, the authority should make reference to the criteria identified by the case law for the determination of the remuneration of the member of the board of auditors (Italian traditional system);
 - b) with respect to the remuneration connected to carrying out of specific duties by the supervisory board (*i.e.* Art. 2409-*terdecies*, para. 1, lett. a), b), d) and *f-bis*), ICC), it shall be necessary an analysis with studies such duties individually.

V. Criteria for the determination of the remuneration connected to the carrying out of control duties

- The partial coincidence of the duties carried out by the board of auditors and by the supervisory board offer the possibility of carrying out an assessment on the applicability of the solutions reached for the determination of the remuneration of the former with respect to the latter.
- Reference point shall be the professional fees of the certified public accountant (Decree No. 645/94) which indicates in a detailed manner the remuneration of those recorded into the respective registers clarifying, depending on the type of activity entrusted to the auditors, the due fees, which vary from a minimum to a maximum range depending on certain thresholds regarding the economic business and business value situation of the company.

VI. Criteria for the determination of the remuneration connected to the carrying out of specific duties by the supervisory board

- In relation to the specific duties carried out by the supervisory board it is necessary to focus on the activities foreseen in Article 2409-*terdecies*, para. 1, lett. d), b), a) and f-*bis*), ICC. The reference is made to the activities of:
 - i) promotion of the issuance of the liability action against the members of the management board;
 - ii) approval of the balance sheet for the fiscal year and, if drafted, the consolidated accounts;
 - iii) appointment and revocation of the member of the management board and determination of their remuneration;
 - iv) resolution on strategic transactions and on industrial and financial plans of the company drafted by the management board (a specific by-laws provision to this extent is necessary).

VI. Criteria for the determination of the remuneration connected to the carrying out of specific duties by the supervisory board

- With respect to the specific activities in relation to which the member of the supervisory board should be entitled to a greater remuneration (i.e. the activities set forth in Article 2409-*terdecies*, para. 1, lett. a) and f-*bis*), ICC), it has to be noticed that:
 1. it is an assessment upon the merits; and
 2. this assessment should have as reference criteria that of the correlative advisory professional services.

The foregoing appears to be consistent in view of the fact that:

- a) it is the case of duties entrusted to the body and, therefore, undertaken upon the agreement of the members thereof;
- b) it is the case of duties which must be exercised with professional competence and
- c) Correlative liability *vis-à-vis* the company.